IN THE
SUPREME COURT OF MISSOURI

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SC89568

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**JAY WOLFE IMPORTS MISSOURI, INC., Appellant,**

**v.**

**DIRECTOR OF REVENUE, Respondent.**

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**Appeal from the Administrative Hearing Commission of Missouri**

**The Honorable John J. Kopp, Commissioner**

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# BRIEF OF RESPONDENT

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## STATEMENT OF FACTS

In this appeal, which presents a question of law, the Director finds the Statement of Facts submitted by the taxpayer, appellant Jay Wolfe Imports to be a sufficient summary of the facts as found by the Administrative Hearing Commission ("AHC"). The AHC's findings are contained in its decision, which is copied in Appellant's Appendix beginning at page A-1.

## ARGUMENT

In this appeal, a company that does business only in Missouri wants to apportion its income as if it also did business elsewhere. To allow that step would require this Court to abandon past precedent, and extend apportionment beyond the scope of its core purpose: to provide companies that operate in more states than just Missouri a method that fairly and efficiently divides their income among those states for taxation purposes.

But even if Jay Wolfe were allowed to apportion, the single-factor method it chose would not make a difference; its sales of tangible property took place wholly within Missouri, leaving no income to be apportioned.

### Legal Standards

Jay Wolfe correctly states the standard of review: the decision of the Administrative Hearing Commission is to be upheld if it is authorized by law and supported by substantial evidence on the whole record. *See*, *e.g.*, *American Nat. Life Ins. Co. of Texas v. Director of Revenue*, 269 S.W.3d 19, 21 (Mo. banc 2008).

Jay Wolfe does not address the standards for construing the statues at issue. That may be because, in its view, § 143.451.2[1] imposes "a simple rule" (Appellant's Brief ("App. Br.") at 11) that presumably requires no

[1] All statutory references are to RSMo 2000 unless otherwise noted.

construction. Though the Director does not disagree that the rule is relatively simple, the Director disagrees as to what that "simple rule" is or means. The disagreement may prompt the Court to conclude that the statute cannot be applied based solely on its plain language.

Should the Court so conclude, the Court will face this question: is the statute that Jay Wolfe invokes a taxation statute? Or is it an exemption statute? That matters, for taxation statutes are construed against the Director (*e.g.*, *American Nat. Life Ins. Co.*, 269 S.W.3d at 21), while exemption statutes are construed against the taxpayer (*e.g.*, *Midwest Acceptance Corp. v. Director of Revenue*, 183 S.W.3d 579, 580 (Mo. banc 2006). To understand where this statute falls, we look at the statutory scheme.

Under § 143.071.2, Missouri imposes a tax "upon the Missouri taxable income of corporations in an amount equal to six and one-fourth percent of Missouri taxable income." "Corporation" is defined, in turn, in § 143.441. Then, in § 143.451.1, the legislature decrees that "Missouri taxable income of a corporation shall include all income derived from sources within this state." Those are taxation statutes.

But there is no need to construe them here. There is no dispute that Jay Wolfe is a "corporation" subject to the corporate income tax, nor that it derives the income at issue here "from sources within this state." After all, Jay Wolfe concedes that it does business only in Missouri. App. Br. at 1; *see*

A-12 ("Jay Wolfe has not shown that it does business in any other state and produces income in any other state.").

Jay Wolfe's claim is based solely on § 143.451.2. That subsection opens by reiterating the general taxation rule already stated, though with particular reference to business that crosses state lines:

> A corporation described in subdivision (1) of subsection 1 of section 143.441 shall include in its Missouri taxable income all income from sources within this state, including that from the transaction of business in this state and that from the transaction of business partly done in this state and partly done in another state or states.

To that point, § 143.451.2 is also a taxation statute.

But it doesn't end there; it adds a "however" clause, allowing the taxpayer to exclude some Missouri-source income when the production of that income also involved other states. Excluding income from taxation is an exemption, not taxation. "Exemptions for taxation are strictly construed against the taxpayer and, as such, it is the burden of the taxpayer claiming the exemption to show that it fits the statutory language exactly." *Ronnoco Coffee Co. v. Director of Revenue*, 185 S.W.3d 676, 677 (Mo. banc 2006); *Midwest Acceptance Corp. v. Director of Revenue*, 183 S.W.3d 579, 580 (Mo. banc 2006). Thus, the statute at issue should be construed against Jay Wolfe. *But see Langley v. Administrative Hearing Commission*, 649 S.W.2d 216, 220 (Mo. banc 1983) (Welliver, J. dissenting).

