

**No. SC98409**

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**IN THE MISSOURI SUPREME COURT**

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**DIRECTOR OF REVENUE, STATE OF MISSOURI,**

**Appellant,**

**v.**

**APLUX, LLC AND PAUL AND ANN LUX ASSOCIATES, L.P.,**

**Respondents.**

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**From the Administrative Hearing Commission of Missouri  
The Honorable Sreenivasa Rao Dandamudi, Commissioner**

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**RESPONDENTS' BRIEF**

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## STATEMENT OF FACTS

This case involves an appeal from Missouri Compensating Use Tax Assessments issued on the purchase of two aircraft, both of which were leased to a third-party, while one was simultaneously leased to a common carrier for use in interstate commerce.

### **A. Business Entities at Issue.**

Respondent APLUX, LLC (“APLUX”) is a limited liability company, organized under the laws of the State of Missouri on July 21, 2006. *LF p. 44, ¶ 1.*<sup>1</sup> APLUX has no employees, and its business purpose is to own assets and make investments, specifically owning and leasing aircraft. *LF p. 44, ¶¶ 1, 2.* APLUX’s only current member is Luxco, but it was manager-managed by Donn Lux and Stephen Soucy. *LF p. 44, ¶¶ 2, 8.*

Paul & Ann Lux Associates, L.P. (“LP” and together with APLUX, “Respondents”) was a Missouri limited partnership, organized in 2004 and voluntarily dissolved and terminated on October 4, 2011. *LF p. 44, ¶ 3.* LP was a member of APLUX until it was dissolved. *LF p. 44, ¶ 4.* LP was issued assessments for use tax for the purchase of the Aircraft on August 21, 2015, almost four years after it was dissolved, because it was a member of APLUX. However, it was no longer a member of APLUX at the time the Excel was purchased.

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<sup>1</sup> 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.*”); Appellant’s Brief (“*Appl. Brief*”).

Luxco, Inc. (“Luxco”) is a corporation formed on March 25, 1958 under the laws of the State of Missouri. *LF p. 44, ¶ 5.* Its original name was the David Sherman Corporation, but its name was changed to Luxco, Inc. on October 28, 2005. *Id.* Luxco is a privately owned producer and marketer of distilled beverages and liqueurs, with locations and subsidiaries located across the United States. *LF p. 44, ¶ 6.* Donn Lux is the CEO and chairman of Luxco. *LF p. 44, ¶ 7.* Donn Lux owned 100% of the voting stock in Luxco through a trust, while the remaining non-voting shares of Luxco were spread among various trusts in favor of Mr. Lux, his siblings, their spouses, and his sons. *LF p. 44, ¶ 9.* Luxco reported federal income tax on its consolidated income tax return for Luxco and its four subsidiaries, including APLUX. *LF p. 45, ¶ 10.* APLUX depreciated its assets and Luxco reported the depreciation on its consolidated return. *LF p. 45, ¶ 11.* Donn Lux executed contracts for both APLUX and Luxco as part of his responsibilities as managing member of APLUX and CEO of Luxco. *LF p. 45, ¶ 13.*

Aero Charter, Inc. (“Aero Charter”) is a Missouri-based corporation located at the Spirit of St. Louis airport in Chesterfield, Missouri. *LF p. 45, ¶ 14.* Aero Charter manages aircraft, leases and charts aircraft, and provides fuel for aircraft. *LF p. 45, ¶ 15.* Aero Charter is a common carrier in Missouri and provides full-service private charters, with a U.S. Air Carrier Certificate issued by the Federal Aviation Administration (“FAA”) under the Federal Aviation Regulations (“FARs”). *LF p. 45, ¶¶ 14, 16.* As a common carrier, Aero Charter provides air charter transportation services to third parties under Part 135 of FARs. *LF p. 45, ¶ 17.* While Donn Lux is a

licensed pilot, he was not an employee of Aero Charter, and he had no contract with Aero Charter to provide pilot services. *LF p. 45, ¶ 18.*

### **B. Purchase and Lease of the TBM.**

APLUX purchased a 2011 Socata TBM 850 aircraft, Serial Number 588 (the “TBM”) from Cutter Southwest Aircraft Sales, L.L.C. in Texas on August 5, 2011 for \$3,220,000, solely for the purpose of placing the TBM under lease to Luxco. *LF pp. 43, 45-46, ¶ 19.* On August 15, 2011, APLUX and Luxco amended their Non-Exclusive Dry Lease Agreement to add the TBM to the agreement (the “TBM Lease”). *LF p. 46, ¶ 22.* The TBM Lease specifically transferred the rights of use of the TBM from APLUX to Luxco, and Luxco agreed to pay \$114,000<sup>2</sup> per year in rent to APLUX. *LF p. 46, ¶ 23.* Also on August 15, 2011, APLUX entered into an Aircraft Management Agreement for the TBM with Aero Charter (“TBM Management Agreement”). *LF p. 46, ¶ 24.* Under the TBM Management Agreement, Aero Charter provided maintenance and hangarage for the TBM and ensured it was ready for operations, while APLUX paid for the maintenance, insurance, management and hangar fees for the TBM. *LF p. 46, ¶¶ 26-27.*

After APLUX and Luxco executed the TBM Lease, Luxco took delivery and possession of the TBM in San Antonio, Texas and transported it to Aero Charter’s base of operations in Chesterfield, Missouri. *LF p. 46, ¶ 28.* APLUX remitted sales tax on the payments received for the TBM Lease but did not pay sales or use tax on the purchase of the TBM. *LF 46, ¶ 29.* While APLUX owned the TBM, it did not use, operate, or fly the TBM; Luxco had operational control of the TBM and only operated non-charter flights

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<sup>2</sup> This was determined by attorneys and accountants as a fair market rate. *LF p. 50, ¶ 56.*

through Aero Charter on the TBM. *LF p. 47, ¶ 30.* Only Luxco, its personnel, or persons related to or friends with Luxco personnel used the TBM for Part 91 flights,<sup>3</sup> besides the Part 91 flights by Aero Charter for maintenance and repositioning the TBM. *LF p. 47, ¶ 32.* Aero Charter billed APLUX for the maintenance, management, and hangar fees, but billed Luxco for its flights on the TBM.<sup>4</sup> *See, e.g., J. Ex. 38, pp. 2157, 2308, 2315.* Luxco recorded annual lease payments due to APLUX in its general ledger as an inter-company transaction with excess from lease payments over expenses returning to Luxco's line of credit. *LF p. 47, ¶ 35.*

### **C. Purchase and Lease of the Excel.**

APLUX purchased a second aircraft, a 1999 Cessna 560 XL, Serial Number 560-5049 (the "Excel" and together with the TBM, the "Aircraft") on January 5, 2012 in Kansas for \$3,150,000, solely for the purpose of placing the Excel under lease to Luxco and Aero Charter. *LF p. 47, ¶ 36.* Luxco advanced the money to purchase the Excel to APLUX from Luxco's operating account and corporate line of credit. *LF p. 47, ¶ 38.* APLUX entered into a non-exclusive lease agreement with Aero Charter on January 31, 2012 (the "Aero-Excel Lease"), under which APLUX transferred the right to use the Excel to Aero Charter for its charter operations, and Aero Charter agreed to pay rent to

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<sup>3</sup> Part 91 flights include flights for maintenance, repositioning the aircraft, and owner flights; they are not for hire under FARs. *LF p. 47, ¶ 31.*

<sup>4</sup> However, it was not uncommon for Aero Charter to misidentify the entity (APLUX or Luxco) to be billed or credited on account summaries or invoices. *LF p. 49, ¶ 53.*

APLUX at the rate of \$1,450 per flight hour per month that Aero Charter chartered the Excel under Part 135 of the FARs. *LF p. 48, ¶¶ 39, 40.* On the same day, APLUX and Aero Charter amended their management agreement to cover the Excel (the “Excel Management Agreement”), wherein Aero Charter provided management, maintenance, insurance, and hangarage for the Excel, which were paid by APLUX. *LF p. 48, ¶¶ 41, 42.*

