SC97475

IN THE SUPREME COURT OF MISSOURI

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,

Respondent.

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

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT

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INTRODUCTION

The Missouri Department of Revenue issued assessments for unpaid use tax for the January 1, 2012, through December 31, 2012, time period to Vaughn Zimmerman for Business Aviation, LLC ("Business Aviation") (Jt. Ex. 2), Zimmerman Properties Construction, LLC (Jt. Ex. 4), James Foster (for JRV Technologies, LLC) (Jt. Ex. 3), and the members of Zimmerman Properties Construction, LLC (App. A-3 (LF 127, ¶12))—Vaughn Zimmerman, Justin Zimmerman, Matthew Zimmerman, and Robert C. Davidson (Jt. Exs. 5-8). All assessed parties appealed to the Administrative Hearing Commission (App. A-1 through App. A-2), claiming that Business Aviation's purchase of an aircraft was exempt from use tax under §144.615(3), RSMo, see LF 4, ¶18, because Business Aviation purchased the aircraft in order to lease it to a common carrier. Business Aviation asserted that the lease transaction satisfied the criteria of a sale for resale exemption in §144.018.1(4), RSMo, see LF 4, ¶21, and the sales tax exemption for sales of aircraft to common carriers in §144.030.2, see LF 4, ¶16. The Director of Revenue challenged the claim that the lease transaction was a "sale" that qualified for those exemptions.

Issues on appeal include:

(1) Whether the lease transaction between Business Aviation and Burgess Aircraft Management, LLC ("BAM") was a "sale" where Business Aviation lost money from all charters of the Aircraft (see Respondent's Br. at

16-18, Tables 1 and 2; see Respondent's Br. at 33-34) and Business Aviation took a loss on its tax returns "because costs of maintenance and operation have been greater than income." App. A-4 (LF 128, ¶26).

(2) Whether the right to use the aircraft was fully transferred to BAM.

STATEMENT OF FACTS

Business Aviation is a Missouri limited liability company that purchased a Cessna Aircraft, Model No. 525, Serial Number 525-0444, Registration #N525BR (the "Aircraft") in Kansas. Appellant's Appendix (App.) A-2, A-3 (LF 126, ¶1, LF 127, ¶17). Business Aviation filled out a Kansas Department of Revenue Aircraft Exemption Certificate form, claiming that its purchase of the Aircraft was exempt from Kansas sales and use tax "for the following reason" [pre-printed on the Kansas Department of Revenue form]:

> K.S.A. 79-3606(g) exempts all sales of aircraft including remanufactured and modified aircraft sold to persons using directly or through an authorized agent such aircraft as certified or licensed carriers of persons or property in interstate or foreign commerce under authority of the laws of the United States or any foreign government…

Jt. Ex. 11, PDF p. 1. Business Aviation does not claim to be a common carrier. Nevertheless, Business Aviation marked an x in the box next to the following statement on the Kansas Sales Tax Exemption Certificate form:

> The aircraft will be used by the purchaser as a certified or licensed carrier (Part 135 or equivalent) of persons or property in interstate or foreign commerce under authority of the laws of the United States or any foreign government, as provided in KSA 79-3606(g).

Jt. Ex. 11, PDF p. 2.

Business Aviation's sole purpose is to own the Aircraft. TR at 111, l. 12-20. Business Aviation had two members—Zimmerman Properties Construction, LLC ("Zimmerman Properties") and JRV Technologies, LLC.

App. A-2 (LF 126, ¶2). Vaughn Zimmerman was the managing member of Business Aviation. App. A-2 (LF 126, ¶3).

Vaughn Zimmerman, Justin Zimmerman, Matthew Zimmerman, and Robert C. Davidson were the members of Zimmerman Properties. App. A-3 (LF 127, ¶7). Zimmerman Properties was a partnership for tax purposes. App. A-3 (LF 127, ¶¶8-10).

JRV Technologies, LLC ("Foster") had a sole member/manager, James Foster. App. A-3 (LF 127, ¶12). It was a disregarded entity for tax purposes. App. A-3 (LF 127, ¶¶13-14).

Mark Burgess is the sole and managing member of Burgess Aircraft Management, LLC (BAM). TR at 26, l. 2-4. He is BAM's director of operations. TR at 26, l. 2-5. BAM "provides air charter transportation services" under Part 135 of the Federal Aviation Administration's regulations, 14 C.F.R. §135.1 et seq. App. A-4 (LF 128, ¶20). BAM also provides aircraft management services to airplane owners. TR at 26, l. 6-24, p. 56, l. 3-16.

The Commission found that Business Aviation purchased the Aircraft in order to lease it to BAM. App. A-3 (LF 127, ¶18). Business Aviation entered into a Lease and Management Agreement (Jt. Ex. 9) with BAM when Business Aviation purchased the Aircraft. App. A-3 (LF 127, ¶¶17, 19).

The Lease and Management Agreement provided that "Lessee 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 Lessee. …" Jt. Ex. 9, p. 2, ¶2(e). Business Aviation retained a right to use the Aircraft during the term of the agreement: "Lessor shall be liable for any and all damage to the Aircraft caused solely by the gross negligence of Lessor *during its use and operation of the Aircraft*, unless covered by insurance." Jt. Ex. 9, ¶5(c) (emphasis added). The Agreement further provides that "Lessor shall pay all costs and expenses in any way related to any *operations of the Aircraft by Lessor*, including, without limitation… ." Jt. Ex. 9, pp. 6-7, ¶6(c) (emphasis added). Mark Burgess explained that "They [Business Aviation] always have the right. They own the airplane. They have the right to do with it whatever they want." TR at 86, l. 15-17. Business Aviation agreed to indemnify BAM with respect to any personal injury, death, or property damage arising out of any operation of the Aircraft by Business Aviation. Jt. Ex. 9, p. 7, ¶6(f), ¶7(a).

The members of Business Aviation, Zimmerman Properties and Foster, chartered the Aircraft "for Part 135 operations" during approximately 56.6 percent of the total flight hours for which the Aircraft was operated in Part 135 (charter) status. App. A-8 (LF 132, ¶49); see App. A-6 (LF 130, ¶37).

Zimmerman Properties chartered the Aircraft for most of those flight hours.[1] Vaughn Zimmerman admitted that BAM (Burgess) did not actually charge Zimmerman Properties or the other Zimmerman companies for the flight hours when those entities chartered the Aircraft. TR at 115, l. 6-22; see TR at 114, l. 21 through p. 115, l. 3.

The "Zimmerman companies" consist of many entities:

> We're a fully integrated real estate company, development company. Zimmerman Properties construction is our construction division. Zimmerman Properties, LLC, is our development division. Wilhoit Properties, Inc., is kind of a parent company that houses all 350 employees and farms them out to the other entities. … And in addition to that, we're the general partner of probably 140, 150 other LLCs which own apartments in a 16-state region.

