SC95205

IN THE SUPREME COURT OF MISSOURI

BARTLETT INTERNATIONAL, INC. AND BARTLETT GRAIN CO., L.P.,

Respondents,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI

Appellant.

On Appeal from the Administrative Hearing Commission
The Honorable Sreenivasa Rao Dandamudi, Commissioner

BRIEF FOR RESPONDENTS

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STATEMENT OF FACTS

Bartlett Grain Company ("Bartlett") is a grain merchandising company that receives, handles, and ships grain from grain elevators located throughout the Midwest. Tr. 30:22–31:1. In 2010, Bartlett made an investment in new equipment for use at its grain elevator in St. Joseph, Missouri. *See* Tr. 12:17-20; 21:19-24. The transactions involving that new equipment are the nexus of this case. In 2012, the Missouri Department of Revenue (the "Director") conducted an audit of Bartlett. Tr. 31:9-12. At the conclusion of that audit, the Director assessed use tax related to the installation of a grain dryer, as well as use tax related to the installation of a grain conveyor. *See* Hearing Ex. 25.[1]

After the Director's Final Decisions, Bartlett appealed these assessments to the Administrative Hearing Commission (the "Commission"). LF 001–021. With respect to the grain dryer, Bartlett contended that there were two distinct transactions: one for purchase of the physical dryer components from GSI Group, Inc. ("GSI"), and a separate transaction for installation of the dryer, which was also completed by GSI. LF 003, ¶ 11. Ultimately, the Commission ruled that the construction and installation of

[1] The Hearing Exhibits are included in the Certified Record as exhibits to the Transcript.

the dryer was a single transaction, and that the Director properly assessed use tax on the entirety of the sale because Bartlett failed to show the parties intended the sale of installation services to be separate from the sale of the physical dryer itself. LF 107. Bartlett does not appeal that conclusion.

With respect to the grain conveyor, however, the Commission ruled that the installation—which was performed by a company named CR Conveying, Inc. ("CRC")—was not part of the sale of the conveyor itself, which Bartlett purchased from GSI; rather, the purchase of the physical conveyor and installation were two separate transactions. LF 117. Thus, the Commission ruled that the Director improperly assessed use tax on the labor components of the installation transaction because the labor was not "part of the sale" of tangible personal property. *Id.* This appeal from the Director followed.

The Grain Conveyor

As the Commission accurately described, Bartlett engaged in two separate transactions with respect to the grain conveyor: (1) purchase of the physical conveyor components from GSI; and (2) installation of the physical conveyor by CRC.

Bartlett's Purchase of the Physical Conveyor from GSI

A grain conveyor, as it sounds, is a piece of machinery that moves grain from one part of a grain elevator to another. Tr. 20:14-15. When a business

in the grain industry seeks to purchase a new conveyor, it typically solicits bids from several different companies, then selects one to supply the physical conveyor. Tr. 21:4-9. Bartlett went through this process in 2010, and ultimately selected GSI to supply the conveyor. Tr. 22:6-9. As the Commission found, and the Director does not contest, GSI's sale of the physical conveyor to Bartlett was documented by price quotations dated April 20 and June 8, 2010, and invoices dated between August 12, 2010 and December 2, 2010. *See* LF 089-090. Neither the quotations, nor the invoices, included any charges for installation, engineering, or other services. Rather, they reflected solely the cost of the physical conveyor components.

GSI shipped the conveyor components to Bartlett on flatbed tractor trailers. Tr. 22:10-14. The conveyor segments arrived in 10-foot long pieces, and Bartlett unloaded them with a material handler or forklift. Tr. 22:15-18. The assembly holes in the conveyor segments were pre-drilled, and assembly bolts were included in the delivery. Tr. 22:19–23:1.

Installation of the Conveyor by CRC

The uncontroverted evidence before the Commission established that, when a grain conveyor is delivered by the manufacturer, it is up to the purchaser to install the conveyor or arrange for installation. Tr. 21:9-10. New conveyors typically ship with a drawing that details the installation process. Tr. 23:4-7. Bartlett's witnesses testified that Bartlett installed

several conveyors at its St. Joseph facility prior to the purchase of the GSI conveyor and could have installed the GSI conveyor on its own as well. Tr. 21:15-18, 23:8-11.