APLUX executed a second, concurrent lease agreement with Luxco for the Excel, which incorporated the terms of the TBM Lease,<sup>5</sup> on February 1, 2012 (the “Luxco Lease”). *LF p. 48, ¶ 43.* The Luxco Lease transferred the right to use the Excel from APLUX to Luxco, and Luxco agreed to pay APLUX \$117,600 per year in rent. *LF p. 48, ¶ 44.* After APLUX closed on the Excel, Aero Charter took delivery of the Excel in Wichita, Kansas and transported it to Chesterfield, Missouri, where it was based at Aero Charter’s site of operations. *LF p. 48, ¶ 45.* APLUX paid tax on the lease payments from Luxco but did not pay tax on the purchase price of the Excel. *LF p. 49, ¶ 46.*

While APLUX owned the Excel, it did not operate or fly the Excel and it did not charter the Excel from Aero Charter. *LF pp. 49, ¶¶ 47, 48.* Aero Charter and Luxco had

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<sup>5</sup> The previously executed terms from the TBM Lease were contained in the Luxco Lease, including the annual rent payment of \$114,000 from Luxco to APLUX. *LF p. 48, ¶ 44.*

operational control of the Excel;<sup>6</sup> Aero Charter chartered the Excel under Part 135 while Luxco used the Excel for Part 91 flights if not in use by Aero Charter. *LF p. 49, ¶ 47, 49.* Aero Charter determined the charter fees for Part 135 charter flights without input from APLUX or Luxco. *LF p. 50, ¶ 55.* Aero Charter recorded the lease payments due to APLUX on a monthly account summary as an offset to any expenses incurred under the Excel Management Agreement; if the rental income for chartered flights exceed the management costs for the Excel, Aero Charter would send APLUX payment in the amount of rental income minus expenses. *LF p. 49, ¶¶ 51, 52.*

Both the Aircraft had Luxco company logos on their tails, and Luxco personnel considered them to be leased corporate Aircraft. *LF p. 50, ¶¶ 58, 59.* In July 2013, Luxco executed Aircraft Time Sharing Agreements for the Aircraft with various individuals related to the Lux family (“Time Share Individuals”), allowing them to schedule Part 91 (non-charter) flights on the Aircraft through Aero Charter under the Luxco Lease. *LF p. 50, ¶¶ 57, 60.* Luxco and the Time Share Individuals would schedule flights for the Aircraft through Aero Charter, and Aero Charter would code the personal flights differently on its statements to Luxco. *LF p. 50, ¶¶ 61-64.* Some of the Time

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<sup>6</sup> While the APLUX-Aero Charter management agreements stated that APLUX “will have and shall exercise Operational Control over each use of the Aircraft by” APLUX, APLUX never operated or used the Aircraft. *LF p. 53, ¶ 68; LF p. 47, ¶¶ 30, 32; LF p. 49, ¶¶ 47-48.*

Share Individuals would mistakenly reimburse APLUX (rather than Luxco) for expenses.

*LF p. 50, ¶ 65.*

#### **D. The Leases.**

The relevant sections from the Luxco Lease<sup>7</sup> state as follows:

2.1 Lease. Lessor agrees to lease to Lessee, and Lessee agree to lease from Lessor, the Aircraft, on the terms and conditions of this Agreement which shall govern each lease and use of the Aircraft by the Lessee. Lessee acknowledges that except during the period that Lessee has possession of the Aircraft, Lessee will have no right to use, possess, or otherwise have access to the Aircraft. Lessee further acknowledges that Lessee does not, and will not at any time, have a priority or preference to use, possess or lease the Aircraft over any other Person.

#### 2.2 Non-Exclusivity.

- (a) Lessee and Lessor acknowledge that the Aircraft is leased to Lessee on a non-exclusive basis, and that the Aircraft shall, at other times, be operated by Lessor and may be otherwise subject to lease to others during the Term.
- (b) In no event shall Lessor be liable to Lessee for unavailability of the Aircraft, or any loss of use thereof, or damages or costs resulting therefrom, for any reason whatsoever, including by reason of any scheduled or unscheduled inspections, maintenance or repair of the Aircraft, or any delays in completion thereof.

3.3 Scheduling. Lessee's use of the Aircraft during the Term of this Agreement is non-exclusive. The parties agree as follows:

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<sup>7</sup> Joint Exhibit 13, the most current lease during the relevant time frame, is quoted here.

Joint Exhibit 11 was the original lease between Luxco and APLUX, and Joint Exhibit 12 added the TBM. The language in the leases is almost identical. *See LF p. 52, n.12.*

- (a) Use by Other Lessees. Lessor and Lessee agree that Lessor may lease the Aircraft to one or more other lessees during the Term on a non-exclusive basis, that Lessor has the absolute right to determine the availability of the Aircraft for lease to Lessee or any other party. Lessor agrees that at such times as the Aircraft is not undergoing maintenance or being used by Lessor, Lessee and all other lessees of the Aircraft shall be scheduled on a “first come, first served” basis; provided, however, that Lessee and all other lessees shall cooperate in good faith on all scheduling matters and shall use their respective best efforts to avoid scheduling conflicts involving the Aircraft.
- (b) Designation of Schedule Keeper. Lessor hereby designates Aero Charter, Inc. as the Schedule Keeper. Lessor shall advise Lessee of any change in the Schedule Keeper.

5.1 Title and Registration. Title to the Aircraft shall remain vested in Lessor at all times during the Term to the exclusion of Lessee and Lessor shall have only such rights as shall be specifically set forth herein. Lessor represents that as of the date of this Agreement the Aircraft is, and throughout the Term the Aircraft shall remain, lawfully registered in Lessor’s name as a civil aircraft of the United States.

5.2 Use and Operation. Except as otherwise expressly provided herein, Lessee shall be solely and exclusively responsible for the use, operation and control of the Aircraft during each period of the Term commencing when the Aircraft has been delivered to Lessee and terminating when the Aircraft has been returned to the Lessor in the condition required hereunder...

5.6 Operational Control. THE PARTIES EXPRESSLY AGREE THAT LESSEE SHALL AT ALL TIMES WHILE THE AIRCRAFT IS IN ITS POSSESSION DURING THE TERM MAINTAIN OPERATIONAL CONTROL OF THE AIRCRAFT, AND THAT THE INTENT OF THE PARTIES IS THAT THIS AGREEMENT CONSTITUTE A “DRY” OPERATING LEASE...<sup>8</sup>

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<sup>8</sup> All capital letters are included in the leases. See *J. Ex. 13*.

The relevant sections from the Aero-Excel Lease<sup>9</sup> state as follows:

2.3 Each operation of the Aircraft by Owner [APLUX] or a lessee of the Aircraft, other than Operator [Aero Charter], including all maintenance flights, training flights, ferry or positioning flights to accommodate Owner or Owner's lessee's operation of the Aircraft, or other similar flights during which the Aircraft is not being operated by Operator as a Charter Flight (each, an "Owner Flight") shall be conducted in accordance with FAR Part 91 and as such may not involve the provision of air transportation for any kind of compensation or reimbursement, except as might be permitted by FAR Part 91.501. Nothing contained in the Agreement is intended or should be constructed to grant Owner or Owner's lessee (a) any authority to conduct flight operations under FAR Part 135 or (b) any control over a Charter Flight.

2.4 Title to and ownership of the Aircraft shall be and remain in the name of Owner at all times throughout the Term and Operator will have no right, title or interest in or to the Aircraft, except the right to possession and use the Aircraft during the Term in accordance with and subject to the terms and conditions of this Agreement.

4.2 Scheduling of Charter Flights. Operator shall arrange, schedule and dispatch all Charter Flights. Operator may use and operate the Aircraft for a Charter Flight at any time during the Term without the prior consent or approval of Owner, provided Owner has not previously scheduled the Aircraft for the same time interval. Owner retains scheduling priority for Owner Flights throughout the Term, provided an Owner Flight does not interfere with a previously scheduled Charter Flight.

7.2 Control. While such maintenance and repair is being done, the Aircraft shall be considered as being under Operator's care, custody, and control. All work to be performed under this Agreement or other management or maintenance agreement between Owner and Operator, shall be performed either by Operator's own employees or at shops to be specified and approved by Operator...

7.5 Exclusivity. The Aircraft will be maintained by Operator without interruption and remain in Operator's legal and actual possession

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<sup>9</sup> The first lease between APLUX and Aero Charter is quoted here. The Excel was added to the lease by Joint Exhibit 18. *See LF p. 53, n.13.*

directly or through its employees or agents. Operator will not use the Aircraft unless the Aircraft is under the legal and actual custody and possession of Operator and remains in Operator's exclusive possession and custody during all Charter Flights. Owner may operate the Aircraft under FAR Part 91 under the operational control of Owner as long as the maintenance of the Aircraft is current under Operator's FAA approved maintenance program....

