

Before the
Administrative Hearing Commission
State of Missouri



VISIONSTREAM, INC.,)	
)	
Petitioner,)	
)	
vs.)	No. 12-1289 RS
)	
DIRECTOR OF REVENUE,)	
)	
Respondent.)	

DECISION

VisionStream, Inc. (“VisionStream”) is not entitled to a refund of such tax collected and remitted from February 1, 2007 to December 31, 2012. VisionStream is not liable for use tax and additions to tax for the same transactions.

Procedure

On July 16, 2012, VisionStream filed its complaint appealing the first of five final decisions of the Director of Revenue (“the Director”) denying, in major part, its request for a refund of sales tax paid between February 1, 2007 and January 31, 2010. On August 17, 2012, the Director filed his answer. On June 24, 2013, VisionStream filed a request for leave to file its first amended complaint to add its challenge to the Director’s final decision to assess unpaid use tax against VisionStream. We deemed the amended complaint filed that day, and the Director filed an answer to it on July 8, 2013. On August 16, 2013, VisionStream sought leave to file its

second amended complaint in order to add its appeals of the Director's final decisions dated July 19, 2013 and August 9, 2013 to assess VisionStream for unpaid use tax and the Director's July 31, 2013 final decision to deny a second application for refund of sales tax collected and remitted by VisionStream. Leave to file the second amended complaint was granted August 28, 2013, and the Director filed his answer to the second amended complaint on September 9, 2013.

We held a hearing on December 10, 2013. Byron E. Francis of Armstrong Teasdale, LLP represented VisionStream, and Thomas A. Houdek represented the Director. This case became ready for our decision on May 28, 2014, when the last written argument was filed.

Findings of Fact

1. VisionStream is a Missouri corporation that began doing business in Missouri in 2004 and, at all times relevant to this action, was located at 11426 Moog Drive in St. Louis, Missouri. Vision Stream ceased operations and filed for bankruptcy in 2013.

2. VisionStream was in the business of designing and constructing exhibits for trade shows and providing services for trade show exhibits. It provided services to customers in and outside of Missouri.

3. In the usual course of its business, VisionStream produced a trade show display for a customer and then arranged to ship it to the designated venue for assembly and display. The needs and requirements of the VisionStream customers varied from project to project.

4. After a trade show, one of four things could happen to a display. In some cases, it would be shipped directly from one show to another. Some displays were of the "build and burn" variety, meant for only one use. In some cases, a customer took physical possession and responsibility for storing the display after a show. But the "normal business practice" in most cases was to dismantle the display and ship it back to VisionStream for storage. Tr. 40.

5. VisionStream entered into separate contracts with its customers for storage of exhibits. Those transactions are not at issue in this case.
6. At all times relevant to this decision, VisionStream did not have its own means for transporting products and relied upon common carriers to ship its displays.
7. VisionStream had a standard contract, the “Display Order,” in which the terms and conditions of its sales were specified.
8. Pertinent terms and conditions of the Display Order included the following:

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 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.^[1]

9. VisionStream seldom executed a Display Order with its clients, however. Its business was a "relationship business," and most agreements with its customers took the form of an e-mail from Vision Stream to its customer with an estimated price for the display previously discussed with the customer, and a reply e-mail from the customer in which it gave its assent to constructing the display and performing the related services such as arranging for shipping and set-up at the trade show.

10. Typically, VisionStream invoiced clients for its products and services thirty to sixty days after a trade show.

11. In its invoices to clients, VisionStream never included the cost of shipping the display in the cost to produce the display. If VisionStream had covered the cost of shipping the display, that cost would appear as a separate item on the invoice. Sometimes the common carrier billed the client directly.

12. VisionStream collected and remitted sales tax on its sales to its customers of the displays, as tangible personal property.

Audit, Refund Claim and Assessments

13. The Director initiated a sales and use tax audit of VisionStream in March of 2010.

¹ Pet. Ex. 10.

14. Both the Director and VisionStream waived the statute of limitations so that the Director could make assessments and VisionStream could make claims for refund of taxes collected and remitted as far back as February 1, 2007.

15. VisionStream filed an application for sales tax refund with the Director on May 26, 2011, seeking a refund of \$263,491.65 from amounts of sales tax it had collected and remitted from the start of the audit period, February 1, 2007, through January 31, 2010.