However, there are also companies that specialize in the installation of grain conveyors. Tr. 21:11-14. In this instance, Bartlett did not have time to install the GSI conveyor itself before the harvest season arrived, so it elected to have a contractor provide the installation service. Tr. 23:12-16. Bartlett selected CRC to install the conveyor. Tr. 23:17-18. Bartlett also arranged for CRC to construct a support structure that was needed to support the conveyor as it traveled from the top of the elevator down to the grain dryer. Tr. 51:13-15.

The installation of a grain conveyor is a detailed process, which requires the installer to bolt together various pieces of the conveyor assembly. *See generally* Tr. 24:3-13. CRC also used a crane to maneuver several of the large pieces of the conveyor into place. Tr. 24:14-18.

The invoices from CRC provide line-item detail of the tasks undertaken by CRC to install the conveyor. *See* Resp. App. A5, A7-A9 (Hearing Ex. 8).[2]

[2] The CRC invoices are provided in two Hearing Exhibits. Exhibit 7 is a copy of the CRC invoices. Exhibit 8 is a demonstrative copy of the same invoices, with certain line items that are central to this case highlighted in color. The

CRC numbered the individual tasks 1 through 5 ("Item #1," "Item #2," etc.), and each invoice then spelled out the specific charges applicable to each "Item." *Id.* Items 2 through 5 itemized charges for the installation of separate sections of the conveyor.[3] *Id.* Under each of these items, CRC itemized materials used in the installation as well as a charge for "Labor" for installation of each Item. *Id.* Bartlett accrued tax for each charge other than "Labor" for each Item (2-4). Tr. 55:24–56:3. The total of the Labor line items was $332,857. *See* Resp. App. A5, A7-A9.

Item 1—which concerned the support structure—required separate treatment. Because CRC was fabricating this separate structure—not merely installing a premanufactured piece of equipment—it itemized its "Fabrication," labor different than the "labor" charges for installation in the other Items. *See* Resp. App. A5. Seeing that this charge was for fabrication, and not for installation labor, Bartlett appropriately accrued tax on the

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Court's copy of Exhibit 8 in the Certified Record is unfortunately not reproduced in color. Thus, a color copy of Exhibit 8 is included in Respondents' Appendix.

[3] Item 2 is titled "Wet Corn Conveying;" Item 3 is titled "Dry Corn Conveying;" Item 4 is titled "Scalper & Cross Conveying;" and Item 5 is titled "E/W Distribution Conveyors." *See* Resp. App. A5, A7-A9.

Fabrication charge, as well as for the cost of various physical components that comprised the support structure. Tr. 52:20–53:16. The only line item in Item 1 for which Bartlett did not accrue taxes was "Engineering," a professional service that is not taxable. Tr. 53:17-19. The Engineering line item was $4,267. *See* Resp. App. A5.

Following the Director's audit, the Director issued a notice of proposed adjustment on February 19, 2013. LF 019-021. The Director then issued Final Decisions upholding its assessment conclusions. Hearing Ex. 25. In that notice, the Director assessed use tax for the Labor and Engineering line items on CRC's invoices. *Id.* As noted above, the Commission rejected the Director's assessment, finding that Labor and Engineering charges were not "part of the sale" of tangible personal property. LF 117. The Director appeals that judgment.

SUMMARY OF THE ARGUMENT

The legal theory underpinning the Director's entire argument is rendered impossible by the plain language of the statute, the Director's own regulations, and, most importantly, this Court's cases interpreting the statute. Indeed, the Director takes the radical position that any time a purchaser incurs a charge for a "service" (typically a nontaxable event), that charge is nevertheless taxable if accompanied by *any* sale of *any* tangible good. That is not the law.

Instead, this Court has consistently explained that charges for services are taxable only if they are "part of the sale" of tangible property. To make this judgment, the fact finder is to determine the intent of the parties with respect to the transaction at issue. Here, the Commission heard evidence and determined that the parties did not intend for the installation labor (performed by CRC) to be "part of the sale" of the physical conveyor itself (from GSI). Further, with respect to the CRC transaction alone, the Commission found that all of the separately stated and itemized service charges (for Labor and Engineering services) were not intended to be "part of the sale" of other tangible property found on the same invoices. Indeed, the evidence demonstrated that the parties intended to contract for services to install the conveyor, and those service charges are nontaxable.

