SC94441

IN THE SUPREME COURT OF MISSOURI

VISIONSTREAM, INC.,

Appellant,

vs.

DIRECTOR OF REVENUE,

Respondent.

Appeal from the Administrative Hearing Commission
The Honorable Karen A. Winn, Commissioner

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Respondent Director of Revenue provides the following supplemental statement of facts for the Court's consideration in accordance with Supreme Court Rule 84.04.

Prior to ceasing operations and declaring bankruptcy in 2013, VisionStream, Inc. ("Taxpayer"), a Missouri corporation, designed and constructed exhibits for display at trade shows. L.F. 59. Typically, Taxpayer would produce a trade show display unique to its customer's specifications and ship the completed display directly to the trade show in another state. L.F. 59.[1] Taxpayer never included shipping in its cost of producing the display; instead, Taxpayer would separately invoice the customer for shipping or have a common carrier directly bill the customer for shipping the display. L.F. 61; *see, e.g.,* Respondent's Exhibit A-1 at VS002210, VS002215; Respondent's Exhibit C-6 at VS000393, VS000394, VS000395; Respondent's Exhibit D-3 at VS000278, VS000279 (examples of Taxpayer invoicing the customer for shipping costs Taxpayer had paid); Respondent's Exhibit A-13 at

[1] The types of goods Taxpayer sold ranged from paper towels to 42-inch monitors. *See, e.g.,* Respondent's Exhibit A-1 at VS002209 (invoice for paper towels, duct tape, etc.), VS002210 (invoice for two 42-inch monitors with speakers, brackets, and cases totaling $11,400.00).

VS000808, VS000810; Respondent's Exhibit B-1 at VS000299; Respondent's Exhibit B-3 at VS000324, VS000325, VS000326 (examples of the common carrier directly billing Taxpayer's customer). Taxpayer's customers typically would see the completed display for the first time at the trade show. Tr. 19. Taxpayer would bill its customer 30 to 60 days after a show, after receiving all the related invoices for that display. Tr. 20, 78; L.F. 61.

Taxpayer had a standard contract, its "Display Order," that included certain "Terms and Conditions" governing its transactions. L.F. 60. Taxpayer and its customers seldom executed a Display Order. Tr. 21; L.F. 60, 68, 70. Instead, Taxpayer's current president testified that most of Taxpayer's agreements consisted of an email from Taxpayer to its customer with an estimated price for a particular display and an email reply from the customer agreeing to hire Taxpayer to create the display and have it shipped directly to the trade show for which it was designed. Tr. 84; L.F. 61.[2] Taxpayer did not introduce any such email exchanges into evidence. L.F. 71.

[2] For a fee, Taxpayer offered certain services to its customers, including display setup and storage. L.F. 59-60, 61. Those services are not at issue here.

Taxpayer introduced its Display Order into evidence at the hearing. Tr. 20-23;[3] Petitioner's Exhibit 10. Its former president testified that the Display Order "would be what we consider kind of our terms and agreement with something I put in front of somebody. If it was done on my behalf, it was done for a new client that kind of just spelled out payment schedule." Tr. 21; L.F. 70. Taxpayer's current president testified—and the Administrative Hearing Commission found—that the Display Order's Terms and Conditions for "Delivery Expenses" and "Inspection on Arrival" were consistent with Taxpayer's "course of dealing" during the time frame for its refund claims. Tr. 74, 83; L.F. 69, 70, 71; *see* Petitioner's Exhibit 10 at 2, ¶V-VI.

In pertinent part, the Display Order Terms and Conditions provide:

> IV. DELIVERY SCHEDULE: . . . . VisionStream does not carry insurance on the Goods purchased hereunder and Purchaser shall have the risk of loss after the Goods leave VisionStream's facility or while the Goods are in storage at VisionStream's warehouse or

[3] The official transcript states that Petitioners' Exhibit 10 was offered by counsel for Respondent Director of Revenue. Tr. 20-23. Even a cursory reading of this segment of the transcript reveals that the attribution is erroneous and that the exhibit was offered by Taxpayer's counsel.

elsewhere. VisionStream is not responsible for Goods damaged, stolen or lost in transportation, in storage, or at exhibit halls or locations. Purchaser should obtain insurance in such amounts as Purchaser deems proper.

