SC95205

IN THE SUPREME COURT OF MISSOURI

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

Respondents (Petitioners below),

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Appellant (Respondent below).

From the Administrative Hearing Commission
The Honorable Sreenivasa Rao Dandamudi, Commissioner

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

The issues before the Court in this matter involve the construction of §§ 144.605(8) and § 144.610.1, RSMo (2013 Cum. Supp.),[1/] revenue laws of the State of Missouri. Therefore, this Court has exclusive jurisdiction over this matter pursuant to Article V, § 3 of the Missouri Constitution.

[1/] All references to the Missouri Revised Statutes are to the 2013 Cumulative Supplement unless otherwise specified.

STATEMENT OF FACTS

Bartlett Grain International ("Bartlett") is a large agri-business which engages in grain merchandising and storage. Bartlett receives, handles, and ships grain from its elevators located in the Midwest. (Tr. 30-31; Ex. A, D3). It owns and operates a grain elevator at its facilities in St. Joseph, Missouri, which is the location at issue in this tax dispute. (Tr. 31, Ex. A).

The Department of Revenue performed a sales and use tax audit of Bartlett for the tax periods of October 1, 2008 through September 30, 2011. (LF 92; Ex. A, D1; Tr. 64-67). The audit revealed that Bartlett failed to accrue and remit use tax on the sales price of several items purchased for its facility in St. Joseph, Missouri. (LF 92). One such item – and the only item remaining in dispute – was for contract charges to fabricate and install a grain conveyor system. (LF 92, 117-18).

A. The Purchase of Materials, Fabrication, and Installation of an Industrial Grain Conveyor.

In 2010, Bartlett purchased the parts for a grain conveyor from one company, GSI Group, Inc. (LF 89-90). Bartlett then received a sales price quote from another company – CR Conveying, Inc. – for the furnishing of materials, fabrication, and installation of the grain conveyor parts at its St. Joseph facilities. (LF 90; Ex. B). Bartlett accepted CR's sales price quote, and

was subsequently billed and invoiced for its purchases of the materials, fabrication, and installation. (Exs. 5 & 7).

The contract with CR to construct the grain conveyor was for a total of $590,574, and was broken into five interconnected parts. (LF 90-91; Ex. B, pp. 1-9).

1. Item #1: Supporting Structures.

In the first part of the contract, CR provided materials, engineering, and galvanizing for the supporting structures of the grain conveyor. (LF 90; Ex. B, p. 1). The materials CR provided included "structural materials" such as two thousand three hundred and forty square feet of galvanized serrated bar grating. (Ex. B, p. 1). This part of the contract also included a sub-contract for "engineering", "structure fabrication", and "hot dipped galvanizing". (Ex. B, p. 1).

The line-item with price breakdowns for this part of the contract were as follows:

Misc. Materials – 24,499

Engineering – 4,267

Fabrication – 104,309

Galvanizing – 21,083

(Ex. B, p. 1). With the exception of "engineering," Bartlett accrued taxes on each of these line-items, including fabrication. (Tr. 55-56).

2. Item #2: Wet Corn Conveying.

In this part of the contract, CR provided materials, wet belt spouting, labor, sub-contract, and rentals for the wet corn conveying part of the grain conveyor. (LF 90; Ex. B, pp. 1-3). The materials CR provided for this part included "tubing", "concrete anchors", "beams", "serrated bar grating", "ladders", "ceramic tiles" and "metal backed Rhino-Hyde Lined Spouting", to name just a few. (Ex. B, pp. 1-2). This part further provided for shop labor and field labor that included "fabricate supports for wet belt", "fabricate wet corn leg braces", "fabricate spout from wet leg to dryer & ceramic line", "fabricate wet corn belt service platform" and other types of fabricated items as well as installation. (Ex. B, pp. 2-3). None of the fabrication or installation of items have any price amounts associated with them. (Ex. B, pp. 2-3).

The line-item price breakdowns for this part of the contract were listed in the contract as follows:

Misc. Materials – 14,168

Wet Belt Spouting – 5,621

Labor – 102,395

Sub-contract – 2,500

Rentals – 10,970

(Ex. B, p. 3). Bartlett accrued taxes on each of these charges except for "labor." (Tr. 55-56).