These factual findings are entitled to deference, and they are fully supported by the evidentiary record. Even standing alone, this Court's case law discussing the "part of the sale" inquiry justifies affirmance in this case. That conclusion is reinforced by the Director's own regulations, which provide examples illustrating why Bartlett does not owe use tax on the service portion of the CRC installation transaction. Finally, even if the Court believes that the services and tangible-property portions of the invoices are "not separable," the true-object test conclusively establishes that the true object of the CRC transaction was installation of the physical conveyor. Under any method of inquiry, the Director improperly assessed use tax on the service charges in the CRC transaction.

The judgment of the Administrative Hearing Commission should be affirmed.

ARGUMENT

The Director misstates the relevant standard of review. "This Court reviews the decision of the [Commission] pursuant to section 621.189." *Street v. Dir. of Revenue*, 361 S.W.3d 355, 357 (Mo. banc 2012). Under that statute, "the decision of the [Commission] is to be upheld when authorized by law and supported by competent and substantial evidence upon the record as a whole unless clearly contrary to the reasonable expectations of the General Assembly." *Id.* (internal quotation marks omitted); *see also May Dep't Stores Co. v. Dir. of Revenue*, 791 S.W.2d 388, 389 (Mo. banc 1990).

Contrary to the Director's assertion, the Commission's findings of fact are essential to several of its conclusions—not the least of which is whether the parties intended the Labor and Engineering charges to be "part of the sale" of tangible personal property. "If the evidence supports either of two opposing findings of fact, deference is afforded to the administrative decision." *Street*, 361 S.W.3d at 357. The Commission's interpretations of revenue laws are reviewed de novo. *Id.*

Finally, the Director attempts to construe this case—at least in part—as Bartlett seeking a tax exemption. That is not the case. The question presented below, and decided by the Commission, was whether § 144.610.1 RSMo imposed use tax on these labor charges in the first instance. Bartlett did not contend that the labor charges were *exempted* from taxation, nor did

the Director argue below that an exemption analysis was appropriate. As the Director concedes, "[t]axing statutes are to be strictly construed in favor of the taxpayer and against the taxing authority." *President Casino, Inc. v. Dir. of Revenue*, 219 S.W.3d 235, 239 (Mo. banc 2007)

I. Under the Statute Alone, Bartlett Was Not Liable for Use Tax on CRC's Services

"Missouri law imposes, with exceptions, a use tax on the privilege of using any article of tangible personal property that has not been subject to the sales tax." *May Dep't Stores*, 791 S.W.2d at 388 (citing §§ 144.600–144.745 RSMo). "This system has the effect of imposing the sales tax rate on purchases made out of state." *Id.* The use tax is imposed as follows:

> A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property . . . purchased on or after the effective date of sections 144.600 to 144.745 in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020. This tax does not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this state until the transportation of the article has finally come to rest within this state or until the

> article has become commingled with the general mass of property of this state.

§ 144.610.1 RSMo. In other words, the tax due is calculated "by applying the sales tax rate to the 'sales price' of the item in question." *May Dep't Stores*, 791 S.W.2d at 388. "Sales price," in turn, is defined as:

> the consideration including the charges for services . . . paid or given, or contracted to be paid or given, by the purchaser to the vendor for the tangible personal property, including any services that are a part of the sale . . . .

§ 144.605(8) RSMo.

It is the final clause of that definition—"including any services that are part of the sale"—that is central to this appeal. As discussed *infra*, the Director's expansive interpretation of this clause has no basis in the law, including the several decisions from this Court applying it. And, as the evidence in the record clearly demonstrates, the labor and engineering charges for which Bartlett did not accrue tax were not "part of the sale" of tangible personal property. As such, the Commission properly granted Bartlett relief from the Director's improper assessment.

A. The Director focuses on the incorrect language in the statute, omitting any discussion of what constitutes "a part of the sale."

Without any basis in the extensive case law discussing Missouri's use tax, the Director takes an extreme position, focusing her attention exclusively on the word "any." Aplt. Br. 15-20. In the Director's view, the Legislature's use of that word when describing taxable services means that any time the sale of a service *accompanies* the sale of tangible personal property, the service is taxable. *See* Aplt. Br. 17, 19. This, of course, ignores the statutory language which makes "any services" taxable *only* when they are "part of the sale" of tangible personal property, not merely when they are charged at the same time as a sale of tangible personal property. *See* § 144.605(8) RSMo.

