No. SC97475

IN THE MISSOURI SUPREME COURT

BUSINESS AVIATION, LLC, VAUGHN C. ZIMMERMAN, JAMES FOSTER, ZIMMERMAN PROPERTIES CONSTRUCTION, LLC, ROBERT C. DAVIDSON, MATTHEW ZIMMERMAN, and JUSTIN ZIMMERMAN,

Appellants,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Respondent.

From the Administrative Hearing Commission of Missouri
The Honorable Audrey Hanson McIntosh, Commissioner

APPELLANTS' INITIAL BRIEF

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JURISDICTIONAL STATEMENT

The issue is whether Appellants' purchase of an aircraft is exempt from state use tax as a sale for resale falling within the exemptions provided by sections 144.018, 144.030, and 144.615 of the Missouri Revised Statutes. Resolving this case requires the construction of revenue laws of the State of Missouri. Therefore, this Court has exclusive appellate jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution. *See Featherston v. Dir. of Revenue*, 412 S.W.3d 221, 222 (Mo. banc 2013).

STATEMENT OF FACTS

I. INTRODUCTION

This case involves an appeal from a Missouri Compensating Use Tax Assessment issued on the purchase of an aircraft to be leased to a common carrier for use in interstate commerce. *LF p. 125.; App. 1*[1] Business Aviation, LLC ("Business Aviation") purchased a Cessna 525 Aircraft, Serial Number 525-044 and Tail Number N525BR (the "Aircraft") from Cessna Finance Corporation. *J. Ex.10, p. 1.* The purchase agreement was dated July 18, 2012, with a closing date of July 31, 2012. *Id. at pp. 1, 6.*

On July 24, 2012, Business Aviation entered into an Aircraft Lease and Management Agreement (the "Lease") with Burgess Aircraft Management, LLC ("Burgess"). *J. Ex. 9, p. 1.* Burgess helps manage and operate private aircraft and has a fleet of aircraft that it charters to customers. *Tr. 26:10-24.* Burgess' sole member and director of operations is Mark Burgess. *Tr. 26:2-5.*

The Lease specifically transfers the rights of exclusive use of the Aircraft from Business Aviation to Burgess. *J. Ex. 9, ¶ 2(b); Tr. 50:16 – 51:5; App. 23.* After entering

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[1] The record on appeal was filed by the Administrative Hearing Commission, whose filing system does not permit the creation of a system-generated legal file. *See Certification of/and Record Filed, October 19, 2018.* Thus, the following citations will be used throughout this brief: Legal File ("*LF*"); Transcript ("*Tr.*"); Joint Exhibit ("*J. Ex.*"); Petitioners' Exhibit ("*P. Ex.*"); Respondent's Exhibit ("*R. Ex.*"); Appendix ("*App.*").

into the Lease, Burgess (and not Business Aviation) picked up the Aircraft from Cessna in Kansas and transported it to Springfield, Missouri, where it was based at Burgess's site of operations. *Tr. 53:10 – 54:9; 107:7 – 12.* Burgess is a common carrier and uses the Aircraft as part of its fleet to offer charter services to the general public. *Tr. 26:6 – 27:22.* Burgess provides management services such as maintenance and crewing to the Aircraft. *Tr. 56:3 – 16; 79:17 – 21.*

Business Aviation never chartered the Aircraft and never planned to charter it. *Tr. 86:22 – 23; 98:8 – 25; 120:11 – 13.* Business Aviation purchased the Aircraft for the sole purpose of leasing it to Burgess. *Tr. 89:4 – 9.* Both Business Aviation and Burgess understood that Business Aviation was transferring all right of use of the Aircraft to Burgess so that Burgess could use the Aircraft in Part 135 on-demand air operations under the Federal Aviation Regulations of the United States Department of Transportation. *Tr. 27:8 – 22; 50:16 – 51:5; 102:22 – 103:1.*

II. PARTIES

At all dates relevant to the matters herein, the two members of Business Aviation were Zimmerman Properties Construction, LLC ("Zimmerman Properties") and JRV Technologies LLC ("JRV").[2] *P. Ex. 1.* Vaughn C. Zimmerman ("Zimmerman"), Justin Zimmerman ("Justin"), Matthew Zimmerman ("Matthew"), and Robert Davidson ("Davidson") were all members of Zimmerman Properties. *Id.* James Foster, II ("Foster") was the sole member of JRV. *Id.*

[2] JRV was not issued an assessment and is therefore not an appellant.

III. THE LEASE

Under the Lease, the rights were fully transferred from Business Aviation to Burgess. *J. Ex. 9, ¶ 2(b); Tr. 50:16 – 51:5.* The Lease specifically states that "the Aircraft is leased to [Burgess] on an exclusive basis for the purpose of [Burgess] providing air charter transportation services to third parties pursuant to and in accordance with the Part 135[3] Operating Certificate issued to [Burgess]." *J. Ex. 9, ¶ 2(b).* "[Burgess] shall have the exclusive care, custody and control of the Aircraft during the term of this Agreement and at all times during any Part 135 charter operations conducted by [Burgess]." *J. Ex. 9, ¶ 2(e).* "[Burgess] certifies that [Burgess], and not [Business Aviation], is responsible for operational control of the Aircraft under this Lease during the term hereof." *J. Ex. 9, ¶ 11(b).* "Subject to no event of default by [Burgess],