V. DELIVERY EXPENSES: Delivery will be F.O.B. manufacturer. All transportation, handling and insurance costs incurred in delivery will be charged to Purchaser. VisionStream may arrange for, and prepay, transportation, handling and insurance with the understanding that these charges will be invoiced subsequently to Purchaser. In addition, the expense for any special crating or handling required shall be borne by Purchaser.

VI. INSPECTION ON ARRIVAL: Purchaser shall inspect the Goods within thirty (30) days after the earlier of arrival of the Goods at Purchaser's designated location or upon written notification by VisionStream and shall conduct appropriate testing of the Goods to

ascertain whether the Goods conform to the Specifications. Failure of Purchaser to notify VisionStream within thirty (30) days shall be considered acceptance of the Goods. . . .

VII. WARRANTIES: . . . . VisionStream warrants the Goods sold hereunder shall be built in accordance with current industry standards, and that any new goods furnished hereunder shall be free from defects in materials and workmanship. If Purchaser rejects the Goods within the thirty day inspection period described above, based solely upon Vision Stream's failure to comply with the foregoing warranty, VisionStream shall correct the defect upon request at VisionStream's expense and such shall constitute Purchaser's sole and exclusive remedy. . . .

VIII. EXCLUSIVE REMEDY: OTHER THAN THE RIGHT TO INSPECT THE GOODS WITHIN THIRTY DAYS FOR WARRANTY MATTERS (PROVIDED ABOVE), THE EXCLUSIVE REMEDY OF PURCHASER FOR

> ANY CLAIM BASED ON THE CONDITION, PERFORMANCE, DEFECT OR NON-CONFORMITY OF THE GOODS SHALL BE TO MAKE A CLAIM TO THE ORIGINAL MANUFACTURER FOR THE WARRANTIES (IF ANY) PROVIDED BY THE ORIGINAL MANUFACTURER. . . .

L.F. 2 (*quoting* Petitioner's Exhibit 10 at 2-3).

Taxpayer charged its customers sales tax on the displays as tangible personal property (*see* § 144.020 RSMo) and remitted that tax to the Department of Revenue. L.F. 61. Taxpayer subsequently sought refunds for sales tax paid between February 1, 2007, and December 31, 2012, for sales of displays that it constructed and that were then delivered via common carrier to trade shows in other states. L.F. 60, 62, 63, 64. Taxpayer contended that the transactions qualified for an exemption in § 144.030 RSMo because they were "made in commerce" between Missouri and another state. L.F. 65.

The Administrative Hearing Commission denied Taxpayer's refund requests, concluding that the retail sales at issue were subject to sales tax pursuant to § 144.020 RSMo because title passed to Taxpayer's customer in Missouri pursuant to the Display Order Terms and Conditions. L.F. 71.

ARGUMENT

Standard of Review

A decision of the Administrative Hearing Commission ("Commission") must be affirmed if: "(1) it is authorized by law; (2) it is supported by competent and substantial evidence on the whole record; (3) mandatory procedural safeguards are not violated; and (4) it is not clearly contrary to the reasonable expectations of the General Assembly." *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 435-36 (Mo. 2010); § 621.193 RSMo.

This Court gives due deference to the Commission's ability to assess witness credibility. *Laciny Bros., Inc. v. Dir. of Revenue*, 869 S.W.2d 761,762 (Mo. 1994). In addition, the Commission's factual determinations "are upheld if supported by substantial evidence upon the whole record." *Concord Publ'g House, Inc. v. Dir. of Revenue,* 916 S.W.2d 186, 189 (Mo. 1996). When the Commission has interpreted the law or the application of facts to law, the review is *de novo. State Bd. of Registration for the Healing Arts v. McDonagh,* 123 S.W.3d 146, 152 (Mo. 2003); *Zip Mail Servs., Inc. v. Dir. of Revenue,* 16 S.W.3d 588, 590 (Mo. 2000).