## I. Because Jay Wolfe has only Missouri source income, it is not qualified to apportion its income. (Responds to Appellant's Point I.)

This case arises from the concept of apportionment – a method of determining what portion of the income of a corporation that operates in multiple states is taxable in Missouri. Apportionment today is largely a result of federal constitutional law, which bars a state from taxing income that does not have a sufficient connection to the state. It is a term of art for formulas that divide taxable income among states in which a company operates. Those formulas are an alternative to simply accounting for revenues and associated costs, *i.e.*, "keeping track, dollar by dollar, of income that has a requisite connection to Missouri so that it can, consistent with the United States Constitution, be subjected to Missouri's income tax." *Medicine Shoppe Int'l, Inc. v. Director of Revenue*, 156 S.W.3d 333, 335 (Mo. banc 2005); *see also* Hellerstein, STATE TAXATION (3d ed., 2008), ¶ 8.03.

To a degree, it is possible for most taxpayers to allocate expenses and income through "dollar by dollar" accounting. For example, a company – which could include an automobile dealer – that owns retail outlets in two different states can determine what expenses it has for each location and what income it receives from or at that location, thus dividing its taxable income between the two. But many companies cannot so easily distinguish income from two sides of a state line because the nature of the business and its transactions make such accounting impossible or impractical.

Thus, Missouri – like most or perhaps all states – has enacted statutes allowing corporations to "apportion" taxes using formulas that create a reasonable, more easily calculated substitute for direct accounting. In Missouri there are two such formulas: "single-factor apportionment," now found in § 143.451; and "three-factor apportionment," found in the Multistate Tax Compact, § 32.200. Here, Jay Wolfe seeks to use single-factor apportionment. But to get there, Jay Wolfe must first establish its right to apportion at all. There is a longstanding rule in Missouri caselaw that a taxpayer situated like Jay Wolfe could not apportion. Jay Wolfe argues that rule was abrogated by implication by the General Assembly. To evaluate that claim, we (a) briefly discuss the history of apportionment in Missouri, (b) address the origin and content of the qualification rule, and finally (c) consider the legislation that, in the view of Jay Wolfe, abrogated it.

**a. A brief history of apportionment in Missouri.**

As this Court observed long ago, "the original income tax law, that of 1917, did impose a tax upon the entire net income of domestic corporations from all sources, intrastate or interstate." *Artophone Corp. v. Coale*, 133 S.W.2d 343, 354 (Mo. 1939). Implicit in that statement is the conclusion that Missouri was limited in its ability to tax non-domestic corporations. That Missouri taxed the entire income of Missouri corporations but could not do the same for the income of non-Missouri corporations doing business here may not have violated the federal constitution, any more than Missouri's decision to tax individuals for all their income, regardless of its sources, violates the federal constitution.[2] But it did create an inequality, adverse to Missouri businesses.

Thus in 1927, the General Assembly amended the income tax law, "evidently ha[ving] in mind that the then existing law made 'certain discriminations between residents and nonresidents, and between individuals and corporations.'" *Id.* A key amendment allowed what became known as "apportionment."

The original version of the apportionment statute continued in place through 1969. *See* § 143.040.2, RSMo (1949, 1959, and Supp. 1969); § 11343, RSMo 1939. It allowed the use of the new formula "[w]here income results

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[2] Individual income taxpayers cannot "apportion" income; the apportionment statutes apply only to corporations. But individuals receive a credit for taxes paid to other states. *See* § 143.081.

from a transaction partially in this state and partially in another state or states, and income and decisions of the portion in the state cannot be segregated."

§ 143.040.1, RSMo Supp. 1969. In other words, the formula was an alternative to accounting for income and expenses by tying them directly to Missouri or to another state. Again, such dollar by dollar accounting is practical when, for example, a company has separate operations in two different states – as would be true if Jay Wolfe operated one dealership in Missouri and another in Kansas.[3] But it is impractical – or at least expensive – in many circumstances.