16. On May 18, 2012, the Director issued assessments of unpaid use tax against VisionStream for the intermittent monthly periods of March, June, September, and December of 2007; March, June, September, and December of 2008; March, June, September, and December of 2009; and January 2010. According to the assessments, the total tax due was \$157,890.04, with additions to tax of \$7,894.48, plus statutory interest.

17. On June 20, 2012, the Director issued a final decision denying \$251,201.99 of VisionStream's refund request, but approving a refund of \$12,289.66 based on sales tax exemptions extended to certain non-taxable services VisionStream had provided its customers during the refund period, including program management, kit coordination, and drapery cleaning.

18. This refund amount was offset by the Director's finding that VisionStream owed \$1,952.62 for unpaid use tax on items it had purchased from out-of-state vendors.

19. The Director issued a refund check in the net amount of \$10,337.04, but VisionStream returned the check without presenting it for payment.

20. VisionStream filed its complaint challenging the denial of the refund, asserting it was due the full amount of its request, and challenging the May 18, 2012 assessments of delinquent use tax. For clarity, that claim will be known as Count I.

21. On April 26, 2013, the Director issued assessments of unpaid use tax from March 1, 2010 through March 31, 2010 in the amount of \$2,447.54, with additions to tax of \$122.38 and interest at the statutory rate.

22. On June 24, 2013, VisionStream's first amended complaint, in which it challenged the April 26, 2013 notice of assessment for unpaid use tax for March of 2010, added Count II to VisionStream's claim against the Director.

23. On February 11, 2013, VisionStream sent the Director its application for sales/use tax refund, seeking a sales tax refund in the amount of \$246,075.56 it had collected and remitted for the period from February 1, 2010 through December 31, 2012.

24. On July 19, 2013, the Director issued an assessment of unpaid use tax against VisionStream, for the period from June 1, 2010 through June 30, 2010, in the amount of \$11,501.38, plus additions to tax of \$575.07, and interest at the statutory rate.

25. On July 31, 2013, the Director issued a final decision denying VisionStream's February 11, 2013 application for a sales tax refund.

26. On August 9, 2013, the Director issued assessments of unpaid use tax against VisionStream for intermittent monthly periods of September and December of 2010; March, June, September, and December of 2011; and March, June, September, and December of 2012. According to the assessments, the total tax due was \$121,939.18, with additions to tax of \$6,096.97, plus statutory interest.

27. On August 15, 2013, VisionStream's second amended complaint added three more counts to VisionStream's appeals of the Director's final decisions as follows: Count III challenged the July 19, 2013 assessment for unpaid use tax; Count IV challenged the August 9, 2013 assessments for unpaid use tax; and Count V challenged the July 31, 2013 denial of VisionStream's second sales tax refund application.

28. The sales tax refund claims and the use tax assessments concern tax that VisionStream collected from February 1, 2007 to December 31, 2012, on sales of displays it constructed for customers that were delivered to out-of-state trade shows.

Conclusions of Law

This Commission has jurisdiction over appeals from the Director's final decisions. Section 621.050.1, RSMo 2000.² Our duty in a tax case is not merely to review the Director's decisions, 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. *J.C. Nichols Co. v. Director of Revenue*, 796 S.W.2d 16, 20-21 (Mo. banc 1990).

VisionStream has the burden to prove that it is entitled to a tax exemption on certain assessed transactions, or that the Director's assessments are otherwise erroneous such that the company is not liable for them. Sections 136.300.1 and 621.050.2, RSMo 2000. A statute imposing a tax is strictly construed in favor of the taxpayer and against the taxing authority. *President Casino, Inc. v. Director of Revenue*, 219 S.W.3d 235, 239 (Mo. banc 2007).

However, the courts take a narrow view of claims of exemption by taxpayers. As the Missouri Supreme Court has announced:

Tax exemptions are strictly construed against the taxpayer. ... An exemption is allowed only upon clear and unequivocal proof, and doubts are resolved against the party claiming it. ... Exemptions are interpreted to give effect to the General Assembly's intent, using the plain and ordinary meaning of the words.

Branson Properties USA v. Director of Revenue, 110 S.W.3d 824, 825-26 (Mo. banc 2003).