Despite nearly 40 years of precedent from this Court discussing the concept of "part of the sale"—including extensive discussion of this case law in the Commission's Decision—the Director *does not site a single case* applying Missouri's use tax in its entire discussion of Point I.

"Where the appellant neither cites relevant authority nor explains why such authority is not available, the appellate court is justified in considering the points abandoned and dismissing the appeal." *Kimble v. Muth*, 221 S.W.3d 419, 423 (Mo. App. 2006) (internal quotation marks, alteration, and citation omitted). Indeed, "[i]f the point is one for which precedent is

appropriate and available, it is the obligation of appellant to cite it if he expects to prevail." *Thummel v. King*, 570 S.W.2d 679, 687 (Mo. banc 1978). Even if the Director believes this case to be a pure question of statutory interpretation, it is certainly not a question of first impression, and the Director "is obligated to cite previous attempts to interpret [the statute] and distinguish if necessary." *Kimble*, 221 S.W.3d at 423.

The Director's omission of the relevant case law is even more substantial here because this Court's cases do not follow the Director's interpretation of the statute at all. Rather, even in the early cases discussing use tax, this Court focused its inquiry on whether the service at issue was "part of the sale," and made that determination by a consideration of the "intent of the parties," *not* by whether the services were charged at the same time as charges for tangible personal property. *See Kurtz Concrete, Inc. v. Spradling*, 560 S.W.2d 858, 861 (Mo. banc 1978).

While this Court has since applied this principle to many different factual scenarios, the focus of the inquiry has remained the same—the intent of the parties controls whether services are "part of the sale" of tangible personal property. *See May Dep't Stores*, 791 S.W.2d at 389 ("In determining whether a service is 'a part of the sale' the intention of the parties is the guiding factor."); *Brinson Appliance, Inc. v. Dir. of Revenue*, 843 S.W.2d 350, 352 (Mo. banc 1992) ("The fundamental question . . . was whether the parties

to these transactions intended the delivery charge to be part of the sale."); *S. Red-E-Mix Co. v. Dir. of Revenue*, 894 S.W.2d 164, 167 (Mo. banc 1995) ("[T]he appropriate consideration is whether the parties intended the delivery charge to be part of the sale."); *Alberici Constructors, Inc. v. Dir. of Revenue*, 452 S.W.3d 632, 639 (Mo. banc 2015) ("In determining whether a delivery charge is a part of the sale transaction, the intention of the parties is the guiding factor." (internal quotation marks omitted)).

Here, the Director does not even bother to discuss the facts relied on by the Commission to establish that Bartlett did not intend for the installation labor and engineering charges to be part of the sale of the physical conveyor, let alone explain how the Commission erred. Indeed, the Director's failure to focus on the relevant legal inquiry, and her corresponding failure to discuss this Court's prior precedent, leads her to advocate for an illogical reading of the statute that would replace the express statutory language "part of the sale" with a broad ruling requiring services to be taxed any time they are sold contemporaneous with the sale of tangible personal property.

Consider an example where a homeowner hires a handyman to mount a garage-door opener (purchased previously from Sears) for $250, and the contractor separately charges the individual $5 for a box of screws he uses to mount the opener to the ceiling. Under the Director's reading, the entire

labor charge would be taxable because it is *any* service (the labor) that merely accompanies, but is not "part of," the sale of tangible goods (the screws).

As the Commission correctly noted, this construction ignores the Legislature's use of the word "including" in the larger phrase "including any services that are part of the sale" *see* § 144.605(8) RSMo, and results in a plainly absurd outcome that is inconsistent with legislative intent and the Director's own regulation at 12 CSR 10-103.600,[4] which requires an analysis of the transaction's "true object"—i.e., the sale of tangible personal property versus the sale of a non-taxable service. LF 110 ("We see no evidence that the legislature meant to open the door to taxing all services sold along with any amount of tangible personal property, no matter how negligible."); *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012) ("[C]onstruction of a statute should avoid unreasonable or absurd results.").

Fortunately, all of this Court's prior precedent identifies the proper inquiry for this case.[5] Here, the intent of the parties demonstrates that the

[4] A copy of the regulation is available at Aplt. App. A60.

[5] Perhaps the Director believes that this long and consistent line of case law should be overruled. If she believes so, she should say so. In any event, the

services for which Bartlett did not accrue tax were not "part of the sale" of tangible property.