TR at 101, l. 4-12.

BAM did not pay Business Aviation for the flight hours that the Aircraft accumulated from Zimmerman Properties or the other Zimmerman companies chartering the Aircraft. TR at 115, l. 6-22. As Vaughn Zimmerman stated,

> I don't pay myself and have him bill me and then write me a check back because it's literally taking money out of this hand and putting it in that hand. Has no economic benefit, no tax benefit whatsoever.

TR at 114, l. 24 through p. 115, l. 2. Vaughn Zimmerman also testified:

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[1] The invoices in Joint Exhibit 18 appear to show that Foster chartered the Aircraft for a total of five trips, but do not show the corresponding number of flight hours. Jt. Ex. 18, PDF pp. 1-5. Business Aviation has the burden of proof. *TracFone Wireless, Inc. v. Dir. of Revenue*, 514 S.W.3d 18, 21 (Mo. banc 2017).

> Q. And I think you testified that even that charge that appears on the invoices, that's really not—you don't artificially move the money since it's just kind of applied to the ProParts and TAP program payment?
> A. Yes. There's no sense in charging ourselves a profit and having an expense on one side and a profit on the other.

TR at 127, l. 2-8.

The per-flight-hour cost of the TAP Elite and ProParts programs for the Aircraft was $434.77. App. A-6 (LF 130, ¶35); Jt. Ex. 30; see Jt. Ex. 15 at PDF p. 20 (invoice from Cessna). The Commission found that "Burgess [BAM] did not charge Zimmerman Properties the $434.77 per flight hour for the Cessna at the end of the month, but that is the amount reflected as paid by Burgess to Business Aviation as Lease Income in a 'true up' on the monthly summaries." App. A-9 (LF 133, ¶54).

The initial budget that Business Aviation prepared contemporaneously with its purchase of the Aircraft (TR at 125, l. 4-17) shows an hourly "flight cost" to Business Aviation of $1,283.77 when the Aircraft was used (consisting of fuel, maintenance, and parts program costs). Jt. Ex. 30. Business Aviation did not pay for the fuel that the Aircraft consumed for "Part 135 operations of the Aircraft by Lessee" BAM, however. Jt. Ex. 9, pp. 6-7, ¶6(c). Business Aviation's hourly flight cost to operate the Aircraft was approximately $595 per flight hour. Jt. Ex. 30; see Jt. Ex. 9, pp. 6-7, ¶6(c). Business Aviation was always responsible for the cost of insurance for operating the Aircraft (Jt. Ex.

9, ¶¶4.1, 4.3), payment of all repairs, maintenance, and maintenance fees (App. A-6, LF 130, ¶33; Jt. Ex. 9, ¶33; 6(b)), and the parts program costs (App. A-6, LF 130, ¶35).

Business Aviation enrolled the Aircraft in two parts programs—TAP Elite and ProParts. TR at 76, l. 6-10; see TR at 113, l. 22-25; see Jt. Ex. 15 at PDF p. 20. The TAP program "is an engine power-by-the hour program that's paid into Williams for replacement costs of the engines." TR at 76, l. 6-13; A-6 (LF 130, ¶35). The ProParts program cost "is paid to Cessna for parts allocation. It's basically a prepaid parts program." TR at 76, l. 13-14. Both parts programs require a set amount to be paid for each hour that the Aircraft is flown in order for the Aircraft to remain eligible for the benefits of the programs. TR at 76, l. 17-25. The TAP Elite and ProParts program payments "are hourly numbers that are directly associated with the cost of operation of the [A]ircraft." TR at 76, l. 14-18; App. A-6 (LF 130, ¶35). The per-flight-hour cost of the TAP Elite and ProParts programs for the Aircraft was $434.77. App. A-6 (LF 130, ¶35); Jt. Ex. 30; see Jt. Ex. 15 at PDF p. 20 (invoice from Cessna).

Zimmerman Properties Construction, LLC was the only Zimmerman company that was a member of Business Aviation. App. A-2 (LF 126, ¶2). The four members of Zimmerman Properties Construction, LLC (Jt. Ex. 1) decided whether or not to approve other Zimmerman company charters of the Aircraft. TR at 101, l. 19-25. When other Zimmerman companies wanted to charter the

Aircraft, Zimmerman Properties Construction, LLC was "the entity that would charter the [A]ircraft and then farm it out to" the Zimmerman development LLC or to property management. TR at 102, l. 1-5; see App. A-7 (LF 131, ¶41).

The "Aircraft Usage" section of each monthly summary in Joint Exhibit 15 lists the number of flight hours that BAM used the Aircraft in its charter operation during the month in question when the customer was someone other than a member of Business Aviation or the Zimmerman companies by the category "Burgess Aircraft." TR at 134, l. 12-19; see e.g. Jt. Ex. 15, PDF pp. 13, 22. The category for flight hours when a member of Business Aviation or one of the Zimmerman companies used the Aircraft (see TR at 101, l. 19 through p. 102, l. 5) was initially called "owner use" on the monthly summaries (Jt. Ex. 15, PDF p. 13; see TR at 134, l. 20-24), and later re-named "internal leases" (see e.g., Jt. Ex. 15 PDF pp. 22, 31; TR at 135, l. 10-16). Table 1 (on the next page) shows the annual flight hours for the "owner use" and "internal leases" categories and the cost to Business Aviation.

Table 1

Calendar year	Hourly flight operating cost to Business Aviation	Total flight hours of the Zimmerman companies or Business Aviation members[2]	Total annual flight hour expense for Business Aviation member or Zimmerman company flight hours
2012	$595	42.6[3]	$25,347.00
2013	$595	136.2[4]	$81,039.00
2014	$595	123.7[5]	$73,601.50

BAM did not pay the $900 hourly rate in Paragraph 3(c) of the Lease and Management Agreement (Jt. Ex. 9, p. 3, ¶3(c)) to Business Aviation for the flight hours that the Aircraft incurred when Zimmerman Properties or Foster chartered the Aircraft from BAM. App. A-9 (LF 133, ¶56). The Commission found that Business Aviation took a loss on its tax returns "because costs of maintenance and operation have been greater than income." App. A-4 (LF 128, ¶26).

[2] These were shown as "internal leases" or "owner use" on the monthly summaries in Jt. Ex. 15 (see TR at 134, l. 20-24, p. 135, l. 10-16).
[3] The first Part 135 flights of the Aircraft took place in September 2012. App. A-8 (132, ¶50 n.12); Jt. Ex. 15, PDF p. 13. For monthly Part 135 flight hours in September, October, November, and December 2012, please see Jt. Ex. 15, PDF pp. 13, 22, 31, and 40.
[4] For monthly Part 135 flight hours in 2013, see Jt. Ex. 15 at PDF pp. 50, 57, 72, 87, 95, 109, 125, 137, 146, 153, 162, and 173.
[5] For monthly Part 135 flight hours in 2014, see Jt. Ex. 15 at PDF pp. 182, 192, 198, 206, 218, 231, 237, 244, 252, 263, 279, and 286.