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[3] The Federal Aviation Administration ("FAA") regulates all passenger flights. Under the FAA, there are three basic sets of operating rules: Part 91, which applies to all flights with passengers; Part 121, which involves common carrier operations such as the typical domestic large airline flights; and Part 135, which involve common carrier operations for chartered flights that can either be scheduled charters or on-demand charters. Air carrier certificates are only issued to applicants conducting Part 121 or Part 135 operations. *14 C.F.R. § 119.1.* Aircraft that are operated under Part 135 may be operated under Part 91 for maintenance flights, training flights, or demonstration flights (i.e. a charter operator showing a potential customer the capabilities of the aircraft). *14 C.F.R. § 91.501(b); 14 C.F.R. § 135.411(a)(1).*

[Business Aviation] covenants and warrants that [Burgess] shall have peaceable and quiet enjoyment of the Aircraft during the term of this Lease." *J. Ex. 9, ¶ 10.*

The Lease contains two sections mentioning Part 91 use by the Lessor, and two sections referencing operations of the Aircraft by Lessor. *See J. Ex. 9, ¶¶ 5(e), 6(c), 6(f), 7(a).* Section five describes Burgess's management and other responsibilities. *J Ex 9, ¶ 5.* Section Six of the Lease concerns Business Aviation's responsibilities, and section seven of the Lease describes indemnification of the parties to the Lease. *J. Ex. 9, ¶¶ 6, 7.* Section 5(e) and 6(c) do not state that the Lessor can conduct Part 91 operations on the Aircraft, only that if the Lessor did conduct Part 91 operations, then the Lessor would become responsible for the Aircraft. *J. Ex. 9, ¶¶ 5, 6.* The testimony of both Mr. Burgess and Zimmerman consistently stated that their understanding of the Lease was such that if Zimmerman or any of the Appellants were to take a Part 91 flight on the Aircraft, the Lease would be terminated. *Tr. 51:1-25; 67:24-68:8; 84:6-24; 86:4-23; 112:23-113:9.*

As Mr. Burgess testified, if Business Aviation informed Burgess that Business Aviation would like to use the Aircraft on its own account rather than charter it, the Lease would be terminated and the agreement between Burgess and Business Aviation would have to be restructured to account for personal flights on the Aircraft. *Tr. 51:1-25; 86:2-15; 112:23-113:9.* In addition, under the Lease Business Aviation has no greater right to use the Aircraft over any other person chartering the Aircraft. *Tr. 111:7-11.*

Section 3(b) of the Lease allows either party to terminate the lease with or without cause with sixty days' notice to the other party. *J. Ex. 9, ¶ 3(b).* Section 3(c) of the

Lease states that, for consideration, Burgess shall pay Business Aviation $900 per flight hour that Burgess charters the Aircraft. *J. Ex. 9, ¶ 3(c).* While the Lease required a payment of $900 per flight hour, Burgess paid Business Aviation $900 per flight hour when the Aircraft was chartered by some entities and paid $434.77 when the Aircraft was chartered by companies related to Mr. Zimmerman. *Tr. 75:16 – 22.*

IV. THE ASSESSMENTS OF UNPAID USE TAX

The Department of Revenue ("DOR") issued an Assessment of Unpaid Sales/Use Tax to Business Aviation on January 9, 2015. *J. Ex.1.* Also on January 9, 2015, the DOR issued an Assessment of Unpaid Sales/Use Tax to Zimmerman, stating "The Department of Revenue has determined that you are liable for the unpaid Use tax of Business Aviation, LLC." *J. Ex. 2.* Both of these assessments were for the amount of $95,446.68. *J. Ex. 1, 2.*

On July 7, 2015, the DOR issued an Assessment of Unpaid Sales/Use Tax to Foster, stating "The Department of Revenue has determined you are liable for the unpaid Use tax of JRV Technologies LLC," but without stating why JRV was liable for unpaid use tax.[4] *J. Ex. 3.* This assessment was in the amount of $96,521.06. *Id.*

On September 4, 2015, the DOR issued an Assessment of Unpaid Sales/Use Tax to Zimmerman Properties, again without stating why the use tax was assessed. *J. Ex.4.* The DOR also issued Assessments of Unpaid Sales/Use Tax to Davidson, Zimmerman, Matthew, and Justin on the same date, September 4, 2015, stating on each that "The

[4] JRV was not issued a use tax assessment.

Department of Revenue has determined you are liable for the unpaid Use tax of Zimmerman Properties Construction LLC." *J. Exs. 5-8.* All of the assessments issued on September 4, 2015 were for the amount of $75,674.41. *J. Ex. 4 – 8.*

All eight of the assessments at issue in this case are for the tax period of January 1 – December 31, 2012. *See J. Exs. 1-8.* While the assessments were for different amounts, Respondent stipulated at the hearing that it is seeking the lesser amount of $75,674.41. *Tr. 23:4-13.*

V. PROCEDURAL HISTORY

All Appellants timely filed appeals of their assessments, and the Commission consolidated the cases on November 25, 2015. *LF p. 124.* The Commission held a hearing on March 24, 2016. *LF p. 126; App. 2.* On September 11, 2018, the Commission entered its order finding Appellants liable for use tax, additions to tax, and interest. *LF p. 125; App. 1.* The Commission found that the Lease was not a sale for resale because the right to use was not fully transferred, which was based on the finding that Burgess did not pay "valuable consideration" to Business Aviation under the Lease. *LF p. 149; App. 25.*

POINTS RELIED ON

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN FINDING THAT THE BUSINESS AVIATION-BURGESS LEASE TRANSACTION WAS NOT A SALE FOR RESALE DUE TO A LACK OF "VALUABLE CONSIDERATION," BECAUSE THE PURCHASE OF THE AIRCRAFT IS EXEMPT FROM TAX AS A SALE FOR RESALE TO A COMMON CARRIER, WHICH IS ENTITLED TO JUDICIAL REVIEW UNDER SECTION 536.100 OF THE MISSOURI REVISED STATUTES, IN THAT BUSINESS AVIATION FULLY TRANSFERRED THE RIGHT TO USE THE AIRCRAFT TO A COMMON CARRIER (BURGESS) AND RECEIVED CONSIDERATION IN RETURN.