3. Item #3: Dry Corn Conveying.

In this part of the contract, CR provided materials, Nolin milling valves, limit switches for valves, labor, and rentals for the dry corn conveying part of the grain conveyor. (LF 90; Ex. B, pp. 3-5). The materials CR provided to construct this portion of the conveyor included "tubing", "serrated bar grating", "ladders", "ceramic tiles," "metal backed Rhino-Hyde Lined Spouting", and "valves". (Ex. B, pp. 3-4). This part further provided for shop labor and field labor that included "fabricate supports for dryer discharge drag", "fabricate dry corn leg braces", "fabricate spout", "fabricate wet and dry leg service platform", and other types of fabricated items as well as installation. (Ex. B, pp. 4-5). Again, none of the detailed fabrication or installation of items have any amounts associated with them. (Ex. B, pp. 4-5).

The line-item price breakdowns for this part of the contract were listed in the contract as follows:

Misc. materials – 7,801

Nolin Milling Valves – 4,928

Limit Switches for Valve – 695

Labor – 95,635

Rentals – 20,181

(Ex. B, p. 5). Bartlett again accrued taxes on each of these charges except for "labor." (Tr. 55-56).

4. Item #4: Scalper and Cross Conveying.

In this part of the contract, CR provided materials, labor, and rentals for the construction of the scalper and cross conveying part of the grain conveyor. (LF 91). The materials CR provided included eighty square feet of 3/16 inch carbon steel, twenty square feet of 1/4 inch carbon steel, three hundred twenty feet of ten gauge carbon steel, "spouting", "expanded metal backed Rhino-Hyde spouting", and many gallons of primer and enamel. (Ex. B, p. 5). This part further provided for shop labor that included "fabricate cross drag conveyor supports", "fabricate scalper supports", "fabricate scalper drag supports", and other types of fabricated items as well as installation. (Ex. B, p. 6). But again, none of the detailed fabrication or installation of items have any amounts associated with them. (Ex. B, p. 6).

The line-item price breakdowns for this part of the contract were listed in the contract as follows:

Misc. materials – 5,587

Labor – 63,220

Rentals – 15,786

(Ex. B, p. 6). Bartlett again accrued taxes on each of these charges except for "labor." (Tr. 55-56).

5. Item #5: East and West Distribution Conveyors.

In the final part of the contract, CR provided materials, labor, sub-contract, and rentals for the construction of the east and west distribution part of the grain conveyor. (LF 91; Ex. B, pp. 6-7). The materials CR provided for the construction included one hundred twenty square feet of 3/16 inch carbon steel, forty square feet of 1/4 inch carbon steel, four hundred square feet of ten gauge carbon steel, "expanded metal backed Rhino-Hyde spouting", concrete anchors, and many gallons of primer and enamel. (Ex. B, pp. 6-7). This part further provided for shop labor that included charges for "fabricate west distribution conveyor supports", "fabricate east distribution conveyor supports", as well as other types of fabricated items and installation. (Ex. B, p. 7). Once again, none of the detailed fabrication or installation of items have any amounts associated with them. (Ex. B, p. 7).

The line-item price breakdowns for this final part of the contract were listed in the contract as follows:

Misc. materials – 5,326

Labor – 67,340

Sub-contract – 4,445

Rentals – 12,168

(Ex. B, p. 7). Bartlett again accrued taxes on each of these charges except for "labor." (Tr. 55-56).

B. The Commission's Decision.

The Bartlett tax dispute came before the Commission in 2014, and at the time involved several different items subject to sales or use tax. (LF 87). The Commission issued its decision followed by an amended decision in 2015. (LF 30-63; LF 87-120). The only issue remaining for this appeal is whether the generic "labor" and "engineering" charges in the contract between Bartlett and CR were taxable under §§ 144.605(8) and 144.610. (LF 117).

In its analysis of the contract to construct the grain conveyor, the Commission concluded that the "labor" and "engineering" parts of the contract were nontaxable services. (LF 117). Although the Commission recognized that Missouri law made taxable "any services that are a part of the sale" of tangible personal property, and that "the services and materials are parts of a single sale" in this case, the Commission nevertheless decided that the engineering and labor charges were not subject to tax. (LF 110, 117).

To reach this conclusion, the Commission adopted a new theory and decided that "in this case the tangible personal property was ancillary to the services." (LF 110). While suggesting that the amount of tangible personal property was supposedly "negligible," the Commission concluded that the true object of the transaction between Bartlett and CR was the sale of an installation service. (LF 110, 117). Neither the Commission nor Bartlett identified any price for any installation service.