The total flight hours when the Aircraft was chartered to customers other than a member of Business Aviation or the Zimmerman companies during 2012, 2013, and 2014 are shown below in Table 2.

Table 2

Calendar year	Hourly rate minus Business Aviation hourly flight operating cost	Total Burgess Aircraft flight hours	Annual total	Business Aviation total annual flight hour expense[6] minus annual total
2012	$900 - $595 = $305	30.1[7]	$305 x 30.1 = $9,180.50	(negative $25,347.00) + $9,180.50= negative $16,166.50
2013	$900 - $595 = $305	121.6[8]	$305 x 121.6 = $37,088	(negative $81,039.00) + $37,088= negative $43,951.00

[6] See Table 1 (Respondent's Br. at 16)
[7] There were no "Burgess Aircraft" category charters in December 2012. Jt. Ex. 15, PDF p. 40. For monthly Part 135 flight hours in September, October, and November 2012, see Jt. Ex. 15, PDF pp. 13, 22, and 31.
[8] For monthly Part 135 flight hours in 2013, see Jt. Ex. 15 at PDF pp. 50, 57, 72, 87, 95, 109, 125, 137, 146, 153, 162, and 173.

2014	$900 - $595 = $305	231.8[9]	$305 x 231.8 = $70,699	(negative $73,601.50) + $70,699= negative $2,902.50

Business Aviation never filed a sales tax or use tax return with the Missouri Department of Revenue. App. A-3 (LF 127, ¶16). Business Aviation did not pay Missouri sales tax or use tax on its purchase of the Aircraft. App. A-4 (LF 128, ¶25).

The Director issued assessments for unpaid use tax for the period January 1, 2012, through December 31, 2012, in the principal amount of $57,150 in total tax due, plus $14,287.50 in additions to tax, and interest in the amount of $4,236.91 as of September 4, 2015, for a total amount of $75,674.41 to Zimmerman Properties, LLC, Robert C. Davidson, Vaughn Zimmerman, Matthew E. Zimmerman, and Justin Zimmerman. Jt Exs 4-8; App. A-9, A-10, (LF 133-34, ¶59). Earlier in 2015, the Director had assessed higher amounts of use tax and additions for the January 1, 2012, through December 31, 2012, time period to Business Aviation, Vaughn Zimmerman, and James Foster for unpaid use tax of JRV Technologies, LLC (Jt. Exs 2-4),

[9] For monthly Part 135 flight hours in 2014, see Jt. Ex. 15 at PDF pp. 182, 192, 198, 206, 218, 231, 237, 244, 252, 263, 279, and 286.

but the Director stipulated that the correct total amount for each assessment was the $75,674.41 shown in the September 4, 2015, assessments. App. A-9 (LF 133, ¶59 n. 16; TR at 12, l. 4-18, p. 22, l. 18 through p. 23, l. 13). The parties stipulated that the applicable state use tax rate was 4.225% and the local use tax rate was 2.125%. App. A-9 (LF 133, ¶58).

All parties appealed their assessments. App. A-1 through A-2; see LF 1-14, 20-30, 36-50, 56-67, 73-84, 90-101, and 107-118. The Commission consolidated the appeals. LF 124. Following a hearing, on September 11, 2018, the Commission issued its Decision finding all petitioners jointly and severally (App. A-26, LF 150) liable for use tax in the principal amount of $57,150 "for the assessment period of January 1, 2012 through December 31, 2012, plus additions to tax in the amount of $14,287.50 and for statutory interest." App. A-30 (LF 154). The Commission concluded that the Petitioners had failed "to show that the Lease constituted a sale for resale because the right to use was not fully transferred for valuable consideration." App. A-25 (LF 149).

ARGUMENT

Standard of Review

A decision of the Administrative Hearing Commission must be affirmed if "(1) it is authorized by law; (2) it is supported by competent and substantial evidence on the whole record; (3) mandatory procedural safeguards are not violated; and (4) it is not clearly contrary to the reasonable expectations of the General Assembly." *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 435-36 (Mo. banc 2010); Section 621.193 RSMo. The Commission's factual determinations "will be upheld if supported by substantial evidence based on review of the whole record." *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 121 (Mo. banc 2014).

This Court reviews the Commission's interpretation of revenue statutes *de novo*. *Brinker Mo., Inc.*, 433 S.W.3d at 435. Exemptions are strictly construed against the taxpayer, "and any doubt must be resolved in favor of application of the tax." *Bartlett Int'l, Inc. v. Dir. of Revenue*, 487 S.W.3d 470, 472 (Mo. banc 2016). The taxpayer bears the burden of proving that "an exemption applies 'by clear and unequivocal proof[ ]' … ." *TracFone Wireless, Inc. v. Dir. of Revenue*, 514 S.W.3d 18, 21 (Mo. banc 2017).

I. Business Aviation's purchase of the Aircraft does not qualify for the exemptions in §§144.018.1(4), 144.030.2(20) or 144.615(3), RSMo, because there was no subsequent "sale" of the Aircraft to BAM. (Responds to Point I)

Use tax is imposed "for the privilege of storing, using or consuming within this state any article of tangible personal property[.]" Section 144.610.1, RSMo. "[A]ll items subject to the Missouri sales tax as provided in subdivisions (1) and (3) of section 144.020" are tangible personal property. Section 144.605(11), RSMo. "An aircraft is an item subject to Missouri sales tax as tangible personal property." *Five Delta Alpha, LLC v. Dir. of Revenue*, 458 S.W.3d 818, 821 (Mo. banc 2015). Business Aviation's purchase of the Aircraft is subject to use tax because Business Aviation failed to prove that it qualified for exemptions in §§144.615(3), 144.018.1(4), or 144.030.2(20), RSMo.

Business Aviation challenged the assessment of use tax on its purchase of the Aircraft by pointing to an exemption in §144.018.1(4). See LF 4, ¶21 ("Because of BAM's status as a common carrier, the Lease meets the exception provided for in RSMo Section 144.018.1(4)."). Business Aviation's statement that it argued that its purchase of the Aircraft fell under the sale for resale exemption in §144.018.1(2), RSMo, (Apps' Br. at 19) appears to be a typographical error.

The Petition that Business Aviation and Vaughn Zimmerman jointly filed with the Commission (LF 1-14) quotes each subparagraph of §144.018.1. LF 3 (¶14). Section 144.018.1(2), RSMo, states that

> … when a purchase of tangible personal property… subject to tax is made for the purpose of resale, such purchase shall either be exempt or excluded under this chapter if the subsequent sale is:
>
> * * *
>
> (2) For resale[.]

