**No. SC 89568**

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**IN THE SUPREME COURT OF MISSOURI**

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

**v.**

**DIRECTOR OF REVENUE**
**Respondent/Appellee.**

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**Appeal from the State of Missouri Administrative Hearing Commission**
**Commissioner John J. Kopp**

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# APPELLANT'S REPLY BRIEF

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## INTRODUCTION

Appellant, Jay Wolfe Imports Missouri, Inc. ("Appellant" or "Jay Wolfe"), brings the Petition in this case to protest the Administrative Hearing Commission's (the "Commission") decision to uphold the Director of Revenue's ("Respondent" or "Director") assessment of tax on the basis that Jay Wolfe is not entitled to apportion its income for purposes of the Missouri income tax and is not entitled to use the single-factor apportionment method to compute its Missouri income tax. Jay Wolfe respectfully submits this reply brief in response to the brief filed on March 9, 2009 by the Director.

## REPLY TO STATEMENT OF FACTS

The facts are undisputed.

## ARGUMENT

The key issues are Jay Wolfe's right to apportion its income and the interpretation of the terms governing the single-factor apportionment formula. As argued in its opening brief filed on January 2, 2009 and herein, Jay Wolfe has clearly established that it is entitled to apportion its income. The Director argues that allowing Jay Wolfe to apportion its income requires this Court to abandon past precedent and to extend apportionment beyond the scope of its core purpose. However, this argument ignores the fact that the Missouri legislature intentionally overrode the source of income test, the precedent to which the Director refers, and substituted a clear, easily administrable rule when it enacted the "partly within [Missouri] and partly without [Missouri]" rule set forth in Section 143.451.2 RSMo 2006.

Additionally, as argued in its opening brief and herein, Jay Wolfe has shown that a proper application of the plain meaning doctrine of statutory interpretation establishes that Jay Wolfe's sales to customers residing outside of Missouri constitute sales that are partly within Missouri and partly without Missouri for purposes of the single factor apportionment formula. The Director argues that Jay Wolfe's sales took place wholly within Missouri. In so arguing, the Director fails to properly apply the single-factor apportionment formula to Jay Wolfe's sales.

**I. Section 143.451.2 RSMo 2006 must be strictly construed in favor of the taxpayer and against the taxing authority.**

The Director argues that Section 143.451.2(2) RSMo 2006 is an exemption statute rather than a taxation statute and, thus, must be construed against Jay Wolfe as the taxpayer. This Court previously determined Section 143.451.2(2) RSMo 2006 and Section 144.010.1(7) RSMo 1986, the predecessor to Section 143.451.2(3) RSMo 2006, are taxation statutes. *Wolff Shoe Company v. Director of Revenue,* 762 S.W.2d 29, 31 (Mo. banc 1988). Thus, Sections 143.451.2 RSMo 2006 must be strictly construed in favor of the taxpayer. *Id.*

**II. Jay Wolfe is entitled to apportion because it can establish that its sales of tangible personal property occur partly within Missouri and partly without Missouri.**

The Director argues that a longstanding rule in Missouri case law precludes taxpayers situated like Jay Wolfe from apportioning income. In support of its argument, the Director discusses the history of apportionment, attempts to apply an apportionment qualification rule that does not exist in current law and downplays the significance of the legislation that overrode the "longstanding rule" upon which the Director's entire case relies.

Jay Wolfe does not dispute the Director's rendition of the history of Missouri's laws providing for apportionment. However, the history is just that - history. Jay Wolfe rejects the Director's argument that out-of-state business is a prerequisite to apportionment. Jay Wolfe also rejects the Director's argument that the legislature did not intend to implement a simple, easy-to-apply apportionment rule when it enacted legislation adopting statutory definitions governing eligibility for single-factor apportionment (specifically, the definition of "partly within [Missouri] and partly without [Missouri]") and contained in Section 144.010.1(7) RSMo 1986 and its successor Section 143.451.2(3) RSMo 2006.

In support of its argument that out-of-state business is a prerequisite to apportionment, the Director points to the language in Section 143.451.2 RSMo 2006 and claims that the phrase "sources within this state" implies that a corporation must have income that is produced outside of Missouri in order to be eligible to apportion. However, not only does this interpretation ignore the clear intent of the statute when read as a whole, but it also requires that the statute be construed in favor of the taxing authority. As previously discussed, the statute must be construed in favor of taxpayer. Thus, to impose a prerequisite on a taxpayer's right to elect single-factor apportionment, the statute must be clear and explicit. The Director agrees it is not clear and explicit (hence the need to argue the prerequisite is implicit in the statutory wording). To conclude that the single-factor apportionment statute imposes a prerequisite to the right to apportion income would be to construe the statute in favor of the taxing authority rather than in favor of the taxpayer. Such a construction flies in the face of the rules of construction applicable to taxation statutes. Thus, Jay Wolfe's right to apportion is not conditioned on its ability to show that its income is derived from sources in states other than Missouri.