B. The record demonstrates that the services at issue here were not "part of the sale" of tangible personal property.

As discussed, the Director's main argument is that the labor charges on CRC's installation invoices are taxable because they are "any" services that accompany the sale of tangible goods. Once again, this is the wrong legal framework. Instead, looking to the intent of the parties, the relevant inquiry is whether the services are "part of the sale" of the tangible property. Here, the evidence proves they were not. All of the charges for labor are separately stated on CRC's invoices from the tangible materials also invoiced. *See* Resp. App. A5, A7-A9. Further, the item CRC installed was already manufactured by GSI, a different company, and was on-site when CRC arrived to complete its work.

Attempting to prove that all of the labor charges are taxable, the Director points to CRC's invoice for the Support Structure (Item 1). Aplt. Br. 19-20. Specifically, the Director quotes testimony from a Bartlett witness, who confirmed that Bartlett "contract[ed] with CRC to create a support

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Director has provided no reason to abandon the Court's prior well-reasoned decisions.

structure for a portion of the conveying system." Aplt. Br. 20 (citing Tr. 51:13-15). Somehow, the Director believes that this "admission" illustrates that charges for this support-structure fabrication were spread across the other "Labor" charges on CRC invoices. Not so. In fact, under Item 1 of CRC's invoice—which is conspicuously labeled "Supporting Structures"—there is a separate line item for "Fabrication." Resp. App. A5. Bartlett ***appropriately and contemporaneously accrued tax*** on this full charge of $104,309.00. Critically, Bartlett has never contested the taxable nature of this fabrication, and its existence as a separate line item on the invoice is further evidence that the separate line items for "Labor" elsewhere in the invoice are truly for installation labor.

That Bartlett paid tax on the Fabrication line item admits nothing, other than that Bartlett was following the Director's own regulation, which states that when the true object of a transaction is the sale of a non-taxable service, the taxpayer should still pay tax on tangible personal property that is separately stated. *See* 12 CSR 10-103.600(3)(C). This regulation, of course, is entirely inconsistent with the arguments the Director advances in her brief.

Importantly, as it should have, the Commission reviewed the evidence in the record bearing on the question of the intent of the parties. The Commission concluded:

> Here, the nature of the sale was best described at the beginning of [CRC]'s price quotation to Bartlett, which stated the nature of the proposed sale: "labor, materials, and rentals *to install customer supplied conveying* for dryer and scalper project at Bartlett Grain Company in St. Joseph, Missouri."

LF 111 (emphasis in original) (citing Hearing Ex. B). "The weight to be given any factor in determining what the parties intended is largely a function of the fact finder." *S. Red-E-Mix*, 894 S.W.2d at 167. Here, the fact finder (the Commission) evaluated the circumstances of this case and determined that the parties did not intend for the installation and engineering labor to be "part of the sale" of tangible property.[6] That conclusion is supported by competent and substantial evidence and should be upheld.

Before the Commission, the Director asserted that the labor charges at issue were "part of the sale" of the physical conveyor components. Though the Director makes some references to this concept in her briefing, she does

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[6] Critically, the Director put on *no* evidence to controvert Bartlett's testimony and documentary evidence establishing that the services were not "part of the sale" of tangible goods. The Director's only witness was the auditor who performed the Bartlett audit, and his testimony was limited to a description of the audit process and his conclusions.

not appear to directly raise this issue on appeal. *See, e.g.*, Aplt. Br. 22-25. As the Commission described, "there is no support in the record for such a global argument." LF 108. Most importantly, the separate tasks were completed by *two separate companies*: GSI fabricated the conveyor; and in a separate transaction, CRC installed the conveyor. Testimony established that the expectation upon delivery of a conveyor is that the purchaser will install the conveyor itself—a task Bartlett previously accomplished on many occasions. Tr. 21:15-18, 23:8-11. Due to time constraints, however, Bartlett elected to outsource the installation to CRC. Tr. 23:12-18. The construction of the conveyor and its subsequent installation were separately invoiced (by different companies).[7] This evidence all illustrates that the parties did not intend for the installation services to be "part of the sale" of the conveyor itself, and "the Director's largely speculative argument about what Bartlett wanted when all the transactions were fulfilled means nothing." LF 109.

The record here establishes that the labor and engineering services for which Bartlett did not accrue taxes were not part of the sale of tangible personal property.

