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,

The Director.

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

APPELLANTS' REPLY BRIEF

HUSCH BLACKWELL LLP

LOWELL D. PEARSON, #46217
235 East High Street, P. O. Box 1251
Jefferson City, MO 65102
Telephone: (573) 635-9118
Facsimile: (573) 634-7854
Email: lowell.pearson@huschblackwell.com

MICHAEL A. COSBY, #57253
LAURA C. ROBINSON, #67733
901 E. St. Louis, Ste. 1800
Springfield, Missouri 65806
Telephone: (417) 268-4000
Facsimile: (417) 268-4040
Email:michael.cosby@huschblackwell.com
laura.robinson@huschblackwell.com

Attorneys for Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 3

ARGUMENT 5

I. BUSINESS AVIATION'S LEASE TO BURGESS WAS A SALE FOR RESALE AND SO BUSINESS AVIATION'S PURCHASE OF THE AIRCRAFT IS EXEMPT FROM TAX 6

A. *Five Delta Alpha* relied upon *Brambles* to resolve whether a lease constitutes a sale for resale, and *Brambles* relied upon *Sipco* 7

B. Burgess did pay a measurable pecuniary benefit to Business Aviation for the right to use the Aircraft 9

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN FINDING THAT BUSINESS AVIATION'S PURCHASE OF THE AIRCRAFT WAS NOT EXEMPT FROM TAX BECAUSE THE RIGHT TO USE THE AIRCRAFT WAS FULLY TRANSFERRED TO BURGESS 17

III. APPELLANTS ARE NOT LIABLE FOR PENALTIES OR ADDITIONS UNDER SECTION 144.665.1 BECAUSE APPELLANTS WERE NOT WILLFULLY NEGLIGENT IN FAILING TO FILE A USE TAX RETURN .. 22

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 26

CERTIFICATE OF SERVICE 27

TABLE OF AUTHORITIES

Page

Cases

Brambles Industries, Inc. v. Director of Revenue, 981 S.W.2d 568 (Mo. banc 1998) 7, 8, 9, 12

Brinker Missouri, Inc. v. Director of Revenue, 319 S.W.3d 433 (Mo. banc 2010) 7, 9

Conagra Poultry Co. v. Dir. of Revenue, 862 S.W.2d 915 (Mo. banc 1993) 22, 23

Five Delta Alpha, LLC v. Dir. of Revenue, 458 S.W.3d 818 (Mo. banc 2015) 6, 7, 9, 12, 19, 20, 21

Hewitt Well Drilling & Pump Serv., Inc. v. Dir. of Revenue, 847 S.W.2d 795 (Mo. banc 1993) 22

Krispy Kreme Doughnut Corp. v. Dir. of Revenue, 358 S.W.3d 48 (Mo. banc 2011) 10

Sipco, Inc. v. Director of Revenue, 875 S.W.2d 539 (Mo. banc 1994) .. 7, 8, 9, 12, 16, 22

State v. Moore, 303 S.W.3d 515 (Mo. banc 2010) 10

Regulations

26 U.S.C. § 167(a)(1) 20

26 U.S.C. § 167(a)(2) 20

12 CSR 10-108.700(2)(A) 11

Statutes

Section 144.018.1, RSMo 6, 19, 24

Section 144.018.1(4), RSMo 6

Section 144.030.2, RSMo 19

Section 144.030.2(20), RSMo Supp. 2010 6

Section 144.605(7), RSMo 10

Section 144.605(8), RSMo 10, 12, 14

Section 144.665.1 22

Other

BLACKS LAW DICTIONARY 349 (9th ed. 2009) 11

ARGUMENT

The Administrative Hearing Commission (the "Commission") found that Business Aviation, LLC's ("Business Aviation") purchase of the Aircraft at issue here did not qualify for a tax exemption because the lease was not a sale for resale. The Commission's rationale was that the lease was not a sale for resale because the full amount of rent required by the lease was not paid.