#### **E. The Assessments of Unpaid Use Tax.**

The Missouri Department of Revenue ("DOR") initiated an audit of APLUX related to Missouri Sales, Use and Withholding Taxes (collectively, the "Audit") in October 2014, for the following tax periods: Sales Tax Audit Period of 10/1/2009 – 6/30/2011 & 7/1/2012 – 4/30/2015; Use Tax Audit Period of 10/1/2009 – 9/30/2014; and Withholding Tax Audit Period of 10/1/2009 – 9/30/2014. *LF p. 53, ¶ 71.* Respondent completed the Audit in August 2015 and issued a Tax Audit Report with the following conclusions:

(a) Sales tax – credit of \$59,665.66, resulting from Respondent's conclusion that the "leasing income was not subject to sales tax as the [Aircraft] were subject to use tax at the time of purchase."

(b) Consumer's use tax – liability of \$266,810.24 based in part on Respondent's conclusion that "a fundamental principle of sales and use tax is to impose the levy upon property at its moment of greatest value," and that the Aircraft "were not used solely for resale as the receipts from the lease...cannot exceed the purchase price of the [Aircraft] within a reasonable amount of time."

(c) Withholding tax – no tax due as the business had no employees.

See *J. Ex. 6*. Shortly thereafter, on August 21, 2015, the DOR issued two Assessments of Unpaid Sales/Use Tax to APLUX and LP, one for the period of July 1 – September 30, 2011 totaling \$96,322.34, including interest and additions; and the second for the period of January 1 – March 30, 2012 totaling \$112,802.02. *LF p. 54, ¶¶ 75, 76.*

#### **F. The Appeal to the Commission.**

APLUX and LP filed a Petition with the Commission on October 20, 2015, appealing the Assessments. *LF p. 43.* The Commission held a hearing on June 20, 2018 and issued its Order on February 10, 2020, after requesting and receiving additional briefings from the parties regarding the application of the recently decided *Business Aviation, LLC v. Director of Revenue*, 579 S.W.3d 212 (Mo. banc 2019) to the current case. *LF pp. 43-44.*

The Commission directly rejected the Director’s argument put forth in his initial brief that APLUX’s leases do not qualify for the exemption from use tax under section 144.615(6) of the Missouri Revised Statutes because this Court “analyzed the claimed resale exemption based upon ‘the interplay of sections 144.018.1(4), 144.615(3), and 144.030.2(20).’” *LF p. 56 n.24* (citing *Bus. Aviation*, 579 S.W.3d at 219).

The Commission determined that “APLUX and Luxco are related, but separate, entities,” that the leases between APLUX and Luxco were not “disingenuous” (as claimed by the Director), and that APLUX transferred the right to use the Aircraft to Luxco and Aero Charter. *LF pp. 63, 67.* The Commission concluded that APLUX qualified for the resale exemption as provided in section 144.018, that APLUX properly collected and remitted sales tax on the lease income paid by Luxco on the TBM and

Excel leases, and that the lease to Aero Charter qualified for the use tax exemption in section 144.615(3) because Aero Charter was a common carrier. *LF p. 68.*

## **ARGUMENT**

### **I. STANDARD OF REVIEW AND INTRODUCTION**

#### **A. Standard of Review**

A Commission’s decision will be upheld when it “(1) is authorized by law; (2) is supported by competent and substantial evidence on the whole record; (3) does not violate mandatory procedural safeguards; and (4) is not clearly contrary to the General Assembly’s reasonable expectations.” *Bus. Aviation, LLC*, 579 S.W.3d at 215; *section 621.193, RSMo*; *Mo. Const. art. V, § 18*. This Court reviews the Commission’s interpretation of revenue laws *de novo*. *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 435 (Mo. banc 2010). 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). Tax exemptions are to be “construed strictly, but reasonably, against the taxpayer.” *Emerson Elec. Co. v. Dir. of Revenue*, 133 S.W.3d 31, 32 (Mo. banc 2004).

#### **B. Introduction**

This case involves two purchases and three leases of aircraft. APLUX purchased the TBM and leased it to Luxco for use as Luxco’s corporate airplane, flying Part 91 non-charter flights.<sup>10</sup> APLUX also purchased the Excel and leased it to Aero Charter for use

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<sup>10</sup> The Federal Aviation Administration (“FAA”) regulates all passenger flights. Under the FAA, there are three basic sets of operating rules: Part 91 (General Operations), which applies to all flights; Part 121, which involves common carrier operations such as

as part of its charter fleet flying Part 135 charter flights. Concurrently, APLUX leased the Excel to Luxco for Part 91 non-charter flights. Both purchases were made out of the state of Missouri, but rather than paying use tax on the purchases, APLUX paid sales tax on the lease payments from Luxco. The lease payments from Aero Charter were exempt from tax under the *Business Aviation* analysis as Aero Charter is a common carrier and used the Excel as part of its charter fleet.

Despite two decisions in the last five years from this Court,<sup>11</sup> the Appellant Director of Revenue (the “Director”) stubbornly continues to argue that a lease does not qualify for tax exemption if it does not transfer the right to use the aircraft to the extent that the Director determines is appropriate. This Court has been clear that the “use and sales tax definitions of ‘sale’ provide only that a ‘transfer’ must exist to constitute a sale under chapter 144.” *Bus. Aviation*, 579 S.W.3d at 218 n.9. The Director argues here that APLUX did not transfer the right to use the Aircraft to Luxco and Aero Charter, but only transferred a “non-exclusive license to use the Aircraft,” and that APLUX maintained

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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. 14 C.F.R. § 91.1 et seq.; 14 C.F.R. § 121.1 et seq.; 14 C.F.R. § 135.1, et seq.

<sup>11</sup> See *Bus. Aviation, LLC, v. Dir. of Revenue*, 579 S.W.3d at 212; *Five Delta Alpha, LLC v. Director of Revenue*, 458 S.W.3d 818 (Mo. banc 2015) (overruled by *Business Aviation* to the extent it required the right to use tangible personal property to be “fully” transferred to be considered a sale for resale).

“significant control” over the Aircraft. *Appl. Brief*, p 27. However, the facts show that APLUX transferred the right to use the Aircraft to Luxco and Aero Charter, and that the only control APLUX exercised over the Aircraft was incidental to ownership. APLUX transferred the right of use to Luxco and Aero Charter and in exchange Luxco and Aero Charter paid APLUX valuable consideration.

Additionally, the Director argues that because the same individual managed APLUX and Luxco, the entities were not separate entities and therefore could not enter into leases with each other. Nevertheless, Luxco and APLUX are separate entities, separately incorporated, and created with distinct business purposes. The leases between APLUX and Luxco are valid leases.

The Director is splitting hairs to avoid the clear authority from this Court over the last five years. In fact, the law is settled on this issue and the Director’s own regulations support the structure of the arrangement created by APLUX. “The legal right of a tax payer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.” *Gregory v. Helvering*, 293 U.S. 465, 469 (1935). Here, APLUX purchased the Aircraft to lease to Luxco and to Aero Charter. APLUX followed Missouri tax law and the Missouri Department of Revenue’s (“DOR”) own regulations explaining the application of tax to leases of tangible personal property to pay sales tax on the Aircraft. The Commission correctly found that the lease to Aero Charter was exempt from tax under the *Business Aviation* analysis, and that APLUX correctly paid tax on the lease payments from Luxco, and thus

that APLUX was not liable for the assessments issued by the DOR. This Court ought to follow its precedents and affirm the Administrative Hearing Commission.

**II. THE COMMISSION CORRECTLY FOUND THAT APLUX DID NOT OWE THE ASSESSMENTS BECAUSE APLUX PAID SALES TAX ON THE LEASE PAYMENTS FROM LUXCO AND BECAUSE APLUX'S LEASE TO AERO CHARTER WAS EXEMPT FROM TAX BECAUSE THE LEASE TRANSFERRED THE RIGHT TO USE THE EXCEL TO AERO CHARTER IN EXCHANGE FOR VALUABLE CONSIDERATION (RESPONDING TO POINT I OF APPELLANT'S BRIEF).**

In Point One of his brief, the Director reargues a point already established by *Business Aviation* – the degree of use required to be transferred to qualify for a sales or use tax exemption. While *Business Aviation* made it clear that a right to use does not have to be “fully” transferred, the Director now argues that APLUX did not fully transfer the right to use the Aircraft to Luxco and Aero Charter.

