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

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

The contract at issue did not call for the mere delivery or simple installation of a household appliance, something that a handyman or a delivery service could perform. Instead, the contract required the specialized fabrication, construction, and installation of a grain conveyor system, including the fabrication and construction of large supporting structures, the pouring of concrete footings, and the welding of steel, along with the purchase and fabrication of thousands of feet of galvanized grating, tubing, steel beams, ladders, and platforms (to name just a few of the materials in the contract). Thus, there is no dispute that the services in this case were "part of the sale" of tangible personal property subject to tax under § 144.605(8), RSMo (2013 Cum. Supp.).[1/]

The contract between the parties included the following five "items": "supporting structures"; "wet corn conveying"; "dry corn conveying"; "scalper and cross conveying"; and "east and west distribution conveyors". (Ex. B). Bartlett would have the Court believe that these are all separate items for tax purposes, or at least the first item for "supporting structures." There should be no mistake, however, that all of the items in the contract were part

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

of the same sale and were required to fabricate, construct, and install a grain conveyor system.

The "supporting structures" in the first item are not some stand-alone set of structures. They constitute the supporting structures for all of the other items in the contract, and make possible the construction and installation of the entire grain conveyor system. Even Bartlett acknowledges that the supporting structures were "needed to support the conveyor." Respondent's Brief, p. 4. And the supporting structures and materials were not a "negligible" part of the sale, as the Commission suggests. (LF 24-25). In fact, the total cost for the supporting structures and materials necessary to construct the grain conveyor system was, at a minimum, $257,717, or nearly half of the total contract price.

The plain language of the statute makes the services in this case subject to tax because they were "part of the sale" of tangible personal property. Likewise, the true object of the contract – if the plain language of the statute is not controlling – was the fabrication, construction, and installation of a grain conveyor system. As such, the Commission's decision should be reversed.

ARGUMENT

I. The Contract in This Case Was for "Labor, Materials and Rentals," and Therefore, the Charges for Services Were "a Part of the Sale" Subject to Tax.

The Commission specifically found that "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)")). Bartlett also acknowledges – repeatedly – that the contract at issue included the construction of "a support structure that was needed to support the conveyor." Respondent's Brief, p. 4; *see also id.* pp. 5, 21, 22. Therefore, under the plain language of the statute as well as case law, the "labor, materials and rentals" are part of the same sale and subject to tax.

A. The Plain Language of the Statute is Unambiguous and Controlling.

There is no suggestion from Bartlett or the Commission that the language of the statute is somehow ambiguous. It provides that services are subject to tax if they are "part of the sale" of tangible personal property. Indeed, this concept is repeated more than once in the statute:

- "'Sales price', the consideration *including the charges for services*";

- "[T]angible personal property, *including any services* that are a part of the sale";
- "[W]ithout any deduction therefrom on account of the cost of the property sold, the cost of materials used, *labor or service cost*".

§ 144.605(8) (emphasis added).

Yet, Bartlett argues that the Director focuses on the incorrect language in the statute. Respondent's Brief, p. 12. Not so. The Director has focused directly on the language of the statute at issue. The question is whether the "charges for services" under the contract (*i.e.*, installation) "are a part of the sale" of tangible personal property (*e.g.*, fabrication of a support structure and other materials). They are.

Not only are the charges for materials, fabrication, and construction in the same contract in this case, they are also inseparably connected. CR Conveying, Inc. ("CRC"), for example, could not have installed the conveyor system purchased by Bartlett if CRC had not fabricated and constructed a support structure – costing approximately $150,000. Bartlett, in fact, concedes in its brief that the support structure in the contract was "needed to support the conveyor." Respondent's Brief, p. 4. Even the Commission correctly concluded that "the services and materials are parts of a single sale." (LF 110). The Commission was convinced, however, that the sale of

materials in this case was "negligible" or constituted a "smaller sale of miscellaneous materials." (LF 24-25). This is entirely unsupported by the provisions of the contract.

Although slightly less than half of the total contract price, the contract in this case included the sale of $257,717 in materials and fabrication – hardly negligible or small.[2/] There is no dispute that these materials and the fabricated support structures are tangible personal property subject to tax, nor is there a dispute that they are part of the same contract with charges for services. Thus, Bartlett takes a different tact in this Court arguing that services are "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." Respondent's Brief, p. 12 (emphasis in original).

[2/] Bartlett suggests that the contract in this case might be compared to a handyman mounting a garage-door opener with a $5 box of screws. That is not an apt description. The taxable materials in this case were valued at $257,717 – nearly half of the entire contract price – and included the fabrication and construction of an entire support structure with concrete, fabricated steel, tubing, grating, ladders, platforms, beams, spouting, braces, and much more.

It is unclear what this argument really means, but it appears to defy the actual facts, to say nothing of the plain language of the statute.