The Director also argues that the rule stating that right to apportion income is conditioned on producing income outside Missouri is contained in decades of Missouri case law that imposes a "source of income" test. Jay Wolfe agrees that this precondition to apportionment is present in Missouri case law. However, as shown in Jay Wolfe's opening brief, the case law that the Director cites as standing for this proposition was overruled by the Missouri legislature's adoption of Section 144.010.1(7) RSMo 1986 and its successor Section 143.451.2(3) 2006. The adoption of these sections made the "source of income" test analysis irrelevant and it should not be applied in determining whether Jay Wolfe is eligible to use the single-factor apportionment method. See I Mo. Taxation Law and Practice §§ 8.15 - 8.16 (MoBar 3d ed. 1996). Additionally, in numerous cases, this Court observed that the adoption of these statutory provisions changed the state of the law governing apportionment. See *Goldberg v. State Tax Commission*, 639 S.W.2d 796, 803, n. 7 (Mo. 1982); *Langley v. Administrative Hearing*

*Commission*, 649 S.W.2d 216, 219-20 (Mo. banc 1983); *Dick Proctor Imports, Inc. v. Director of Revenue*, 746 S.W.2d 571, 574, n. 1 (Mo. banc 1988); and *Bass Pro Shops, Inc. v. Director of Revenue*, 746 S.W.2d 97, 98 n. 1 (Mo. banc 1988). In each of these cited cases, the tax years at issue occurred prior to the enactment of the statutory language. Therefore, in those cases, this Court did not have to apply the new rules, but rather was required to use the source of income test in its analysis. However, in a case involving tax years occurring after the enactment of the new statutory language, this Court held that the source of income test has no place in the analysis of transactions involving the sale of tangible property. *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31-32 (Mo. 1988).

Like *Wolff Shoe*, this case involves tax years subsequent to the effective date of Section 143.451.2(3) RSMo 2006 and its predecessor Section 144.010.1(7) RSMo 1986. The source of income test has no bearing on Jay Wolfe's right to elect the single-factor apportionment method for apportioning its business income from sales of tangible property. Jay Wolfe's right to apportion its business income is dependent only upon having sales of tangible property that occur "partly within [Missouri] and partly without [Missouri]." Missouri's income tax laws impose no other preconditions or limitations to apportionment, not even a requirement that a taxpayer must be paying income tax on business income to other states. To read such a precondition or limitation into the statute is counter to the long-standing principle that a taxation statute must be construed in favor of the taxpayer.

The Missouri legislature enacted a simple rule for determining whether a corporate taxpayer has the right to apportion its business income using the single-factor apportionment method. The right to apportion is based only upon the taxpayer's showing that its sales occur partly within Missouri and partly without Missouri. The Missouri legislature eliminated the inherent complexity and uncertainty of the source of income test.. The Missouri legislature substituted the clear, easily administrable rule, the "partly within [Missouri] and partly without [Missouri]" rule set forth in Section 143.451.2 RSMo 2006.

**III. Jay Wolfe's vehicle sales to out-of-state customers qualify as sales that are "partly within [Missouri] and partly without [Missouri]" for purposes of Section 143.451.2 RSMo 2006.**

The Missouri legislature has enacted a simple rule for the apportionment of income arising from the sale of tangible property. The rule is based only upon the seller's shipping point and the purchaser's destination point. No separate rules apply to tangible property sales under different conditions of sale. The only relevant factors are the seller's shipping point and the purchaser's destination point.

The Director claims that Jay Wolfe's vehicle sales to out-of-state customers do not qualify as sales of tangible property that are "partly within [Missouri] and partly without [Missouri]." To support this claim, the Director argues that tangible property must be *shipped* from a seller's Missouri location to a destination outside of Missouri, or vice versa.  Interestingly, the Director does not challenge Jay Wolfe's interpretation of the phrase "destination point", but only challenges the meaning of seller's shipping point.