PRIMARY AUTHORITIES:

Brambles Indus., Inc. v. Dir. of Revenue, 981 S.W.2d 568 (Mo. banc 1998)

Five Delta Alpha, LLC v. Dir. of Revenue, 458 S.W.3d 818 (Mo. banc 2015)

Sipco, Inc. v. Dir. of Revenue, 875 S.W.2d 539 (Mo. banc 1994)

STATUTES:

Section 144.018, RSMo.

Section 144.030, RSMo.

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN RULING THAT APPELLANTS ARE LIABLE FOR ADDITIONS, BECAUSE THERE WAS NO WILLFUL NEGLECT, EVASION, OR FRAUDULENT INTENT IN NOT PAYING TAXES, WHICH IS ENTITLED TO JUDICIAL REVIEW UNDER SECTION 536.100 OF THE MISSOURI REVISED STATUTES, IN THAT APPELLANTS HAD A GOOD FAITH BELIEF THAT THEY DID NOT OWE TAX ON THE PURCHASE OF THE AIRCRAFT.

PRIMARY AUTHORITIES:

Sipco, Inc. v. Dir. of Revenue, 875 S.W.2d 539 (Mo. banc 1994).

Hewitt Well Drilling & Pump Serv., Inc. v. Dir. of Revenue, 847 S.W.2d 795 (Mo. banc 1993).

STATUTES:

Section 144.665, RSMo.

SUMMARY OF ARGUMENT

Missouri use tax is imposed on purchases of tangible personal property made out of state but used, stored, or consumed in Missouri. *Section 144.610, RSMo*. Exemptions exist, including when the tangible personal property is purchased for resale, and when the tangible personal property is an aircraft and the purchaser is a common carrier. *Section 144.018.1, RSMo.*; *Section 144.030.2, RSMo*. The interplay of these statutes is such that if an aircraft is purchased to lease to a common carrier, and the lease falls under the "resale" exemption of section 144.018, then the purchase of the aircraft is exempt from taxes. *Five Delta Alpha, LLC v. Dir. of Revenue*, 458 S.W.3d 818, 821 (Mo. banc 2015).

Here, the purchase of the Aircraft falls under the sale for resale exemption found in section 144.018.1 of the Missouri Revised Statutes because Business Aviation, LLC is not a common carrier but did purchase the Aircraft to lease it to another party. When a purchase is exempt from sales or use tax because it is for a subsequent lease, then tax is required on the lease payments unless it falls under an exemption. *See 12 CSR 10-108.700*. Here, the Lessee of the Aircraft is a common carrier;[5] thus the subsequent lease payments by the Lessee are exempt from tax under section 144.030.2 of the Missouri Revised Statutes.

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[5] The Administrative Hearing Commission found that Burgess Aircraft Management, LLC was a common carrier, and thus was eligible for the exemption found in section 144.030.2. Because this finding was not appealed, it is a final decision.

In finding that the Lease is not a sale for resale, the Commission misconstrued the statutes and Missouri Supreme Court cases holding that leases can be sales for resale when consideration is received. Moreover, the Commission ignored the Director's Regulations defining leases. The Commission manufactured a "valuable consideration" test that is never found in the law (and for which the Commission cited no authority). Finally, the Commission misconstrued Missouri revenue laws concerning the requirements for finding a taxpayer liable for additions to taxes. For these reasons, the Commission's decision should be reversed.

STANDARD OF REVIEW

When reviewing a decision of the Administrative Hearing Commission interpreting revenue statutes, the appellate court conducts a *de novo* review on all issues. *Office Depot, Inc. v. Dir. of Revenue,* 484 S.W.3d 793, 794 (Mo. banc 2016). The decision will be upheld if it is supported by law and by substantial evidence on the record as a whole. *Id.*; *Section 621.193, RSMo*.

POINTS RELIED ON

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN FINDING THAT THE BUSINESS AVIATION-BURGESS LEASE TRANSACTION WAS NOT A SALE FOR RESALE DUE TO A LACK OF "VALUABLE CONSIDERATION," BECAUSE THE PURCHASE OF THE AIRCRAFT IS EXEMPT FROM TAX AS A SALE FOR RESALE TO A COMMON CARRIER, WHICH IS ENTITLED TO JUDICIAL REVIEW UNDER SECTION 536.100 OF THE MISSOURI REVISED STATUTES, IN THAT BUSINESS AVIATION FULLY TRANSFERRED THE RIGHT TO USE THE AIRCRAFT TO A COMMON CARRIER (BURGESS) AND RECEIVED CONSIDERATION IN RETURN.

Business Aviation filed a Petition with the Administrative Hearing Commission (the "Commission"), appealing the use tax assessment that the Department of Revenue issued for Business Aviation's out-of-state purchase of a Cessna (the "Aircraft"). Business Aviation argued that the purchase of the Aircraft fell under the sale for resale exemption contained in section 144.018.1(2) of the Missouri Revised Statutes[6] because it leased the Aircraft to Burgess Aircraft Management, LLC ("Burgess"). It further claims

[6] All citations for tax statutes will be for 2012, the relevant period to this action, i.e., RSMo. 2000 and RSMo. Supp. 2010, unless otherwise noted.

that the lease payments are exempt from tax because Burgess is a common carrier, under section 144.030.2(20).[7]

The Commission ruled that Appellants did not qualify for the sale for resale tax exemption because the Lease did not fully transfer the right of use of the Aircraft from Business Aviation to Burgess. *LF pp. 146 – 148; App. 22-24.* According to the Commission, this decision turned on whether Business Aviation received "valuable consideration" from Burgess. *Id.* The Commission determined that "valuable consideration" was not received because in some instances Burgess paid less rent than stated in the Lease. *Id. at 148; App. 24.* The Commission's heavy reliance on "valuable consideration" was wrong, in that that term is not the test established by this Court, and even if it were, the Commission incorrectly applied it.