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[7] As the Commission put it when discussing the GSI Dryer transaction, the GSI Conveyor transaction, and the CRC Installation transaction: "Clearly, these were three distinct transactions." LF 109.

C. This Court's prior precedent confirms that CRC's services were not part of the sale of tangible personal property.

This Court has looked to several factors to determine the intent of the parties with respect to different transactions. The factors identified are not an exhaustive list, *S. Red-E-Mix*, 894 S.W.2d at 167, and several of the factors are not applicable to the facts of this transaction. Indeed, as the Commission described, use tax issues more commonly arise in cases where the customer obtains the primary product and ancillary services from the same provider. *See* LF 111. It is much less common for the Director to assert, as she has here, that services provided by a *separate company* from the manufacturer are taxable due to the existence of some tangible personal property items in the service invoice.

Nevertheless, several of the factors this Court has identified as relevant to the intent inquiry are helpful for this case. For example, in *May Department Stores*, this Court analyzed whether charges for freight services were intended to be "part of the sale" of various items the store purchased (e.g., shelves, trade fixtures, racks, paint). 791 S.W.2d at 388-89. The Court concluded they were not because "all charges were separately stated." *Id.* "At no time were shipping costs billed as part of the merchandise costs." *Id.* In other words, the *service* cost was never billed as part of the *materials* cost.

So too here. As the CRC invoices illustrate, all labor charges for installation and engineering are separately stated from all of the other charges detailing tangible property. Resp. App. A5, A7-A9. And there is no evidence whatsoever that any service cost (here, Labor and Engineering) was ever billed as part of any materials cost. Further, when fabrication of the support structure occurred, it was separately stated, and Bartlett accrued taxes accordingly—all despite the Director's attempt to misconstrue testimony to establish otherwise. All of the installation labor and engineering charges at issue in this case were separately stated, and *May Department Stores* illustrates why the Commission's decision should be affirmed.

Additional factors support this conclusion as well. In *Brinson Appliance*, this Court evaluated whether the use tax should be imposed on a service charge for the delivery of appliances. 843 S.W.2d at 351. This Court held that delivery was not part of the sale of the appliances because the means of obtaining that service "were entirely up to the customer." *Id.* at 352. "The customer had the option to take the appliance from the store, hire a carrier, or use a carrier selected by [the seller]." *Id.*

Just as in *Brinson Appliance*, the manner in which Bartlett obtained the service—installation—was entirely up to Bartlett. The completed conveyor was delivered directly to Bartlett from GSI, and Bartlett could have

installed the conveyor itself. Tr. 21:15-18, 23:8-11. Indeed, Bartlett had done so several times before. *Id.* Bartlett also had the option to select a separate contractor to install the conveyor, which was the option Bartlett ultimately selected. *Id.* *Brinson Appliance*, therefore, also supports the Commission's decision.

Even the cases in which this Court found services to be taxable help illustrate why the services here are not. For example, in *Alberici Constructors*, this Court evaluated whether a delivery charge was part of the cost of a crane rental. 452 S.W.3d at 638-39. While the rental agreement contained pre-printed language stating that the lessee normally has the option of using a third-party delivery service, the specific agreement in that case had a typewritten price for the delivery service from the same company supplying the crane. *Id.* at 639. Because the lessee was unable to provide any evidence that it separately negotiated or contracted for the service, this Court found the service to be taxable. *Id.*

Here, however, the installation service was completed by *an entirely different company* than the company that manufactured the conveyor. Tr. 23:17-20. And even as amongst the various charges from CRC, the installation services were separately stated—indeed contained in different work "items"—than fabrication of the support structure. There is simply no

factual basis to claim the installation services were part of the sale of any tangible personal property.

When evaluating these factors described in prior opinions, it is important to remember that "[t]he weight to be given any factor in determining what the parties intended is largely a function of the *fact finder*." *S. Red-E-Mix*, 894 S.W.2d at 167 (emphasis added). The Commission completed that task as fact finder and found that the most accurate description of the intent of the parties was described in CRC's price quote: "to install customer supplied conveying." LF 111 (citing Hearing Ex. B). The Commission correctly ruled that the installation and engineering labor was not part of the sale of any tangible personal property, and that conclusion should be affirmed.[8]

