

Before the
Administrative Hearing Commission
State of Missouri



OFFICE DEPOT, INC.,)	
)	
Petitioner,)	
)	
vs.)	No. 12-2190 RS
)	
DIRECTOR OF REVENUE,)	
)	
Respondent.)	

DECISION

Office Depot, Inc. (Office Depot) is entitled to a refund of use tax in the amount of \$83,954.43 plus statutory interest.

Procedure

Office Depot filed a complaint on December 10, 2012, challenging the Director of Revenue’s (“Director”) final decision denying a refund of use tax.

On May 5, 2014, the parties filed stipulated facts. On June 2, 2014, Office Depot filed a motion for summary decision. On July 2, 2014, the Director filed her response to the motion. On July 17, 2014, Office Depot filed its reply.

Findings of Fact

1. Office Depot is a corporation, incorporated in the State of Delaware and headquartered at 6600 North Military Trail in Boca Raton, Florida, and is registered with the Missouri Secretary of State.

2. Office Depot is a retailer of office products and services, including supplies and technology and printing services, in the state of Missouri to businesses, individuals, state government, and political subdivisions at its physical retail locations in the state. Office Depot also sells its products through its internet Web site. Office Depot has been in business in Missouri since 1988.

3. Office Depot Operated 25 retail stores in Missouri as of December 31, 2012. Office Depot has no distribution centers in Missouri.

4. Office Depot employed 490 individuals to work in its retail stores as of December 31, 2012.

5. Office Depot promotes and advertises its products and services to existing and potential customers in Missouri, in part, through a contract for the mailing of product catalogs and other advertising materials. The catalogs and advertising materials are mailed into the state directly to existing Missouri customers with whom Office Depot has had a business relationship that was established by past dealings.

6. Office Depot contracted with an unrelated printer, R.R. Donnelley and Sons Company (“R.R. Donnelley”), to print and mail its product catalogs and advertising materials from its location outside of Missouri to Office Depot’s existing customers in the state of Missouri, using the United States Postal Service. Such product catalogs and advertising materials provided by Office Depot constituted 3.5% of Office Depot’s national advertising.

7. At all times during the tax periods under appeal, R.R. Donnelley operated a printing business in Jefferson City, Missouri, which is not similar to its printing businesses in Mattoon, Illinois, and Seymour, Indiana. R.R. Donnelley also maintains a business location in St. Louis, Missouri.

8. Office Depot provided specific addresses, including addresses in Missouri, to R.R. Donnelley and directed R.R. Donnelley to mail all of its product catalogs and advertising materials to those addresses. R.R. Donnelley mailed such product catalogs and advertising materials from Indiana and Illinois.

9. Office Depot purchased paper from outside of Missouri to use in the production of its product catalogs and advertising materials, some of which were sent to Missouri addresses. Office Depot had the paper delivered to R.R. Donnelley's facilities in Mattoon, Illinois, and Seymour, Indiana. For the refund period, the cost of the paper was \$746,739.57 and the cost of the printing and mailing services was \$652,500.83.

10. Office Depot accrued and paid \$83,954.43 in use tax to the Director based on the cost of the printed catalogs and advertising materials included in tax returns covering the periods December 2008 through December 2010.

11. The cost of the printed catalogs and advertising materials included the cost of the paper and the cost of the printing and mailing services.

12. On January 20, 2012, Office Depot filed an application for use tax refund with the Director in the amount of \$83,954.43 paid for the periods December 2008 through December 2010.

13. On October 15, 2012, the Director issued a final decision denying Office Depot's refund claim in its entirety because the transactions are subject to tax.

14. On December 10, 2012, Office Depot timely filed a complaint with us appealing the Director's final decision.

Conclusions of Law

This Commission has jurisdiction over appeals from the Director's final decisions.¹ Office Depot has the burden of proving it is not liable for the amount assessed by the Director.²

¹Section 621.050.1. Statutory references are to RSMo 2000, unless otherwise noted.

²Sections 136.300.1 and 621.050.2.

Our duty in a tax case is not merely to review the Director's decision, but to find the facts and to determine, by the application of existing law to those facts, the taxpayer's lawful tax liability for the period or transaction at issue.³

I. Use Tax

Section 144.610⁴ provides for a compensating use tax in Missouri as follows:

1. A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property, purchased on or after the effective date of sections 144.600 to 144.745 in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020. This tax does not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this state until the transportation of the article has finally come to rest within this state or until the article has become commingled with the general mass of property of this state.
2. Every person storing, using or consuming in this state tangible personal property is liable for the tax imposed by this law, and the liability shall not be extinguished until the tax is paid to this state[.]

Section 144.605⁵ defines “use” for purposes of the use tax imposed by § 144.610:

- (13) “Use”, the exercise of any right or power over tangible personal property incident to the ownership or control of that property, except that it does not include the temporary storage of property in this state for subsequent use outside the state, or the sale of the property in the regular course of business[.]

Unlike sales tax, which is imposed on the sale of an item in Missouri, the compensating use tax is levied on the privilege of using, storing, or consuming an item within Missouri. The purpose of the use tax is to complement, supplement, and protect the sales tax by creating “equality of taxation of purchases or use of property purchased outside the state which cannot be reached as sales because of the commerce clause of the federal constitution.”⁶ This purpose is

³*J.C. Nichols Co. v. Director of Revenue*, 796 S.W.2d 16, 20-21 (Mo. banc 1990).

⁴RSMo Supp. 2013.

⁵RSMo Supp. 2013.

⁶*Farm and Home Savings Ass'n v. Spradling*, 538 S.W.2d 313, 317 (Mo. 1976).

achieved by imposing an equivalent levy for the privilege of using property in Missouri that was purchased outside of Missouri as would have been imposed upon the sale of the property in Missouri.