The Director now argues that (1) the use of the Aircraft was not fully transferred in exchange for valuable consideration, and (2) the right to use the Aircraft was not fully transferred from Business Aviation to Burgess Aircraft Management, LLC ("Burgess").[1] The Commission previously rejected this argument, and this Court should as well. *See LF p. 145 ("**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 not pay Business Aviation the $900 per flight hour lease rate…**").* Business Aviation fully transferred the right of use to Burgess and in exchange Burgess paid Business Aviation valuable consideration. Thus, the purchase of the Aircraft by Business Aviation is exempt from tax.

[1] Burgess Aircraft Management, LLC is referred to as "BAM" by the Director in his brief, and as "Burgess" in Appellants' briefs. *See Director's Brief, p. 7.* BAM and Burgess are the same entity.

I. BUSINESS AVIATION'S LEASE TO BURGESS WAS A SALE FOR RESALE AND SO BUSINESS AVIATION'S PURCHASE OF THE AIRCRAFT IS EXEMPT FROM TAX.

The exemption that applies here is based on clear statutory authority as applied by this Court, most recently in 2015. The statutes allow for an exemption as follows: 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,*[2] *RSMo.*[3] Thus, Business Aviation's purchase of the Aircraft is exempt from Missouri use tax if it is purchased for the purpose of resale and that resale is exempt from tax. A lease can be a sale for resale. *Five Delta Alpha, LLC v. Dir. of Revenue*, 458 S.W.3d 818, 822 (Mo. banc 2015). 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.*[4] Here, Business Aviation purchased the Aircraft for the purpose of leasing (the resale) the Aircraft to Burgess (a common carrier) so that

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[2] The Director pointed to a "typographical error" in Appellants' *Initial Brief*. *Director's Brief, p.* 21. As the Director stated, the correct exemption is section 144.018.1(4) "Subject to tax but exempt under this chapter."

[3] 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.

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

Burgess could use the Aircraft in its aircraft charter operations (interstate commerce). The resale (the lease from Business Aviation to Burgess) is exempt from tax (leased to a common carrier for use in interstate commerce). Thus, the original purchase of the Aircraft is exempt from tax.

A. *Five Delta Alpha* relied upon *Brambles* to resolve whether a lease constitutes a sale for resale, and *Brambles* relied upon *Sipco*.

The first argument made by the Director is that *Brinker Missouri, Inc. v. Director of Revenue*, 319 S.W.3d 433 (Mo. banc 2010) is more relevant than either *Sipco, Inc. v. Director of Revenue*, 875 S.W.2d 539 (Mo. banc 1994) or *Brambles Industries, Inc. v. Director of Revenue*, 981 S.W.2d 568 (Mo. banc 1998). This is a curious argument because *Brinker* does not discuss consideration in any more detail than *Sipco* or *Brambles*, and *Brinker* does not discuss whether a lease is a sale for resale at all. *See Director's Brief, p. 24*. Moreover, this Court in *Five Delta Alpha* relied upon *Brambles* in its discussion of whether a lease constitutes a sale for resale, and the test in *Brambles* came from *Sipco*. 458 S.W.3d at 822. *Five Delta Alpha* did not rely on (or even cite to) *Brinker*.

The Director argues that *Sipco* and *Brambles* are not applicable to the determination of consideration paid in a lease because they are "factored in" cases. *Director's Brief, p. 27-29*. However, *Five Delta Alpha* deals with the issue of whether the lease of an aircraft is a sale for resale, and it specifically quoted *Brambles* to define whether a lease was a sale for resale. 458 S.W.3d at 820. The *Brambles* Opinion, in determining whether the sale of packaging material was a sale for resale, stated that "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." *Brambles*, 981 S.W.2d at 571. Similarly, here, the question that the Commission raised is whether Burgess paid Business Aviation consideration for the right to use the Aircraft. *LF p. 144*. [5]

This Court in *Brambles* concluded that consideration was paid because the customer paid the same for the soap whether the pallet was sold or leased. 981 S.W.2d at 571. 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, this Court also had to determine whether consideration was paid. 875 S.W.2d at 540. 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*.

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[5] The following citations are used throughout this brief: Legal File ("*LF*"); Transcript ("*Tr.*"); Joint Exhibit ("*J. Ex.*"); Petitioners' Exhibit ("*P. Ex.*"); Respondent's Exhibit ("*R. Ex.*"); Appendix ("*App.*").

