IN THE MISSOURI SUPREME COURT

801 SKINKER BOULEVARD CORPORATION, UNION ELECTRIC d/b/a AMEREN UE COMPANY, and LACLEDE GAS COMPANY,	)	Cause No. SC92401
Appellants,	)	PETITION FOR REVIEW
v.	)	
DIRECTOR OF REVENUE,	)	
Respondent.	)	

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

APPELLANTS' REPLY TO RESPONDENT'S STATEMENT OF FACTS

Respondent's Statement of Facts is a continuous "spin" of misinformation and mischaracterization. Respondent states that "Appellant 801 Skinker Boulevard Corporation (the "Corporation") . . . manages a group of 39 condos in St. Louis, Missouri." (Resp Brief, p. 1). Appellant does not manage 39 condos. 801 Skinker is not made up of "condos." (LF 88, para 1). It is a cooperative made up of individuals that have possessory interest in the apartments that comprise 801 Skinker. (LF 88, para 1). However, for purposes of RSMo. §144.030.2 (23), Appellants agree that 801 should be treated as a condominium or apartments. Though the members do not own their units, the association functions very much like a condominium. Just as with condominium associations, the members/residents collectively pay 801 for the cost of maintaining the common areas of their building. (LF 42, para 8; 43, para 12; 88-90). Likewise, 801 also fits the definition of apartments as set forth by this Court in *American Healthcare Management, Inc. v. Director of Revenue*, 984 S.W.2d 496 (Mo. 1999).

Respondent mischaracterizes the nature of 801's common area metering. It repeatedly states that the common area is on "separate meters." Appellant is aware of only two types of metering – single or master. The 801 common area is serviced by a single meter for Laclede Gas (LF 159-170) and two single meters from Ameren (LF 133-144).

On page 2 of its "Statement of Facts," Respondent mischaracterizes the "use" of the utilities. It states that "the gas and electricity at issue is *used by* the Corporation for

heating, cooling and lighting the common areas . . ." (Resp Brief, p. 2). Instead, the utilities are used by the **residents** who then pay 801 their proportionate share for the expense. (LF 43, para 12).

Respondent states that "The Missouri Public Service Commission ("PSC") has not approved a residential rate classification for the purchase of gas or electricity for the common areas of the Corporation." This is purposefully misleading – 801 could not apply to the PSC for a rate re-classification. The PSC sets the rate classification definitions and the utility applies them as best they can. The statutes provide the procedure available to the taxpayer to address any errors. Applying to the PSC for a rate-reclassification is not one of them. The PSC simply does not process applications for "approval" from each customer of utilities.

Finally, showing real desperation, Respondent cites to a website operated by a real estate agent. (Resp. Brief p. 1 Fn 3). Neither the website nor its content was introduced during the summary proceedings by either party. Respondent knows that neither party is authorized to introduce new facts on appeal. The website has no relevance and should be stricken from Respondent's Statement of Facts.

ARGUMENT

I. Common Area Utilities That Serve The Members/Residents Of 801 Are Exempted From Utility Sales Tax By The Plain Language Of The Statute.

The statute at issue here could not be any more clear. It allows an exemption from sales tax for utilities used for "domestic use." Domestic use is defined as use that is for nonbusiness, noncommercial or nonindustrial purposes. In 1994, the exemption was amended to further clarify and ensure the application of the exemption to residents of apartments, condominiums and their common areas. It states in relevant part:

> Utility service through a single or master meter for residential apartments or condominiums, including service for common areas and facilities and vacant units, shall be deemed to be for domestic use. RSMo. §144.030.2 (23)(a).[1]

This Court made it clear that the 1994 Amendment was intended to "clarify" the exemption for domestic use and not to restrict the general intent of the exemption. *American Healthcare* at 499..

This Court also found that:

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[1] Contrary to Respondent's assertion that Appellants ignored this language in their Brief, Appellants' addressed this language on p. 8, 9, p. 14-18 out of a total of 14 pages of briefing. This can hardly be characterized as an "attempt to ignore."

> The 1994 Amendment basically provided a mechanism for avoiding assessments of sales tax paid on utilities purchased for domesitc use by residential apartments and condominiums. *American Healthcare* at 499.

Thus, the legislature made it clear that these collective residential arrangements fall squarely within the general concept of domestic usage and such residential cooperatives are nonbusiness, nonindustrial and noncommercial. The legislature made it clear that it is not the entity that is billed or the configuration of the residential community that matters.