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[8] Perhaps in an effort to flip the burden of proof and standard of review, the Director asserts (at 20-21) that Bartlett did not prove that it qualified for the exemption for "installation," which provides that "'sales price' shall not include . . . the amount charged for labor or services rendered in installing or applying the property sold." § 144.605(8) RSMo. The plain language of this exemption would seemingly apply only when the seller of the property was also the installer. Here, CRC (the installer) is entirely separate from GSI (the manufacturer). Further, to the extent Bartlett needed to prove that the

II. The Director's Own Regulation Confirms That the Services Were Not Taxable

Application of the plain language of the statute is sufficient to resolve this case. As the relevant case law makes clear, CRC's installation labor and engineering services were not part of the sale of any tangible personal property. But to the extent the Court is inclined to look further, the Director's own regulation discussing this topic confirms that the Commission's decision was correct.

The Director's regulation states:

> In general, the sale of tangible personal property is subject to tax unless a specific statute exempts it. The sale of a service is not subject to tax unless a specific statute authorizes the taxation of the service. When a sale involves both tangible personal property and a nontaxable service, the sale of the tangible personal property will be subject to tax, and the service will not be subject to tax, if the sale of each is separate. . . .

12 CSR 10-103.600(1). In further describing the treatment of repair services and personal services, the regulation states:

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labor in the CRC contract was for installation services, that fact was established through all of the evidence previously discussed in this Section.

> If the amount paid for the repair or personal service is separately stated from the tangible personal property used to perform the repair or personal service, the amount paid for the repair or personal service is not subject to tax.

12 CSR 10-103.600(3)(B)(1).[9]

First, the Director's adoption of these regulations conclusively demonstrates that the legal position she asserts in this case—that "any" service is taxable as long as it accompanies the sale of tangible goods—is incorrect. Indeed, the Director's position in this case is in direct conflict with her codified statement: "When a sale involves both tangible personal property and a nontaxable service, the sale of the tangible personal property will be subject to tax, and the service will not be subject to tax, if the sale of

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[9] The Commission noted that this regulation may be invalid because it elevates the inquiry of whether the charge is "separately stated" to a controlling question, as opposed to simply a factor in a broader analysis, perhaps in conflict with this Court's cases. LF 103 (citing, e.g., *Brinson Appliance*, 843 S.W.2d at 352). In that event, the case law controls. *Alberici Constructors*, 452 S.W.3d at 640. That said, the Director's own acknowledgement that separately stated service charges are typically not taxable greatly undermines the legal position the Director takes in this case.

each is separate." 12 CSR 10-103.600(1). If this regulation means anything, it means that services do not become taxable merely because they accompany the sale of tangible personal property.

Second, the installation labor and engineering service charges in this case are each separately stated. *See* Resp. App. A5, A7-A9. They are not combined with the costs of materials or other tangible property, and Bartlett accrued taxes appropriately. As the regulations state, because the service charges were separately stated, they are nontaxable.

A. Examples from the Director's regulation illustrate that the services here are not part of the sale.

In addition to the plain language of the regulation, the examples provided by the Director's regulation are also helpful to establish why Bartlett does not owe use tax on the service charges. For example:

> A person takes her car to a mechanic for new brakes. The mechanic installs new brakes and charges sixty dollars ($60) for the parts and fifty dollars ($50) for labor, which is separately stated on the invoice. Tax is due on the sixty dollars ($60) charge for the brakes. If the mechanic does not separately state the labor, tax should be charged on the total invoice . . . .

12 CSR 10-103.600(4)(J).

In that example, because the labor was separately stated on the invoice, the customer is only obligated to pay tax on the parts used during the installation. Similarly here, the labor CRC charged was separately stated from the charges for parts CRC used in the installation. Resp. App. A5, A7-A9. Thus, Bartlett owes tax on only the separately stated tangible property (which it properly accrued in the first instance).

The regulation also includes an example confirming that fabrication charges are taxable:

> A steel fabricator enters into an agreement to fabricate steel beams for a building. The fabricator makes a retail sale of the steel beams. Even though the fabrication labor is separately stated on the sales invoice, the total sale price including charges for the fabrication labor is subject to tax.

12 CSR 10-103.600(4)(A). Below, the Director argued that this example required that *all labor charges* be construed as "fabrication." LF 112-113. The Commission appropriately rejected that argument, because the record shows that CRC separately stated its fabrication charges from its charges for installation labor and engineering services. *Id.* To be clear, Bartlett appropriately accrued taxes on the fabrication charges in the first instance. Tr. 52:20–53:16.