Under what became known as "single-factor apportionment," a qualifying Missouri corporation could use a formula to approximate the amount of its income that was truly attributable to its Missouri activities, rather than tracing every dollar to one state or another. The method was outlined in the statute:

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[3] The "Jay Wolfe Automotive Group," presumably a parent company or management of an affiliated group of companies, apparent does precisely that. *See* http://www.jaywolfe.com/ (visited February 25, 2009). Jay Wolfe Imports, however, is a separate corporation, doing business as Jay Wolfe Honda, only at one location in Missouri. *See* App. A-2.

> The amount of sales which are transactions wholly within this state shall be added to one-half of the amount of sales which are transactions partly within this state and partly without this state, and the amount thus obtained shall be divided by the total sales in cases where sales do not express the volume of business, the amount of business transacted wholly within this state shall be added to one-half of the amount of business transacted partly in this state and partly outside this state and the amount thus obtained shall be divided by the total amount of business transacted, and the net income shall be multiplied by the fraction thus obtained, to determine the proportion of income to be used to arrive at the amount of tax, and the amount of tax shall be such percent thereon as may now or hereafter be provided.

*Id.* The result was that the corporation could use a ratio derived from the location of its sales to decrease the amount of its taxable income, excluding from Missouri taxation a portion of "the entire net income" on which a corporation is otherwise taxed.

In *Artophone*, this Court asked a question pertinent to analysis and application of the statute as it later evolved: "What did the Legislature mean by 'transactions' and by 'sales which are transactions partly within this state and partly without this state?'" 133 S.W.2d at 348. The Court observed that "transaction" was an imprecise term, quoting another court for the proposition that "'the term "transaction" is not legal and technical, it is common and colloquial; it is therefore to be construed according to the context and to approved usage.'" *Id.*, quoting *Scott v. Wagoner*, 139 P. 454, 456 (Mont. 1914). Thus, this Court gave "transaction" a broad meaning.

For 40 years, this "single-factor" apportionment based on "sales which are transactions" wholly within or partly within and partly without the State was the only method of apportionment available to Missouri corporations. That changed in 1967, with adoption of the Multistate Tax Compact. One author explains the circumstances of that development:

> The Multistate Tax Compact was drafted in 1966 and became effective, by its own terms, on August 4, 1967, after seven states had adopted it. … The compact was formed in the aftermath of the Supreme Court's 1959 decision in *Northwestern States Portland Cements Co. v. Minnesota* [358 U.S. 450] allowing for state taxation of interstate commerce and entities. The Supreme Court held that states could tax interstate commerce and its proceeds, if the entity subject to the tax had some "nexus" to the taxing jurisdiction and the tax was "fairly apportioned."

Caroline N. Broun, etc., THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS: A PRACTITIONER'S GUIDE (American Bar Association, 2006) p. 388 (footnotes omitted). Missouri was one of the early Compact states; the Compact, now found at § 32.200, has thus been part of Missouri law for more than 40 years.

Under the Compact, corporations doing business in Missouri – regardless of where they were domiciled – could apportion income in a new way. Compact apportionment – which applies beyond just income taxes – has three elements, hence the common references to "three-factor apportionment" (*see*, *e.g.*, *Suburban Newspapers of Greater St. Louis, Inc. v. Director of Revenue*, 975 S.W.2d 107, 108 (Mo. banc 1998); *Ford Motor Co. v. City of Hazelwood*, 155 S.W.3d 795, 797 (Mo. App. E.D. 2005), as distinguished from the "single-factor apportionment" at issue here.

Beginning in 1967, then, corporations looking for a statutory formula with which to exclude some of their income from Missouri taxation because its source, at least in part, is in another state could choose between single-factor apportionment under § 143.040 and three-factor apportionment under the Compact.

In 1972, the General Assembly rewrote Chapter 143, the income tax chapter. It moved single-factor apportionment from § 143.040.2 to § 143.451.2, where it resides today. *See* S.B. 549 Mo. Session Laws 1971-72,

p. 698. But the language of the single-factor apportionment provision remained functionally the same.