Respondent not only concedes that 801 is a condominium for purposes of the exemption, but even goes so far as to define the units as "condos." Besides, 801 clearly fits the definition of apartments[2] as held by this Court in *American Healthcare. Id.* at 498.

Utility usage for the 801 common areas is clearly domestic. The visitors, contractors and others that might be found using the common areas are just as likely to be found in the resident's units or in the dwellings of any other residential facility that qualifies for the exemption. Last, but not least, the common area is served by single meters. No utilities for the common area of 801 are consumed for nondomestic purposes. The exemption specifically applies to these common areas.

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[2] Apartment – a room or a group of related rooms among similar sets in one building, designed for use as a dwelling. Dictionary.com.

This Court held on two occasions, both in *Hyde Park Housing v. Director of Revenue*, 850 S.W.2d 82 (Mo. Banc. 1993) and *American Healthcare* that "the purpose of the exemption is to ease the burden of utility costs on residential users." *Hyde Park* at 84; *American Healthcare* at 499. The residents of 801 are clearly those intended users.

The common areas of 801 are no different than the common areas of the nursing facility in *American Healthcare*. There, the Director denied the sales tax exemption to the operators of various nursing homes. This Court held that nursing homes were residential facilities and are "apartments" under the statute. *Id.* at 498. But more signifigantly, and contrary to Respondent's argument that there was no discussion of common areas (Resp. Brief p. 23) this Court held that floor space of the facility used for nursing care and other activities, including hallways and elevators were also domestic use areas. *Id.* at 488-500. The only exclusion from the exemption were those areas used for "administrative offices, beauty shops, gift and laundry shops, and medical treatment rooms . . ." *Id.* at 500 Fn 3. All other commons areas were deemed for domestic use. 801 does not have such commerical use areas.

The statute and these Court's holdings in *Hyde Park* and *American Healthcare* make it clear that 801's application for refund should be granted.

II. Respondent's "Individual Occupant" And "Single Meter Or Master Meter" Arguments Are Simply Without Merit.

Respondent slices, dices and tortures the language of the statute in order to create confusion where no confusion exists.

A. Respondent's "individual occupant" argument is contrary to the statute's plain language.

Respondent refers to the first sentence of the "Domestic use" definition section which makes reference to "individual occupant." The first sentence of the definition section reads:

> "Domestic use" means that portion of metered water service, electricity, electrical current, natural, artificial or propane gas…which an individual occupant of a residential premises uses for nonbusiness, noncommercial or nonindustrial purposes.

It argues that this means that the residents of 801 could not qualify for the exemption because they are not "individual occupants" with regard to the common areas. Their argument is that "individual" refers to only one and the common areas are used by many occupants.

Respondent's "Individual Occupant" argument is hard to reconcile. If taken as Respondent wants us to, - that the exemption is only available to a single occupant of a residence – then it is likely that most dwellings, including those occupied by families, extended families, nursing aids living with the elderly, residences with housekeepers, etc. would not qualify for the tax exemption. It is interesting that Respondent proudly asserts that all units of 801 qualified for the exemption, yet it made no inquiry as to the actual number of inhabitants of the units. Such inquiry at 801 and every other dwelling would

be appropriate in accordance with Respondent's strained interpretation. Clearly, this is not how the exemption was intended to be applied and clearly, the Director has never applied it in such a way.

Nevertheless, their interpretation is not dispositive of 801's application. The legislature made it clear in its 1994 Amendment that utility service utilized in common areas of condominiums and apartments are included in the definition of domestic use. Therefore, their argument is moot.

B. Respondent's "single or master meter" argument is also contrary to the statute's plain language.

Respondent takes issue with 801's application because it claims that in order to qualify for the exemption, the statute somehow mandates that to qualify for the exemption, the common areas must be on the same meter as all of the residential units. The section referred to was added as part of the 1994 Amendment and states: "utility service through a single or master meter for residential apartments or condominiums, including service for common areas and facilities . . . shall be deemed to be for domestic use."

Appellants have already explained in their opening Brief the irrationality of the Director's argument. Essentially, Respondent is saying that the exemption for sales tax only applies to condominiums, apartments and common areas if they are all on the same meter. Nowhere in this provision does the legislature say anything remotely close. The provision merely lets the consumer know that it does not matter if the utility usage is on a single or master meter – if they live in an apartment or condominium, such residential

communities together with their common areas will be deemed noncommercial, nonindustrial and nonbusiness usage.