VisionStream's initial challenge of the Director's actions was its appeal of the decision denying its May 26, 2011 application for a refund of sales tax. In response to VisionStream's contention that it had not owed a significant portion of the amounts of sales tax it collected and

²Statutory references are to RSMo Supp. 2013, unless otherwise noted.

remitted from February 2007 to January of 2010, the Director issued assessments of unpaid use tax against VisionStream for that same period of time. Thus, as VisionStream states in its written argument, there are two issues in this case, although we paraphrase the first slightly. First, was VisionStream required to collect and remit Missouri sales tax on exhibit properties that were delivered by common carrier to out-of-state addresses? Second, was VisionStream required to collect and remit Missouri vendor's use tax on exhibit properties, delivered to out-of-state addresses, that the owner later sent to VisionStream for storage?³

A. Sales Tax – Passage of Title

Section 144.020.1 defines and authorizes the collection of sales tax in Missouri, providing in relevant part:

A tax is hereby levied and imposed 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. The rate of tax shall be as follows:

(1) Upon every retail sale in this state of tangible personal property, . . . a tax equivalent to four percent of the purchase price paid or charged[.]

A “sale at retail” is “any transfer made by any person engaged in business . . . of the ownership or, or title to, tangible personal property to the purchaser, for use or consumption . . . for a valuable consideration.” Section 144.010(11). But VisionStream contends that every sale in which the products it sold were sent out of state was exempt from sales tax pursuant to § 144.030.1, which provides:

There is hereby specifically exempted from the provisions of section 144.010 to 144.525 and from the computation of the tax levied, assessed or payable pursuant to section 144.010 to 144.525 such retail sales as may be made in commerce between this state and any other state of the United States[.]

³ Pet. Prop. Findings of Fact, Concl. of Law, and Order at 7.

This “interstate commerce exemption” “is not related to the ultimate destination or original source of the goods . . . [it] applies only to transfers of title or ownership in commerce.” *Bratton Corp. v. Director of Revenue*, 783 S.W.2d 891, 893 (Mo. banc 1990). Thus, if title to the personal property at issue passed in Missouri, the sale is a sale at retail in Missouri, and subject to Missouri sales tax, even if the destination of the goods is out of state.

1. Did the Display Agreement Represent the Parties’ Intent as to Passage of Title?

As VisionStream notes, the defining question for the sales tax issue is whether title to the displays passed in Missouri. To answer it, we consider, among other things, whether the terms and conditions of the Display Order governed the transactions at issue.

If they do, our inquiry is at an end. Under the Display Order, VisionStream’s products were expressly delivered to its customers “F.O.B.” VisionStream’s warehouse. “F.O.B.”, under § 400.2-319, RSMo 2000, “is a delivery term under which (a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods . . . and bear the expense and risk of putting them into the possession of the carrier[.]”

“The 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.” *House of Lloyd, Inc. v. Dir. of Revenue*, 824 S.W.2d 914, 923 (Mo. banc 1992) (*abrogated on other grounds*). In *House of Lloyd*, the issue was whether title to machinery and equipment passed upon shipment from the vendor’s plant, or upon delivery and installation at the purchaser’s plant. *House of Lloyd* is unlike this case in that the parties agreed that the terms of a written purchase order controlled the issue of passage of title. It is like this case, however, in that the purchase order itself contained explicit agreement as to when title would pass, but had terms that could point to different times that title passed. One term was “Ship F.O.B. [vendor’s] plant.” *Id.* at 922. Another term was “Risk of loss of the goods shall

pass to Buyer at the time that the goods are actually tendered for delivery to Buyer at his offices in Grandview, Missouri.” *Id.* The evidence also showed that the vendor provided the labor to install the equipment in the buyer’s plant.

The court considered all of these factors, but held:

The transfer of title and the responsibility for loss do not necessarily occur at the same time. . . . Admittedly the vendor performed the labor installing the conveyors after the parts arrived at appellant’s plant. Because the vendor was required to perform labor under the purchase order after delivery does not necessarily determine the time or place that title to the goods passed.

Id. For the court, the “F.O.B. vendor’s plant” term was dispositive of where title passed.

As its paperwork suggests and its witnesses confirmed, VisionStream relied upon common carriers to perform all delivery of the merchandise it produced. According to the invoices and bills of lading associated with its business transactions, VisionStream and its customers sometimes worked together to choose the common carrier for the pickup and delivery of VisionStream’s products, and the parties would negotiate the handling of freight charges. In some instances VisionStream would advance the freight charges and bill the customer back for them, and at other times VisionStream would direct the carrier to send the freight bill directly to VisionStream’s client. But consistent with the definition of the term F.O.B., the customer bore the expense of delivery to the location specified by the customer. A typical invoice might contain the following description of VisionStream’s services with respect to an already-constructed display:

Booth Preparation: Remove from storage the 20’ island display, clean and touch up exhibit, prepare carpet-vacuum-spot clean, reroll (1) 30’ carpet, receive model from client, pack with shipment, prep all components of the display, repack all items, load on truck, unload truck upon return, inspect for damage, make repairs to crates, return all items to storage, pull model and return to client.[⁴]

⁴ Resp. Ex. D-1 at VS000327.