A. Statutory Grounds for Imposing Use Tax

Missouri statutes allow for both sales and use tax. Sales tax applies when tangible personal property is purchased within the state of Missouri. *Section 144.020, RSMo.* Use tax applies when an out-of-state purchase would have been subject to sales tax had it been made in-state, and the property is then stored, used, or consumed in Missouri. *Section 144.610, RSMo.* Because both sales and use tax are applied to the purchase of tangible personal property depending on whether the property was purchased inside or outside the state, the same exemptions that apply to sales tax also apply to use tax. *See*

[7] The subsection was renumbered to (21) based on amendment of the statute in 2014, but returned to (20) in 2018.

Section 144.615(3), RSMo (exempting from Missouri use tax, "tangible personal property, the sale or other transfer of which, if made in this state, would be exempt from or not subject to the Missouri sales tax pursuant to the provisions of subsection 2 of section 144.030.").

B. Exemptions from Use Tax and the Main Missouri Cases Relevant Here

When the purchase of tangible personal property is made for the purpose of resale, it is exempt from Missouri use tax if the subsequent sale is exempt from Missouri sales or use tax. *Section 144.018.1, RSMo*. Tangible personal property includes aircraft. *Fall Creek Const. Co. v. Dir. of Revenue*, 109 S.W.3d 165, 169 (Mo. banc 2003). All sales of aircraft to common carriers for storage or use in interstate commerce are exempt from use tax. *Section 144.030.2(20), RSMo Supp. 2010*.

There are three cases that largely define the law relevant to this case.

The most recent, and most on point, is *Five Delta Alpha, LLC v. Dir. of Revenue*, 458 S.W.3d 818 (Mo. banc 2015). In *Five Delta Alpha* (as here), the taxpayer purchased an aircraft in Kansas and then immediately leased the aircraft to an air carrier in Missouri. *Id.* at 819. The air carrier subsequently moved the aircraft into Missouri and used the aircraft as part of its air carrier operations. *Id.* The taxpayer paid use tax under protest on the purchase of the aircraft and then filed a tax protest payment affidavit with the Director of Revenue. *Id.* The Director denied the taxpayer's refund. *Id.* This Court found that the lease constituted a resale because the right of the aircraft's use was fully transferred to the air carrier under the lease, and that the air carrier provided air courier service for valuable consideration. *Id.* at 822. Because the air carrier was deemed a

common carrier and the lease constituted a resale, the court found that the taxpayer was entitled to the use tax exemption and was therefore not liable for the Assessment. *Id.* The case at hand is controlled by *Five Delta Alpha*, where this Court reversed the Commission, as it should do here.

Five Delta Alpha relied on two earlier cases, *Brambles Indus., Inc. v. Dir. of Revenue*, 981 S.W.2d 568 (Mo. banc 1998) and *Sipco, Inc. v. Dir. of Revenue*, 875 S.W.2d 539 (Mo. banc 1994).

In *Brambles*, a taxpayer leased pallets to a distributor to ship soap to retailers. *Brambles*, 981 S.W.2d at 569. The distributor obtained pallets from several sources, and sometimes it sold the pallets to the customer while other times it simply leased the pallets. *Id.* The customer paid the same amount for the products and pallet whether the pallet was leased or sold. *Id.* The taxpayer argued that the leased pallets were not taxable as they were transferred "for resale." *Id.* at 570. The Commission found that because the title to the pallets was not transferred, the pallets were not sold and therefore the amount paid for the pallets was taxable. *Id.*

This Court reversed, applying the test from *Sipco*, finding that packaging material is resold if there is, "(1) a transfer, barter or exchange; (2) of the title or ownership of tangible personal property or the right to use, store or consume the same; (3) for a consideration paid or to be paid." *Sipco*, 875 S.W.2d at 542. The *Brambles* Court continued by saying, "just as packaging material is purchased for resale when it is purchased for the purpose of transferring the right to use it in return for consideration, leases of packaging material are excluded from sales tax where the material is leased for

the purpose of transferring the right to use the packaging material to a subsequent purchaser for ***valuable consideration***." *Id.* at 570. (emphasis added). The Court went on to find that the first two prongs of the *Sipco* test were met because the distributor had a right to use the taxpayer's pallets and that it transferred those pallets to the customer so that the customer had a right to use the pallets at least until the soap was unloaded. *Id.* at 571. Thus, "the question is essentially one of consideration. That is, did the transfer of the right to use from P & G to its customers occur in return for consideration." *Id.*

The *Brambles* Opinion concluded that consideration was paid because the customer paid the same for the soap whether the pallet was sold or leased. *Id.* When the pallet was sold, the purchase price of the pallet was included in the price of the soap. *Id.* The fact that the pallet was leased for the same amount, "implies that some consideration should also be assumed to have been paid for the right to use those pallets." *Id.* Thus, the Court did not require any specific amount of consideration to be paid to meet the *Sipco* test, just "some consideration." *Id.*