In Missouri, a use tax is imposed upon the purchase of tangible personal property if it is purchased outside the state but used within the state and the purchase would have been subject to sales tax within the state. *Section 144.610.1.*<sup>12</sup> An aircraft is an item of tangible personal property and thus the purchase of an aircraft is subject to sales or use tax unless it qualifies for an exemption. *Bus. Aviation*, 579 S.W.3d at 216.

Two exemptions apply here. The first exemption, applicable to the Luxco Lease leasing the Aircraft from APLUX to Luxco, is the “resale exemption” found in section

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<sup>12</sup> 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.

144.018.1 of the Missouri Revised Statutes and explained in the Missouri Code of State Regulations, which states that when purchasing tangible personal property to lease, the purchaser can elect to either pay sales or use tax on the purchase price or on the subsequent lease. 12 CSR 10-108.700(3)(A), *Appellant's App.* A60-A64. The section 144.018.1 exemption applies to both sales and use tax.

The second exemption, applicable to the Aero-Excel Lease leasing the Excel from APLUX to Aero Charter, is based on clear statutory authority found in sections 144.018.1(4), 144.615(3), and 144.030.1(20) of the Missouri Revised Statutes creating a common carrier exemption, which was confirmed by this Court in both *Business Aviation* and *Five Delta Alpha*. Under this exemption, the lease of an aircraft to a common carrier for use in its charter service can be exempt from tax if the right to use the aircraft was transferred in exchange for valuable consideration. *Bus. Aviation*, 579 S.W.3d at 217; *Five Delta Alpha*, 458 S.W.3d at 822.

APLUX paid tax on the Luxco Lease as Luxco is not a common carrier and thus does not qualify for the section 144.030.1(20) exemption. The Director now argues that APLUX did not fully transfer the right to use the Aircraft to Luxco or Aero Charter and that APLUX acted as the owner of the Aircraft, and so APLUX does not qualify for the resale exemption. *Appl. Brief*, p. 27. However, the “use and sales tax definitions of ‘sale’ provide only that a ‘transfer’ must exist to constitute a sale under chapter 144.” *Bus. Aviation*, 579 S.W.3d at 219 n.9. A transfer from APLUX to Aero Charter exists, and thus that lease APLUX is not seeking an exemption for the TBM or Excel – it

simply argues that it can pay tax on the lease payments received and that the lease payments from Aero Charter are exempt from sales tax.

**A. The Resale Exemption of Section 144.018 Applies to the Leases of the Aircraft From APLUX to Luxco.**

The Director argues that the “statutory resale exemption requirements are set forth in § 144.615(6) for use tax and the statutory resale exclusion for in-state transactions is set forth in § 144.010.1(11) for sales tax” and that the exemptions contained in those two statutes are the only ones that could apply. *Appl. Brief*, p. 30 (citing *President Casino, Inc. v. Dir. of Revenue*, 219 S.W.3d 235, 238 (Mo. banc 2007)). However, the Director ignores section 144.018 was made effective May 12, 2010, after *President Casino* was decided.<sup>13</sup> Without citing any authority, the Director further argues that section 144.018 does not create a new tax exemption outside of section 144.615 and 144.010, but simply explains the resale exemptions already created. *Appl. Brief*, p. 43. The Director’s argument ignores the statement in *Business Aviation* where this Court said that section 144.018 is “intended to clarify the exemption or exclusion of purchases for resale from sales and use taxes as originally enacted in this chapter” and “outlines exemptions from

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<sup>13</sup> *President Casino* involved the determination of whether purchases of gaming equipment for a casino were tax exempt. *President Casino*, 219 S.W.3d at 238. This Court determined that the gaming tax applied, rather than sales or use tax. *Id.* at 242. Further, the purchase of food for “comps” was not exempt as a resale because the purchase price was not factored into the sale of food subject to sales tax and thus the gaming tax applied. *Id.* at 244.

sales and use tax for tangible personal property purchased for resale...” *Bus. Aviation*, 579 S.W.3d at 216; *section 144.018.4, RSMo*.

The resale statute reads:

**Notwithstanding any other provision of law to the contrary...**when a purchase of tangible personal property or service subject to tax is made for the purpose of resale, such purchase shall be either exempt or excluded under this chapter if the subsequent sale is:

- (1) Subject to tax in this or any other state;
- (2) For resale;
- (3) Excluded from tax under this chapter;
- (4) Subject to tax but exempt under this chapter; or
- (5) Exempt from the sales tax laws of another state, if the subsequent sale is in such other state.

*Section 144.018.1, RSMo* (emphasis added). According to the plain language of the statute, notwithstanding what sections 144.030 or 144.015 say, if tangible personal property has been purchased for resale, it is exempt from tax if the resale falls into one of the five categories listed. *Id.* While subsections two and three address other issues not in play in the current case, subsection one very clearly applies to all resales. Thus, section 144.018 does not require a resale exemption under section 144.030 or 144.615 to apply before the analysis of section 144.018. Also, section 114.018 applies to both sales and use tax, as established by the heading, by the use of the word “tax” in subsection .1 (with no qualifying use of “sales”), and by the reference to sales and use tax in subsection .4

If tangible personal property is purchased for resale, and one of the five situations in section 144.018.1 applies, then tax does not have to be paid on the purchase of that tangible personal property. Section 144.018 avoids taxing the same piece of tangible personal property twice. *See Sipco, Inc. v. Dir. of Revenue*, 875 S.W.2d 539, 541 (Mo.

banc 1994). To read the statute as the Director suggests, requiring a resale exemption from section 144.030 or section 144.615 to apply first before considering section 144.018, would make section 144.018 superfluous. If a sale for resale under section 144.615(6) is the only resale exempt from tax, there would be no need to provide the five conditions applicable to that resale, as contained in section 144.018.1. There is nothing in the text of section 144.018 to support the Director's position.

*Business Aviation* only looked to section 144.615 for exemptions because the company claimed that, under section 144.018.1(4), the resale (the lease) was “[s]ubject to tax but exempt” under section 144.615(3). *Bus. Aviation*, 579 S.W.3d at 216; *Section 144.018.1(4)*. This Court in *Business Aviation* began its analysis of the resale exemption in section 144.018 to determine if there were a sale. Because the company claimed a use tax exemption that pointed to a sales tax exemption, this Court found that it had to prove there was a sale under both the sales and use tax definition of sale. *Bus. Aviation*, 579 S.W.3d at 217. Here, APLUX only claims a sale under the use tax statutes for its leases to Luxco.<sup>14</sup> Thus, to satisfy a “sale” under the use tax statutes, one must show “(1) a

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<sup>14</sup> A sale under the sales tax statutes would have a similar analysis. A sale is defined under the sales tax statutes as “any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for valuable consideration...” *Section 144.010.1(9)*. “Because the transfer can be ‘in any manner or by any means whatsoever,’ a lease can qualify as a sale. *See* 12 CSR 10-108.700(2)(A) (defining ‘lease’ as ‘any transfer of the right to possess or use tangible personal property

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.” *Bus. Aviation*, 579 S.W.3d at 217. If APLUX can establish that the Luxco Lease qualifies as a sale, and one of the five enumerated conditions apply, then section 144.018.1 applies to the purchase of the Aircraft.

Moreover, tax applies to the Luxco Lease (the subsequent sale) under section 144.020(8), making section 144.018.1(1) applicable to the sale. The DOR’s own Regulations state that the purchaser of tangible personal property can elect to pay tax on the purchase price or subject the lease to tax. *12 CSR 10-108.700(3)(A)(3)*, *Appellant’s App. A60-A64*. Thus, APLUX is not claiming that the entire transaction is exempt from tax; only that under sections 144.018.1 and 144.020(8) along with 12 CSR 10-108.700, APLUX can pay tax on the lease payments it receives for the Aircraft rather than on the purchase price of the Aircraft.

