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**SC95785**

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**IN THE SUPREME COURT OF MISSOURI**

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**TRACFONE WIRELESS, INC.,  
Appellant,**

**v.**

**DIRECTOR OF REVENUE,  
Respondent.**

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

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**RESPONDENT'S BRIEF**

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## STATEMENT OF FACTS

This case involves sales tax on amounts paid to TracFone Wireless, Inc. (“TracFone”) for its provision of cellular telecommunication service in Missouri.

TracFone is a prepaid wireless telecommunications company with headquarters in Miami, Florida. Appellant’s (App.) A2 (¶1). TracFone contracted with commercial mobile radio service carriers including AT&T, Verizon, and T-Mobile to obtain access to wireless telecommunication network transmission facilities owned or operated by those carriers. App. A2 (¶3).

TracFone provided telecommunications service to Missouri residents. It did so by selling them prepaid packages of access to carriers’ wireless telecommunications networks, which TracFone calls “Airtime.” App. A2 (¶4). Customers may purchase a set number of minutes of access or unlimited access for a period of time, such as a month. App. A2 (¶4).

Airtime allows TracFone’s customers to make and receive telephone calls on handsets that TracFone sells. TR at 39, l. 5-9; App. A2 (¶5). TracFone “sold handsets to its Missouri customers” that “could only be used to make and receive calls on cell phone networks provided by TracFone.” App. A2 (¶5). The handsets could not be unlocked, modified, or resold. App. A2 (¶5). When TracFone’s customers made calls inside Missouri, they did so by

accessing cell phone towers and facilities that are located in Missouri. TR at 45, l. 1-14. The Airtime and handsets that TracFone sold to Missouri customers enabled those customers to access telecommunication service provided by TracFone. TR at 46, l. 15 through 47, l. 24.

The Administrative Hearing Commission found that the sales of Airtime and handsets were made from Miami, Florida. App. A2 (¶7).

### **Proceedings at the Administrative Hearing Commission**

From November 1, 2009, through December 31, 2011, TracFone paid Missouri sales tax on its sales of Airtime and handsets. App. A1, A3 (¶8). In 2013, TracFone filed two complaints with the Administrative Hearing Commission (AHC), seeking refunds of those sales tax payments. App. A1. The first complaint, filed in May 2013, appealed the denial of TracFone's request for a partial refund of sales tax that it paid for the months of November 2009 through January 2010. App. A1. The second complaint, filed in September 2014, appealed the denial of its request for a partial refund of sales tax paid for the months of February 2010 through February 2011. App. A1. TracFone requested a partial refund of the taxes it paid, asserting that it should have paid use tax, rather than sales tax, on the transactions at issue. App. A1, n. 1. The AHC consolidated those appeals. App. A2.

After a hearing, the AHC determined that TracFone was not entitled to a refund of any portion of the sales tax that it paid for the period between

November 2009 and December 2011. App. A12. And the Commission found that the transactions in question were not subject to use tax. App. A11.

## ARGUMENT

### *Standard of Review*

A decision of the Administrative Hearing 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. banc 2010); Section 621.193 RSMo. 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. banc 1996), quoting *L & R Leg Co. v. Dir. of Revenue*, 796 S.W.2d 624, 625 (Mo. banc 1990).

The Commission’s interpretation of a revenue statute is reviewed de novo. *IBM Corp. v. Dir. of Revenue*, 491 S.W.3d 535, 538 (Mo. banc 2016). “[E]xemptions are strictly construed against the taxpayer.” *Id.*, quoting *Ben Hur Steel Worx, LLC v. Dir. of Revenue*, 452 S.W.3d 624, 626 (Mo. banc 2015). The taxpayer must show that it qualifies for an exemption by “clear and unequivocal proof,” “and all doubts are resolved against the taxpayer.” *IBM Corp.*, 491 S.W.3d at 538, quoting *Fred Weber, Inc. v. Dir. of Revenue*, 452 S.W.3d 628, 630 (Mo. banc 2015).

**I. The Commission correctly determined that the “in commerce” exemption does not apply to TracFone’s retail sales of mobile telecommunications service and equipment. (Responds to Point I)**

Section 144.020 RSMo imposes sales tax on the basic rate paid or charged on all sales of local and long distance telecommunications service to telecommunications subscribers and to others through equipment of telecommunications subscribers for the transmission of messages and conversations and upon the sale, rental or leasing of all equipment or services pertaining or incidental thereto... .

Section 144.020.1(4) RSMo.