In the earlier *Sipco* case, the taxpayer sold pork to customers and included dry ice in the shipments. *Sipco*, 875 S.W.2d at 540. The price of the dry ice was not itemized for the customer. *Id.* Because the dry ice was purchased out of state, the DOR assessed use tax on the dry ice. *Id.* at 541. Sipco argued that the dry ice was a sale for resale and therefore exempt from tax. *Id.* The Director argued that the transfer of the dry ice to the customer was not a sale because Sipco did not receive consideration from the customer specifically for the dry ice. *Id.* This Court stated that, to the extent previous cases had implied "that the holder of goods must show a calculated cost specifically factored into

the price for resale to take advantage of the resale exemption, they are misleading and should no longer be followed. *Id.* at 542. The *Sipco* Court found that the dry ice was a sale for resale, even though the value of the dry ice was factored directly or indirectly into the price of the pork without being broken out separately. *Id.* Thus, there is no requirement for a showing of a specific amount of consideration to be paid to consider that valuable consideration was paid for a lease. *Id.*

C. The Lease Transaction Between Business Aviation and Burgess was a Sale for Resale

1. The Lease Transaction

Respondent argued below that the Lease was not a sale for resale because Business Aviation did not hold the Aircraft as a retailer in the regular course of business, as required by section 144.615(6) of the Missouri Revised Statutes, because Business Aviation did not have a lease with Burgess, and because Business Aviation used the Aircraft itself. *LF p. 135; App. 11.* While Respondent argued that the consideration required by the Lease in the amount of $900 per flight hour was not enough rent for this to be considered a true lease, Respondent did not argue that the payment of less than the full amount of the Lease did not constitute valuable consideration. The Commission came up with that theory on its own, without any briefing.

The Lease shows that the transaction was a sale for resale. First, "title passes from a seller to a buyer upon completion of delivery by the seller unless the parties to the transaction intend otherwise." *McDonnell Douglas Corp. v. Dir. of Revenue*, 945 S.W.2d 437, 441 (Mo. banc 1997). Tax is not imposed until the tangible personal property enters

Missouri ready for use. *Fall Creek Const. Co.*, 109 S.W.3d at 173. Even though Business Aviation signed the Purchase Agreement on July 18, 2012, delivery of the Aircraft from Cessna did not occur until July 24, 2012, the same date as the effective date of the Lease between Business Aviation and Burgess.[8] *Tr. 108:6-9.* The Aircraft was under the Lease, and thus under the control of Burgess, when it entered Missouri. Notably, Burgess, and not any member of Business Aviation, transported the Aircraft from Kansas to Missouri. *Tr. 53:10-54:9; 107:7-12.*

Moreover, Business Aviation fully transferred the right of use to Burgess under the Lease, as required by *Five Delta Alpha.* The Lease clearly states that "Lessee shall have the exclusive care, custody and control of the Aircraft during the term of this Agreement…" *J. Ex. 9, ¶ 2(e).* Zimmerman could charter the Aircraft if it was available, but neither Zimmerman nor any of the other Appellants had a right to use the Aircraft. *Tr. 131:5-11.*

In addition, Business Aviation never used the Aircraft on its own account. *Tr. 98:8-15; 120:11-13.* In fact, all the evidence shows that Business Aviation never used the Aircraft at all: Mr. Burgess even testified, "And to further clarify, Business Aviation has never chartered this aircraft." *Tr. 86:22-23.* Burgess picked up the Aircraft and flew it from Kansas to Missouri. *Tr. 53:10-54:9.* From that point on, Burgess has been the only entity to exercise any control over the Aircraft. *Tr. 32:9-33:11; 50:16-*

[8] The first flight in interstate commerce did not occur until September 18, 2012 because the Aircraft required maintenance before it met FAA requirements. *J. Ex. 16.*

51:5. Burgess provides the needed maintenance, provides the pilots for each flight, provides training needed to keep its pilots certified to fly the Aircraft, makes sure the Aircraft is insured, and decides when the Aircraft flies and who flies on the Aircraft. *Tr. 124:3-5.* Business Aviation reimburses Burgess for expenditures such as maintenance costs or hangar fees, but only at Burgess's direction. *Tr. 80:9-14; 124:9-11.* Business Aviation does not decide what maintenance is to be performed. All of those decisions are left to Burgess under the Lease. *J. Ex. 9, ¶ 2(e).* Burgess maintains operational control of the Aircraft during flights, and is responsible for all other aspects of the Aircraft outside of flights. *Tr. 61:7-62:13.* Indeed, the Commission found (correctly) that "Business Aviation transferred the right to use the Cessna to Burgess." *LF p. 144; App. 20.*

2. The Erroneous Decision of the Administrative Hearing Commission

Given these facts, the Commission ought to have applied them to the law in *Five Delta Alpha, Brambles* and *Sipco* and concluded, as those decisions did, that the transaction was exempt.

The Commission's decision actually started off on the right foot, in that it reached several correct legal conclusions:

- "We are guided by the Missouri Supreme Court's analysis and conclusions in *Five Delta Alpha, LLC*, as the facts in this case are similar to those in *Five Delta Alpha*." *LF p. 137; App. 13.*

- "Based upon the facts and the law, we conclude that Burgess was a common carrier for purposes of § 144.030.2(20)." *LF p. 140; App. 16.*
- "In this case, Business Aviation transferred complete operational and maintenance control of the Cessna to Burgess. Business Aviation and its members could not demand the use of the Cessna for chartering; rather, they chartered a plan from Burgess' fleet as would any other Burgess customer. Hence, based upon *Brambles* and as relied upon by *Five Delta Alpha.* We conclude that Business Aviation transferred the right to use the Cessna to Burgess." *LF p. 144; App. 20.*

All of these conclusions are now final because the Director did not cross-appeal.