No evidence was presented that BAM leased the Aircraft from Business Aviation so that BAM could sell the Aircraft to someone else. Rather, BAM leased the Aircraft so that BAM could use it to provide "air charter transportation services" in accordance with BAM's Part 135 operating certificate. Jt. Ex. 9, p. 2, ¶2(b); *see* TR at 89, l. 4-9.

A purchase of taxable tangible personal property is exempt from sales tax if the purchase "is made for the purpose of resale" and "if the subsequent sale is: … (4) Subject to tax but exempt under this chapter[.]" Section 144.018.1(4), RSMo. Business Aviation claims that its purchase of the Aircraft was exempt from use tax because it purchased the Aircraft in order to lease it to a common carrier. Apps' Br. at 16, 21. Business Aviation asserts that a purchase of tangible personal property for the purpose of resale is exempt from

use tax "if the subsequent sale is exempt from Missouri sales or use tax." Apps' Br. at 21.

The question is whether Business Aviation established by clear and unequivocal proof that the lease and management transaction between Business Aviation and BAM constituted a "sale" for purposes of §§144.018.1(4), 144.030.2(20) and 144.615(3).

Section 144.615(3), RSMo, "addresses the use tax exemption for resales." *Five Delta Alpha, LLC v. Dir. of Revenue*, 458 S.W.3d 818, 821 (Mo. banc 2015). It provides that

> There are specifically exempted from the taxes levied in sections 144.600 to 144.745:
>
> * * *
>
> (3) 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[.]

Section 144.615(3), RSMo.

Section 144.030.2, RSMo, contains specific exemptions from Missouri's use tax, §§144.600 to 144.745, as well as Missouri's sales tax. For example, subsection 2 specifically exempts from sales and use taxes "[a]ll sales of aircraft to common carriers for storage or for use in interstate commerce… ." Section

144.030.2(20), RSMo.; *Five Delta Alpha, LLC*, 458 S.W.3d at 822, *citing* §144.030.2(20).

> "Sale" as used in §§144.600 to 144.745 is defined as
>
> any transfer, barter or exchange of the title or ownership of tangible personal property, or the right to use, store or consume the same, for a consideration paid or to be paid, and any transaction whether called leases, rentals, bailments, loans, conditional sales or otherwise, and notwithstanding that the title or possession of the property or both is retained for security.

Section 144.605(7), RSMo. This Court has broken that definition of "sale" into a three-part test. *Brinker Mo., Inc.* 319 S.W.3d at 438-40. "… [F]or a transaction to constitute a sale or resale, three elements must be satisfied: (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 consideration paid or to be paid." *Brinker Mo., Inc.* at 439.

The final element of a "sale," "for consideration paid or to be paid," *Brinker Mo., Inc.* at 439, *quoting* §144.605(7), RSMo, requires more than the existence of "consideration" in the general sense of consideration sufficient to support the formation of a valid contract. Under §144.605(7), consideration must be "paid." Section 144.605(7), RSMo; *Brinker Mo., Inc.* at 439.

The question before this Court is not whether an agreement between Business Aviation and BAM was an enforceable contract. "Legal consideration contemplates two parties and ordinarily some consideration must flow from both parties." *Wages v. Young*, 261 S.W.3d 711, 716 (Mo. App. W.D. 2008) (quoting cases). Consideration sufficient to support an enforceable contract "does not depend on" a payment of money. *McRentals, Inc. v. Barber*, 62 S.W.3d 684, 706 (Mo. App. W.D. 2001). Business Aviation cites breach of contract cases that discuss what constitutes sufficient consideration for a valid contract to exist. See Apps' Br. at 28; *Greenberg v. Morris*, 436 S.W.2d 734, 738 (Mo. 1968); *McRentals, Inc.*, 62 S.W.3d at 706; *Moore v. Seabaugh*, 684 S.W.2d 492, 496 (Mo. App. E.D. 1984). Those cases do not answer the question whether the right to use the Aircraft was transferred to BAM "for a consideration paid or to be paid." Section 144.605(7) RSMo.

Business Aviation asserts that consideration is "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) (internal citation and quotation marks omitted). That definition does not require either party to a contract to make a monetary payment as "consideration."

"Consideration sufficient to support a contract may be either a detriment to the promisee or a benefit to the promisor." *Nat'l Adver. Co. v. Herold*, 735 S.W.2d 74, 78 (Mo. App. E.D. 1987). In general, the "benefit" to

the party making promises may consist of "some legal right to which he would not otherwise have been entitled." *Greenberg*, 436 S.W.2d at 738. By leasing the Aircraft, BAM acquired a legal right to which it would not otherwise have been entitled—a right to use the Aircraft in BAM's charter operations. But, as explained in the Director's Argument Section II, the right to use the Aircraft was not fully transferred. See Resp't's Br. at 36-40.

Under *Greenberg*, a detriment to the promisee is consideration. 436 S.W.3d at 738. The detriment may be the promisee's forbearance of a legal right it "otherwise would have been entitled to exercise." *Id.* Or the detriment may be "a loss." *Id.*

Business Aviation's forbearance of its ownership right to make full use of the Aircraft so that BAM could charter it to customers who were not members of Business Aviation or one of the Zimmerman companies was a "detriment" to Business Aviation. That satisfies the definition of consideration in *Greenberg v. Morris*, 436 S.W.2d 734 (Mo. 1968), *id.* at 738, but it does not fulfill the statutory element "for consideration paid or to be paid[,]" *see Brinker Mo., Inc.* at 439, *quoting* §144.605(7), RSMo.

A loss to Business Aviation would be sufficient consideration for its agreement with BAM to be an enforceable contract under the definition in *Greenberg v. Morris*, 436 S.W.2d at 738. But a detriment in the form of a loss to the lessor, Business Aviation, is not "consideration paid or to be paid" under

the statutory definition of sale, §144.605(7), RSMo, or for purposes of the use tax exemption that Business Aviation seeks.

A. *Sipco, Inc. v. Dir. of Revenue*, 875 S.W.2d 539 (Mo. banc 1994) and *Brambles Indus., Inc. v. Dir. of Revenue*, 981 S.W.2d 568 (Mo. banc 1998) do not resolve whether the transaction between Business Aviation and BAM was an exempt "sale."

In *Five Delta Alpha*, this Court relied on *Brambles* to support its conclusion that a lease can constitute a sale for resale under certain circumstances. *See* 458 S.W.3d at 820, 822, *citing Brambles*, 981 S.W.2d at 570. *Brambles* and *Sipco* addressed whether materials used to package items subject to sales tax that were sold to a customer were exempt from sales or use tax. *President Casino, Inc. v. Dir. of Revenue*, 219 S.W.3d 235, 243 (Mo. banc 2007), *citing Sipco* at 542; *Brambles*, 981 S.W.2d at 570-71.