A. Determining taxability of the transactions at issue requires establishing when title transferred.

Missouri imposes a tax "upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service

at retail in this state." § 144.020.1 RSMo. Among other exemptions, Missouri exempts from that sales tax "such retail sales as may be made in commerce between this state and any other state of the United States, or between this state and any foreign country." § 144.030.1 RSMo.

The Department of Revenue has adopted regulations addressing taxability of certain transactions. In pertinent part, the regulations provide:

> (1) In general, a sale of tangible personal property is subject to sales tax if title to or ownership of the property transfers in Missouri unless the transaction is in commerce. The seller must collect and remit the sales tax. . . . If a sale of tangible personal property is not subject to Missouri sales tax and the property is not stored, used or consumed in this state, no Missouri tax is due. . . .
>
> (2) Definition of Terms.
>
> . . .
>
> (B) In commerce--a transaction is in commerce if the order is approved outside Missouri and the tangible personal property is shipped from outside Missouri directly to the buyer in Missouri.

> (3) Basic Application of Taxes.
>
> (A) Title transfers when the seller completes its obligations regarding physical delivery of the property, unless the seller and buyer expressly agree that title transfers at a different time. A recital by the seller and buyer regarding transfer of title is not the only evidence of when title passes. The key is the intent of the parties, as evidenced by all relevant facts, including custom or usage of trade.
>
> (B) Unless otherwise agreed by the parties, when a Missouri seller delivers tangible personal property to a third-party common or contract carrier for delivery to an out-of-state location, title does not transfer in Missouri and the sale is not subject to Missouri sales tax. A buyer that carries its own goods is not acting as a common or contract carrier.

12 C.S.R. 10-113.200 ("Determining Whether a Transaction Is Subject to Sales Tax or Use Tax").

Based on the foregoing, the taxability of the transactions at issue here is predicated upon transfer of title occurring in Missouri. The contract between Taxpayer and its customers governs when title transferred and whether that transfer occurred in Missouri.

B. Title transferred upon Taxpayer's delivery of its customers' displays to the common carrier.

Title passage can be a negotiated term between parties to a contract. *See House of Lloyd, Inc. v. Dir. of Revenue,* 824 S.W.2d 914, 923 (Mo. 1992). Taxpayer's only evidence concerning the terms of its contracts with its customers is the Display Order it introduced at hearing. L.F. 71; *see* Tr. 84; L.F. 61 (contracts were formed in emails). Taxpayer introduced and invoked the Display Order to bolster its claim that the parties to the contract, i.e. Taxpayer and its customer, intended for the display titles to pass upon inspection at the trade show outside of Missouri. Tr. 83; *see* Petitioner's Exhibit 10 at 2, ¶VI. To the contrary, the Display Order evidences the parties' intention for title to pass to the customer upon Taxpayer's delivery of the goods to the common carrier in Missouri for shipment to the trade show in another state or country.

Taxpayer's current president testified that if there was any loss that occurred during shipment, Taxpayer believed it shared the loss with the shipper. Tr. 78. Yet Taxpayer introduced no evidence, not even anecdotal

testimony by its former and current president from its 10-year business history, demonstrating it had ever shared any shipping loss or damage with a shipper.

In contrast, in its Display Order, Taxpayer states that it "does not carry insurance on the goods purchased" and that its customer "shall have the risk of loss after the Goods leave [Taxpayer's] facility or while the Goods are in storage" at Taxpayer's warehouse or elsewhere. Petitioner's Exhibit 10 at 2, ¶IV. Further, even though the customer has 30 days to inspect the completed display, its only remedy is to allow Taxpayer to correct any defects. Petitioner's Exhibit 10 at 2, ¶VI.

In *House of Lloyd, Inc. v. Director of Revenue,* 824 S.W.2d 914 (Mo. 1992),[4] the Court reinforced that "[a]bsent an explicit agreement, . . . title

[4] *House of Lloyd* was abrogated on other grounds by *Sipco, Inc. v. Director of Revenue,* 875 S.W.2d 539 (Mo. 1994). In *House of Lloyd*, the Court imposed a use tax on strapping material and packing peanuts used to safeguard deliveries to customers, concluding that "the packing process was not fabrication and nuts not exempt from use tax under §144.030.2(5)" RSMo. *See Sipco*, 875 S.W.2d at 541-42.