APLUX is not claiming that both the purchases and subsequent leases to Luxco are exempt from tax. APLUX simply claims that the lease payment from Luxco is subject to sales tax under section 144.020.1(8) and so the purchase of the Aircraft is exempt from tax under section 144.018.1(1). APLUX is using the language from the DOR’s own regulations to “claim a resale exemption based on the intended lease of the

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for a term in exchange for consideration.’” *Bus. Aviation*, 579 S.W.3d at 217 (internal citations omitted).

tangible personal property.” 12 CSR 10-108.700(3)(A), *Appellant’s App.* A60-A64.<sup>15</sup>

This “resale exemption” Regulation states as follows:

When a lessor purchases tangible personal property for the purpose of leasing, the lessor may pay tax on the purchase price or claim a resale exemption based on the intended lease of the tangible personal property.

*Id.* Under this Regulation, a “lease” is defined as “any transfer of the right to possess or use tangible personal property for a term in exchange for consideration. This includes a rental.” 12 CSR 10-108.700(2)(A), *Appellant’s App.* A60-A64. Additionally, the examples included in this regulation specifically address purchasing an airplane, renting out the airplane, and paying tax on the rental payment rather than the purchase price of the airplane: “A taxpayer purchases three airplanes and provides the seller with a resale exemption certificate. Taxpayer then offers the airplanes for rental. Taxpayer must collect and remit tax on the rental payments for the airplanes.” 12 CSR 10-108.700(4)(C), *Appellant’s App.* A60-A64.

Thus, to claim the resale exemption contained in section 144.018.1, APLUX must show that it leased the Aircraft to Luxco, which requires it to show that it transferred the right to possess or use the Aircraft for a term in exchange for consideration. *Id.* This analysis is similar to the analysis under *Business Aviation*, which requires that “the right

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<sup>15</sup> Administrative regulations are “entitled to a presumption of validity and may not be overruled except for weighty reasons,” *State ex rel. Mo. Pub. Defender Comm’n v. Waters*, 370 S.W.3d 592, 602 (Mo. banc 2012) (internal citation omitted).

to use the aircraft [be] transferred...for valuable consideration paid or to be paid.” *Bus. Aviation*, 579 S.W.3d at 217.

The first prong under *Business Aviation* is to determine whether the right of use was transferred. *Bus. Aviation*, 579 S.W.3d at 217. While “use” has not been defined by either the Sales Tax statutes or the Sales/Use Tax Regulations, this Court analyzed “use” under the Use Tax Statutes, finding that it requires “any right or power over tangible personal property incident to the ownership or control of that property...” *Id.* (quoting Section 144.605(13), RSMo 2000). In *Business Aviation*, the Court found the right to use was transferred to Burgess because the lease granted “the exclusive care, custody and control of the Aircraft during the term of [the Lease] and at all times during any Part 135 charter operations conducted by [Burgess]” to Burgess, Burgess maintained exclusive custody and control of the airplane each time it was flown, and the airplane was stored at Burgess’ hangar facility when it was not flown. *Id.* at 218.

Here, the Luxco Lease specifically grants Luxco the right to use the Aircraft in return for consideration paid by Luxco. *See J. Ex. 13*. Section 5.2 of each Lease says, “...Lessee [Luxco] shall be solely and exclusively responsible for the use, operation and control of the Aircraft during each period of the Term commencing when the Aircraft has been delivered to Lessee and terminating when the Aircraft has been returned to Lessor [APLUX] in the condition required hereunder.” *Id.* Section 5.6 of each Lease states that, “The parties expressly agree that [Luxco] shall at all times while the Aircraft is in its possession during the term maintain operational control of the Aircraft, and that the intent of the parties is that this agreement constitute a “dry” operating lease. [Luxco] shall

exercise exclusivity over initiation, conducting or terminating any flight conducted pursuant to this Agreement, and the Flight Crew shall be under the exclusive command and control of [Luxco] in all phases of such flights.” *Id.*

The Luxco Lease grants Luxco the same rights to use and control the Aircraft that were granted to Burgess under the lease in *Business Aviation*. Additionally, Luxco had the ability to, and did, enter an agreement with Aero Charter so that Aero Charter could provide management services to the aircraft. *See J. Ex. 24-27*. The ability to enter an agreement concerning the Aircraft shows that Luxco had a right or power incident to ownership or control of the Aircraft.

Additionally, APLUX never used either Aircraft. *LF pp. 61, 66*. All Part 91 non-charter flights taken by Mr. Lux, Luxco personnel, or someone under a timeshare agreement with Luxco were taken under the TBM Lease or the Luxco Lease and not as APLUX flights. *LF p. 50, ¶¶ 60, 61*. In fact, Luxco considered the Aircraft to be Luxco’s corporate aircraft, so much so that Luxco put its own logo (not that of APLUX) on the Aircraft. *LF p. 50, ¶¶ 58, 59*. Accordingly, APLUX transferred the right to use the Aircraft to Luxco under the Luxco Lease, just as *Business Aviation* transferred the right to use its aircraft to Burgess. *See Bus. Aviation*, 579 S.W.3d at 218.

The second prong under *Business Aviation*’s analysis of a tax-exempt sale is that there must be valuable consideration paid or to be paid. *Bus. Aviation*, 579 S.W.3d at 218. Valuable consideration is “[c]onsideration 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.” *Id.* (quoting *Black’s Law Dictionary* (10th ed.

2014)). *Business Aviation* makes clear that checks do not have to be exchanged and that credit from one company to another qualifies as consideration. *Bus. Aviation*, 579 S.W.3d at 219. All that is required is “valid compensation and a pecuniarily measurable benefit.” *Id.* While in *Business Aviation*, the lessee sometimes paid less than required by the lease, and the Director argued that *Business Aviation* did not make a profit off the lease payments, the Court still found that valuable consideration was paid. *Id.*

Here, section 3.4 requires Lessee to pay rent in the amount specified in Schedule I. Here, Luxco paid APLUX \$114,000 per year in rent for the TBM and \$117,600 per year in rent for the Excel. *J. Ex. 12, 13, Schedule I.* Because these amounts are “valid compensation and a pecuniarily measurable benefit,” Luxco paid valuable consideration to APLUX, meeting the second prong of the test under *Business Aviation*.<sup>16</sup>

The Director argues that APLUX maintained control over the Aircraft and thus did not transfer the right to use the Aircraft to Luxco. As part of this argument, he states that in “*Business Aviation*, the lessee ‘was to pay all costs for maintenance, insurance, management, cleaning, and repairs, as well as for the hangar fees.’ 579 S.W.3d at 215.” *Appl. Brief*, p. 35. He further argues that, in contrast to *Business Aviation*, the leases here allowed APLUX to retain control over the Aircraft and reserved the priority to use the Aircraft. *Id.* In fact, *Business Aviation*, the lessor (not the lessee), was responsible for those fees. *Bus. Aviation*, 579 S.W.3d at 215. Moreover, the lease required Business

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<sup>16</sup> The Director does not contest the Commission’s finding that Luxco paid APLUX valuable consideration.

Aviation to “pay all costs and expenses related to its operation of the aircraft if it chartered or used it.” *Id.* This Court stated that while the lease provided for Business Aviation to use the aircraft, it never did so. *Id.* The Court found that Business Aviation had transferred the right to use the aircraft to Burgess and thus qualified for the exemption. *Id.*

Similarly, here, the “record establishes that APLUX did not at any time use or operate the TBM” or the Excel. *LF* p. 49, ¶¶ 47, 48; p. 61. Just as in *Business Aviation*, the Director asserts many ways APLUX possibly maintained a right to use the Aircraft during the term of the lease. *Bus. Aviation*, 579 S.W.3d at 218 n.10. However, just as in *Business Aviation*, APLUX transferred the right to use the Aircraft to Luxco, without the requirement that the right to use be “fully transferred.” *Id.* APLUX transferred the right to use the Aircraft to Luxco in exchange for consideration, establishing the Luxco Lease as a sale for resale. Thus, APLUX correctly paid tax on the lease payments from Luxco under 12 CSR 10-108.700.