The Decision began its downward descent when it began to emphasize the concept of "valuable consideration." *LF p. 144; App. 20.* The source of this error is a serious misreading of *Sipco* and *Brambles*. To fully understand the error, we have to start with *Sipco.* There, this Court said a resale occurs if three factors are met: (1) a transfer, barter or exchange; (2) of the title or ownership of tangible personal property, or the right to use, store or consume the same; (3) "for a consideration paid or to be paid." *Sipco*, 875 S.W.2d at 542. The first two factors were properly decided by the Commission. *See LF p. 20* ("[W]e conclude that Business Aviation transferred the right to use the Cessna to Burgess.").

The third factor is the source of the Commission's error. To start, note the precise language of this Court: "for a consideration paid or to be paid." *Sipco*, 875 S.W.2d at 542. As discussed below, the Commission's decision badly contorted this language.

Brambles relies heavily on *Sipco*, and quotes the "for a consideration paid or to be paid" language. *Brambles*, 981 S.W.2d at 570. However, after doing so, *Brambles* states that the transfer is for "valuable consideration." *Id.* The word "valuable" was new.

Sipco did not use the word "valuable," but one would not think adding it would be much of an issue. Courts in Missouri use "consideration" and "valuable consideration" interchangeably, defining both as "a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." *Greenberg v. Morris*, 436 S.W.2d 734, 738 (Mo. 1968); *McRentals, Inc. v. Barber*, 62 S.W.3d 684, 706 (Mo.App. W.D. 2001); *Moore v. Seabaugh*, 684 S.W.2d 492, 496 (Mo.App. E.D. 1984) ("Valuable consideration may consist of some right, interest, profit or benefit accruing to one party, or some forbearance, loss or responsibility, given, suffered or undertaken by the other.").[9]

A benefit must have value. Since an item of no value cannot be consideration, it is axiomatic that the word "consideration" includes the concept of "value." The addition of the word "valuable" in *Brambles* was not discussed by the Court, so it was not meant to alter the word "consideration" from *Sipco*. *Brambles*, 981 S.W.2d at 570. And since "valuable" adds no meaning to "consideration," it is meaningless surplusage. *Five Delta*

[9] The Commission specifically found that Business Aviation received consideration, but determined that the Lease was not for resale because Business Aviation did not receive "valuable consideration." *LF pp. 148, 149; App. 24-25.*

Alpha, in a footnote, cited but did not discuss the "valuable consideration" language in *Brambles*. 458 S.W.3d at 822 n.8.[10]

So, this Court never discussed "valuable consideration," never established it as a test, never indicated it is somehow different from "consideration," and never exhibited one shred of evidence that the single, off-hand reference to "valuable" in *Brambles* creates a higher standard to determine whether a lease is a sale for resale. However, for some inexplicable reason, in the Decision the Commission gave the word "valuable" great weight, as if it were an off-repeated holding of this Court, and decided the whole case on its own made-up characterization of "valuable consideration."[11]

The Commission notes the true fact that Zimmerman Properties and Foster got a discount and were charged $434.77 per hour of flight time, rather than the $900 per hour in the Lease. *LF p. 145; App. 21.* However, the Commission compounds its previous errors by phrasing the issue this way: "The key question then is can the Lease constitute a sale for resale where the right of use is fully transferred to Burgess when Burgess does

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[10] *Five Delta Alpha*'s only other reference to "valuable consideration" is in relation to the lessee receiving "valuable consideration" for providing charter services. 458 S.W.3d at 822.

[11] Notably, the Department of Revenue's own rules define a lease as "any transfer of the right to possess or use tangible personal property for a term in exchange for consideration." *12 CSR 10-108.700(2)(A).* There is no requirement for "valuable consideration."

not pay Business Aviation the $900 per flight hour lease rate when Zimmerman Properties or Foster charter the Cessna?" *Id.*

No authority leads to that question. The *Brambles* reference to valuable consideration certainly does not. Neither does the *Five Delta Alpha* passing reference to valuable consideration received for providing air courier service. 458 S.W.3d at 822. Just before framing the question the Commission noted that $434.77 per flight hour was paid. *Id.* The conclusive point should be the establishment that "consideration" or "valuable consideration" was paid. No authority is cited for the formation of the Commission's question.

Having asked the wrong question, it is probably inevitable that the Commission came to the wrong result and made more errors along the way.

After framing the question, the Commission next discusses section 144.605, which defines a sale as involving "consideration paid or to be paid," and sales price as consideration "paid or given, or contracted to be paid or given." *LF p. 146 – 147; App. 22-23*. It is critical to note that both subsections reference consideration ***paid or to be paid***. *Section 144.605, RSMo*. The Decision even adds emphasis to the "paid" language. *LF p. 146 – 147; App. 22-23*. But yet later the Commission concludes that valuable consideration can only be what was "to be paid." *LF p. 148; App. 24*. Thus, the Commission completely ignores and reads out of the statutes the word "paid." The Commission also ignores the similar language in *Sipco* (consideration "paid or to be paid"). *Sipco*, 875 S.W.2d at 542.

The Commission's discussion remains off-track when it creates an imaginary distinction between "consideration" and "valuable consideration." *LF p. 147; App. 23.* The Commission cites *Black's Law Dictionary*[12] for this definition of "valuable consideration:"

> *Consideration that is valid under the law;* consideration that either confers a pecuniarily measurable benefit on one party or a pecuniarily measurable detriment on the other.

Id. (emphasis in Decision).