TracFone does not dispute the Commission’s determination that the sales of Airtime and handsets were sales of telecommunications service and equipment within the purview of §144.020.1(4). See App.’s Br. at 9. Nor does TracFone challenge the Commission’s factual determinations. Rather, TracFone claims that, because its sales of Airtime and handsets to Missouri customers were made from TracFone’s Miami, Florida headquarters, they are exempt from sales tax under §144.030.1, which applies to retail sales “in commerce” between the states.

The Commission appropriately relied on *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 102 S.W.3d 526 (Mo. banc 2003), in concluding that the “in commerce” exemption did not apply to TracFone’s sales. App. A8-A9. In *Six Flags*, this Court held that the sale of admission tickets and season passes to non-Missouri residents did not qualify for the “in commerce” exemption because the “true object of the transactions” was a service that the taxpayer’s customers accessed in Missouri. *Six Flags*, 102 S.W.3d at 528. In this case, the Commission concluded that the true object of the transactions at issue was access to telecommunications service. App. A4, A9.

The record shows that the object of the transactions was the provision of telecommunications service in Missouri. The Commission determined that Airtime was access to wireless telecommunications network transmission facilities owned or operated by various carriers. App. A2 (¶¶ 3, 4). TracFone’s vice president for corporate taxation (TR at 22, l. 17-22) admitted that when TracFone’s customers made calls inside Missouri, they did so by accessing cell phone towers and facilities that are located in Missouri, TR at 45, l. 1-14. When TracFone’s Missouri customers used Airtime, they had access to telecommunications service through those cell phone networks. See App. 2 (¶¶ 3-5). The Commission found that the cell phone networks were “provided by TracFone.” App. A2 (¶5). The handsets that TracFone sold could only be

used to access those cell phone networks as authorized by TracFone. App. A2 (¶5), A9.

The true object of the handset sales was simply to provide access to telecommunications service. App. A9. There was no evidence that the handsets used to access the service provided by TracFone have independent monetary value in the hands of its customers. *See Six Flags*, 102 S.W.3d at 528. The handsets cannot be unlocked, modified, or resold by Missouri customers. App. A2 (¶5).

TracFone asserts that, because it is an out-of-state seller, its transactions with Missouri customers qualify for the “in commerce” exemption. TracFone’s out-of-state location is not the deciding factor on this record. The acceptance of orders and processing of payments outside Missouri, and shipping the handsets to Missouri from another state, were merely “incidental or nonessential interstate elements” that did not make the transactions eligible for the “in commerce” exemption. *Six Flags*, 102 S.W.3d at 528. The transactions between TracFone and Missouri customers did not take place in commerce between the states. *See id.*

TracFone cites *Western Trailer Servs, Inc. v. LePage*, 575 S.W.2d 173, 174 (Mo. banc 1978), in support of its assertion that if “importation formed a component of” a transaction between “persons of different states,” the transaction will qualify for the “in commerce” exemption, even if the seller is

located in Missouri. Under *Six Flags*, however, a mere component of importation will not make a transaction eligible for the “in commerce” exemption. *Six Flags*, 102 S.W.3d at 528. Moreover, the networks through which TracFone’s customers accessed the telecommunications service that TracFone provided were not imported—they were already located in Missouri. See App. 2; TR at 45, l. 1-14.

TracFone points out that it did not own the cell towers or physical components of the wireless telecommunications network that TracFone used to provide the telecommunications service. But that does not mean that the telecommunications service that TracFone provided is not subject to sales tax. In *Lynn v. Dir. of Revenue*, 689 S.W.2d 45 (Mo. banc 1985), the taxpayer did not claim to have an ownership interest in the Missouri River that its customers accessed in order to enjoy the service of amusement that taxpayer provided—excursions on the river. *Id.* at 46.

TracFone notes the possibility that its telecommunication service could be used outside Missouri (App.’s Br. at 16, 18). But the record does not establish what telephone calls, if any, its Missouri customers made outside

the state of Missouri.<sup>1</sup> This Court has declined to hold that the location where a good or service might be used after a transaction is completed qualifies a sale for the “in commerce” exemption, at least where the potential out-of-state use has not been shown to be an integral part of the transaction. *Overland Steel, Inc. v. Dir. of Revenue*, 647 S.W.2d 535, 539 (Mo. banc 1983).