Section 143.451.2(3) RSMo 2006 defines "partly within [Missouri] and partly without [Missouri]" to mean that the seller's shipping point is in Missouri and the purchaser's destination point is outside Missouri.  The purchaser's destination point is determined without regard to the F.O.B. point or other conditions of sale.  Section 143.451.2(3)(d) RSMo 2006.  The seller's destination point is determined without regard to the location of the seller's principal office or place of business.  *Id.*

The statutes and regulations provide no other guidance regarding the interpretation of the term "shipping point."  However, in *Helzberg Diamond Shops, Inc. v. Director of Revenue*, the Administrative Hearing Commission (the "Commission") ruled that a "seller's shipping point" is the point from which tangible property is shipped or *delivered* to the purchaser upon sale.  *Helzberg*, Nos. RI-83-2659, RI 83-2768 and RI 83-2679, 1986 Mo. Tax LEXIS 69 (Mo. Admin. Hrg. Comm'n 1986).

The Commission applied the *Helzberg* definition of "seller's shipping point" in *The Rival Company v. Director of Revenue*, a case in which the goods at issue were not shipped, but rather were picked up by the customer at the seller's loading dock for delivery to the customer's destination point outside of Missouri.  No. RI 97-001155, 1998 Mo. Tax LEXIS 230 (Mo. Admin. Hrg. Comm'n 1998).  The Commission found that the seller's shipping point was at the point where the seller *delivered* the goods to the purchaser, the seller's loading dock in Missouri.  *Id* at *10-11.

Jay Wolfe generally does not ship vehicles to customers, but, upon sale, Jay Wolfe *delivers* its vehicles to its customers at its Kansas City, Missouri facility. Therefore, based on *Helzberg's* definition of "seller's shipping point," Jay Wolfe's Kansas City, Missouri facility is the shipping point for its vehicle sales. Furthermore, as shown in its opening brief, Jay Wolfe's out-of-state customers pick up their vehicles at Jay Wolfe's Kansas City, Missouri dealership location and drive their vehicles to their out-of-state addresses. Accordingly, Jay Wolfe's out-of-state customers have a destination point outside of Missouri. Consequently, with a shipping point within Missouri and a destination point outside of Missouri, Jay Wolfe's sales to out-of-state customers qualify as sales of tangible property that are "partly within [Missouri] and partly without [Missouri]" for single-factor apportionment purposes.

The Director also challenges the manner in which Jay Wolfe determines its customer's destination point and states that Jay Wolfe has failed to prove that its knows its customer's destination point. The single-factor apportionment statute contains no requirement that a seller have actual knowledge of a purchaser's destination point. In fact, a seller such as Jay Wolfe may rely on the address provided by each customer when determining the customer's destination point. *Rival*, No. RI 97-001155, 1998 Mo. Tax LEXIS 230 at *11. Jay Wolfe has substantially more assurance about its customer's destination point as the seller in *Rival*, or as any seller which ships tangible property to an out-of-state address. Jay Wolfe's out-of-state customers may return the vehicle to

Missouri, but a shipper's out-of-state customer may change the shipping destination during or after transit, or reship the tangible property to Missouri.

Jay Wolfe's sales to out-of-state customers are transactions involving the sale of tangible property occurring partly within Missouri and partly without Missouri. Thus, pursuant to Section 143.451.2 RSMo 2006, Jay Wolfe has the right to elect the single-factor apportionment method. Further, Jay Wolfe properly classified the sales to out-of-state customers as sales occurring "partly within [Missouri] and partly without [Missouri]."

## CONCLUSION

Wherefore, for the reasons set forth herein, Jay Wolfe prays that this Court enter an Order:

(a) Finding that Jay Wolfe is entitled to apportion its income for purposes of the Missouri corporate income tax;

(b) Finding that Jay Wolfe may elect the single-factor apportionment method set forth in Section 143.451.2 RSMo 2006;

(c) Finding that Jay Wolfe properly applied the partly within and partly without definitions contained in Section 143.451.2(3) RSMo 2006;

(d) Finding that Jay Wolfe properly computed its Missouri corporate income tax liability for its 2002, 2003 and 2004 tax years;

(e) Reversing the Administrative Decision of August 7, 2008;

(f) Holding that Jay Wolfe is not liable for the Missouri corporate income tax or interest assessed by the Director for tax years ending December 31, 2002, December 31, 2003 and December 31, 2004; and

(g) Providing such other and further relief as this Court deems just and proper.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

A copy of this brief and a copy of a disc containing it were mailed via Federal Express on March 23, 2009, to:

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief includes the information required by Rule 55.03, and complies with the limitations contained in Rule 84.06. I further certify that this brief contains 2,525 words and that Microsoft Word for Windows version 2002 was used to prepare this brief.

The undersigned further certifies that I have provided the clerk of the Court and Appellee's counsel with a CD diskette containing the full text of this Brief, labeled with the case number and name. I further certify that the CD was scanned and is virus-free.

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