**B. The Resale Exemption Contained in Section 144.615 of the Missouri Revised Statutes Applies to the Luxco Lease.**

The Director argues that the lease from APLUX to Luxco does not qualify for a use tax resale exemption under section 144.615 of the Missouri Revised Statutes because APLUX did not transfer the right to use the Aircraft and because APLUX “exercised significant control over the Aircraft.” *Appl. Brief*, pp. 27, 40-44. He argues that the only exemption available to APLUX is found in 144.615(6), which exempts from use tax, “[t]angible personal property held by processors, retailers, importers, manufacturers,

wholesalers, or jobbers solely for resale in the regular course of business.” According to the Director, APLUX used the Aircraft and so did not purchase the Aircraft “solely for resale,” that it did not purchase the Aircraft for resale “in the regular course of business,” and that APLUX is not a processor, retailer, importer, manufacturer, wholesaler or jobber.<sup>17</sup>

However, as shown below, APLUX purchased the TBM solely to lease to Luxco, and the Excel solely to lease to Luxco and Aero Charter. APLUX never used either Aircraft. The sole purpose for purchasing the Aircraft was to lease them to third parties. Additionally, APLUX was created for the purpose of investing and owning assets, including for buying, selling and leasing aircraft. Thus, the Aircraft leases were conducted in the “regular course” of APLUX’s business as referenced in section 144.615(6). Finally, the undefined terms “processors, retailers, importers, manufacturers, wholesalers, or jobbers” are so broad that they could include almost any company. APLUX is an importer as it imports aircraft from other states into Missouri. Thus,

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<sup>17</sup> Additionally, without description or legal support, the Director argues that APLUX only granted a “non-exclusive license to use the Aircraft” to Luxco and Aero Charter. *Appl. Brief*, p. 27. However, as shown in the Statement of Facts, *supra*, and the discussion below, APLUX transferred the right to possess and use the Aircraft to Luxco and Aero Charter in exchange for consideration, which created leases rather than revocable licenses.

APLUX plainly qualified for the resale exemption under section 144.615(6), rendering the purchases of both planes as exempt.

**C. APLUX's Lease to Aero Charter, as a Common Carrier, Was Exempt From Tax Under the *Business Aviation* Analysis.**

The statutes allow for a use tax 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(4), RSMo.* Thus, APLUX'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*, 458 S.W.3d at 822. 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.*<sup>18</sup> Here, APLUX purchased the Excel for the purpose of leasing (the resale) the Excel to Aero Charter (a common carrier)<sup>19</sup> so that Aero Charter could use the Excel in its aircraft charter operations (interstate commerce). Aero Charter paid valuable consideration to APLUX.<sup>20</sup> Accordingly, the resale (the lease

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<sup>18</sup> The subsection was renumbered to (21) based on amendment of the statute in 2014 but returned to (20) in 2018.

<sup>19</sup> There was no dispute below regarding whether Aero Charter is a common carrier under section 144.030.2(20). *LF p. 45, ¶ 16 n.4.*

<sup>20</sup> There was no dispute below that Aero Charter paid valuable consideration to APLUX. *LF p. 58.*

from APLUX to Aero Charter) is exempt from tax (leased to a common carrier for use in interstate commerce).

Because APLUX “claims a use tax exemption pursuant to section 144.615(3), which cross-references section 144.030.2 (a list of exemptions in the sales tax portion of the statute), [APLUX] must prove there was a sale to [Aero Charter] under both the use and sales tax definitions of ‘sale.’” *Bus. Aviation*, 579 S.W.3d at 217. Thus, pursuant to the definitions of “sale” in under sections 144.605(7) and 144.010.1(9), APLUX must show that the right to use the Excel was transferred to Aero Charter for “valuable consideration paid or to be paid.” *Id.*

The recent decision by this Court in another revenue case earlier this year is not to the contrary. *See DI Supply I, LLC v. Dir. of Revenue*, 601 S.W.3d 195, 196 (Mo. banc 2020). In *DI Supply*, the resale exemption for a “sale for resale” contained in section 144.010.1(11), RSMo 2012<sup>21</sup> was found to derive from the statutory definition of a “sale at retail.” *DI Supply*, 601 S.W.3d at 197. Under this definition, the Court determined that a resale exemption under section 144.010.1(11) requires the transfer of title or ownership of tangible personal property but “does not include the right to use, store or consume tangible personal property...” *Id.* at 198-199. Thus, granting customers the right to use the furnishings in a hotel room was not enough to qualify as a sale for resale. *Id.* at 202.

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<sup>21</sup> This was found in section 144.010.1(10), RSMo Supp. 2010, and is currently found in section 144.010.1(13), RSMo Supp. 2019.

Moreover, the exemption contained in *Business Aviation* derives from section 144.018.1, not 144.010.1(10), and involves the definition of a “sale” from 144.010.1(9) rather than a “sale at retail.” *Bus. Aviation*, 579 S.W.3d at 216. Moreover, the leases contained in *Business Aviation* and here transfer of ownership (partial or full) during the terms of the leases. “Ownership” is defined as “the bundle of rights allowing one to use, manage, and enjoy property...” Black’s Law Dictionary (10th ed. 2014). Because the leases at issue here transfer the bundle of rights allowing Luxco and Aero Charter to use, manage, and enjoy the Aircraft, they satisfy the definition of “resale.”

Under the Aero-Excel Lease, APLUX transferred the right to use the Excel to Aero Charter for consideration. *J. Ex. 22*. Section 2.4 of the Aero-Excel Lease states that Aero Charter, as the Operator, “will have no right, title or interest in or to the [Excel], except the right to possession and use the [Excel] during the Term...” *Id.* Section 4.2 states that Aero Charter “shall arrange, schedule and dispatch all Charter Flights. [Aero Charter] may use and operate the [Excel] at any time during the Term without the prior consent or approval of Owner...” *Id.* Section 7.5 requires the Excel to “be maintained by [Aero Charter] without interruption and remain in [Aero Charter’s] legal and actual possession directly or through its employees or agents.” *Id.* The Lease itself specifically grants Aero Charter “the right to possession and use” of the Excel. *Id.* Additionally, Aero Charter hangared the Excel, just as Burgess did in *Business Aviation*. Thus, APLUX clearly transferred the right to use the Excel to Aero Charter.

“Under Missouri law, 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., Inc. v. Dir. of Revenue*, 109 S.W.3d 165, 173 (Mo. banc 2003). Even though APLUX signed the Purchase Agreement for the Excel on January 5, 2012, delivery of the Excel did not occur until February 1, 2012, one day after the effective date of the Lease between APLUX and Aero Charter. *J. Ex. 31*. The Aircraft was under the Aero-Excel Lease, and thus under the control of Aero Charter, when it entered Missouri.

APLUX never operated any right or power over the Excel. Aero Charter picked up the Excel and flew it from Kansas to Missouri. From that point on, Aero Charter and Luxco were the only entities to possess or use the Excel. Aero Charter provided the needed maintenance, provided the pilots for each flight, provided training needed to keep its pilots certified to fly the Aircraft, made sure the Aircraft was insured, and decided when the Aircraft flew. *J. Ex. 22*. APLUX reimbursed Aero Charter for expenditures such as maintenance costs or hangar fees, but only at Aero Charter's direction. APLUX did not decide what maintenance was performed. All those decisions were left to Aero Charter under the Lease. Aero Charter maintained operational control of the Aircraft during charter flights and was responsible for all other aspects of the Aircraft outside of flights. Neither APLUX nor LP exercised any right or power over the Aircraft.

“Operational Control,” as defined by the FAA, “means the exercise of authority over initiating, conducting or terminating a flight.” *14 C.F.R. § 1.1*. When conducting operations under Part 135 (common carrier operations for chartered flights), the certificate holder must remain in operational control. *14 C.F.R. § 135.77*. While

operational control refers to who is in charge during the flight, the certificate holder is also responsible for the airworthiness of the aircraft. 14 C.F.R. § 135.413. The certificate holder must maintain the aircraft under chapter 135, must make sure that all defects are repaired, and must perform the required maintenance. *Id.* Additionally, the certificate holder must maintain all records of the aircraft. 14 C.F.R. § 135.63. The certificate holder must retain operational control of the aircraft during charter flights and must maintain responsibility for the aircraft between flights.

Here, Aero Charter held the certificate from the FAA allowing the Excel to be used in Part 135 operations. *J. Ex. 32.* The Aero-Excel Lease required that Aero Charter maintain the Excel without interruption. *J. Ex. 15, 18, section 7.5.* Therefore, Aero Charter had to maintain operational control during the charter flights on the Excel and had to ensure the Excel was maintained per standards for charter aircraft between flights.

