BEFORE THE
ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

FILED
AUG 21 2014
ADMINISTRATIVE HEARING COMMISSION

REEDS WRECKED CARS, LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 13-1106 RS
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

PETITIONER'S REPLY BRIEF

1. Respondent contends that the legislature included two definitions of a material recovery processing plant ("MRPP") in § 144.030.2(5), RSMo. (Respondent's Brief, p. 17) That is not the case, because what Respondent argues is a second definition follows the word "including," which means that the subsequent language provides an express instance of when the preceding definition should be deemed to have been met. In *Union Electric Co. v. Cuivre River Electric Co-op, Inc.,* 571 S.W. 2d 790, 794 (Mo. App. E.D. 790), the court said that while the word "including" is ambiguous, "Ordinarily. . . it is not a word of limitation, but rather, one of enlargement." Here it supplements the definition which it follows, thereby enlarging it, rather than presenting a separate definition of the words in question. In *Short v. Southern Union Co.,* 372 S.W. 3d 520, 532 (Mo. App. W.D. 2012), the Court wrote:

> Our research reveals that "include" in the context of statutes has almost universally been contrued by Missouri courts as a term of enlargement, as providing an illustrative, *non-exclusive*, example, or as both" (Emphasis added)

In § 144.030.2(5), RSMo, as in most of those cases, "including" precedes an illustrative and non-exclusive example for the definition under consideration.

Because the words following "including" provide an example rather than a definition, the words in that example do not limit other potential examples of the sole statutory definition that is given for a material recovery processing plant. As argued in Petitioner's original brief, other examples of the definition of MRPP (which definition uses the key word "primary") exist which do not imply or require the application of the word "exclusively" which is contained within the single statutory example of an MRPP.

Furthermore, while the statutory example includes the phrase "used exclusively," even the Respondent agrees that courts have sometimes interpreted the word "exclusive" to allow consideration of what is "primary" as opposed to "secondary." (Respondent's Brief, p. 19, discussing *Barnes Hospital v. Legget*, 646 S.W. 2d 889 (Mo. App. E.D. 1983) (See also *Division of Employment Security v. Industrial Commission*, 242 S.W. 2d 593 (Mo. App. W.D. 1951), in which "exclusively" was held not really to mean "solely" but rather was applied as meaning "primary.") After quoting the *Barnes Hospital* language to that effect ("exclusively has reference to the primary and inherent use as against a mere secondary and incidental use"), however, Respondent ignores that holding and erroneously contends that the court found "exclusively" to be synonymous with "solely." Consequently, even to meet this statutory example, it would not have been necessary for Petitioner to have used the purchased equipment "solely" for materials recovery. Rather, under these cases it would only have been necessary for Petitioner to use the equipment primarily for that purpose (which is what Mr. Reed testified that the company did).

Of course, Petitioner is not relying on the statutory example of a facility or equipment used exclusively for the collection of recovered materials for delivery to a MRPP. As pointed out in its original brief, that cannot be the only type of MRPP that exists because then a recycler that delivers

recovered materials to a manufacturer rather than to another MRPP could not itself be an MRPP, nor could a recycler who does anything other than "collect" materials to be recycled. What is necessary is that the facility have as its primary purpose the recovery of materials into a different form which is used in producing a new product, and Petitioner does that.

2. Respondent has also argued that Petitioner is not an MRPP because it did not produce a useable product. (Respondent's Brief, pp. 21-22) Respondent again misreads the statute. Section 144.030.2(5), RSMo does not say that a material recovery processing plant must produce a new product but rather that it must recover "materials into a useable product *or a different form which is used in producing a new product.*" (Emphasis added) Respondent has therefore completely ignored the statutory language which provides two alternative manners in which an entity may recover materials for use in a useable product. It may either turn out its own recovered useable products, or it may recover products in a different form – different from the form in which it started – which different form is later turned into a useable product.

In 12 CSR 10-111.060, Respondent recognized that second alternative in a highly analogous situation. When a business purchases aluminum, paper and other products to be bundled and then sold to facilities which use them as raw materials to produce new and different products, the Respondent's rule says that the business is a MRPP. That taxpayer put its raw materials in a new form essentially by bundling them. This taxpayer puts its raw materials into a new form essentially by unbundling them. Then they both send them on the next business operating in the recycling process, which business produces new and different products. Reeds Wrecked Cars, just like the paper recycler in the Respondent's rule, is a MRPP even though it is not the entity that produces the new product.