POINTS RELIED ON

I. The Commission Erred in Holding that Bartlett is Not Liable for Use Tax on Certain "Labor" and "Engineering" Charges, Because "Any Services That are a Part of the Sale" of Tangible Personal Property are Subject to Tax Under § 144.605(8), In That the Services Here Were Part of the Sale of Tangible Personal Property, Including Materials, Fabrication, and Other Taxable Items for the Construction of a Grain Conveyor.

Akins v. Dir. of Revenue, 303 S.W.3d 563 (Mo. 2010)

Branson Properties USA, L.P. v. Dir. of Revenue, 110 S.W.3d 824 (Mo. 2003)

State v. Rowe, 63 S.W.3d 647 (Mo. 2002)

§ 144.605

§ 144.610

II. The Commission Erred in Holding that Bartlett is Not Liable for Use Tax on Certain "Labor" and "Engineering" Charges, Because the "True Object" Test for Combined Sales of Tangible Personal Property and Services Either Does Not Apply or is Met, In That Bartlett Paid Not Just for Any Services or for Some Intangible Product, but for

the Materials, Fabrication, and Installation of a Grain Conveyor.

Brinson Appliance, Inc. v. Dir. of Revenue,

843 S.W.2d 350 (Mo. 1992)

Sneary v. Dir. of Revenue, 865 S.W.2d 342 (Mo. 1993)

Western Blue Print Co. v. Dir. of Revenue,

311 S.W.3d 789 (Mo. 2010)

12 CSR 10-103.600

SUMMARY OF THE ARGUMENT

This was no mere delivery contract or a charge for simple installation. No, the contract in this case was for tens of thousands of dollars in materials, more than a hundred thousand dollars in fabricated tangible personal property, and still more taxable items necessary to construct an industrial grain conveyor. For a contract like this, Missouri tax law specifically provides that "any services that are a part of the sale" of tangible personal property are subject to use tax. § 144.605(8) (emphasis added). Here, the Commission rightly concluded that "the services and materials are parts of a single sale." (LF 110).

The plain language of the statute, along with the Commission's undisputed conclusion should have ended the inquiry with the contract at issue subject to use tax. But it did not. Instead, the Commission came up with a new theory of use tax liability. According to the Commission, service charges are nontaxable if "the tangible personal property was ancillary to the services." (LF 110). This new theory is unsupported by the language of the statute. The statute, after all, does not qualify the tax liability by quantitative limitations such as "smaller," "ancillary," or "less substantial." It provides that "any" services that are part of a sale of tangible personal property are subject to tax.

The Commission's new theory is also inconsistent with an existing exemption or exclusion for installation labor or services. Missouri law provides that "the amount charged for labor or services" is not subject to use tax if it is "rendered in installing or applying the property sold." § 144.605(8). Yet, the Commission did not even try to analyze the applicable provision for installation – for good reason. The taxpayer did not attempt to prove any amount associated with installation. The contract lists merely a generic "labor" charge where it might have identified labor for installation. Indeed, within the details describing the type of "labor" performed, the contract repeatedly refers to fabrication of tangible personal property. And the taxpayer already conceded that fabrication was subject to use tax.

Without any evidence to support the exemption, the Commission embarked on an analysis of the supposed "true object" of the transaction. But because the plain language of the statute resolves the matter the "true object" test does not apply. Even if the "true object" test could apply in this case, the true object of this transaction was unquestionably the construction of tangible personal property – an industrial grain conveyor. The contract did not call for the mere delivery of a product or for any simple installation. To the contrary, the contract was for more than half a million dollars and included materials, fabrication, installation of parts, and much more. As such, "any services" that were a part of the sale of tangible personal property

are subject to use tax. The Commission's decision should, therefore, be reversed.

ARGUMENT

Standard of Review

The only issue before the Court is a legal issue concerning the interpretation of revenue laws – §§ 144.605(8) and 144.610.1. This Court reviews the Commission's interpretation of revenue laws *de novo*. *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 436 (Mo. 2010) ("Statutory interpretation is an issue of law that this Court reviews *de novo*."); *Finnegan v. Old Republic Title Co. of St. Louis, Inc.,* 246 S.W.3d 928, 930 (Mo. 2008).