Accordingly, both *Sipco* and *Brambles* offer guidance to this Court in determining whether the lease from Business Aviation to Burgess was a sale for resale as the question is whether consideration was paid. This Court in *Five Delta Alpha* relied upon *Brambles* in determining whether a lease was a sale for resale, and *Brambles* in turn relied upon *Sipco*. *See Five Delta Alpha*, 458 S.W.3d at 822; *Brambles*, 981 S.W.2d at 570. Moreover, the Director has not offered another case that discusses the determination of consideration paid.

B. Burgess did pay a measurable pecuniary benefit to Business Aviation for the right to use the Aircraft

The Director discusses consideration on pages 24 to 27 of the *Director's Brief*, as well as in Section I.B at pages 29 to 35. To enhance the clarity of, and reduce repetition of, Appellants' reply, Appellants address all of the Director's arguments about consideration in this section.

While the Commission focused on the "to be paid" language for a sale found in the statutes, the Director argues that *Brinker* says to have a sale, "consideration must be paid." *Director's Brief, p. 24*. In fact, *Brinker* discusses whether a transfer of tangible property occurred; the extent of its discussion on consideration is the following statement:

> As such, for 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, 319 S.W.3d at 439 (emphasis added). As argued in Appellants' *Initial Brief* and again below, the language "paid or to be paid" is critical.

The "paid or to be paid" language comes from the revenue statute: a sale is "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***…" *Section 144.605(7), RSMo.(emphasis added)*. Every word in the statute "must be given effect because '[w]hen interpreting a statute, this Court must give meaning to every word or phrase of the legislative enactment.'" *Krispy Kreme Doughnut Corp. v. Dir. of Revenue*, 358 S.W.3d 48, 52–53 (Mo. banc 2011) (citing *State v. Moore*, 303 S.W.3d 515, 520 (Mo. banc 2010)). The decision below requires this Court to ignore the "consideration paid" language, while the *Director's Brief* requires this Court to ignore the "to be paid" language.

The Director then argues that Appellants' discussion of consideration is irrelevant because it did not require consideration to be paid, as required under the statute. *Director's Brief, p. 25-27.* However, Appellants argue that no specific value of consideration is required under the statute based on the definition of consideration. While the statute requires something that is "paid or to be paid," which generally would be a monetary payment,[6] the term "consideration" was used in the statute and defined

[6] The Director argues that "consideration" under the statute requires a "monetary payment." *Director's Brief, p. 25*. However, section 144.605(8) defines "sales price" as "the consideration…paid or given, or contracted to be paid or given…whether paid in

elsewhere. The phrase "paid or to be paid" was added to consideration, and thus the concern of the Director – i.e. that the forbearance of ownership rights in the Aircraft as consideration – is addressed.

Moreover, Appellants did not argue that the phrase "paid or to be paid" was superfluous language; they argued in their *Initial Brief* that because the case law definition of "consideration" does not require a specific amount to qualify as consideration, the amount of consideration paid or to be paid also does not have to be a certain sum. *Appellants' Initial Brief, pp. 34 – 36.*

The Director then argues that the term "valuable consideration" must be used in the Court's analysis of determining whether a lease constitutes a sale for resale because under the statute a sale requires "consideration paid or to be paid." *Director's Brief, p. 30.* As pointed out in Appellant's *Initial Brief*, 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" for a lease, but now the Director argues that the word "valuable" must be present for a lease to be considered a sale.

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money or otherwise, and any amount for which credit is given to the purchaser…" Thus, consideration does not have to be a monetary payment, as it would be illogical to require a sale to have a "monetary payment" but allow the sales price to be "paid in money or otherwise."

The Director relies on BLACKS LAW DICTIONARY 349 (9th ed. 2009) to define "valuable consideration" in relevant part as consideration that relates to either a pecuniarily measurable benefit or detriment. *Id.* It is important to note that the definition of "sales price" in the same statute refers to consideration, "whether paid in money or otherwise." *Section 144.605(8).* Thus, to require the definition of consideration to be "valuable consideration" requiring a monetary payment would make the definition of "sales price" nonsensical – while the sales price does not have to be paid in money, a sale only occurs if an amount of money is paid or to be paid.