There is no mention of shipping on this invoice because it was direct-billed to the client. In a case in which shipping costs were advanced to the client, however, the shipping was a separate line item or items, such as:

Freight Charges:

--St. Louis to San Diego -- \$3,229.61

--Airfreight of new SAFC dimensional letters to show site -- \$216.00

--Transaction fee -- \$1,607.03⁵]

The invoices bear out that the parties intended that title to the displays pass as specified in the Display Order, or F.O.B. VisionStream. If so, title passed to VisionStream's customer in Missouri, when VisionStream delivered the tangible personal property to the common carrier for further transportation to a trade show. Such a transaction is subject to Missouri sales tax.

VisionStream argues that the Display Order does not represent the intent of the parties because it was seldom used. The testimony and evidence from the hearing bear out its contention that the parties seldom executed the Display Agreement. But no other written agreements between VisionStream and its customers – for example, the e-mails by which it claims it received approval from the client to execute the product – are in evidence.

VisionStream argues that while there is no evidence that VisionStream and its clients ever explicitly agreed on where title to the goods passed, the “course of dealing” between VisionStream and its clients evidenced their intent that title to the goods would pass when they were delivered to the trade show. As evidence of this intent, VisionStream introduced the Display Agreement and pointed to the provision allowing a purchaser to inspect the goods within thirty days of delivery and providing that failure to notify VisionStream within thirty days of whether the goods conformed to the specifications was to be considered acceptance of the goods.

The inconsistency of this position – that one paragraph of the Display Agreement evidenced the parties' intent but others did not – notwithstanding, the argument fails for several

⁵ Resp. Ex. G-2 at VS001392.

reasons. First, it is belied by many other provisions of the Display Agreement, not only the F.O.B. provision. Primarily, we look to the remedies set forth in the Display Agreement. VisionStream warranted that the goods would be built in accordance with industry standards and would be free from defects in materials and workmanship. The Purchaser's "sole and exclusive remedy" was "based solely upon VisionStream's failure to comply" with its warranty, and the remedy was for VisionStream to correct the defect at its expense. In other words, VisionStream's customer did not have the right to inspect the goods at the trade show, reject them, and not pay for them. Whether or not the parties executed the Display Agreement, the terms set forth therein represent the commercially logical and reasonable course, and therefore the most likely: VisionStream would not expend the resources to construct a display for a client to use at a trade show (which obviously was unique and not marketable to other clients) and advance the shipping and insurance cost, if there were a chance it would never be paid. Otherwise, a client could use the custom-built display at the trade show and subsequently reject it, and VisionStream would never be paid for its work. This would not be a commercially reasonable way to do business.

Both parties direct us to a pair of concrete cases as offering support for their respective positions in this case: *Kurtz Concrete, Inc. v. Spradling*, 560 S.W.2d 858 (Mo. banc 1978), and *Southern Red-E-Mix Co. v. Director of Revenue*, 894 S.W.2d 164 (Mo. banc 1995). While the cases are not directly on point because the central controversy in each was over taxability of delivery charges, the analysis pertaining to transfer of title to liquid concrete in those cases has some application to this case.

In both the concrete cases, the Supreme Court noted that the materials that the seller placed into the mixing truck for delivery to the purchaser were no longer of any use to the seller once they were on board the delivery truck. The ingredients mixed together to produce concrete

are not unlike the materials and components that are designed, integrated and fabricated to create marketing displays. Similar to the mixed concrete, the component parts of the marketing displays created by VisionStream are of no use to other consumers once they are assembled and ready for shipment to the various places of their destination to show off the wares of VisionStream's clientele. And like the concrete mix, once the materials are inside the truck and off to a destination of the buyer's choosing, all that must happen for the customer to use the product is for the truck to be driven to the destination and the materials off-loaded, shaped, and installed at the destination.

VisionStream's products are distinguishable from concrete in that they can be used more than once and in different locations over time, but alike in that they can be used only by one customer. In that way, the production of custom-blended concrete is analogous to the production of marketing displays for trade shows. Once the materials for the display are loaded onto a common carrier for delivery, they belong to the customer.