Sipco reached the opposite conclusion with respect to dry ice used for packaging pork products. *Id.* at 542. In reversing course, the Court stated

passes . . . at the time and place at which the seller completes his performance with reference to the physical delivery of the goods. . . ." *Id.* at 923 (internal quotation and citation omitted). The Court then stated:

> [t]he general rule is that, absent an intention of the parties, under a contract F.O.B. the point of shipment, the title passes at the moment of delivery to the carrier. . . . Missouri follows the general rule. In *Tuttle v. Bracey-Howard Constr. Co.,* 136 Mo. App. 309, 117 S.W. 86 (1909), the court held that the sale was complete on delivery of the material F.O.B. Trenton. Title passed upon the shipment of goods. Delivery to the carrier vested title in the buyer."

Id.

The Court in *House of Lloyd* also noted that "RSMo defines 'F.O.B.' (free on board) in the context of the purchase order used by the parties as a

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that "[t]o the extent that [*King v.*] *National Super Markets*[, 653 S.W.2d 220, 221 (Mo. 1983),] and *House of Lloyd* imply that the holder of goods must show a calculated cost specifically factored into the price for resale to take advantage of the resale exemption, they are misleading and should no longer be followed." *Id.*

'delivery term.' . . . Delivering the goods to the point of shipment and putting them in the carrier's possession constituted 'delivery' under the UCC," or Uniform Commercial Code. *Id.* The Court found that the purchase order requiring that the vendor ship the conveyors "F.O.B. Truman, Arkansas" has "a clear and unambiguous meaning, requiring the seller to deliver the goods to the carrier at the point of shipment." *Id.* at 923-24. The Court stated:

> When the conveyors were delivered to the carrier for shipment, the vendor's obligation with respect to 'physical delivery' was complete in accordance with the meaning of the plain terms of the purchase order. . . . Title to the goods passed at the point of shipment consistent with §400.2-401(2)(a) and not later at destination per §400.2-401(2)(b).

House of Lloyd, 824 S.W.2d at 924.

Here, Taxpayer's shipping terms were "F.O.B. manufacturer" (Petitioner's Exhibit 10 at 2, ¶V), and Taxpayer's responsibility for the shipment ended once it placed the shipment with the common carrier. At that point, title to the items transferred to Taxpayer's client. *See* 12 C.S.R. 10-113.200(3). The inspection provision in the Display Order touted by Taxpayer is inapposite to determining when the transfer of title occurred.

Instead, the inspection provision relates to Taxpayer's warranties of the displays, and Taxpayer's customers could neither refuse the display nor return it for a refund. Petitioner's Exhibit 10 at 2, ¶VI-VII. Although Taxpayer sometimes paid for shipping initially, its Display Order and invoices evidence that it simply fronted the shipping costs for its clients, and it ultimately required repayment of the shipping costs in full. Petitioner's Exhibit 10 at 2, ¶VI-VII.; *see, e.g.,* Respondent's Exhibit A-1 at VS002210, VS002215; Respondent's Exhibit C-6 at VS000393, VS000394, VS000395; Respondent's Exhibit D-3 at VS000278, VS000279.

Taxpayer argues that the Commission erred in comparing its custom-built displays with the concrete in *Kurtz Concrete, Inc. v. Director of Revenue,* 560 S.W.2d 858 (Mo. 1978). The issue in *Kurtz* was whether the delivery charges were subject to Missouri sales tax as services rendered before title passes. *Id.* at 859. In order to determine the taxability of Kurtz's delivery charges for the concrete it manufactured and delivered to its clients, the Court analyzed when title to the concrete passed from Kurtz to its clients. *Id.* at 859-60.