Appellants recognize that the statute requires consideration that is "paid or to be paid," and that in this case, the consideration that was "paid or to be paid" was a monetary amount. The question here has become whether the amount of the consideration actually paid is sufficient to meet the third prong of the *Sipco* test requiring the transfer to be in exchange for "a consideration paid or to be paid." *Sipco*, 875 S.W.2d at 542. The Commission held that the amount of consideration actually paid did not equal the amount required by the Lease, and so the consideration paid was not "valuable consideration" and therefore did not meet the *Sipco* test. *LF p. 148*. The Director argues that the amount of consideration paid is not enough to confer a "measurable pecuniary benefit" to Business Aviation because Business Aviation did not make a profit, and thus does not qualify for as a sale. *Director's Brief, p. 31*. Neither is correct.

The Commission found that, "it 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*. That should be the end of the discussion under the *Sipco*/*Brambles*/*Five Delta Alpha* test as they only require "consideration paid or to be paid." *Five Delta Alpha*, 458 S.W.3d at 822; *Brambles*, 981 S.W.2d at 570; *Sipco*, 875 S.W.2d at 540. While the Commission ultimately determined that the consideration paid was not "valuable consideration" because it was not the same amount as required by the lease, the Director now makes a new and different argument.

The Director argues that Burgess "did not pay a measurable pecuniary benefit to Business Aviation as consideration for the right to use the Aircraft…" *Director's Brief, p. 31*. The Director claims that Business Aviation's cost to fly the Aircraft was $595 per hour, but it received $434.77 in payment from Burgess and so that payment is not a "measurable pecuniary benefit." *Director's Brief, p. 33*.

The Director also argues that the Aircraft was not chartered often enough to entities outside the Zimmerman companies "to result in a net positive payment to Business Aviation for the chartering of the Aircraft." *Director's Brief, p. 34*. The Commission found that the analysis of the percentage of time that each entity chartered the Aircraft was irrelevant to whether valuable consideration was paid. *LF p. 135 n.19*. The Director now tries to argue that the analysis is relevant to the total amount of consideration paid. *Director's Brief, p. 34*. However, the correct analysis is whether consideration was "paid or to be paid," not how much consideration was "paid or to be paid."

The Director seems to argue that a "measurable pecuniary benefit" is only paid if the receiving company makes a profit. *Director Brief, p. 33*. By focusing on whether

Business Aviation made a profit or received more than the cost to fly, the Director ignores the second half of its own definition that valuable consideration can be a measurable pecuniary detriment to a party. Thus, the fact that Burgess paid $434.77 per hour during some charters and $900 per hour during others shows a measurable pecuniary detriment to Burgess. Further, no statute or case law shows a requirement that a company make a profit to show that consideration is paid or to be paid.

Moreover, the Director bases his argument that Business Aviation did not make a profit on a projection spreadsheet that Mr. Zimmerman created before purchasing the Aircraft. *See Tr. 125:11-17*. This spreadsheet is simply a projection of what Mr. Zimmerman thought might be paid, created prior to the purchase of the Aircraft. *See Tr. 126:17-127:1*. This spreadsheet does not have a breakdown of a cost per flight hour except what it might cost for a Business Aviation to charter the Aircraft. *See Tr. 126:2-10*. However, even assuming the spreadsheet is accurate and Business Aviation did not make a profit overall, the test is whether there was "consideration paid or to be paid," not whether Business Aviation made a profit.

The Director argues that Burgess "did not pay Business Aviation for the flight hours that the Aircraft accumulated from Zimmerman Properties or the other Zimmerman Companies chartering the Aircraft." *Director's Brief, p. 32.* However, the Director did acknowledge that the amount is reflected as being paid by Burgess to Business Aviation on the monthly lease summaries. *Director's Brief, p. 32; see, e.g. J. Ex. 15, pp. 088, 097, 106, 115*. As section 144.605(8) shows, consideration includes "any amount for which credit is given to the purchaser by the vendor." To the extent the Director argues that

consideration was not paid because Burgess gave Business Aviation a credit on the monthly summary rather than a check, the Director is incorrect. The credit that Burgess gave Business Aviation on the monthly summary is still "consideration paid."