> *Sipco* stands for the proposition that "where a business does not charge separately for goods transferred to customers but, rather, factors the cost of the goods into the price of all items sold to the customers," the business' purchase of such goods is not subject to sales tax or use tax.

President Casino, Inc., 219 S.W.3d at 243 (citing cases). *Sipco* and its progeny "make clear, however, that the exemption from sales and use tax is premised on the fact that the cost of the free goods are factored into the cost of items that are subject to sales tax." *President Casino, Inc.* at 243.

In *Sipco*, there was no stated charge for the dry ice with which the taxpayer packaged pork products that it sold to customers in order to safeguard

the pork's wholesomeness during shipping. 875 S.W.2d at 540, 542. Instead, "the value of the dry ice was factored… into the total consideration paid for the pork." *Id.* at 542. In *Sipco*, this Court applied the consideration element of the statutory definition of "sale" where the unstated cost of the dry ice was factored into the consideration paid for the pork. *Id.*

The language of §144.605(7) is the same today as it was when *Sipco* was written. Section 144.605, RSMo; §144.605(7), RSMo (Supp. 1994). Under the plain language of §144.605(7), what the transaction is called does not determine whether it is a sale for purposes of §§144.600 to 144.745. Sections 144.605, 144.605(7), RSMo. What determines whether a transaction is a "sale" for use tax purposes is whether it meets the three-part test derived from the language of §144.605(7) that defines "sale." *Brinker Mo., Inc.*, 319 S.W.3d at 439; *see Sipco, Inc. v. Dir. of Revenue*, 875 S.W.2d 539, 542 (Mo. banc 1994).

Like *Sipco*, this case requires the application of the statutory definition of "sale" in §144.605, RSMo. But *Sipco*'s analysis of the third element of a "sale," "for a consideration paid or to be paid," does not apply here, because the lease and management transaction between Business Aviation and BAM involved a single item of tangible personal property—the Aircraft. See Jt. Ex. 9. This is not a "factored in" case.

In *Five Delta Alpha*, the taxpayer sought a use tax exemption for an aircraft that it purchased in Kansas and immediately leased. 458 S.W.3d at

819-21. Apparently, the "for a consideration paid or to be paid" element of a "sale" was not in dispute, because the opinion does not discuss the consideration for the lease, although it quotes §144.605(7), RSMo. *See id.* *Five Delta Alpha* references the sales and use tax exemptions in §§144.018.1(4) and 144.030.2(2), as well as §144.615(3)—the statutes under which Business Aviation sought a use tax exemption for its purchase of the Aircraft.

B. BAM did not pay valuable consideration--a measurable pecuniary benefit—to Business Aviation for the right to use the Aircraft in BAM's charter operations.

As the Commission noted, this Court used the term "valuable consideration" in *Five Delta Alpha, LLC v. Dir. of Revenue*, 458 S.W.3d 818 (Mo. banc 2015) and in *Brambles Indus., Inc. v. Dir. of Revenue*, 981 S.W.2d 568 (Mo. banc 1998). App. A-23 (LF 147); *Five Delta Alpha* at 822; *Brambles* at 570. Business Aviation suggests that "valuable consideration" must mean the same thing as consideration, because "an item of no value cannot be consideration." Apps' Br. at 28. Context matters. A detriment to a seller or to a lessor could be valuable to a buyer or a lessee, but that would not be sufficient to satisfy §144.605(7), which requires consideration to be "paid" to a seller. *See* §144.605(7), RSMo.

Brambles likely used the phrase "valuable consideration" because the definition of "sale" for purposes of the Sales Tax Law included transfers "of tangible personal property for valuable consideration… [,]" §144.010.1(8),

RSMo (1996 Supp.), as it does today. Section 144.010.1(12), RSMo. Although §144.605(7) does not use the phrase "valuable consideration," Business Aviation contends that its purchase of the Aircraft was exempt from use tax because it qualified for the exemption in §144.018.1(4), RSMo, LF 4, ¶21; see Apps' Br. at 21. Moreover, the language of §144.615(3) requires that "the sale… would be exempt from or not subject to the Missouri sales tax pursuant to the provisions of subsection 2 of section 144.030[,]" so the meaning of "valuable consideration" is pertinent to this Court's analysis. The meaning of "valuable consideration" is also helpful because consideration is "paid" where there is a sale for purposes of Missouri's use tax. *See* §144.605(7), RSMo.

As the Commission noted, "BLACK'S LAW DICTIONARY 349 (9th ed. 2009) defines 'valuable consideration in relevant part:

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

App. A-23 (LF 147) (emphasis in Decision omitted). The "consideration that is valid under the law" portion of that definition is not useful, because this case requires the construction of specific revenue laws. The meaning that requires the "consideration" to confer "a pecuniarily measurable benefit on one party" is helpful both in the context of the third element of a "sale," "for consideration paid or to be paid," *see Brinker Mo., Inc.* at 439; §144.605(7), RSMo, and in the

context of the sales tax exemptions in §144.018.1(4) and §144.030.2(20) for certain sales.

The evidence in the record shows that BAM did not pay a measurable pecuniary benefit to Business Aviation as consideration for the right to use the Aircraft in BAM's charter operations. Therefore, the transfer to BAM of a right to use the Aircraft was not a "sale" for purposes of the sales tax exemptions in §§144.018.1(4) and 144.030.2(20), RSMo. Business Aviation failed to meet its burden of showing that the transaction between Business Aviation and BAM fit the language of §144.615(3) exactly, *Bartlett Int'l, Inc.*, 487 S.W.3d at 472, because Business Aviation did not establish that its purchase of the Aircraft qualified for the sales tax exemption in 144.030.2(20) RSMo. *See* §144.615(3), RSMo.

The Commission found that the members of Business Aviation, Zimmerman Properties and Foster, chartered the Aircraft "for Part 135 operations" during approximately 56.6 percent of the total flight hours for which the Aircraft was operated in Part 135 (charter) status. App. A-8 (LF 132, ¶49); see App. A-6 (LF 130, ¶37). Zimmerman Properties chartered the Aircraft for most of those flight hours.[10] Vaughn Zimmerman, Business

[10] The invoices in Joint Exhibit 18 appear to show that Foster chartered the Aircraft for a total of five trips, but do not show the corresponding number of flight hours. Jt. Ex. 18, PDF pp. 1-5. Business Aviation has the burden of proof. *TracFone Wireless, Inc.*, 514 S.W.3d at 21.