The Commission added emphasis to the first clause, as if it were decisive. *Id.* The reference to "valid under the law" certainly does not equate to "stated in a lease." There is no discussion that a discount not stated in a lease is somehow "invalid" under the law. And the Commission utterly ignores the second clause that states, "consideration that either confers a pecuniarily measurable benefit on one party or a pecuniarily measurable detriment on the other." *LF p. 147; App. 23.* Obviously, the $434.77 per hour payment is a "pecuniarily measurable benefit." Thus, the Commission's own citation shows its error.

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[12] The Commission cites only to *Black's Law Dictionary*, rather than case law such as *Greenberg*, 436 S.W.2d at 738, *McRentals*, 62 S.W.3d at 706, or *Seabaugh*, 684 S.W.2d at 496, for the definition of "valuable consideration." However, as shown above, these cases define both "consideration" and "valuable consideration" as a benefit accruing to one party or a detriment to the other party, which the Commission admits occurred here.

Having gone this far down the wrong path, the Commission then completes the journey. *LF pp. 147-149; App. 23-25.* It again incorrectly states the question, referencing the "fundamental issue of whether the Cessna was fully transferred for the consideration required under the Lease." *LF p. 147; App. 23.* Finally, it reaches three conclusions:

(1) [I]t is indisputable Burgess paid Business Aviation some consideration for the lease "payment of $434.77 per flight hour for charters by Zimmerman Properties and Foster, and $900 per flight hour for charters by other persons)." *LF p. 148; App. 24.*

(2) "The Cessna was not fully transferred to Burgess because Burgess did not always pay the consideration required by the Lease." *Id.*

(3) "Petitioners fail to show that the Lease constituted a sale for resale because the right to use was not fully transferred for valuable consideration." *LF p. 149; App. 25.*

Shortly, this brief will discuss how this conclusion is absurd and is also inconsistent with Missouri law that it never cites. But before doing that, it is important to summarize the errors that are apparent on the face of the Decision that led to the incorrect result:

(1) It failed to apply *Sipco's* plain test, that consideration (not valuable consideration) is required.

(2) It ignored the plain language of *Sipco* that consideration is that which is "paid or to be paid." By the Commission's own admission, consideration was paid.

(3) It ignored the plain language of section 144.605(7), defining a sale as for "consideration paid or to be paid" even though it added emphasis to that text. By the Commission's own admission, consideration was paid.

(4) It ignored the plain language of section 144.605(8), defining "sales price" as including consideration "paid or given, or contracted to be paid or given," even though it added emphasis to that text. By the Commission's own admission, consideration was paid.

(5) It conflated the stray word "valuable" in *Brambles* into a new test, where "valuable consideration" is somehow different from "consideration."

(6) It equated the phrase "consideration that is valid under the law" in *Black's Law Dictionary* to "consideration that is exactly the same as in a lease."

(7) It ignored the *Black's Law Dictionary* definition that it quoted, that consideration is a "pecuniarily measurable" benefit or detriment.

The analysis could stop there because the Decision obviously collapses on itself. But there is more.

First, the decision leads to obviously absurd results: Imagine a lease for an apartment requiring a monthly rent of $1,000. The tenant loses his job, and asks to pay $500 one month. The landlord agrees. The Commission would conclude that the lease is invalid and does not confer to the tenant the right to occupy the apartment because of the discount. No one would rationally expect that to be the result.

Second, this Court has previously found that the amount of consideration paid is not determinative of whether there is a lease; the determinative factor is whether there is consideration at all. "Actual benefit is not necessary to constitute consideration." *Seabaugh*, 684 S.W.2d at 496. "Valuable consideration may consist of some right, interest, profit or benefit accruing to one party, or some forbearance, loss or responsibility, given, suffered or undertaken by the other. Even slight consideration is sufficient to support a promise." *Id.* (internal citations omitted). Consideration can exist without regard to a consideration clause in the contract or the payment of money. *McRentals*, 62 S.W.3d at 706.

Parties can modify a written agreement by subsequent oral agreement, including a contract provision that requires modifications to be in writing. *Crabby's Inc. v. Hamilton*, 244 S.W.3d 209, 2014 (Mo.App. S.D. 2008). This ability to modify written agreements includes the ability to waive provisions of contracts by agreement. *Id.*; *Campbell v. Richards*, 176 S.W.2d 504, 505 (Mo. 1944) (find that a party may waive any condition of a contract that is in that party's favor, so long as it does not affect the rights of the other party). Here, the acceptance of less than the full amount of the lease payments by Business Aviation did not affect Burgess's rights under the Lease. The right

to use the Aircraft was still fully transferred to Burgess even if Burgess did not pay the full amount of the Lease.

"Thus, it is clear that it is not the price that supplies the necessary consideration but the offeree's promise to pay it." *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 781 (Mo. banc 2014) (Wilson, J., dissenting opinion). "Courts have no authority to attempt to value the bargained-for consideration in an effort to determine whether the promisor is – or is not – receiving 'adequate' return for the promise given." *Id.*; see *Sanger v. Yellow Cab Co., Inc.*, 486 S.W.2d 477, 480 (Mo. banc 1972) (finding that a party "under no disability and under no compulsion may convey his property or relinquish his rights for as small consideration as he may decide."). "An inadequacy [of consideration] does not constitute a failure of consideration." *Arthur Fels Bond & Mortg. Co. v. Pollock*, 149 S.W.2d 356, 359 (Mo. 1941).