The Director's regulatory examples prove that Bartlett accrued all taxes correctly with respect to the conveyor installation. The separately stated labor and engineering service charges are not taxable.

B. If tangible personal property and a service are "not separable" within a transaction, the Director's regulation requires application of the "true object test."

Even if this Court believes that the service charges (labor and engineering) are "not separable" from the personal property charges on CRC's invoices, that finding does not end the inquiry.

> When the sale of tangible personal property and a nontaxable service are not separable, the entire sale price is taxable if the true object of the transaction is the transfer of tangible personal property. None of the sale price is taxable if the true object of the transaction is the sale of the nontaxable service.

12 CSR 10-103.600(1). Thus, the regulation requires the Court to determine the "true object" of the transaction. This comports with this Court's precedent on this issue. "This Court has held that to determine the 'true object' of a transaction that involves both non-taxable services and taxable retail sales, the Court looks to the 'real object the buyer seeks.'" *W. Blue Print Co. v. Dir. of Revenue*, 311 S.W.3d 789, 791 (Mo. banc 2010) (quoting *Sneary v. Dir. of Revenue*, 865 S.W.2d 342, 345 (Mo. banc 1993)).

C. The true object test proves that the services are not taxable.

Application of the true object test in this case yields the same result as the application of the plain language of the use tax statute or the plain language of the Director's regulations. "If the tangible personal property is 'merely incidental' to a non-taxable service, its existence will not transform the entire transaction into a taxable retail sale." *W. Blue Print*, 311 S.W.3d at 791.

The Director's regulation defines "true object" as follows:

> (C) True object—the real object the buyer seeks in making the purchase. The essentials of the transaction determine the true object. The true object of the transaction is the tangible personal property if:
>
> 1. The purchaser desires and uses the tangible personal property;
> 2. The tangible medium is not merely a disposable conduit for the service or intangible personal property;
> 3. The tangible personal property is a finished product; or

4. The tangible personal property is not separable from the service or intangible personal property.

12 CSR 10-103.600(2)(C). As the Commission correctly noted, the first two sentences of the definition comport with this Court's true-object case law. LF 115. Further, as the Commission accurately described, the four enumerated factors do not apply to this case because Bartlett's desire was the installation of the physical conveyor. *Id.*

The Director contends that this conclusion "makes no sense" because what Bartlett really wanted was a "fully fabricated and installed grain elevator." Aplt. Br. 25. But that is not what Bartlett wanted *from CRC* and *in this transaction*. Indeed, GSI—not CRC—fabricated the grain conveyor. What Bartlett wanted from CRC was the installation of the conveyor.

This Court's cases discussing the true-object test illustrate the same conclusion. Once again, the Director chooses not to discuss any of this Court's case law on this point, relying instead on a unilateral interpretation of her own regulation. In *Western Blue Print*, this Court evaluated the true object of a transaction in which a company scanned customer's documents and then provided the customer with a CD containing the electronic files. 311 S.W.3d at 789-90. Of course, the customer "desired" the finished product of the tangible CD, but the Court held that the "essence of the transaction" was the intangible service of scanning the documents. *Id.* at 792.

Similarly, while Bartlett "needed" the tangible materials that CRC used to install the conveyor (nuts, bolts, etc.), the essence of the transaction was the installation service. The Commission evaluated all of the evidence and came to the correct factual conclusion that the essence and true object of Bartlett's transaction with CRC was the installation service. LF 115. The Commission once again reiterated the importance of the price quote—which was a statement from CRC, not from Bartlett—which outlined the purpose of the transaction: "to install customer supplied conveying." *Id.* (citing Hearing Ex. B). "This statement makes it clear—the true object of this transaction was not to buy labor or materials, or to rent equipment, but to install the Conveyor System." *Id.*

* * *

Because the plain language of the statute dictates that Bartlett appropriately accrued taxes with respect to the installation services of CRC, this Court need not reach the Director's own regulations. But even those regulations—both their plain language and the application of the true-object test—establish that the Commission's decision was correct.

CONCLUSION

The judgment of the Administrative Hearing Commission should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and accurate copy of the foregoing document has been served by means of electronic filing via Missouri's CaseNet e-filing system, to counsel below, this 25th day of January, 2016:

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I further certify that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 7,005 words.

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