In 1979, the General Assembly amended the single-factor apportionment statute. S.B. 218, 235, 340 & 398, Mo. Session Laws 1979-80 at 331, 333. Curiously, it put the amendment in the "definitions" section of Chapter 144, the chapter that deals with sales and use tax.[4] The latter part of § 144.010.7, RSMo Supp. 1980 defined, for the first time, the categories of sales "transactions" used in calculating single-factor apportionment, and expressly applied them to Chapter 143:

> …[f]or the purposes of taxation under chapter 143, RSMo, a transaction involving the sale of tangible property is:

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[4] Actually, the 1979 General Assembly passed two different versions of § 144.010; the other version did not include the new definition. In the 1980 Supplement, the Revisor noted: "This section as enacted by H.B. 59 became effective 9-26-79; this section as enacted by S.B. 218, 235, 298, 340 & 398 becomes effective 1-1-80. The two versions should be read together, but they cannot be merged at this printing of the statutes." Subsequent editions merged them, including the new definitions applicable to Chapter 143.

(a) "Wholly in this state" and not "in commerce" if both the seller's shipping point and the purchaser's destination point are in this state;

(b) "Partly within this state and partly without this state" and "in commerce" if: (i) the seller's shipping point is in this state and the purchaser's destination point is outside this state, or (ii) the seller's shipping point is outside this state and the purchaser's destination point is in this state. The purchaser's destination point shall be determined without regard to the F.O.B. point or other conditions of the sale.

As of 1980, then, the single-factor apportionment formula did not include all sales transactions however defined, but only those transactions that constituted the "sale of tangible property" where there were "shipping" and "destination" points.

In 1988, the General Assembly eliminated the structural anomaly, moving the definitional language to Chapter 143. H.B. 1335 Mo. Session Laws 1988; § 144.451.2, RSMo 1986. The definitions were modified slightly, eliminating the "in commerce" language and adding a third subsection to ensure that "wholly without" the state would include only transactions where neither the shipping nor the destination point were in Missouri. And their application was limited to "this section," *i.e.*, to single-factor apportionment, rather than application throughout Chapter 143. (The language is quoted in full at pp. 27-28, *infra*.)

**b. Out-of-state business – which jay Wolfe lacks – is a prerequisite to apportionment.**

The Commission held that there is a "threshold question" (App. at A-5) and a prerequisite for apportionment: the corporate taxpayer must be doing business in a state or states other than Missouri. *See* App. at A-5 – A-11. Jay Wolfe challenges that conclusion.

The "source of income" concept appears throughout the corporate income tax scheme. That scheme begins with § 143.071.3, which imposes a tax "upon the Missouri taxable income of corporations in an amount equal to six and one-fourth percent of Missouri taxable income." It proceeds next to § 143.431.1, which defines "Missouri taxable income": "The Missouri taxable income of a corporation taxable under sections 143.011 to 143.996 shall be so much of its federal taxable income for the taxable year, with the modifications specified in subsections 2 to 4 of this section, as is derived from *sources within Missouri* as provided in section 143.451." (Emphasis added.) The scheme thus turns to § 143.451, which begins by reiterating the references to Missouri-source income: "1. Missouri taxable income of a corporation shall include all income derived from *sources within this state*."

(Emphasis added.) Notably, none of those provisions have been changed in any pertinent way in the last 30 years or more.

The same is true of the first part of § 143.451.2, the subsection that contains the single-factor formula. It, too, uses "source" language, though also recognizing that there is some income that is derived from multiple states: "A corporation described in subdivision (1) of subsection 1 of section 143.441 shall include in its Missouri taxable income all income from *sources within this state*, including that from the transaction of business in this state and that from the transaction of business partly done in this state and partly done in another state or states. …" (Emphasis added.)

With that scheme before it, this Court established the rule that the AHC applied here: that apportionment is available only when the corporation has income the source of which is a state other than Missouri – *i.e.*, when the corporation has income that Missouri cannot constitutionally tax.

The requirement that the corporation seeking to apportion produce income elsewhere dates back to at least 1940, when the Court explained in *In re Kansas City Star*, 142 S.W.2d 1029 (Mo. 1940), that for a corporation to have apportionable income, it had to produce income outside Missouri:

> [U]nless labor or capital is utilized outside this state in business transactions, the income therefrom must be regarded as

> arising wholly from sources in this state and is not allocable even though the transactions were done in interstate commerce.