Even under the Director's definition of consideration as a "monetary pecuniary benefit," the credit from Burgess would still be consideration. For example, on the November 2012 summary, Business Aviation owed $11,140.62 for monthly charges. *J. Ex. 15, p. 106*. However, the lease income totaled $25,345.94. For that month, Burgess paid Business Aviation $14,205.32.[7] Even looking at the October 2012 summary, the total owed by Business Aviation was $19,190.39, and the lease income paid from Burgess to Business Aviation was $7,826.40. *J. Ex. 15, p. 097*. Thus, Business Aviation only owed Burgess $11,363.99. The credit of approximately $7,826.40 was still consideration paid, and was a monetary pecuniary benefit to Business Aviation as they only paid $11,363.99 instead of $19,190.39.

While the Commission ruled that the amount of consideration paid must equal the amount of consideration to be paid to be valuable consideration, the Director argues that "consideration paid" must be a "measurable pecuniary benefit" that results in a profit to the Lessee. However, Burgess did either pay or credit Business Aviation between $434

[7] While the Director argues that Burgess did not pay Business Aviation for the flight hours, when the lease income exceeded the amount owed by Business Aviation in a month, Burgess did pay Business Aviation the excess. *See Tr. 114:13-20; 135:5-9; 136:1-9*.

and $900 per flight hour, and thus consideration was paid under the Lease. Accordingly, the Lease qualifies as a sale for resale, and Business Aviation's purchase of the Aircraft is exempt from tax.

To summarize on this point, both the Commission's decision and the *Director's Brief* are irreconcilable with the statutes and the case law. The Commission ignored the plain statutory and *Sipco* language allowing either "consideration paid or to be paid" for a sale; the Director ignores the consideration "to be paid" language, and adds a new concept of profit found in no statute or case.

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN FINDING THAT BUSINESS AVIATION'S PURCHASE OF THE AIRCRAFT WAS NOT EXEMPT FROM TAX BECAUSE THE RIGHT TO USE THE AIRCRAFT WAS FULLY TRANSFERRED TO BURGESS.

In section II of the Brief, the Director argues that Business Aviation did not fully transfer the right to use the Aircraft to Burgess. *Director's Brief, pp. 36-40.* The Director points to paragraphs in the Lease, excerpts of testimony by Mr. Burgess, the fact that Burgess gave the Zimmerman companies discounts when they chartered the Aircraft, that Business Aviation took depreciation deductions on its tax returns, that Business Aviation's members chartered the Aircraft, that Business Aviation "held the Aircraft" which produced an income, and that Business Aviation hangared the Aircraft at the Burgess Aircraft facility and paid to hangar the Aircraft there.

The Director first argues that the provisions of the Lease and the testimony of Mr. Burgess show that Business Aviation retained rights over the Aircraft, precluding a finding that "the right of use was fully transferred." *Director's Brief, pp. 36-37.* However, as noted in Appellants' *Initial Brief*, the parties to the Lease believed that the Lease fully transferred the rights to use to the Aircraft from Business Aviation to Burgess. *See Appellants' Initial Brief, pp. 10 – 11.* The testimony of both Mr. Zimmerman and Mr. Burgess supports that conclusion. *Id.*

The Director partially quotes Mr. Burgess' testimony from the hearing in support of the argument that the Lease is not a true lease. *Director's Brief, p. 37.* However, when the cited testimony is read in full context, it is apparent that Mr. Burgess simply

states that the only way Business Aviation would have any control over the Aircraft would be to cancel the Lease, thus ***supporting*** the point that the right of use of the Aircraft was fully transferred under the Lease:

> Q: So could Mr. Zimmerman come over to where the plane is hangered and do anything with it without chartering it from you?
> A: No.
> Q: Has he ever attempted to do that?
> A: No.
> Q: Has he ever asked you if he could do that?
> A: No.
> Q: And if he did, would you let him?
> A: Well, he owns the aircraft. If he wants to do something else with it, then we're going to void the lease, take it off charter, and he can go do with it whatever he wants. But at that point in time, he's exercising his rights to terminate the lease and the lease agreement. But up to that point in time, no, he can't.
> Q: So absent terminating the lease, he has no ability to use the plane?
> A: That's correct.