Aviation's managing member (TR at 99, l. 13-15, p. 100, l. 1-3), admitted that BAM (Burgess) did not actually charge Zimmerman Properties or the other Zimmerman companies for the flight hours when those entities chartered the Aircraft. TR at 115, l. 6-22; see TR at 114, l. 21 through p. 115, l. 3. BAM did not pay Business Aviation for the flight hours that the Aircraft accumulated from Zimmerman Properties or the other Zimmerman companies chartering the Aircraft. TR at 115, l. 6-22. As Vaughn Zimmerman stated,

> I don't pay myself and have him bill me and then write me a check back because it's literally taking money out of this hand and putting it in that hand. Has no economic benefit, no tax benefit whatsoever.

TR at 114, l. 24 through p. 115, l. 2.

> Q. And I think you testified that even that charge that appears on the invoices, that's really not—you don't artificially move the money since it's just kind of applied to the ProParts and TAP program payment?
> A. Yes. There's no sense in charging ourselves a profit and having an expense on one side and a profit on the other.

TR at 127, l. 2-8. The Commission found that "Burgess [BAM] did not charge Zimmerman Properties the $434.77 per flight hour for the Cessna at the end of the month, but that is the amount reflected as paid by Burgess to Business Aviation as Lease Income in a 'true up' on the monthly summaries." App. A-9 (LF 133, ¶54).

Moreover, an hourly rate of $434.77 would only have covered the portion of the TAP Elite and ProParts program expenses incurred during—and in

direct relation to—the flight hours when the Zimmerman companies chartered the Aircraft. TR at 76, l. 17-25; App. A-6 (LF 130, ¶35). The evidence showed that Business Aviation's hourly flight cost to operate the Aircraft was approximately $595 per flight hour. Jt. Ex. 30; see Jt. Ex. 9, pp. 6-7, ¶6(c). If paid, the $434.77 hourly rate would not represent a pecuniarily measurable benefit as Business Aviation contends (see Apps' Br. at 31).

The initial budget that Business Aviation prepared contemporaneously with its purchase of the Aircraft (TR at 125, l. 4-17) shows an hourly "flight cost" to Business Aviation of $1,283.77 when the Aircraft was used (consisting of fuel, maintenance, and parts program costs). Jt. Ex. 30. Business Aviation did not pay for the fuel that the Aircraft consumed for "Part 135 operations of the Aircraft by Lessee" BAM, however. Jt. Ex. 9, pp. 6-7, ¶6(c). The operation of the Aircraft, exclusive of fuel, cost Business Aviation approximately $595 per flight hour. Jt. Ex. 30.

In "determining the merits of revenue cases, it is important to look beyond legal fictions to discover the economic realities of the case." *Loren Cook Co. v. Dir. of Revenue*, 414 S.W.3d 451, 454 (Mo. banc 2013) (internal punctuation omitted), *quoting Great Southern Bank v. Dir. of Revenue*, 269 S.W.3d 22, 25 (Mo. banc 2008). Between September 2012 (when the Aircraft was first used in BAM's charter operations) and December 2014, Business Aviation lost approximately $63,000.00 from the chartering of the Aircraft. See

Tables 1 and 2 (Respondent's Br. at 16-18); Jt. Ex. 30 (Business Aviation's hourly flight operating cost); Jt. Ex. 9, pp. 6-7, ¶6(c) (Business Aviation did not pay the cost of fuel for BAM's Part 135 operations); Jt. Ex. 15 at PDF pp. 13, 22, 31, 40, 50, 57, 72,87, 95, 109, 125, 137, 146, 153, 162, 173, 182, 192, 198, 206, 218, 231, 237, 244, 252, 263, 279, and 286 (flight hours for months of September 2012 through December 2014). Business Aviation lost more than $16,000 during the last four months of 2012 from all charters of the Aircraft. See Table 1 (Respondent's Br. at 16); Jt. Ex. 20; Jt. Ex. 15 at PDF pp. 13, 22, 31, and 40. The $900.00 per-flight-hour rate that BAM was to pay Business Aviation when BAM chartered the Aircraft to customers other than the members of Business Aviation or the Zimmerman companies may have exceeded Business Aviation's per flight hour expense by $305, but the Aircraft was not chartered to such parties for a sufficient number of hours to result in a net positive payment to Business Aviation for the chartering of the Aircraft. See Tables 1 and 2 (Respondent's Br. at 16-18); Jt. Ex. 15 at PDF pp. 13, 22, 31, 40, 50, 57, 72,87, 95, 109, 125, 137, 146, 153, 162, 173, 182, 192, 198, 206, 218, 231, 237, 244, 252, 263, 279, and 286 (flight hours for months of September 2012 through December 2014).

BAM did not confer a pecuniarily measurable benefit upon Business Aviation for BAM's use of the Aircraft in its charter operations. Business Aviation failed to establish that it transferred the right to use the Aircraft to

BAM in its charter operations for valuable consideration, so there was no "sale" to BAM for purposes of the sales tax exemptions in §§144.018.1(4) and 144.030.2(20), RSMo. Business Aviation's lease of the Aircraft to BAM was not a "sale" within the meaning of §144.605(7) because it was not for "consideration paid or to be paid," §144.605(7), RSMo. Business Aviation is not entitled to the resale exemption in §144.615(3) or to the sale to a common carrier exemption in §144.030.2(20), because BAM did not pay a measurable pecuniary benefit or valuable consideration for the transfer of the right to use the Aircraft in BAM's charter operations.

II. The Commission correctly concluded that Business Aviation's purchase of the Aircraft was not entitled to an exemption under §§144.018.1(4), 144.030.2(20) or 144.615(3), RSMo, because the right to use the Aircraft was not fully transferred to BAM. (Responds to Point I)

The Commission ultimately concluded that "Petitioners failed to show that the Lease constituted a sale for resale because the right to use [the Aircraft] was not fully transferred for valuable consideration." App. A-25 (LF 149). In *Five Delta Alpha*, this Court concluded that the lease of the subject aircraft was a sale for sales tax purposes "because the right of the aircraft's use was fully transferred" to the lessee, a common carrier. 458 S.W.3d at 822. Perhaps looking back to *Sipco*'s analysis of a "sale" under §144.605, RSMo, which this Court cited in *Brambles*, *see Brambles*, 981 S.W.2d at 570, 570 n. 5, *citing Sipco* at 542 ("Although *Sipco* is a use tax case, its analysis has been extended to sales tax."), *Five Delta Alpha* stated that

> [t]his Court, applying the statutory definition of 'sale,' has previously held that a lease can constitute a sale for resale where the right of use is fully transferred…

Five Delta Alpha at 822, *citing Brambles* at 570.