*Id*. at 672. By 1982, the Court could look back at a long list of precedents and declare that "the 'source of income' test of § 143.451 and its predecessors" was a "longstanding construction of Missouri law." *Goldberg v. State Tax Commission*, 639 S.W.2d 796, 801 (Mo. 1982). Thus, the Court held that "the 'source of income' test embodied in present § 143.451 was effective and … controlling" before the adoption of the Multistate Tax Compact. *Id.*. That a corporation have income from another state was, according to the Court, a "threshold determination" that "the legislature did not intend … to vitiate" by adoption of the Multistate Tax Compact. *Id.*

The next year, in *Langley v. Administrative Hearing Commission*, 649 S.W.2d 216 (Mo. banc 1983), a single-factor apportionment case, the court reiterated, this time in a single-factor case, the rule stated in *Kansas City Star* and applied to three-factor apportionment in *Goldberg*.

On a single day in 1988, the Court returned to apportionment eligibility in two cases, *Bass Pro Shops, Inc. v. Director of Revenue*, 746 S.W.2d 97 (Mo. banc 1988), and *Dick Proctor Imports, Inc. v. Director of Revenue*, 746 S.W.2d 571 (Mo. banc 1988). In *Dick Proctor*, the Court again spoke of whether a corporation was eligible to apportion: "The initial question here is whether appellant was eligible to use the single factor apportionment formula." 746

S.W.2d at 573. The Court then applied the "source of income" test to determine eligibility. It required that the corporation have sales "partly within and partly without" Missouri, and explained that a sale would be "partly within and partly without Missouri if the taxpayer has used labor or capital outside Missouri in the transaction." *Id.* The Court applied the same rule in *Bass Pro Shops*. 746 S.W.2d at 98.

In *Bass Pro Shops* and *Dick Proctor Imports*, the Court associated the "source of income" test with the use of "partly within and partly without" language in the single-factor apportionment formula itself. The Court also limited its application of the "source of income" test to tax years before 1980, when § 144.010.1(7), RSMo 1986, became effective. *Dick Proctor Imports*, 746 S.W.2d at 573-74 & n. 1; *Bass Pro Shops*, 746 S.W.2d at 98 n. 1.

The Court reiterated its statement, citing *Dick Proctor Imports*, the next year in *Wohl Shoe Co. v. Director of Revenue*, 771 S.W.2d 339, 341-42 (Mo. banc 1989). But in none of those cases did the Court answer the question posed here, which is whether the "source of income" test still exists as a prerequisite for apportionment. And any suggestion that the test had disappeared as of 1980 would have been dicta, given that none of those cases involved 1980 or any subsequent tax year.

The next year, in *Dow Chemical Co. v. Director of Revenue*, 787 S.W.2d 276 (Mo. banc 1990), a three-factor apportionment case, the Court could have reiterated the suggestion that *Goldberg* was no longer good law and that the "source of income" test had somehow changed by virtue of the 1979 amendment. Instead, it reiterated the rule from *Goldberg*:

> Our law accords a corporation that does business in more than one state alternatives for the apportionment to Missouri of its business income for purpose of Missouri taxation. One option is the single-factor formula of § 143.451.2 that rests solely on the sales or business ratio. That method apportions to Missouri for taxation *income derived from sources within this state. See Goldberg* ….

Rather than suggest that corporations could now qualify to apportion, the court spoke as if its prior rule still applied. Similarly, the court did not draw such a line a few years later when it returned to apportionment in *Lemay Building Corp. v. Director of Revenue*, 889 S.W.2d 835 (Mo. banc 1995).[5]

That income from business activities out-of-state would be a prerequisite for apportioning income makes sense. After all, the purpose of

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[5] In addition to citing this Court's "source of income" cases, the AHC noted its own prior opinions that consistently imposed such a prerequisite. *See* App. at A-9-10. Those are not, of course, binding here. But they do demonstrate a consistent view of the law.

apportionment, at least since the federal decisions on taxation of interstate commerce, is not to give some Missouri corporations a break on Missouri taxes, but merely to ensure that the state is not taxing them beyond what it is permitted to do. And there is no constitutional bar to taxing a Missouri corporation on all of its income if it does not do business – and thus does not subject itself to tax – in any other state. Indeed the very term "apportionment" is tied to the concept that the income must be assigned among taxing jurisdictions. It is ill-suited to the concept of a tax discount our exclusion.