In support of this new "charged at the same time" theory, Bartlett cites to *Kurtz Concrete, Inc. v. Spradling*, 560 S.W.2d 858, 861 (Mo. 1978). *Kurtz*, which this Court declined to extend in *Southern Red-E-Mix Co. v. Dir. of Revenue*, 894 S.W.2d 164 (Mo. 1995), does not stand for the proposition for which Bartlett argues. It involved simple delivery of concrete and questions of when title passed. Here, there are no delivery or title issues; Bartlett contracted with CRC to construct an expensive support structure and paid for more than a quarter-of-a-million dollars of materials under the contract. Those materials and the associated fabrication cannot be separated from the contract and are not merely charged at the same time.

What is more, 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). 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.

B. The Case Law Does Not Support Bartlett's Claims.

According to Bartlett, "[t]his Court's prior precedent" supposedly support its claims. Respondent's Brief, p. 20. It does not. Each of the cases that Bartlett cites (and decries the Director for not citing) involved delivery charges, much different than the fabrication and sale of tangible personal property in this case.

In *May Dep't Stores Co. v. Dir. of Revenue*, 791 S.W.2d 388 (Mo. 1990), for example, the issue was whether shipping costs were part of the sale of merchandise. This Court concluded that the shipping costs were not part of the sale of merchandise because the charges were stated separately. Bartlett argues that this case is like *May* because the charges were itemized in the contract. For delivery charges that might make sense. But that is not the issue in this case. The idea that merely itemizing service charges separately from material and fabrication charges as a way to avoid tax in all cases would wreak havoc on sales and use tax law. The fabrication and materials in this case are substantially different than delivery charges. There is no way that the contract in this case could have been completed without the materials, fabrication, and construction of a support structure. Though they are separately itemized they are part of the same sale.

The same is true for *Brinson Appliance, Inc. v. Dir. of Revenue*, 843 S.W.2d 350 (Mo. 1992), another case involving delivery charges. The delivery and installation of a household appliance – effectively setting the appliance in place and plugging it in – is substantially different than the contract in this case. CRC could not merely take the cardboard wrappings off the grain conveyor pieces and simply set the pieces in place. Instead, CRC had to build an expensive support structure, fabricate parts, and custom build the entire system. The fact that large segments of the conveyor were pre-manufactured does not undermine the extensive construction and fabrication that had to be completed as part of the contract.

Finally, Bartlett cites *Alberici Constructors, Inc. v. Dir. of Revenue*, 452 S.W.3d 632 (Mo. 2015), yet another delivery case. And ironically, *Alberici* is probably the closest case, but not in the way Bartlett might imagine. In *Alberici*, the company was contracted to "construct or install manufacturing equipment at a new cement manufacturing plant in Missouri." *Alberici*, 452 S.W.3d at 634. To do so, "Alberici was responsible for installing and constructing the steel supports and cement manufacturing equipment provided by Holcim." *Id.* Yet the case was not about whether that construction and installation of pre-purchased materials and equipment was a tax-free service. Such a suggestion would have been absurd. Instead, the

case was only about the delivery charges for rented cranes used to build the structure.

Here, we are not talking about delivery charges. Instead, the issue is about fabrication, construction, and installation that cannot be separated in a contract. As such, the parties' intent is clear – the parties intended for CRC to fabricate a support structure, use materials, and construct a conveyor system. Under the plain language of the statute and the controlling case law, the contract, including the services provided as part of the contract, are subject to tax.

II. The True Object of the Contract, if That Test Even Applies in this Case, Was for the Fabrication and Installation of a Conveyor System.

Even if the plain language of the statute does not control, as it should, the "true object" test, as set forth in the regulation, is satisfied. Under the regulations, 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.

12 CSR 10-103.600(2)(C). 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 services required to construct it.

Bartlett suggests, however, that merely stating the charges for tangible personal property and services separately is sufficient to make the charges for services nontaxable. *See* Respondent's Brief, p. 26 (stating that "because the service charges were separately stated, they are nontaxable"). That is not what the regulation provides, nor could it, as the Commission correctly concluded. (LF 103 (noting that the regulation "elevates the 'separately stated' factor to a rule which . . . violates the holding of *Brinson Appliance*, *Southern Red-E-Mix* and *Alberici Constructors* that 'separately stated' is not a rule, but only a factor, and then only in delivery cases")). Instead, the regulation makes this clear in the very first example, stating that "[e]ven 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).

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." 12 CSR 10-103.600(2)(C). This does not describe this case to any degree. Bartlett contracted for the fabrication and installation of a grain conveyor and none of the extensive support structures, fabricated materials, or other items provided by CRC under the contract could be merely discarded.

Bartlett further argues that this contract was not about the "nuts, bolts, etc." Respondent's Brief, p. 31. But this hardly captures the actual contract, and severely understates the tangible personal property involved. The contract was for – at a minimum – $257,717 in tangible personal property. It required the fabrication and construction of extensive structures and associated materials. Without this substantial tangible personal property there would have been no installation of the grain conveyor. Thus, the true object of the contract was a fully fabricated and installed grain conveyor, and as such the entire contract was subject to tax.

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

I hereby certify that a true and correct copy of Appellant's Reply Brief was electronically via Missouri CaseNet e-filing system on the 16th day of February, 2016, to:

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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 2,518 words.

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