Respondent also misconstrues the applicability of *Galamet, Inc. v. Director of Revenue,* 915 S.W. 2d 331 (Mo. banc 1996). Petitioner made no claim that it does what Galamet does, but rather noted that Galamet (which operated as does PSC Metals in this case) was found by the Missouri Supreme Court to be a manufacturer. Petitioner is not a manufacturer, but rather is a MRPP which supplies the materials which it has turned into a different form to a manufacturer which converts those recovered materials into a useable product.

3. The statute says that a taxpayer is exempt from sales tax if "its primary purpose (is) the recovery of materials into . . . a different form which is used in producing a new product." Respondent argues that the word "purpose" is unrelated to intention and that "primary purpose" must be determined based upon what business operations are, rather than what they are intended to be, under three cases that he has cited. Those cases deal with other statutes; but while here the issue is how to construe the words "primary purpose" as they are used in this statute, in none of the Respondent's cases are the courts construing those words as parts of other statutes. Rather, they all construe different statutory language.

In *Missouri Goodwill Industries v. Gruner*, 210 S.W. 2d 38 (Mo. 1948), the court was construing the words "used exclusively for purposes purely charitable." It then found – contrary to Respondent's argument that "exclusively" means "solely" and ignoring the word "purely" entirely – that the primary purpose of Goodwill was not to make profit but to assist handicapped men and women become self-supporting. In holding Goodwill to be exempt, the Supreme Court looked primarily at what Goodwill intended – to help the handicapped – rather than what it actually did as a business, which was to turn a profit. But it did not construe the statutory words, "primary purpose." (In that case the Court also quoted with approval from *Y.M.C.A. v, Baumann,* 130 S.W.

2d 499, "The rule of strict construction in the matter of exemption from taxation is not questioned, but 'strict construction must be a reasonable construction.'" 210 S.W. 2d at 40)

Respondent also discusses *St. John's Medical Center, Inc. v. Spradling,* 510 S.W. 2d 417 (Mo. 1974). In that case four hospitals claimed to be exempt from sales taxes on the sales made in their cafeterias and gift shops under a statute exempting from sales taxes "all sales made by . . . religious and charitable organizations or institutions . . . in their religious, charitable or educational functions and activities." (Section 144.040.1, RSMo) Once again, that case was not about the construction of the word "purpose" or the phrase "primary purpose" as used in a statute, so once again it is not directly applicable to the construction of § 144.030.2(5), RSMo in this case. And once again, the court did not look at what the hospitals actually did – which was to turn a profit on their cafeteria and gift shop operations – but rather at what they intended, which was to operate their hospitals for charitable purposes, and at what they did not intend ("There was no intention to serve the general public in these cafeterias and gift shops"). (510 S.W. 2d at 419)

The third and last case cited by the Respondent, *Columbia Athletic Club v. Director of Revenue,* 961 S.W. 2d 806 (Mo. Banc 1998), like the other two, also does not construe the word "purpose" or the phrase "primary purpose" as those are used in a statute. Rather, the case required a determination as to whether the Columbia Athletic Club was a "place of amusement, entertainment or recreation, games and athletic events" (in which event sales taxes were due) or not. In making that distinction, the Court looked for the primary purpose of that business. It found that because its primary purpose was not to be a place of "recreation, games and athletic events," the Club was not subject to sales taxes. Rather, the Court concluded that the stated intent of the owner to allow members to improve their health through exercise was indeed its primary purpose.

Consequently, none of the cases upon which Respondent relies for its proposed construction of the word "purpose" or the words "primary purpose" as used in the MRPP exemption statute supports his position. Consequently, the construction of those words as proposed by Petitioner in its original brief – as necessitating a conclusion based upon Petitioner's intent – should be determined to be the correct one in this case. Courts give terms their plain and ordinary meaning as derived from the dictionary. (See, e.g., *Moon Shadow, Inc. v. Director of Revenue,* 945 S.W. 2d 436, 437 (Mo. banc 1997)) That means that the word "purpose" should be defined as the end or aim of the taxpayer, which in this case was and is to be a materials recovery processing plant.