This Court has previously found that operating within Part 91 of the Federal Aviation Regulations alone is enough to exhibit the “exercise of any right or power” necessary to require the payment of use tax. *See Fall Creek*, 109 S.W.3d at 172. Here, Aero Charter operated the Excel under its air carrier certificate as Part 135 on demand air operations. While operational control is not the only way to exercise right or power over an aircraft, the fact that Aero Charter had operational control during its charter flights and during the period between flights shows that APLUX transferred the right to use the Excel Aircraft to Aero Charter under the Aero-Excel Lease. Because APLUX transferred the right to use the Excel to Aero Charter for use in its charter fleet in exchange for

valuable consideration, the lease payment from Aero Charter to APLUX is exempt from tax.

**D. The Concurrent Leases to Luxco and Aero Charter Do Not Change the Analysis Allowing the Payment of Tax on the Leases.**

The difference between *Business Aviation* and the current case is that here, APLUX leased the Excel to Luxco concurrently with the lease to Aero Charter. APLUX is not claiming that the original purchase is exempt from tax under the resale exemption; it paid sales tax on the lease payments under 12 CSR 10-108.700(3)(A)(2). However, because the sale to Aero Charter would be exempt under section 144.030.2(20), and the sole lease to Aero Charter would be exempt under *Business Aviation* and *Flying Five*, the concurrent lease to Aero Charter is also exempt from tax. See 12 CSR 10-108.700(1), *Appellant's App. A60-A64* ("Payments for the lease of tangible personal property are exempt from tax if the sale of the tangible personal property would be exempt."). The right to use the tangible personal property must be transferred, but it does not have to be "fully transferred." *Bus. Aviation*, 579 S.W.3d at 218 n.9.

APLUX did not use the Aircraft. After it transferred to the right to use the Aircraft to Luxco and Aero Charter, the only control APLUX exerted over the Aircraft was that of ownership. In exchange for the right to use the Aircraft, APLUX received valuable consideration from Luxco and Aero Charter. APLUX correctly paid sales tax on the lease payments from Luxco under 12 CSR 10-108.700, while the lease payments from Aero Charter were tax exempt under the *Business Aviation* analysis.

**III. THE ADMINISTRATIVE HEARING COMMISSION CORRECTLY FOUND THAT APLUX DOES NOT OWE THE ASSESSMENTS BECAUSE APLUX IS A LEGITIMATE BUSINESS, SEPARATE FROM LUXCO, AND IT LEASED THE AIRCRAFT TO LUXCO AND AERO CHARTER (RESPONDING TO POINT II OF APPELLANT’S BRIEF).**

The Director argues in Point II that the leases between APLUX and Luxco should not be considered sales for resale under any analysis because “Mr. Lux had ultimate and total control over both APLUX and Luxco...” *Appl. Brief*, p. 45. He argues that the “arrangement [is] devoid of economic substance.” *Id.* In effect, the Director asks this Court to pierce the corporate veil of APLUX and find that Luxco, rather than APLUX, was the actual owner of the Aircraft and so could not lease the Aircraft to itself. The Director argues that leases from APLUX to Luxco were “merely tax avoidance.”<sup>22</sup> *Appl. Brief*, p. 45.

However, as the Commission stated, the “record establishes the facts relied upon by the Director, but not his characterizations of those facts or his conclusions.” *LF* p. 63. In actuality, APLUX and Luxco are two separate business entities, the leases between APLUX and Luxco are valid sales under the taxing statutes, and APLUX correctly paid tax on the lease payments from Luxco, as allowed by the DOR’s own regulations, while the lease payments from Aero Charter were tax exempt.

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<sup>22</sup> APLUX was not formed for “tax evasion” as the Director implies on page 53 of his Brief, as shown by the fact that APLUX paid tax on lease payments from Luxco.

### **A. APLUX and Luxco Are Separate Entities.**

The Director argues that APLUX and Luxco were “completely controlled by the same person” and thus the leases between APLUX and Luxco are not valid. *Appl. Brief*, p. 49. He further argues that because Mr. Lux was the CEO and chairman of the board of Luxco and the manager of APLUX,<sup>23</sup> APLUX and Luxco are not separate entities. *Id.* “In the eyes of the law, two different corporations are two different persons. This is true even if one corporation is the sole shareholder of the other.” *Grease Monkey Int’l, Inc. v. Godat*, 916 S.W.2d 257, 262 (Mo. App. 1995) (internal citations omitted); see *K.C. Roofing Ctr. v. On Top Roofing, Inc.*, 807 S.W.2d 545, 549 (Mo. App. 1991) (stating that a corporation is a separate legal entity even though it has a single stockholder). “If the purpose to be served by the arrangement is fair and lawful, then legal forms and relationships are to be observed and the case determined upon the basis of separate and individual corporate existence.” *Ritter v. BJC Barnes Jewish Christian Health Sys.*, 987 S.W.2d 377, 385 (Mo. App. 1999). In previous decisions relating to revenue laws, this Court has recognized “the importance of separate corporate existence, even when two corporations act in concert and share a parent corporation.” *Circuit City Stores, Inc. v. Dir. of Revenue*, 438 S.W.3d 397, 401 (Mo. banc 2014) (citing *Cent. Cooling & Supply Co. v. Dir. of Revenue*, 648 S.W.2d 546, 549 (Mo. 1982)).

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<sup>23</sup> While the Director argues that APLUX is “completely controlled” by Mr. Lux, Luxco was the member of APLUX with Mr. Lux managing APLUX. *LF* p. 44, ¶¶ 1, 8.

Here, APLUX is a limited liability company formed in 2006 for the purpose of investing and owning assets. *LF* p. 44, ¶ 1. Luxco is an S-corporation formed in 1958 and is a bottler, blender, distiller, and marketer of alcoholic beverages across North America. *LF* p. 44, ¶¶ 5-6. APLUX is a wholly owned subsidiary of Luxco and is one of four subsidiaries of Luxco. *LF* p. 44, ¶¶ 8, 10. APLUX and Luxco are separate legal entities, even though Luxco is the sole member of APLUX, and are recognized as such in the eyes of the law.

### **B. Economic Substance.**

While the Director claims that the lease agreements between Luxco and APLUX were “non-negotiated,” in fact attorneys and accountants helped set a rate that would be fair for both APLUX and Luxco. *LF* pp. 50, ¶ 56. Moreover, while the Director now argues that rates paid by Luxco are “arbitrary, flat rates,” compared to the Aero-Excel Lease where Aero Charter pays per flight hour, the rates are set for different uses. *Appl. Brief*, p. 49. Aero Charter only needs the Excel when it is using the Excel for a charter flight, which is scheduled, while Luxco is using the Aircraft as its own corporate aircraft and thus would pay a different rate. Additionally, the “flat” rate set for the Luxco Lease is not arbitrary but set at a rate supported by the market.

The Director argues that the leases between APLUX and Luxco should be found invalid because APLUX is not a separate entity from Luxco. Using circular logic, the Director bases this contention on the DOR’s previous statement from the Audit that APLUX was “just two airplanes.” *Appl. Brief*, p. 54. However, APLUX is in the business of investing and owning assets, including the two Aircraft at issue in this case.

It frequently buys and sells aircraft, as is evidenced by the multiple leases. *See J. Ex. 11, 12, 13.* In addition to the income it receives for the lease of the Aircraft, it also depreciates the Aircraft on its taxes.

In *Simmons Hardware Company v. City of St. Louis*, 192 S.W. 394 (Mo. 1916), the company argued that sales to its subsidiaries should not be taxed since the company controlled all the subsidiaries. The company transferred merchandise to its subsidiaries by selling the merchandise from one entity to another. *Id.* at 396. At the time, there was a tax of \$1 per each \$1,000 of sales during the year, and the City of St. Louis imposed this tax on the sale of merchandise to the subsidiaries. *Id.* This Court stated that, “all the elements of payment and delivery which characterize a sale were present in the transactions,” and that the parent and subsidiary companies “were all distinct and separate entities, either of which might independently prosper, and survive the others.” *Id.* at 397. Thus, the Court found the sales to the subsidiaries to be taxable. *Id.*

In *Kansas City v. Standard Home Improvement Company, Incorporated*, 512 S.W.2d 915 (Mo. App. 1974), the court found that the sale of steam between a subsidiary and the parent was a taxable sale. *Id.* at 918. The debtor alleged that because the two companies had common officers and directors, they should be treated as one company and thus no tax would be due, even though both companies treated the transaction as a sale on their books. *Id.* The court, in finding that the transaction should be taxed, stated that there was “no legal obstacle against regarding the sale of this steam from a subsidiary to a parent company as a purchase and sale.” *Id.*

Similarly, here, “all the elements of payment and delivery which characterize a sale” are present in the lease between APLUX and Luxco. *Simmons Hardware*, 192 S.W. at 397. APLUX transferred the right to use the Aircraft to Luxco, while Luxco paid APLUX rent through intercompany transactions handled through journal entries on a general ledger. There is no legal obstacle against regarding the lease of the Aircraft from APLUX to Luxco as a purchase and sale.