We find that the Display Agreement, despite the fact that it was seldom executed, is the best evidence of the parties' intent as to when title passed in these transactions. First, all of its provisions, taken together, represent the most commercially reasonable arrangement for a company that produces a unique and not generally marketable product. Second, VisionStream's former president testified that it was "what we consider kind of our terms and agreement with something I put in front of somebody."⁶ Although he also testified that he used the Display Agreement primarily for the terms and conditions relating to documentation of the price and the payment schedule, VisionStream introduced it into the record as evidence that yet another provision in the Display Agreement – that its customers had a 30-day acceptance period after the display's arrival at the trade show – indicated the parties' intent. In the absence of other

⁶ Tr. 21.

evidence, it is hard not to infer that if the Display Agreement represented the parties' intent on certain issues, it also represented their intent on the remaining issues as well.

Third, VisionStream introduced *no other* evidence of the parties' intent, except for equivocal and self-serving statements from its own current and former employees. For example, its current president testified that the agreement to proceed with constructing the display usually took the form of an e-mail exchange, but no such e-mails were placed in the record. We are convinced that the Display Agreement, whether executed or not, embodies the course of dealing between VisionStream and its customers.

Title to the displays passed when they were put into the hands of a common carrier at VisionStream's loading dock, and the transactions at issue are subject to sales tax. For the sake of thoroughness, however, we will consider VisionStream's other arguments.

2. If the Parties had no Agreement as to Passage of Title, Where did it Occur?

Vision Stream argues that there simply was no agreement between it and its client as to when title passed. Thus, it argues, we should ignore the Display Agreement, and the Director's regulation 12 CSR 10-113.200(3)(B)⁷ is dispositive. The regulation states:

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 in not acting as a contract or common carrier.

But this regulation does not seem apt in a situation such as this one, in which the tangible personal property is delivered out of state, but usually returns to Missouri after a few days for

⁷All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

storage and future undetermined use. We think the more applicable provision is 12 CSR 10-113.200 (3)(A), which provides:

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.

In this case, VisionStream completed its obligations regarding physical delivery of the property when the common carrier took the property from its loading dock. That the shipping and subsequent delivery were not its financial responsibility is reflected in the many invoices to customers placed into evidence by the Director. VisionStream often arranged for the shipping, and sometimes advanced payment for it, but the shipping costs were the customer's responsibility.

Vision Stream also relies on *May Dep't Stores Co. v. Director of Revenue*, 748 S.W.2d 174 (Mo. banc 1988). In that case, the court decided that sales in which Missouri buyers directed the Missouri seller to make delivery in another state to a third party by mail or common carrier were not retail sales in the state of Missouri and hence not subject to Missouri sales tax. The *May* court, in a very brief opinion, stated that "neither title nor ownership passed until delivery." *Id.* at 176. But the case is distinguishable from the situation here because under the facts of the case, the delivery was to a third party in another state, where the goods, presumably, would remain.

Vision Stream also directs our attention to a 1982 decision of this Commission, *Frontier Bag, Inc. v. Director of Revenue*, case no. R-80-0073 (1982). Our decisions are not precedential. *Fall Creek Const. Co. v. Director of Revenue*, 109 S.W.3d 165, 172 (Mo. banc 2003). Even if they were, *Frontier Bag* is again distinguishable. One of the express terms of the parties'

agreement in that case was “it is understood that the City of Olathe does not accept delivery of the bags nor take title to them until we have had a chance to examine, inspect, and count the bags in our service center. If we find failure for any reasons then the bags will be returned for full credit to Frontier Bag, Inc.” Under such an express condition, we determined that title to the bags passed to the purchaser only upon delivery to, and inspection by, the city of Olathe, Kansas.

Here, by contrast, there is no evidence that the parties agreed that VisionStream retained title to the displays until the buyer accepted them at an out-of-state trade show. VisionStream’s president testified, “We assumed that if there was any loss that occurred when the shipment was being made that we would be responsible for that and we’d most likely share that responsibility with the common carrier.” Tr. 78. His testimony about his “assumption” does not establish a meeting of the minds, but it is revealing in that it indicates that the true responsibility for risk of loss would lie with the common carrier, not with VisionStream.

VisionStream argues that the delay of 30 to 60 days from the F.O.B. date to the invoice date and the 30 days it affords its customers to inspect the goods before “acceptance” are indications of delay in title transfer, but they are more appropriately characterized as trade customs. The 30-day delay allows for shipping, set up, inspection, and repairs before final billing occurs. It also allows VisionStream to ascertain the costs of materials it buys from other vendors. VisionStream’s billing policies do not affect our analysis.