Tr. 51:6-23.

> Q: And so that's a little different than Burgess Aircraft Management having exclusive control of the aircraft at all times, correct?
> A: Well, if we were to lease the aircraft to Part 91 operations, we'd have issues with our 135 certificate. So we do not lease that back to them in that situation. They always have the operational – or the option of taking the airplane off lease or calling me up and saying, 'We've hired our own pilot, we want you to continue to manage the airplane, but we no longer want to have it on a charter fleet,' at which point we became a management company, they hire their own crew, and they no longer fly charter.

Tr. 84:13-24.

> Q: It's available for them to use by calling you and saying, "Mark, we want to go to Little Rock," correct?
> A: If Business Aviation or one of its members called us up and says, "I want to charter this aircraft someplace," we would put them a price structure together and offer them a charter quote. If Business Aviation called up and says, "We don't want to charter

> the airplane, we want to get on the airplane and use it," then I'm going to have very distinct objections because now we're moving into 91 operations, which we don't do on that aircraft.
>
> At that point in time, we have to restructure everything, we have to turn the airplane back into a management agreement, and all this goes away, and we no longer charter the aircraft. They always have the right. They own the airplane. They have the right to do with it whatever they want.
>
> But at some point in time, that right reaches into my legal obligations as an air carrier; and I can't have them doing both. I can't have them flying Part 91 and flying Part 135. It doesn't work that way in this agreement, in this situation. And to further clarify, Business Aviation has never chartered this aircraft.

Tr. 86:4-23.

It is clear from the testimony that under the Lease, Business Aviation has no right to use the Aircraft; that right has been fully transferred to Burgess by the Lease. Because the right to use the Aircraft has been fully transferred to Burgess by the Lease, the transaction satisfies the *Five Delta Alpha* requirement and therefore qualifies for tax exemption under sections 144.018.1 and 144.030.2 of the Missouri Revised Statutes.

The Director next argues that Burgess "did not actually charge the Zimmerman companies for the flight hours incurred when the Zimmerman companies used the Aircraft," and that Business Aviation "used its bargaining power as the owner of the Aircraft" to get a discounted rate for its members when chartering the Aircraft, which shows that Business Aviation "used" the Aircraft. *Director's Brief, p. 39, 40.* This is irrelevant because whether Burgess gives the members of Business Aviation a discount on their chartered flights does not impact whether Business Aviation "used" the Aircraft. Additionally, Mr. Burgess testified that the members of Business Aviation received a "good customer discount" regardless of what aircraft they chartered because they

frequently charter aircraft and not because Business Aviation owned the Aircraft. *See Tr. 68:22-69:14.*

The Director next argues that taking a depreciation deduction on federal income tax shows Business Aviation's exercise of a right or power over the Aircraft, which shows that Business Aviation "used" the Aircraft and did not fully transfer its use to Burgess. *Director's Brief, p. 39.* The argument is based on two federal statutes. One permits a depreciation credits for property used in the trade or business. *26 U.S.C. § 167(a)(1).* The second permits a depreciation deduction for "property held for the production of income." [8] *26 U.S.C. § 167(a)(2). Id.* To accept the Director's argument, this Court would have to overrule *Five Delta Alpha* which held that a lease can be a sale for resale and the test for use tax is transfer of the right to use. *Five Delta Alpha*, 458 S.W.3d at 822. Depreciation on an income tax return is therefore irrelevant.

Finally, the Director argues that Business Aviation chose the hangar space of the Aircraft and paid to hangar the Aircraft, and so exercised a right or power incident to ownership. *Director's Brief, p. 40.* However, Burgess stored the Aircraft in its own hangar. *J. Ex. 9*, ¶ 6(e). Burgess determined when the Aircraft would leave the hangar to fly and when it would stay in the hangar. *Tr. 30:6-8.* Business Aviation had no control over when the Aircraft was in operation and when the Aircraft was in the hangar, and so

[8] The Director admits that the Aircraft produced income, which was all from the Lease, but denies this income is enough to be "consideration paid."