Here the object of the taxation is the provision of a service in Missouri. TracFone provided telecommunications service in Missouri to Missouri customers using wireless telecommunications facilities and equipment located in Missouri. See App. 2; TR at 45, l. 1-14. TracFone’s reliance on older cases interpreting the in commerce exemption, and applying the exemption to sales of tangible goods, is misplaced. The transactions in *American Bridge Co. v. Smith*, 179 S.W.2d 12 (Mo. 1944) and *Binkley Coal Co. v. Smith*, 179 S.W.2d 17 (Mo. 1944) involved the sale of tangible goods from sellers outside Missouri to customers in Missouri, not the provision of a service in Missouri. Moreover, the decision in *Binkley Coal Co.* focused on where the transaction took place, 179 S.W.2d at 19, not the location of the seller’s principal place of business, *see id.* at 18.

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<sup>1</sup> TracFone had the burden of establishing by “clear and unequivocal proof” that the transactions qualified for the exemption. *IBM Corp.*, 491 S.W.3d at 538.

Here, the true object of the transactions, and the object of the taxation, was telecommunications service provided in Missouri. TracFone has failed to meet its burden of establishing that the transactions qualify for the “in commerce” exemption.

**II. The Commission correctly determined that the transactions are not subject to use tax.**

At the AHC, TracFone asserted that the transactions should have been subjected to use tax. App. A11. Missouri’s use tax “is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property...” Section 144.610.1 RSMo. “Tangible personal property” is defined as “all items subject to the Missouri sales tax as provided in subsections (1) and (3) of section 144.020[.]” Section 144.605(11) RSMo.

The legislature’s definition of a term “should be followed in the interpretation of the statute to which it relates and is intended to apply... and is binding on the courts.” *State ex rel. Jackson v. Dolan*, 398 S.W.3d 472, 479 (Mo. banc 2013), quoting *In re Hough’s Est.*, 457 S.W.2d 687, 691 (Mo. 1970). This Court must apply the term “tangible personal property” as defined by the legislature, see *Dolan*, 398 S.W.3d at 479, to determine the scope of §144.610.

Use tax is only imposed on tangible personal property. Section 144.610.1 RSMo. Sales of telecommunications service and “all equipment or services pertaining or incidental thereto...” are subject to sales tax under §144.020.4, so they are not tangible personal property for purposes of Missouri’s use tax, *see* §144.605(11). The cases that TracFone cites on page 22 of its brief addressed the use tax’s applicability to tangible personal property. *See Southwestern Bell v. Morris*, 345 S.W.2d 62, 63 (Mo. banc 1961); *Management Servs, Inc. v. Spradling*, 547 S.W.2d 466, 467 (Mo. banc 1977) (use of airplane); *Ronnoco Coffee Co. Inc., v. Dir. of Revenue*, 185 S.W.3d 676, 676-77 (Mo. banc 2006) (coffee equipment).

TracFone asks this Court to interpret Missouri’s use tax statute as applying to “the interstate version of all intrastate retail sales subject to tax under §144.020...” (App.’s Br. at 20). But the legislature’s intent to limit the scope of the use tax to tangible personal property is clear and unambiguous, so no statutory construction is necessary. *See Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. banc 2011). TracFone points to the Court’s discussion of a severability clause in the 1959 House Bill that enacted the use tax. *Mo. Pac. R.R. Co. v. Morris*, 345 S.W.2d 52, 60 (Mo. banc 1961). The inclusion of a severability clause in the original legislation does not indicate that the legislature intended the use tax to “apply to *all* property” as TracFone asserts. App.’s Br. at 21. Nor does the severance doctrine allow

this Court to rewrite the use tax statute to “apply to *all* property” as TracFone suggests. *See State v. Hart*, 404 S.W.3d 232, 244-45 (Mo. banc 2013).

It is questionable whether TracFone has standing to challenge the constitutional validity of not subjecting its sales of telecommunications service to use tax. TracFone is not prejudiced by not being subjected to use tax on those transactions. *See Mo. Pac. R.R. Co. v. Morris*, 345 S.W.2d 52, 60 (Mo. banc 1961).

Moreover, uniformity “does not require that all subjects of taxation be taxed,” only that a tax be uniform as to each class of subjects upon which the tax falls. *Mid-Amer. Television Co. v. State Tax Comm’n*, 652 S.W.2d 674, 680 (Mo. banc 1983). The uniformity requirement is met here—all sales of telecommunications service that are subject to sales tax under §144.020.(4) are excluded from taxation under Missouri’s use tax, *see Virden v. Schaffner*, 496 S.W.2d 846, 848 (Mo. 1973).

## 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 AND COMPLIANCE

I hereby certify that Respondent's Brief was electronically filed and served via Missouri Case.Net this 10th day of November, 2016, upon:

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I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 2,738 words exclusive of cover, signature block, and certificates.

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