4. The fact that Petitioner continued to have a salvage business does not impact its position because by statute an MRPP only needs to have as its primary purpose the aim of being a metals recovery processing plant. The use of the word "primary" necessarily means that the business can have other objectives at the same time, including selling parts that cannot be recycled and cannot be thrown away. To hold that a business that sorts materials and puts the results in different forms which are used in producing a new product cannot be a material recovery processing plant if it sells some of the things that the next operator in the recycling process does not want and would not take is not a "reasonable construction" of this statute, which is required under the *Y.M.C.A.* case as cited above. In *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W. 2d 186, 194 (Mo. Banc 1998), the Supreme Court, in allowing an exemption from sales tax on a publisher's new equipment, affirmed that "Statutes must be given a 'common sense and practical interpretation.'" Common sense dictated in that case the allowance of the exemption in part because of the financial realities of operating a small business: the exemption lessened the purchaser's burden in buying new and replacement equipment. A reasonable, common sense construction of the MRPP exemption statute

would recognize Petitioner's intent to become a material recovery processing plant not only as articulated by its owner but also by its substantial investment in equipment needed to do that, its increase in employees to handle that work, and the rapid expansion of its sales of recycled materials. It should also be noted that on the issue of a taxpayer's intent with regard to purchased equipment, the testimony of the sole witness for the business was accepted in *Concord Publishing House, Inc.*, 916 S.W. 2d at 195.

The Director relies heavily on the initial income ratios of Plaintiff's recycling business. However, as the Supreme Court held in *Spudich v. Director of Revenue*, 745 S.W. 2d 677, 681 (Mo. Banc 1988), "The fact that revenues from the sale of food and drink exceed those from the sale of billiard table playing time does not vitiate the billiard's center's character as a place of amusement." Consequently, the relative gross income from the different activities should not be dispositive here. It should also be noted that the sales of recycled materials in the initial years were impacted by the limited number of times that PSC Metals came to the site to pick them up.

Just as the purpose of the statute which exempts machinery and equipment used in manufacturing was "to encourage the production of items ultimately subject to sales tax and to encourage the location and expansion of industry in Missouri" (*Concord Publishing House, Inc.*, 916 S.W. 2d at 190), so the purpose of this statute exempting machinery and equipment used in recycling was to encourage the production of items ultimately subject to sales tax and to encourage the location and expansion of the recycling industry in Missouri. The Director's position would have the exact opposite effect. A decision affirming these assessments would chill those efforts because no existing business could make necessary purchases in order to get into recycling as its primary focus without paying the tax that the exemption was designed to avoid.

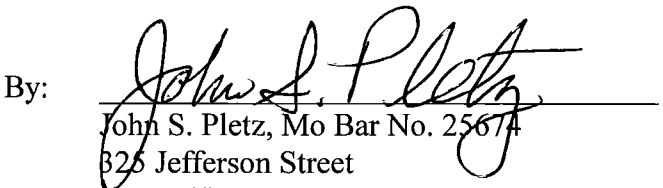
The objective of statutory construction is to ascertain the intent of the legislature from the language used and then give effect to that intent. (E.g., *Budding v. SSM Healthcare System*, 19 S.W. 3d 678, 680 (Mo. Banc 2000) In this case, that would be accomplished by rejecting the Director's suggested construction of § 144.030.2(5), RSMo and approving the construction advanced by the Petitioner.

5. Finally, Respondent also misconstrues § 144.210.1, RSMo, arguing that a claim of exemption is improper when the reason stated on an exemption certificate was not the correct reason. That is not what the statute says. It only says that if the claim of exemption is improper, the director can collect the tax, additions, interest and penalties directly from the purchaser rather than the seller. The Director is attempting to add words to the statute which are not there. Petitioner's claims of being exempt are not improper because it is exempt as a MRPP. Therefore, § 144.210.1, RSMo does not apply.

For the reasons set out in its briefs, Petitioner respectfully prays that the Commission determine that the Director's assessments were erroneous and should be withdrawn.

Respectfully submitted,

PLETZ AND REED, P.C.

By: 

John S. Pletz, Mo Bar No. 25674
325 Jefferson Street
Post Office Box 1048
Jefferson City, MO 65102
Telephone: (573) 635-8500
Facsimile: (573) 634-3079
Attorneys for Petitioner.

CERTIFICATE OF SERVICE

I certify that on the 21st day of August, 2014, a true copy of the above and foregoing Petitioner's Reply Brief was sent by United States Mail, postage prepaid, addressed to Thomas A. Houdek, Legal Counsel, Missouri Department of Revenue, Truman State Office Building, 301 West High, Room 670, Jefferson City, MO 65105-0475.

John S. Pletz