Business Aviation did not "use" the Aircraft. Paying to hangar the Aircraft is a cost of ownership, not an "exercise of right or power" incident to ownership.

In sum, Business Aviation fully transferred the right to use the Aircraft to Burgess, as required by *Five Delta Alpha*. 458 S.W.3d at 822. The deduction of depreciation or the choice of hangar space for the Aircraft do not change this. In fact, the Commission found that "Business Aviation transferred the right to use the Cessna to Burgess." *LF p. 144; App. 20.* Accordingly, the right to use the Aircraft was fully transferred for consideration paid, and the purchase of the Aircraft by Business Aviation is exempt from tax.

III. APPELLANTS ARE NOT LIABLE FOR PENALTIES OR ADDITIONS UNDER SECTION 144.665.1 BECAUSE APPELLANTS WERE NOT WILLFULLY NEGLIGENT IN FAILING TO FILE A USE TAX RETURN.

The Director argues that because there is no testimony by Business Aviation that it had a good faith belief that it did not have to file taxes, it cannot show an absence of willful neglect. *Director's Brief, p. 41-46.* The taxpayer has the burden to show that its failure to file tax returns was not due to willful negligence. *Hewitt Well Drilling & Pump Serv., Inc. v. Dir. of Revenue*, 847 S.W.2d 795, 799 (Mo. banc 1993). However, this Court has never stated that testimony regarding a good faith belief is required. *See Sipco, Inc. v. Dir. of Revenue*, 875 S.W.2d 539, 543 (Mo. banc 1994); *Conagra Poultry Co. v. Dir. of Revenue*, 862 S.W.2d 915, 919 (Mo. banc 1993).

While the Court in *Hewitt* did find that the taxpayer was not willfully negligent based on the taxpayer's testimony, the taxpayer's testimony is not a requirement to establish the absence of willful negligence. *Hewitt*, 847 S.W.2d at 799; *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.*

In *Conagra*, the claimant pointed to the fact that it paid sales taxes on other items that it did not claim were tax exempt, and that it treated the items it believed were tax exempt the same in Missouri as it did in other states. *Conagra*, 862 S.W.2d at 919. This Court found that was enough to establish a lack of willful negligence. *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. Further, Business Aviation's submission of the tax exemption certificate showed that they intended to use the Aircraft in interstate commerce and that they did not believe they owed tax on the purchase of the Aircraft. *See J. Ex.11*. 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 Lease of the Aircraft meets the requirements as a sale for resale in that it is a transfer of the right to use the Aircraft in exchange for consideration paid or to be paid. The Aircraft was leased to a common carrier for use in interstate commerce and so meets the exemption under section 144.030(20). Thus, purchase of the Aircraft is exempt from tax under section 144.018.1 of the Missouri Revised Statutes. Further, the Appellants showed an absence of willful neglect and thus are not liable for penalties and additions. Accordingly, the Commission's finding should be reversed.

HUSCH BLACKWELL LLP

LOWELL D. PEARSON, #46217
235 East High Street, P. O. Box 1251
Jefferson City, MO 65102
Telephone: (573) 635-9118
Facsimile: (573) 634-7854
Email: lowell.pearson@huschblackwell.com

MICHAEL A. COSBY, #57253
LAURA C. ROBINSON, #67733
901 E. St. Louis, Ste. 1800
Springfield, Missouri 65806
Telephone: (417) 268-4000
Facsimile: (417) 268-4040
Email:michael.cosby@huschblackwell.com
laura.robinson@huschblackwell.com

Attorneys for Appellants

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 4,964 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 April 9, 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:

Emily A. Dodge
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Email: emily.dodge@ago.mo.gov

Benjamin C. Slawson
Senior Counsel
Missouri Department of Revenue
Truman State Office Building
301 West High, Room 670
P.O. Box 475
Jefferson City, MO 65105-0475
Email: Benjamin.slawson@dor.mo.gov

Attorneys for The Director

/s/ *Lowell D. Pearson*