There is no question that Jay Wolfe does not meet the "source of income" prerequisite to apportionment. After all, Jay Wolfe concedes that it does business only in Missouri. App. Br. at 1. As the AHC found: "Jay Wolfe has not shown that it does business in any other state and produces income in any other state." App. at A-12.

That finding is based largely, of course, on what Jay Wolfe does. But it is buttressed by what Jay Wolfe does not do: pay income taxes on business done in other states. For example, though Jay Wolfe uses Kansas customers as the example when it is arguing its position (*see* App. Br. at 1 ("Jay Wolfe's Customers primarily reside in either Missouri or Kansas.")), it does not file corporate income tax returns in Kansas (see AHC findings, ¶ 7, App. A-3). Yet Kansas law requires that "every corporation doing business within [that] state or deriving income from sources within [that] state" file returns and pay income taxes. Kansas Statutes 89-32,100(c), Supp. 2008.

### c. The insertion of a new, narrower definition of "partly within and partly without" income did not make corporations that do business only in Missouri eligible to "apportion" their income.

Jay Wolfe argues, of course, that the "source of income" test was abolished. In doing so, Jay Wolfe can point to only one change in arguably pertinent statutory language: the insertion of definitions into what is now § 143.451.2. Thus, Jay Wolfe asserts that the insertion of those narrower definitions into single-factor apportionment abolished the "source of income" test – *i.e.*, that the legislature narrowed the definition of "transaction" and thus broadened the availability of single-factor apportionment. Jay Wolfe highlights this Court's language in *Dick Proctor Imports*, *Bass Pro Shops*, and *Lemay Building Corp.*, but its result carries that language well beyond the breaking point. And more important, Jay Wolfe provides no explanation for why the language can or should be read that way.

Nothing in the new definitions suggests that the legislature intended to expand the availability of single-factor apportionment. The definitions merely limited the data to be used in the formula. Before they were adopted, the input to the formula was an amorphous set of sales "transactions."

Afterwards, the input was a more limited data set, *i.e.*, sales of tangible property, classified according to the location of the shipping and destination points. Nothing in Jay Wolfe's argument – and nothing in this Court's precedents – even hints at a reason to conclude that restricting the data set expanded eligibility for apportionment. In the absence of something in the legislation that suggests an intent to expand eligibility, this Court should not revisit its own precedents and eliminate the prerequisite of out-of-state income.

## II. Because Jay Wolfe produced no income by sales transactions that included shipping tangible personal property from one state to another, it had no sales "partly within this state and partly without this state" for purposes of § 143.451.2 and could not benefit from single-factor apportionment. (Responds to Appellant's Point II.)

If the Court rules that the restrictive changes in the definitions in § 143.451.2 did eliminate the "source of income" prerequisite to apportionment, it should nonetheless deny relief to Jay Wolfe because even under those definitions, Jay Wolfe cannot reduce its Missouri taxable income through single-factor apportionment. Jay Wolfe, at least on the record it made to the AHC, has no sales transactions that are "partly within and partly without" or "wholly without" the State of Missouri. Thus its ratio calculated under single-factor apportionment was 1.0 – making 100% of its revenue taxable in Missouri.

Section 143.451.2 begins by declaring that corporations must include as "Missouri taxable income all income from sources within this state, including that from the transaction of business in this state and that from the transaction of business partly done in this state and partly done in another state or states." In other words, even income the production of which involves activity in other states is included as Missouri income. The section then creates an exception to or limitation on that declaration, in three steps.

In part (1), it authorizes the division of income among states when the "income and deductions of the portion in the state cannot be segregated." § 143.451.2(1). The provision thus recognizes, implicitly, that some income and deductions *can* be segregated. For example, were Jay Wolfe to have two separate car sales facilities, one on each side of the Missouri-Kansas line, the income from and deductions attributable to each of those facilities could presumably be segregated between the two states. The purpose of § 143.451.2, however, is to deal with the circumstance where the income and expenses cannot be segregated.