Respondent proudly asserts that there is no dispute that the individual units (or "condos" as Respondent refers to them) of 801 are all on "separate meters" and are all tax exempt. (Resp Brief p. 15). Respondent simply cannot reconcile how the individual units are tax exempt, despite the fact they are not on a single or master meter with each other. Yet, it argues that the common area must be on a single meter with all the units before it qualifies for the tax exemption.

This Court correctly explained the genesis of this provision:

> RSMo. §144.030.2 (23) was amended after the *Hyde Park* decsison. The event that led to the *Hyde Park* case was that the Director assessed taxes on utilities purchased through a master meter on behalf of occupants of residential apartments.
>
> . . .
>
> The 1994 Amendment basically provided a mechanism for avoiding assessments of sales tax paid on utilities purchased for domestic use by residential apartments and condominiums. *American Healthcare* at 499.

The *Hyde Park* case involved a master metered apartment building. The legislature, in crafting the 1994 Amendment made it clear that the tax exemption applies to condominiums, apartments and common areas whether they are on a master **or** single meter. As also stated in *American Healthcare*, the Amendment was enacted to clarify, not restrict or prohibit the exemption. *Id.* at 499.

Respondent, as well as the Commissioner make a fuss about the word "deemed." They argue that it is meant to point out that utility service used by occupants of condominiums and apartments – "are not typically considered domestic use." Therefore, they can only qualify if, as they argue, they are all centrally metered. This argument is clearly contrived. Utility service used by the occupants of apartments and condominiums are squarely domestic usage. More plausible is that it stems from the *Hyde Park* case as referenced by the Court in *American Healthcare*. In the *Hyde Park* case, the Director of Revenue, after its audit of the housing projects, challenged *Hyde Park's* rate of classification. Clearly, the Director had decided that utility usage by apartments using a master meter did not qualify for the exemption. Their view was that it was a commercial use. Apparently, the legislature begged to differ. Thus, the use of the word "deemed." In disagreeing with the Director's position, the legislature made it clear that they were not dealing exclusively with master metered housing, so they included "single or master" in its amendment, which connotes inclusivity, rather than exclusivity.

The common area of 801 clearly fits in the language of the Amendment. It is serviced by single meters and the usage is clearly domestic in accordance with the statute's definition.

III. The Determination By The Sellers That The Use Was Nonexempt Is Not The Final Determination.

Respondent argues that because Appellants Ameren and Laclede Gas initially made an erroneous classification of 801, it is dispositive of this case. This is simply not true. Appellants Laclede and Ameren have joined in this appeal because they acknowledge that the rate classification was in error. The rate classification should have been residential.

It is these kinds of errors that the statute intended to address when it enacted RSMo. §144.190 as well as the other provisions of redress – e.g. RSMo. §144.030.2(23)(c). If this Court were without jurisdiction, Respondent would have made that claim, but it has not.

Respondent cites to *Hyde Park* for the proposition that it was the rate classification of the seller utility that controlled the outcome. There, the seller classified the apartments as residential and this Court supported that determination. However, in *American Healthcare*, the rate classification for many of the nursing homes was nonresidential. *Id.* at 499. This Court, referring to *Hyde Park*, stated:

> The Court did not specifically address the issue of residential apartments that did not purchase under a residential tariff but it did state that the manner of use will be important when utility services are purchased for domestic use but are

not purchased under a residential tariff. *Id.* at 85; *American Healthcare* at 499.

This Court acknowledged that nonresidential classifications by the utility sellers is simply not dispositive and could well be erroneous. And, RSMo. §144.030.2(23)(c) provides the avenue to purchasers to address any errors and apply for refunds.

CONCLUSION

For the foregoing reasons, the utilities purchased by 801 fall squarely within RSMo. §144.030.2(23) which exempts sales tax on utility services used for nonbusiness, noncommercial or nonindustrial purposes. The common areas of the 801 building are used exclusively for domestic/residential purposes. Contrary to Respondent's argument 801 receives its utilities through single meters and thereby complies with the tax exempt status provided for in RSMo. §144.030.2(23).

This Court should reverse the holding of the Administrative Hearing Commission in sustaining the DOR's Motion for Summary Decision and its denial of 801's Motion for Summary Decision. This Court should award a refund in full of the sales tax paid, plus interest at the rate of 6% per annum together with 801's reasonable attorneys' fees and costs.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 21st day of November, 2012, served a true and correct copy of the foregoing via the Missouri Electronic Filing System upon the following counsel of record:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The Undersigned hereby certifies that this Appellant's Reply Brief was prepared in the format of Microsoft Word using Times New Roman typeface in font size 13. This Brief contains approximately 2,419 words.

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