"Taxing 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. 2007). "The opposite is true of tax exemptions; they 'are to be strictly construed against the taxpayer, and any doubt is resolved in favor of application of the tax.' " *President Casino, Inc.*, 219 S.W.3d at 239 (quoting *Southwestern Bell Tel. Co. v. Dir. of Revenue*, 182 S.W.3d 226, 228 (Mo. 2005)). An exemption or exclusion is allowed "only upon clear and unequivocal proof, and doubts are resolved against the party claiming it." *Branson Properties USA, L.P. v. Dir. of Revenue*, 110 S.W.3d 824, 825-26 (Mo. 2003); *see Southwestern Bell Tel. Co. v. Morris*, 345 S.W.2d 62, 68 (Mo. banc 1961). And as such, "it is the burden of the taxpayer claiming the exemption to show that it fits the statutory language exactly." *Cook Tractor Co. v. Dir. of Revenue*, 187 S.W.3d 870, 872 (Mo. 2006).

The taxpayer in this case, Bartlett Grain International, seeks to avoid use tax on certain "labor" and "engineering" portions of its invoice to purchase materials, fabricate, and install an industrial grain conveyor. The Commission held that Bartlett was not liable for tax because the purchase was supposedly of a service and involved "negligible" tangible personal property. (LF 110). Not so. Under the statute, "any" service that is part of the sale is subject to tax. And the "labor" portions in this case unquestionably included fabrication, which is taxable. Moreover, the amount of materials, fabrication, and other taxable items was not negligible – they constituted nearly half, if not more, of the total contract amount.

I. The Commission Erred in Holding that Bartlett is Not Liable for Use Tax on Certain "Labor" and "Engineering" Charges, Because "Any Services That are a Part of the Sale" of Tangible Personal Property are Subject to Tax Under § 144.605(8), In That the Services Here Were Part of the Sale of Tangible Personal Property, Including Materials, Fabrication, and Other Taxable Items for the Construction of a Grain Conveyor.

This is a simple case really, involving a straightforward application of the statutory language and the associated burdens of proof. The Commission's decision, however, departs from the plain language of the

statute and misapplies the burden. Accordingly, the Commission's decision should be reversed.

A. The Plain Language of the Statute Imposes a Tax on "Any" Services That are a Part of a Sale of Tangible Personal Property.

As with any statutory provision, "the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. 2010) (citing *State ex rel. White Family P'ship v. Roldan*, 271 S.W.3d 569, 572 (Mo. 2008)). "It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute." *Hyde Park Hous. P'ship v. Dir. of Revenue,* 850 S.W.2d 82, 84 (Mo. 1993).

The General Assembly imposed a tax on the "sales price" of "tangible personal property" stored, used, or consumed within Missouri. § 144.610.1. The term "sales price," in turn, is defined under Missouri law. *See* § 144.605(8). "If terms within a tax statute are defined by the legislature, [a tribunal] must give effect to the legislature's definition." *Jones v. Dir. of Revenue*, 832 S.W.2d 516, 517 (Mo. 1992). Here, the definition of "sales price" is determinative:

> "Sales price", 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, . . . except that . . . "sales price" shall not include . . . the amount charged for labor or services rendered in installing or applying the property sold . . . .

§ 144.605(8) (emphasis added).

Under Missouri law, therefore, services that are part of the sale of tangible personal property are subject to use tax. Not just some services, but "any" services that are part of the sale. The services in this case, described generically as "labor" and "engineering," were certainly part of the sale of tangible personal property. (Ex. B). Indeed, the matter is undisputed because the Commission concluded that "the Director has a point – the services and materials are parts of a single sale." (LF 110; LF 107 (concluding that the transaction "by its terms, involved the sale of both services (installing the Conveyor System) and tangible personal property (the materials)")).

The plain language of the statute should have ended the Commission's analysis in this case, since there is no ambiguity in the statute and no dispute that services were part of the sale of tangible personal property. But

the Commission departed from the plain language of the statute and created a new exception for sales in which tangible personal property are supposedly "ancillary to the services." (LF 110).

B. There is No Requirement for the Services to be an Ancillary (or Smaller) Part of the Sale of Tangible Personal Property.

"When the words are clear, there is nothing to construe beyond applying the plain meaning of the law." *State v. Rowe*, 63 S.W.3d 647, 649 (Mo. 2002) (*quoted in State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. 2012)). Despite the lack of any ambiguity in the statute, the Commission went beyond the plain language in this case. It determined that certain services are not subject to tax under § 144.605(8) as long as the sale of tangible personal property is "negligible" or "ancillary" to a more substantial sale of services. There is no basis for such an interpretation of the statute, and this sale did not involve a "negligible" amount of tangible personal property in any event.