Business Aviation suggests that a provision of the lease and management agreement that provides in part that "Lessee 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 Lessee. …" (Jt. Ex. 9, p. 2, ¶2(e)) is evidence that the right to use the Aircraft was fully transferred to BAM. See Apps' Br. at 25. But the Lease and Management Agreement reveals that Business Aviation retained a right to use the Aircraft during the term of the agreement: "Lessor shall be liable for any and all damage to the Aircraft caused solely by the gross negligence of Lessor *during its use and operation of the Aircraft*, unless covered by insurance." Jt. Ex. 9, ¶5(c) (emphasis added). The Agreement further provides that "Lessor shall pay all costs and expenses in any way related to any *operations of the Aircraft by Lessor*, including, without limitation… " Jt. Ex. 9, pp. 6-7, ¶6(c) (emphasis added). Business Aviation also agreed to indemnify Lessee with respect to any personal injury, death, or property damage arising out of any operation of the Aircraft by Lessor (Jt. Ex. 9, p. 7, ¶6(f), ¶7(a)). Mark Burgess, the sole member and operations director of BAM (TR at 26, l. 2-5), explained that "They [Business Aviation] always have the right. They own the airplane. They have the right to do with it whatever they want." TR at 86, l. 15-17. Business Aviation failed to establish by clear and unequivocal proof that the right to use the Aircraft was fully transferred to BAM, or that the transaction between Business Aviation and BAM was a "sale" for purposes of §144.605, RSMo.

Burgess' testimony included discussion of the concept of operational control. See e.g. TR at 29, 32, 61, 64. A charter air carrier operating under Part 135 "is responsible for operational control" and is required to list in its policy and procedure manual "the name and title of each person authorized by it to exercise operational control." 14 C.F.R. §135.77; *see* 14 C.F.R. §135.21(a). Who has operational control of an aircraft is important because an owner or a lessor may be liable for personal injury, death, or property damage when an aircraft "is in the actual possession or operational control of the lessor [or] owner… ." 49 U.S.C. §44112(b) (2018), *amended by* FAA Reauthorization Act of 2018, Pub. L. No. 115-254, §514, 132 Stat. 3358 (Oct. 5, 2018).[11] Burgess' understanding is that "operational control from the standpoint of flight operations is a 135 operation so that if something happens and if something breaks on the aircraft, they want to know who to go after." TR at 64, l. 8-11. Burgess explained that when the Aircraft "goes out on [Part] 135 flights" BAM "maintains 100-precent operational control of the" Aircraft throughout the duration of those flights. TR at 29, l. 23 through p. 30, l. 1. BAM's exercise of operational control of the Aircraft during BAM's charter flights does not

[11] When the Commission issued its Decision, §44112(b) used the language "actual possession or control" rather than "actual possession or operational control."

establish that the right to use the Aircraft was fully transferred to BAM under *Five Delta Alpha* or §144.605(7), RSMo.

The fact that BAM did not actually charge the Zimmerman companies for the flight hours incurred when the Zimmerman companies used the Aircraft (TR at 115, l. 6-22; see TR at 114, l. 21 through p. 115, l. 3) is further evidence that the right to use the Aircraft was not fully transferred to BAM.

Indeed, Business Aviation used the Aircraft after entering into the Lease and Management Agreement with BAM. The word "use" "as used in sections 144.600 to 144.745 mean[s] and include[s]:

> the exercise of any right or power over tangible personal property incident to the ownership or control of that property, except that it does not include the temporary storage of property in this state for subsequent use outside the state, or the sale of the property in the regular course of business[.]

Section 144.605, RSMo; §144.605(13), RSMo. Business Aviation used the Aircraft by exercising its right to take depreciation deductions for the Aircraft on Business Aviation's federal income tax returns for 2012 and 2013 (Jt. Ex. 23, PDF pp. 2, 5, 6, 8; Jt. Ex. 24, PDF pp. 2, 5, 6, 10; TR at 116, l. 17-22). Taking a depreciation deduction for property on its federal income tax return was an exercise of a "right or power over tangible personal property incident to" Business Aviation's "ownership or control of" the Aircraft, §144.605(13). Federal tax law allows depreciation deductions for "property used in the trade or business, or" (26 U.S.C. §167(a)(1)) "property held for the production of

income[ ]" 26 U.S.C. §167(a)(2). Business Aviation's members were business entities that chartered the Aircraft. App. A-2 (LF 126, ¶2), App. A-8 (LF 132, ¶49). Business Aviation held the Aircraft (see App. A-4, LF 128, ¶21), which produced some income, although Business Aviation took a loss on its tax returns "because costs of maintenance and operation have been greater than income." App. A-4 (LF 128, ¶26).

Business Aviation also used its bargaining power as the owner of the Aircraft so that Business Aviation's members and the Zimmerman companies could charter the Aircraft from BAM without paying the $900 per flight hour rate that BAM imposed on other customers. App. A-9 (LF 133, ¶56). Finally, Business Aviation exercised a right or power incident to its ownership or control of the Aircraft by choosing to hangar the Aircraft at the Springfield/Branson National Airport in the Burgess Aircraft hangar facility and by paying $1,200 per month to store the Aircraft at that location. Jt. Ex. 9, p. 7, ¶6(e).

III. Appellants are liable for penalties or additions under §144.665.1, RSMo, because Business Aviation and its members failed to meet their burden of showing that they were not willfully negligent in failing to file a use tax return for Business Aviation. (Responds to Point II)

For the purposes of chapter 144, a limited liability company, such as Business Aviation, "and its members shall be classified and treated on a basis consistent with the limited liability company's classification for federal income tax purposes." Section 347.187.2, RSMo. Zimmerman Properties Construction, LLC was treated as a partnership for federal income tax purposes. App. A-3 (LF 127, ¶¶8-10). JRV Technologies, LLC ("Foster") was a one man LLC, App. A-3 (LF 127, ¶12) that was treated as a disregarded entity with no legal existence separate from its single owner, James Foster, App. A-3 (LF 127, ¶12), for federal income tax purposes, 26 C.F.R. §301.7701-3(b)(1)(ii); App. A-3 (LF 127, ¶¶13-14).

"[A]ll partners are liable jointly and severally for everything chargeable to the partnership pursuant to sections 138.130 and 138.140" (§358.150.1, RSMo,) including "any penalty [that] is incurred," §358.130 RSMo, "and for all other debts and obligations of the partnership." Section 358.150.1, RSMo. The Commission correctly determined that Zimmerman Properties and its

members, and Foster, were jointly and severally liable for the unpaid use tax, penalties, and interest. App. A-26 (LF 150); App. A-30 (LF 154).