We note that the determination that title passed when VisionStream delivered the goods to the common carrier is supported by Missouri case law and the Uniform Commercial Code as codified in Missouri law. In *House of Lloyd*, the court stated:

The parties have the right to control the time and place that passage of title occurs by their express intent. However, these intentions control only when the parties “otherwise explicitly agreed” when title will pass. “Explicitly agreed” means that which is so clearly stated or distinctly set forth that there is no doubt as to its meaning. The parties admit that there was no explicit agreement when title

was to pass. Absent an explicit agreement, “. . . title passes . . . at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . . “ Section 400.2-401(2). Section 400.2-401 equates delivery of possession to transfer of title.

824 S.W.2d at 923 (citations omitted).

Finally, our conclusion that title to the displays passed to the customers when the common carrier picked them up from VisionStream is the logical result for taxation purposes, as well. There is no evidence in the record that any other state attempted to impose sales or use tax on the displays. We assume that VisionStream’s customers would have acted in an economically rational manner if that had happened, and would have requested credits or refunds from the State of Missouri if they had been subjected to such double taxation. Under VisionStream’s theory that title passed to its customer at the trade show venue, the displays would escape all taxation.

Whether the passage of title was governed by the Director’s regulations, the Uniform Commercial Code, or the Display Agreement, we find that title to the displays passed in Missouri. VisionStream’s sales of displays to its customers are subject to Missouri sales tax.

B. Use Tax

Prudentially, the Director made use tax assessments on the sales at issue after VisionStream applied for sales tax refunds on them. *See Dyno Nobel v. Director of Revenue*, 75 S.W.3d 240 (Mo. banc 2002) (where sales were not subject to use tax, Commission could not credit amounts to unpaid sales tax if no sales tax assessments were made). Having determined that these transactions were subject to sales tax, no use tax is due. Therefore, we discuss the Director’s use tax assessments only briefly.

Section 144.610 imposes a use tax, at the rate of four percent, for the privilege of storing, using, or consuming in Missouri personal property purchased from out of state. *President Casino, Inc. v. Director of Revenue*, 219 S.W.3d 235, 237-38 (Mo. banc 2007). Section 144.635,

RSMo 2000, requires “every vendor making a sale of tangible personal property for the purpose of storage, use or consumption in this state [to] collect from the purchaser an amount equal to the percentage on the sale price imposed by the sales tax law in section 144.020[.] Section 144.605(14) defines “vendor” in a manner broad enough to include an instate seller (“every person who maintains a place of business in this state”). It further defines “use” in subparagraph (13) as:

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;

and “storage” in subparagraph (10) as:

any keeping or retention in this state of tangible personal property purchased from a vendor, except property for sale or property that is temporarily kept or retained in this state for subsequent use outside the state[.]

VisionStream warehoused the displays of most of its customers after returning from the trade show or exhibit hall, which suggests that most did not have the desire or the space to dedicate to storage. We do not find that providing temporary storage substantially changes the nature of VisionStream’s business. We agree with VisionStream that the Director has stretched the meaning of § 144.635 too far in his effort to make the case that VisionStream is liable for use tax on the storage of displays if it is not liable for sales tax. VisionStream is not a “vendor making a sale of tangible personal property for the purpose of storage, use or consumption in this state.” It sells the displays at retail in Missouri for customers to buy and use them as they deem appropriate. To the extent that its customers pay for storage of the displays, they pay pursuant to separate agreements that are not part of the record, and presumably they pay separate amounts for that service.

Finally, we think that 12 CSR 10-113.300(1) is dispositive as to the applicability of use tax. The regulation states that “In general, the temporary storage of property in this state with the intent to subsequently use the property outside the state is not subject to use tax.” The remaining provisions of the regulation dealing with temporary storage make clear that it pertains to goods purchased from out-of-state vendors. In general, goods purchased from in-state vendors, like VisionStream, are subject to Missouri sales tax.

Summary

VisionStream is not entitled to a refund of the sales tax it collected and remitted on its sales of tangible personal property to customers, even if the property was shipped out of state for use by its customers. VisionStream is not liable for use tax or additions to tax in connection with the same transactions.

SO ORDERED on August 12, 2014.

\s\ Karen A. Winn
KAREN A. WINN
Commissioner