The Commission purports to look at the "purpose" of the statute in disregard of the plain language. (LF 110). A court, however, "will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an absurd or illogical result." *Akins v. Dir. of Revenue*, 303

S.W.3d 563, 565 (Mo. 2010). The language of the statute in this case is neither ambiguous nor would it lead to an absurd or illogical result.

Here, the statutory language provides that if there is a sale of tangible personal property then "any services that are a part of the sale" are subject to tax. The statute specifically uses the word "any" to describe the taxable services. The statute does not use "smaller," "ancillary," "less substantial," or any other type of language suggesting a quantitative analysis when deciding whether services are part of the sale of tangible personal property.

Moreover, the sale of tangible personal property was not "negligible" in this case, as the Commission suggests. The miscellaneous materials alone were tens of thousands of dollars – $57,381 to be precise. What is more, the tangible personal property portions of the sale was much larger by far than just the materials. In one line item alone Bartlett conceded that there was a taxable charge of $104,309 for "fabrication" (*i.e.*, the creation of tangible personal property). Adding this charge to the other items that are indisputably subject to tax results in no less than $257,717 in materials, fabrication, and other taxable items. Hardly a "negligible" amount.

Further still, the supposed "labor" that is at the core of this dispute is not simple service like the delivery of an appliance, but involved substantial "fabrication," or the creation of tangible personal property. For example, in the detailed description for one generic "labor" charge, the contract lists the

following: "fabricate supports for wet belt" "fabricate wet corn leg braces"; fabricate two (2) switchgear access platforms"; "fabricate wet corn belt service platform." (Ex. B, p. 2). At the hearing, in fact, a witness for Bartlett was asked: "Did Bartlett contract with CRC to create a support structure for a portion of the conveying system?" The witness answered "yes." (Tr. 51:13-15). Thus, even the "labor" listed in the sales contract was not merely non-taxable service, but the creation of tangible personal property. Simply lumping items together in a generic category called "labor" does not render them non-taxable.

C. The Tax Exemption for "Installing" the Property Does Not Apply.

Surprisingly, the exemption or exclusion in the statute that might apply is not even directly discussed by the Commission in its decision. Under the statute, certain services are tax exempt even if they are part of the sale of tangible personal property; namely, "services rendered in installing or applying the property sold." § 144.605(8). It bears repeating, of course, that an exemption or exclusion is to be strictly construed and the taxpayer has the burden to show by "clear and unequivocal proof" that "it fits the statutory language exactly." *Branson Properties USA, L.P.*, 110 S.W.3d at 825-26; *Cook Tractor Co.*, 187 S.W.3d at 872. Bartlett failed to do so in this case.

The sales contract identifies specific charges associated with specific items such as "misc. materials", "engineering", "fabrication", and "galvanizing." (LF 90-91; Ex. B, pp. 1-7). But none of the specific charges are for "installation." Indeed, it is only in the details of the contract that there is any mention of "installation" or "install," and none of the line items has a contract amount associated with the service. (Ex. B, pp. 1-7). Actually, in the details of the contract the description "fabricate" is used virtually the same number of times as the description "install." And "fabricate" and "install" are all rolled up into a generic charge for "labor." Thus, Bartlett had the opportunity to meet its burden to prove that certain labor charges were exempt as "installing," but it did not do so.

The plain language of the statute controls the disposition of this case, and requires no further analysis. If the sales price included "any services" that are part of the sale of tangible personal property, which the Commission conceded was the case here, the services are subject to use tax. Accordingly, the Commission's decision should be reversed.

II. The Commission Erred in Holding that Bartlett is Not Liable for Use Tax on Certain "Labor" and "Engineering" Charges, Because the "True Object" Test for Combined Sales of Tangible Personal Property and Services Either Does Not Apply or is Met, In That Bartlett Paid Not Just for Any Services or for Some Intangible Product, but for the Materials, Fabrication, and Installation of a Grain Conveyor.