In part (2), the statute creates an apportionment scheme – *i.e.*, a method for dividing or assigning income and deductions among states based not on where a dollar was spent or earned, but by imposing a formula that looks only at sales, divided among three classes: "transactions wholly within this state," "transactions partly within this state and partly without this state," and "total sales." This method is merely a rough estimate of what portion of the corporation's income Missouri can constitutionally tax. And the corporation is not bound to use this formula: it can find ways to segregate income among the states from which it is derived (again, *see* § 143.451.2(1)), or it can use three-factor apportionment under the Multistate Tax Compact.

To use this single-factor method (called single-factor because it looks only at sales), a taxpayer must have sales that qualify as "partly within and partly without this state," which brings us to the subpart (3) – the portion of the statute that is problematic here.

As noted above, the General Assembly defined the terms "wholly within" and "partly within and partly without" as they are to be used in the apportionment formula. Again, in each instance, the taxpayer must first identify the "seller's shipping point":

> (3) For the purposes of this section, a transaction involving the sale of tangible property is:
>
> (a) "Wholly in this state" if both *the seller's shipping point* and the purchaser's destination point are in this state;

> (b) “Partly within this state and partly without this state” if *the seller’s shipping point* is in this state and the purchaser’s destination point is outside this state, or the seller’s shipping point is outside this state and the purchaser’s destination point is in this state;
>
> (c) Not “wholly in this state” or not “partly within this state and partly without this state” only if both *the seller’s shipping point* and the purchaser’s destination point are outside this state;
>
> …

§ 143.451.2(3) (emphasis added). To be able to use single-factor apportionment, then, a corporation must have transactions in which it, as the seller, has a “shipping point” in Missouri and the purchaser has a “destination point” in another state, or vice versa.

Jay Wolfe entirely ignores the key term, “shipping.” It is not enough that the purchaser live in another state. Nor is it enough that the purchaser take the tangible property and move it to another state. As part of the transaction, the tangible property must be shipped from the seller’s location in Missouri to a destination outside of Missouri, or vice versa.

Absent that restriction, every Missouri retailer could use single factor apportionment based on purchases by out-of-state residents. For example, a Wal-Mart store in Missouri, perhaps near a state line, cannot record state of residence from checks or credit cards for those who buy goods in its stores and then use single-factor apportionment to exclude income from those sales from Missouri taxation.  Otherwise, McDonalds could record the states shown on the license plates of drive-through customers and assign revenue from sales to those with out-of-state plates to the "partly without" class.

We agree that when a retailer – even Wal-Mart, or Domino's pizza – sells tangible property to a buyer for delivery (whether by the retailer or by a third party, even if paid for by the purchaser) in another state, that sale constitutes a transaction "partly within and partly without" Missouri, which can be fed into the single-factor apportionment formula.  But to accept Jay Wolfe's premise that the residence of the purchaser brings a sale within the "partly without" class is a dramatic, unjustified, and unjustifiable expansion of apportionment.

In fact, Jay Wolfe is like Wal-Mart or McDonalds:  it is selling goods to customers who come to its location in Missouri.  It, like Wal-Mart and McDonalds, completes the transaction in Missouri.  It, like Wal-Mart, turns the goods over to the buyer in Missouri.  Where the buyer then takes the car is not part of the arrangement with Jay Wolfe.  Though Jay Wolfe may know where the customer lives, and may even know where the customer decides to title the car, nothing in the record before the AHC proves that Jay Wolfe knows the "purchaser's destination point," which may or may not be the address they give to Jay Wolfe.

The single-factor formula, even with the definitions inserted in 1979, requires that the seller do something more than sell to someone who gives an out-of-state address. Unless the transaction includes the movement of tangible property to a location in another state, the transaction cannot be included in the "partly within and partly without" category. Because Jay Wolfe has thus failed to prove that any of its sales are outside of the "wholly within" Missouri category, all of its sales are included in full in the calculation, resulting in a ratio of 1.0, and taxation of the full amount of Jay Wolfe's taxable income.

## CONCLUSION

For the reasons stated above, the decision of the Administrative Hearing Commission should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing brief were mailed, postage prepaid, via United States mail, on March 9, 2009, to:

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**CERTIFICATION OF COMPLIANCE**

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 5,833 words.

The undersigned further certifies that the labeled disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

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