The amount of use tax assessed by the Director is not in dispute. The only question is whether Office Depot is subject to use tax. As guidance, the parties have provided us with two opinions of the Supreme Court: *May Department Stores Company v. Director of Revenue*⁷ and *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*.⁸

May Department Stores

Office Depot argues that *May Department Stores* is on point with the facts before us. In *May Department Stores*, the taxpayer operated department stores in the St. Louis area. The taxpayer also caused catalogs to be printed in Illinois. It supplied mailing labels to the printer who mailed the catalogs directly to the addresses. Thus, the catalogs were never in the taxpayer's possession after the completion of printing. Furthermore, the catalogs did not come to rest in Missouri until delivered to the various addresses.

The Director sought to collect use tax on those catalogs that were mailed by the Illinois printer to Missouri addresses. The Supreme Court reasoned that the taxpayer never engaged in the "storage, use or consumption" of the catalogs in Missouri and, therefore, never sought "to exercise any of the privileges which give rise to the [use] tax[.]"⁹ Accordingly, the Supreme Court ruled that the taxpayer was not liable for use tax.

Southwestern Bell Yellow Pages

The Director argues that *Southwestern Bell Yellow Pages* is on point with the facts before us. In *Southwestern Bell*, the taxpayer purchased raw paper outside Missouri to be

⁷ 748 S.W.2d 174 (Mo. banc 1988).

⁸ 94 S.W.3d 388 (Mo. banc 2002).

⁹ *May Dep't Stores* at 175.

delivered to printers outside Missouri. The paper was printed and bound into telephone directories by these printers. The printers shipped the finished directories to a Missouri independent contractor, employed by and under the direction of the taxpayer. This independent contractor distributed the telephone directories, free of charge, to areas of the state where the taxpayer provided telephone service. The taxpayer's main source of revenue for these directories came from Missouri businesses that paid to place advertisements in the directories.

The Director collected, and the taxpayer sought a refund of, the use tax paid on the raw paper. The Supreme Court reasoned that the telephone directories produced from the raw paper were articles, as the term is used in § 144.610.1.¹⁰ Furthermore, the Supreme Court reasoned that the taxpayer "exercised rights over the raw paper, incident to its ownership thereof, when it fulfilled its advertising contracts with Missouri businesses."¹¹ Finally, the Supreme Court reasoned that the taxpayer exercised its rights over the raw paper when it distributed the telephone directories to Missouri residents and businesses.¹²

Accordingly, because the taxpayer exercised its rights over an article, it was liable for use tax for the raw paper it purchased for the production of the telephone directories.¹³

Office Depot's Liability

We agree with Office Depot that *May Dep't Stores* is on point with the facts before us and is controlling. However, we briefly discuss each of the Director's arguments.

First, the Director argues that Office Depot engaged R.R. Donnelley to mail the catalogs to addresses in Missouri. The Director argues that this is similar to *Southwestern Bell*, where the taxpayer engaged an independent contractor to distribute telephone directories. We disagree. This is similar to the facts of *May Dep't Stores*, where printers outside Missouri simply mailed

¹⁰ *Southwestern Bell* at 391.

¹¹ *Id.* at 391-392.

¹² *Id.*

¹³ *Id.*

catalogs into Missouri. Like the taxpayer in *May Dep't Stores*, Office Depot did not exercise any privileges over the catalogs, in Missouri, that would give rise to the use tax.

Second, the Director argues that in *May Dep't Stores*, the taxpayer did not own the paper that was printed into catalogs. The ownership of the raw paper is not clear from the facts of *May Dep't Stores*. Thus, the Director contends that *Southwestern Bell* is controlling based on the fact Office Depot owned the raw paper that was printed into catalogs. However, if Office Depot did not exercise the privileges that give rise to the use tax, then the fact it owned the raw paper outside Missouri is irrelevant to whether use tax applies. Like the taxpayer in *May Dep't Stores*, Office Depot did not engage an independent contractor in Missouri to take possession of and distribute the catalogs. Therefore, we still find *May Dep't Stores* is controlling.

Third, the Director argues that Office Depot owned the catalogs that came to rest in Missouri. The Director contends that the directions for mailing catalogs were sent to R.R. Donnelley from within Missouri, whereas in *May Dep't Stores*, the directions for delivery of the catalogs were made outside Missouri. The significance of this distinction is not clear. Furthermore, we do not understand if she uses the term “independent contractor”¹⁴ to describe R.R. Donnelley or the United States Postal Service. We find the directions given to the printer by Office Depot are similar to those directions given to the printer by the taxpayer in *May Dep't Stores*.

Finally, the Director argues that Office Depot exercised complete control over the catalogs by directing R.R. Donnelley to mail them to addresses in Missouri. However, we fail to see how this differs from the facts in *May Dep't Stores*, where mailing labels were provided directly to the printer instead of addresses.

¹⁴ Respondent's brief, p. 9.

We agree with Office Depot that *May Dep't Stores* is controlling. Accordingly, we find that Office Depot did not exercise the privileges that give rise to the use tax in Missouri and is entitled to a refund of \$83,954.43.

II. Interest on Tax

Section 144.190¹⁵ provides for interest on overpayment of use tax as follows:

2. If any tax ... has been erroneously ... collected ... such sum shall be credited on any taxes then due from the person legally obligated to remit the tax pursuant to sections 144.010 to 144.525, and the balance, with interest as determined by section 32.065, shall be refunded to the person legally obligated to remit the tax[.]

Office Depot is entitled to interest at the statutory rate, if a credit is not applicable.

Summary

Office Depot is entitled to a refund of use tax in the amount of \$83,954.43 plus statutory interest.

SO ORDERED on April 30, 2015.

\s\ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner

¹⁵ RSMo. Supp. 2013.