In certain cases under §§ 144.010 and 144.020, where it has been unclear whether the sale of an item involved the "taxable transfer of tangible personal property or the nontaxable performance of a service," this Court has applied a "true object" test. *Sneary v. Dir. of Revenue*, 865 S.W.2d 342, 345 (Mo. 1993). "The test focuses on the essentials of the transaction to determine the real object the buyer seeks." *Id.* (citing *James v. TRES Computer Serv. Sys., Inc.*, 642 S.W.2d 347 (Mo. 1982) and *K & A Litho Process, Inc. v. Dir. of Revenue*, 653 S.W.2d 195 (Mo. 1983)). The Commission correctly noted, however, that this test has only ever been applied to the sale of an individual item, not the sale of materials, fabrication, and installation of a large and complex industrial construction project, as in this case. (LF 117).

As set forth above, the plain language of the statute at issue – § 144.605(8) – provides that "any services" that are part of the sale of tangible personal property are subject to tax unless the labor or services are exempt as installation. This is the analysis that should control in this case, and for which Bartlett failed to meet its burden. But even if the true object test does apply, the sale in this case was not merely for any services or some intangible personal property, but instead for the sale of tangible personal property – in the form of materials, fabrication, and installation of an industrial grain conveyor.

Below is a simple chart setting out the contract for the construction of the grain conveyor. The total contract price is $590,574, and is divided into five parts as follows:

	Bartlett Accrued Tax	Claimed as Non-taxable
Item #1: Supporting Structures	Misc. Materials – 24,499 Fabrication – 104,309 Galvanizing – 21,083	Engineering – 4,267
Item #2: Wet Corn Conveying	Misc. Materials – 14,168 Wet Belt Spouting – 5,621 Sub-contract – 2,500 Wet Belt Concrete – -2,350 Rentals – 10,970	Labor – 102,395
Item #3: Dry Corn Conveying	Misc. materials – 7,801 Nolin Milling Valves – 4,928 Limit Switches for Valve – 695	Labor – 95,635

	Rentals – 20,181	
Item #4: Scalper and Cross Conveying	Misc. Materials – 5,587 Rentals – 15,786	Labor – 63,220
Item #5: East and West Distribution Conveyors	Misc. Materials – 5,326 Sub-contract – 4,445 Rentals – 12,168	Labor – 67,340
Totals:	257,717	332,857

Note that Bartlett accrued taxes on $257,717 of the total contract price, and thereby conceded that nearly half of the contract price was taxable. But that is not all. Of the remaining charges, much of the work actually involved fabrication or the creation of tangible personal property, which Bartlett already conceded was taxable. Indeed, the contract provides a detailed description of the items necessary to construct the industrial grain conveyor. Each item has a bulleted breakdown of the "labor" which contains virtually the same number of references to fabrication as to installation.

In the regulations for sales tax, the "true object" is defined as the "real object the buyer seeks in making the purchase." 12 CSR 10-103.600(2)(C). The true object is 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.

Id.

Here, there is no question that what Bartlett desired was tangible personal property – a fully fabricated and installed grain conveyor. This is not merely some disposable conduit but a finished product that cannot be separated from the service required to construct it. The Commission, in contrast, argued that "Bartlett did not particularly desire or use the miscellaneous materials (nuts, bolts, primer, paint, steel plate and tubing) themselves, but did want the result." (LF 115). This conclusion makes no sense. Bartlett absolutely wanted all of the materials used to construct its grain conveyor as well as all the fabricated tangible personal property necessary for its construction.

The regulation further specifies that "[t]he true object of the transaction is the service or intangible personal property if the tangible personal property is merely the medium of transmission for an intangible product and can be discarded after the purchaser has obtained access to the intangible component." *Id.* Again, it makes no sense to suggest that the fully

fabricated and installed grain conveyor in this case, which was the intention of the parties to the contract, is merely the medium for intangible "labor" and can now be discarded.

Furthermore, the transaction at issue was not for the delivery of some product that could merely be set in place – like a washing machine or a dryer. *See, e.g., Brinson Appliance, Inc. v. Dir. of Revenue*, 843 S.W.2d 350 (Mo. 1992). Nor was it for some intangible personal property like a computer program or electronic information. *See, e.g., Western Blue Print Co. v. Dir. of Revenue*, 311 S.W.3d 789 (Mo. 2010). Instead, the transaction was for an industrial grain conveyor that required hundreds of thousands of dollars in materials, fabrication, and other taxable items. As such, even if the true object test applied in this case, it is satisfied and the entire contract is taxable.

CONCLUSION

For the foregoing reasons, the decision of the Administrative Hearing Commission should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 5,424 words.

/s/ *Jeremiah J. Morgan*
Deputy Solicitor General