### **C. Proper Purpose Test.**

“That two corporations, parent and subsidiary, are commonly owned and operated does not eliminate sales tax consequences as to property transferred from one to the other.” *Central Cooling*, 648 S.W.2d at 548. In *Central Cooling*, the petitioner was a wholly owned subsidiary of Johnson Furnace Company (“Johnson”) with no employees but separately organized under Missouri law, duly registered with the Secretary of State. *Id.* at 547. Johnson was a construction company, and petitioner was created to so that it could purchase supplies at wholesale rates for which Johnson was not eligible. *Id.* Petitioner submitted purchase orders in its name, but the bills were paid directly by Johnson. *Id.* The Director issued tax assessments on the transfer of goods from petitioner to Johnson, and petitioner urged the court that the tax was improper as petitioner and Johnson were in effect the same company. *Id.* Instead, petitioner argued, the transfer of goods should simply be considered an interdepartmental transfer within a company. *Id.* The court, quoting the Supreme Court, stated:

Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator’s personal or undisclosed convenience, so long as that

purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity.

*Id.* (quoting *Moline Properties Inc. v. Commissioner of Internal Revenue*, 319 U.S. 436, 438-439 (1943)). The test, according to this Court, is whether “the arrangement between the two corporations is being employed for a proper purpose.” *Id.* at 548. So long as the arrangement is fair and lawful, the case is to be determined by the separate existence of the two companies. *Id.* That “two corporations, parent and subsidiary, are commonly owned and operated does not eliminate sales tax consequences as to property transferred from one to the other.” *Id.* Further, the court said that “if there is a transaction that would have been subject to the imposition of a sales tax if the transaction had been between two separately owned corporations, the common ownership of the two corporations is irrelevant.” *Id.* “In tax matters a corporation and its stockholders are deemed separate entities.” *Id.*

This court found that petitioner and Johnson were separate companies, and that the transfer of goods between them was taxable based on a number of factors. *Id.* The court found that petitioner and Johnson were organized as separate entities under Missouri law; that petitioner submitted purchase orders under its own name and bills were sent to petitioner; the supplies purchased by petitioner went to Johnson and Johnson paid the bills for the purchases; and that Johnson enjoyed a distinct business advantage by obtaining supplies at wholesale prices, which it could not do without petitioner. *Id.*

Here, APLUX has no employees, just as petitioner in *Central Cooling* had no employees. As in *Central Cooling*, APLUX and Luxco are organized as separate entities

under Missouri law. APLUX was formed in 2006 as a separate entity, and only became a wholly owned subsidiary of Luxco in approximately 2011. *LF* p. 44, ¶¶ 1, 8. APLUX purchased the Aircraft under its own name. *J. Ex.* 28, 30. APLUX had three sources of income during the period in question, one from the lease with Aero Charter and one from each of the leases with Luxco. *LF* p. 46, ¶ 23; p. 48, ¶¶ 40, 44. Luxco is a privately owned producer and marketer of distilled beverages and liqueurs, with locations and subsidiaries located across the United States, and is not in the business of owning, operating or leasing Aircraft to others. *LF* p. 44, ¶ 6. Thus, APLUX serves the business purpose of owning Aircraft and leasing them to others, and Luxco is able to lease the Aircraft rather than be responsible for ownership of the Aircraft.

While the Director tries to argue that *Central Cooling* and *Moline* stand only for the principal of imposing tax on transactions between two related entities, they “undoubtedly must also stand for the reverse.” *Acme Royalty Co. v. Dir. of Revenue*, 96 S.W.3d 72, 75 (Mo. banc 2002). In *Acme Royalty*, the appellant owned a company located in Delaware. *Id.* at 73. The appellant entered into a licensing agreement with a related entity located in Missouri that required the related entity to pay royalties to the appellant for use of trademarks owned by the related entity. *Id.* Through an audit, the Director discovered the existence of the appellant and determined that the royalty income was subject to Missouri income tax. *Id.* at 74. While in *Acme Royalty*, the Director argued that *Central Cooling* “stands only for the principle that common ownership will not allow a corporation to avoid the tax consequences arising from the creation of separate corporate entities,” this Court found that the “corporate subdivision instituted by

the Appellants created separate legal entities, and they should be treated as such.” *Id.* at 75. Thus, this Court found that the income was not taxable because the Delaware company did not conduct business in Missouri, and the Missouri company did not receive the income. *Id.* Similarly, here, the corporate subdivision instituted by APLUX and Luxco creates separate entities and they should be treated as such, allowing leases between the two entities.

#### **D. APLUX is Not an Agent of Luxco.**

Finally, the Director argues that APLUX is simply an agent of Luxco, and thus the leases of the Aircraft from APLUX to Luxco are not valid. *Appl. Brief*, p. 54. While the Director argues that APLUX is an “agent” of Luxco, he does not discuss the elements of agency law. Instead, the Director relies upon *Loren Cook Company v. Director of Revenue*, 414 S.W.3d 451 (Mo. banc 2013) for this contention. *Id.* at 454. In *Loren Cook*, the petitioner purchased an aircraft from Cessna and then two years later sold the aircraft to another party. *Id.* at 452. On the same day that it sold the aircraft, Cook purchased a separate aircraft from a different party. *Id.* For both sales, Cook assigned its contractual rights and obligations to an intermediary company, which held title to both aircrafts for mere minutes, so that it would appear that Cook sold and purchased the aircraft to the intermediary. *Id.* Cook then tried to claim trade-in credit on the purchase and sale of the aircraft. *Id.* This Court determined that the intermediary was “merely acting as an agent to facilitate the different transactions that Cook had previously initiated.” *Id.* at 454.

The present situation bears no resemblance to *Loren Cook*. APLUX is not simply doing the bidding of Luxco. APLUX was formed in 2006 for the purpose of holding assets and investing. APLUX entered into separate leases with Luxco for the Aircraft, as well as a lease with Aero Charter for the lease of the Excel, and management agreements with Aero Charter to take care of the Aircraft.

“The law of agency is based on the fundamental premise that he who acts through another acts by or for himself.” *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 378 (Mo. App. 2014). To establish an agency relationship, the following elements must be met: 1) the agent must have “power to alter legal relations between the principal and a third party;” 2) the agent must be “a fiduciary with respect to matters within the scope of the agency;” and 3) the principal must have “the right to control the conduct of the agent with respect to matters entrusted to the agent.” *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 642 (Mo. 2002). Here, APLUX had no ability to alter legal relationships between Luxco and third persons; APLUX is not a fiduciary for Luxco; and Luxco does not control the conduct of APLUX. The Commission correctly found that “APLUX and Luxco are related, but separate, entities,” and the leases transferred the right to use the Aircraft from APLUX to Luxco and Aero Charter. *LF pp. 63, 67.*

## **CONCLUSION**

The Commission correctly found that the Respondents are not liable for use tax assessments issued by the Department of Revenue for the purchase of the Aircraft. The leases of the Aircraft meet the requirements as a sale for resale in that they are transfers of the right to use the Aircraft in exchange for consideration paid or to be paid. The Excel was leased to a common carrier for use in interstate commerce and so meets the exemption under sections 144.018.1(4), 144.615(3), and 144.030(20). Thus, the purchase and subsequent lease of the Excel to Aero Charter is exempt from tax under section 144.018.1 of the Missouri Revised Statutes. Additionally, APLUX paid tax on the leases of the TBM and the Excel to Luxco. Finally, Luxco and APLUX are separate entities and can, and did, enter into leases with each other for the Aircraft. Accordingly, the Commission's decision should be affirmed.

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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 11,864 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 October 13, 2020, 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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