The Director included additions to use tax in Petitioners' assessments. Jt Exs 2-8; App. A-9, A-10, (LF 133-34, ¶59). Section 144.655, RSMo, states in pertinent part:

> 4. Except as provided in subsection 5 of this section, every person purchasing tangible personal property, the storage, use or consumption of which is subject to the tax levied by sections 144.600 to 144.748, who has not paid the tax due to a vendor registered in accordance with the provisions of section 144.650, shall file with the director of revenue a return for the preceding reporting period in the form and manner that the director of revenue prescribes, showing the total sales price of the tangible property purchased during the preceding reporting period and any other information that the director of revenue deems necessary for the proper administration of sections 144.600 to 144.748. The return shall be accompanied by a remittance of the amount of the tax required by sections 144.600 to 144.748 to be paid by the person. Returns shall be signed by the person liable for the tax or such person's duly authorized agent. For purposes of this subsection, the reporting period shall be determined by the director of revenue and may be a calendar quarter or a calendar year. Annual returns and payments required by the director pursuant to this subsection shall be due on or before April fifteenth of the year for the preceding calendar year and quarterly returns and payments shall be due on or before the last day of the month following each calendar period of three months. Upon the taxpayer's request, the director may allow the filing of such returns and payments on a monthly basis. If a taxpayer elects to file a monthly return and payment, such return and payment shall be due on or before the twentieth day of the succeeding month.

Section 144.655.4, RSMo. Business Aviation never filed a sales tax or use tax return with the Missouri Department of Revenue. App. A-3 (LF 127, ¶16).

The Department added a penalty (additions) to Petitioners' assessments (see Jt. Exs 2-8) as authorized by §144.665, RSMo, which provides in pertinent part that:

> 1. In case of failure to file any return required under sections 144.600 to 144.745 on or before the date prescribed therefor (determined with regard to any extension of time for making a return), unless it is shown that such failure is due to reasonable cause and not the result of willful neglect, evasion, or fraudulent intent, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is not for more than one month, with an additional five percent for each additional month, or fraction thereof, during which such failure continues, not exceeding twenty-five percent in the aggregate…

§144.665.1 RSMo.[12]

Under *Hewitt Well Drilling & Pump Serv., Inc. v. Dir. of Revenue*, 847 S.W.2d 795 (Mo. banc 1993) and §144.665.1, the taxpayer has the burden of showing that it was not willfully negligent in failing to file a use tax return. *Hewitt* at 798-99; §144.665.1 RSMo. " 'Willful' " means "intentional or self-

[12] The Commission's Decision cited a different penalty statute, §144.250.1, RSMo, that applies to failures to file sales tax returns (see App. A-26, LF 150). That appears to be a clerical error, because the Commission then discussed this Court's analysis in *Hewitt Well Drilling & Pump Serv., Inc. v. Dir. of Revenue*, 847 S.W.2d 795 (Mo. banc 1993), concerning the standard for imposition of penalties under §144.665.1 for failing to file a use tax return, *Hewitt* at 798-99 (App. A-26 through A-28, LF 150-52), and applied that standard in finding that Petitioners were subject to additions to use tax (App. A-28 through A-29, LF 152-53). The Commission also cited *Conagra Poultry Co. v. Dir. of Revenue*, 862 S.W.2d 915 (Mo. banc 1993), which applied *Hewitt* to a penalty under §144.250.1. *Conagra* at 918-19.

determined." *Hewitt*, 847 S.W.2d at 799, *citing Webster's Third New Int'l Dictionary* (1986). "This Court has found willful neglect under §144.665.1, where taxpayers, in the absence of good faith, failed to file sales or use tax returns." *Hewitt* at 799.

Business Aviation does not dispute that it presented no testimony to attempt to show that it had a good faith belief that no Missouri sales or use tax was due on its purchase of the Aircraft. See Apps' Br. at 39; see App. A-29, LF 153. That distinguishes this case from *Hewitt*, in which the Commission "found that Hewitt's president believed that the purchases of the well-drilling rig and the other items were not subject to consumer use tax. Implicit in this finding is that Hewitt's belief was held in good faith." 847 S.W.2d at 799.

Pointing to a Kansas Department of Revenue Aircraft Exemption Certificate form that Vaughn Zimmerman appears to have filled out and signed on behalf of Business Aviation (Jt. Ex. 11), Business Aviation argued below—and argues here—that it filled out the Kansas form and gave it to Cessna because Business Aviation believed that it owed no sales or use tax due to sales tax exemptions. App. A-27 (LF 151); Apps' Br. at 38. But there was no testimony or other evidence concerning Business Aviation's intention. See App. A-27 through A-29 (LF 151-53). It is unclear, on the face of Joint Exhibit 11, that Business Aviation met the criteria for an exemption from Kansas sales and use tax. App. A-28, A-29; see Resp't's Br. at 9. Further, the *Kansas*

Department of Revenue Aircraft Exemption Certificate form completed by Vaughn Zimmerman is not evidence that any Petitioner had a good faith belief that no *Missouri* use tax was due on Business Aviation's purchase of the Aircraft. App. A-28 through App. A-29. And "[a]s the Director points out, the certificate is facially inconsistent with Petitioners' currently alleged exemption." App. A-29 (LF 153).

Business Aviation notes that, in *Sipco*, this Court upheld a penalty on the failure to pay use tax on natural gas used outside the singer because there was no attempt to justify that failure, but found the taxpayer's arguments concerning its failure to pay use tax on natural gas that was used in its singer reasonable, and reversed the penalties with respect to that natural gas. 875 S.W.2d at 543. *Sipco* also referenced the *Hewitt* standard for willful neglect. *Id.*, *quoting Hewitt* at 799. It is not clear from reading *Sipco* that this Court intended to change the standard for willful neglect established in *Hewitt*. Although this Court's opinion in *Sipco* did not discuss any testimony or Commission findings concerning any good faith belief the taxpayer may have had that natural gas purchased for use in its singer was exempt from use tax, the conclusion of the opinion includes the statement that "[t]he assessment of penalties is affirmed as to 50% of the natural gas and reversed as to the remaining 50% that Sipco believed in good faith to be exempt." *Sipco*, 875 S.W.2d at 543.

Conagra Poultry Co., which involved the imposition of a penalty under §144.250.2, RSMo, for failure to pay sales tax on certain purchases, *see Conagra*, 862 S.W.2d at 918, also cited the *Hewitt* standard. 862 S.W.2d 915 at 918-19. This Court should apply the *Hewitt* standard for willful neglect in failing to file a use tax return here. Under that standard, a taxpayer has the burden of making an evidentiary showing that it had a good faith belief that it was not required to file a Missouri sales or use tax return, and did not owe Missouri sales or use tax on the purchase. *Hewitt*, 847 S.W.2d at 799; *Conagra*, 862 S.W.2d at 918-19. Business Aviation has failed to satisfy that standard. This Court should affirm the imposition of $14,287.50 in penalties or statutory additions.

CONCLUSION

For the reasons stated above, Business Aviation failed to show that its purchase of the Aircraft qualified for one of the Missouri use tax or sales tax exemptions that Business Aviation relied upon. This Court should affirm the joint and several liability of Appellants for $57,150 in unpaid use tax on Business Aviation's purchase of the Aircraft, plus the imposition of penalties or statutory additions in the amount of $14,287.50 and interest at the statutory rate.

Respectfully Submitted,

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I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 9,935 words exclusive of cover, signature block, and certificates.

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