Here, while the Commission correctly found that Business Aviation transferred the right to use the Aircraft, but it incorrectly found that the Lease was not a sale for resale. *L.F. pp. 144, 149; App. 20, 25.* The Commission found that Business Aviation transferred the right to use the Aircraft to Burgess, and that Burgess paid consideration for the right to use the Aircraft. *L.F. pp. 144, 148; App. 20, 24.* Thus, the Commission's conclusion that the Lease was not a sale for resale because Business Aviation did not

receive valuable consideration is a misinterpretation of the revenue statutes and previous case law. This Court should reverse.[13]

[13] If the Court reverses on Point I, Point II need not be addressed because there can be no additions on tax not owed.

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN RULING THAT APPELLANTS ARE LIABLE FOR ADDITIONS, BECAUSE THERE WAS NO WILLFUL NEGLECT, EVASION, OR FRAUDULENT INTENT IN NOT PAYING TAXES, WHICH IS ENTITLED TO JUDICIAL REVIEW UNDER SECTION 536.100 OF THE MISSOURI REVISED STATUTES, IN THAT APPELLANTS HAD A GOOD FAITH BELIEF THAT THEY DID NOT OWE TAX ON THE PURCHASE OF THE AIRCRAFT.

Respondent assessed a twenty-five percent (25%) penalty in addition to the tax assessment, presumably under section 144.665.1 of the Missouri Revised Statutes. *See J. Ex. 1 – 8.* For the Department of Revenue to assess penalties, there must be willful neglect, evasion, or fraudulent intent on the part of the taxpayer in failing to file returns; the failure cannot be due to reasonable cause. *Section 144.665, RSMo.* Here, Appellants did not file a tax return because they believed they did not have to file, and not because of willful neglect, evasion, or fraud.

"[T]axing statutes, especially those which impose penalties, are to be strictly construed against the taxing authority and in favor of the taxpayer." *Hewitt Well Drilling & Pump Serv., Inc. v. Dir. of Revenue*, 847 S.W.2d 795, 799 (Mo. banc 1993). To avoid penalties, "the taxpayer need only establish that its conduct was not characterized by 'willful neglect'" as opposed to the presence of reasonable cause. *Sipco, Inc. v. Dir. of Revenue*, 875 S.W.2d 539, 543 (Mo. banc 1994). This Court has repeatedly found that where the taxpayer believed no tax was due, even if it later turned out that the tax was

owed, the failure to file tax returns was not "willful neglect" and therefore no penalties or additions should be applied. *See Hewitt*, 847 S.W.2d at 799; *Sipco*, 875 S.W.2d at 543; *Conagra Poultry Co. v. Dir. of Revenue*, 862 S.W.2d 915, 919 (Mo. banc 1993).

Business Aviation believed at the time that it purchased the Aircraft that it did not owe any sales or use tax due to the sales tax exemptions. That is why Business Aviation provided a tax exemption certificate to Cessna.[14] *J. Ex.11.* Respondent argues that if Business Aviation really believed that the subsequent Lease was a sale for resale then it would have registered with the Director of Revenue and reported its gross receipts from the Lease. However, Appellants believed that the entire transaction, including the subsequent lease payments, were exempt from sales and use tax. Because the statute only requires a person who has not paid the tax *due* to file a return, and Business Aviation did not believe that any tax was due, Business Aviation did not willfully neglect to file a return. *See section 144.655.4, RSMo.* Therefore, Business Aviation should not be held liable for additions to the tax assessments.

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[14] The Aircraft Exemption Certificate states that "charter companies qualify for the exemption" and that "businesses whose aircraft is used for personal, company, recreational, or instructional purposes are NOT exempt…" *J. Ex.11.* Because the Aircraft would be leased solely to a charter company, and the Aircraft would not be used for personal, company, recreational, or instructional purposes, Appellants chose this exemption.

The Commission stated that, "[Appellants] presented no testimony to show that they had a 'good faith belief' that no tax was due." *LF p. 153; App. 29.* Because of the lack of testimony, the Commission found that Business Aviation failed to meet its "burden to show an absence of willful neglect, and they are liable for statutory additions…" *Id.* However, this Court does not require testimony regarding a petitioner's belief on whether it owes taxes to meet the burden of showing a lack of willful neglect. *See Sipco*, 875 S.W.2d at 543; *Conagra Poultry*, 862 S.W.2d at 919. In *Sipco*, this Court found that "Sipco's arguments regarding the natural gas used in the singer were reasonable, even though Sipco did not prevail. *Sipco*, 875 S.W.2d at 543. Accordingly, it was error to assess penalties against Sipco on the 50% of purchases of natural gas to be used in the singer." *Id.* Thus, in *Sipco*, the Court found a lack of willful neglect based on the reasonableness of Sipco's arguments as to why it did not owe tax and did not impose additions to the tax owed. *Id.* Similarly, here, the Court should find that Business Aviation's arguments are reasonable as to why tax is not owed, which shows a lack of willful neglect. Therefore, additions should not be imposed.

CONCLUSION

The Commission erred in finding the Appellants liable for use tax for the purchase of the Aircraft. The Aircraft was purchased as a sale for resale, exempt under section 144.018 of the Missouri Revised Statutes, and the lease payments received are exempt from tax as a sale to a common carrier under section 144.030 of the Missouri Revised Statutes. Further, the Commission erred in finding Appellants liable for additions to the use tax assessments, as there was no willful neglect in the failure to file returns because Appellants believed that no tax was due, as required under section 144.665 of the Missouri Revised Statutes. Accordingly, the Commission's finding should be reversed.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 7,893 words, exclusive of the portions exempted by Rule 84.06(b), based on the word count that is part of Microsoft Office Word 2010.

/s/ Lowell D. Pearson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 18, 2019, I electronically filed a true and accurate copy of the foregoing document with the Clerk of the Court by using the Missouri eFiling System and for service on all counsel registered with the eFiling System:

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