To satisfy its client's orders, Kurtz placed the mix in the truck and combined it with water to create concrete. *Id.* Once the mix entered the truck, it could not be returned to inventory. *Id.* During delivery to the client's location, the truck churned the contents to prevent the concrete from

setting or separating. *Id.* The concrete had to be used within hours of its mixing and if it was not used, it had to "be dumped" as it became "useless." *Id.*

The Court determined that because Kurtz's client had to pay for the concrete once the materials entered the truck, ownership passed to the client at that time, and the separately stated delivery charges were not subject to tax. *Id.* at 862. *Kurtz* never dealt with taxability of the underlying order itself; the sale at retail of the tangible personal property, *i.e.*, the ready-mix concrete, was indubitably taxable.[5]

Here, as in *Kurtz*, the custom-made displays could neither be used for another customer once completed nor could a customer return them. Once the displays were completed, the client was required to pay for them. Also,

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[5] *Kurtz* was distinguished by *Southern Red-E-Mix Co. v. Director of Revenue,* 894 S.W.2d 164 (Mo. 1995), which also concerned the taxability of concrete delivery charges. Unlike *Kurtz,* Southern Red-E-Mix did not separately state its delivery charges. *Id.* at 166. The Court stated that "*Kurtz* cannot be read to establish an industry-wide rule prohibiting taxation of delivery charges of concrete" and held that requiring sales tax to be paid on the delivery expenses was supported by the evidence. *Id.* The taxability of delivery expenses is not at issue here.

according to the fact finder, the Display Order best reflects the parties' intentions, and it reflects that Taxpayer shifts the risk of loss to its customers once the displays leave Taxpayer's facility.

C. Taxpayer has not established its right to a sales tax refund.

Taxpayer argues that its transactions were not subject to sales tax pursuant to § 144.020 RSMo and instead were exempt pursuant to § 144.030 RSMo. Taxpayer bore the burden of proof before the Commission. § 621.050 RSMo.

Tax exemptions are "strictly construed against the taxpayer." *Branson Props. USA, L.P. v. Dir. of Revenue*, 110 S.W.3d 824, 825 (Mo. 2003). Indeed, an exemption is allowed "only upon clear and unequivocal proof, and doubts are resolved against the party claiming it." *Id.* As such, the burden is on the taxpayer "to show that it fits the statutory language exactly." *Cook Tractor Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 872 (Mo. 2006). Taxpayer failed to meet its burden here.

In its course of dealing with its customers, Taxpayer eliminated its exposure for loss or damage during shipping through various provisions in its Display Order. Petitioner's Exhibit 10 at 2, ¶IV, V, VI, VII, VIII. Specifically, Taxpayer's Display Order notifies customers that delivery will be "F.O.B. manufacturer," and that Taxpayer will invoice customers for all shipping costs. Petitioner's Exhibit 10 at 2, ¶V. Taxpayer now attempts to

disavow itself from the terms of its Display Order that undercut its refund request while at the same time noting that other terms of its Display Order are consistent with its course of dealing during that same time frame. *See* Tr. 83.

The Commission noted that the only evidence Taxpayer introduced of its intent with respect to passage of title was "equivocal and self-serving statements from its own current and former employees" and that "the Display [Order], whether executed or not, embodies the course of dealing between [Taxpayer] and its customers." L.F. 71. Notably absent from Taxpayer's evidence were any sample contracts with its customers or any insurance policies or other indicia that it indeed retained the risk of loss or damage during shipping or storage contrary to its Display Order terms.

The Display Order terms are consistent with Taxpayer's behavior as reflected in its customer invoices. Further, the terms make sense in light of the volume and net value of what Taxpayer was shipping as well as the various destinations for those shipments.

Taxpayer has not met its burden to establish by "clear and unequivocal proof" that it "fits the statutory language exactly" to be entitled to a refund, particularly when "doubts are resolved against the party claiming" the refund. *Cook Tractor Co., Inc.*, 187 S.W.3d at 872; *Branson Props. USA, L.P.*, 110 S.W.3d at 825.

CONCLUSION

For the foregoing reasons, the Commission's August 12, 2014, Decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically upon all parties via Missouri CaseNet on January 28, 2015.

I further certify that this brief contains 3,666 words in compliance with the limitation in Rule 84.06(b), it contains the signature and required information in compliance with Rule 55.03, and I have signed the original.

/s/ *Rochelle L. Reeves*
Assistant Attorney General