

IN THE SUPREME COURT
STATE OF MISSOURI

NO.SC87142

COOK TRACTOR CO., INC.,
Appellant,

vs.

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Respondent.

ON PETITION FOR REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
NO. 03-2184 RS
THE HONORABLE JOHN J. KOPP, COMMISSIONER

BRIEF FOR APPELLANT
COOK TRACTOR CO., INC.

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JURISDICTIONAL STATEMENT

The Department of Revenue assessed a sales/use tax on repair parts and trailers purchased by Cook Tractor Co. Inc. for the audit period of January 1, 2000 to December 31, 2002. Cook Tractor Co. Inc. appealed the Department of Revenue's decision on the assessment of the tax to the Administrative Hearing Commission. The case was heard by the Commission on August 19, 2004. The Commissioner entered his Decision on September 2, 2005 in favor of the Director of Revenue. Petitioner filed its timely Motion for Reconsideration on September 30, 2005 with the Administrative Hearing Commission, which was denied. Petitioner filed its timely Petition for Review with the Supreme Court September 30, 2005.

This appeal arises from the decision of the Administrative Hearing Commission involving the construction of Section 144.030.2(3), RSMo which exempts from state and local sales and use tax, “[m]aterial, replacement parts and equipment purchased for use directly upon, and for the repair and maintenance or manufacture of, motor vehicles, watercraft, railroad rolling stock or aircraft engaged as common carriers of persons or property[.]” The principal question presented is whether Cook Tractor is a common carrier and more specifically, the meaning and effect of the language: “holds itself out to the general public[.]” contained in the statutory definition of common carrier in Section 390.020(6), RSMo.

Thus, the Court's review of this case will necessarily involve the construction of Section 144.030.2(3), RSMo, which is a revenue law of the State of Missouri. This Court has exclusive jurisdiction over the issues pursuant to Article V, §3 of the Missouri Constitution.

STATEMENT OF FACTS

The Department of Revenue conducted an audit on Cook Tractor Co. Inc. for the period of January 1, 2000 to December 31, 2002. (Tr. 79). The Department of Revenue assessed a sales/use tax on repair parts for Cook Tractor Co. Inc.'s trucks and the trailers that Cook Tractor Co. Inc. purchased, during that time period. (Tr. 92). Cook Tractor Co. Inc. appealed the determination of the Department of Revenue to the Administrative Hearing Commission, and a hearing was conducted on August 19, 2004. (L.F. 14). The Administrative Hearing Commission found in favor of Director of Revenue, finding that Cook Tractor Co. Inc. is not a common carrier and is subject to the sales/use tax, plus interest on said tax. (L.F. 14).

Cook Tractor Co. Inc. is a Company located in Clinton Missouri. Cook Tractor Co. Inc. (Cook Tractor) buys, sells, and transports large machinery. (Tr. 12). Cook Tractor mainly handles farm machinery but also deals construction equipment. Cook Tractor also sells repair parts for machinery. (Tr. 12). Cook Tractor also accepts and sells consigned machinery. Cook Tractor holds monthly auctions to sell the machinery. (Tr. 12). The public is invited to these auctions. On average there are 500 people present at these auctions. (Tr. 34). Linda Christy is the secretary-treasurer of Cook Tractor. Linda Christy handles the bookkeeping, inventory, and accounts receivable and payable for the company. (Tr. 11).

Announcements are made at Cook Tractor's public auctions that Cook Tractor will transport property for hire. (Tr. 33). These announcements are made

before the sale over a loud speaker so that everyone in the public audience can hear the announcement. (Tr. 34). The monthly auctions are advertised by posting fliers in the area, by maintaining a website and newspaper advertisements in the local papers. (Tr. 74-75). Employees of Cook Tractor and its agents have had occasion to advertise the service of hauling for hire in other states on a regular basis. (Tr. 36). Cook Tractor has been engaged in the business of hauling for hire since 1997. (Tr. 174).

In the event that a potential customer calls Cook Tractor to request its hauling services, Cook Tractor accepts the customer's business as long as Cook Tractor has the proper equipment to haul the goods and the customer is willing to pay for the services. (Tr. 64 & 37) Cook Tractor actually engages in the business of transporting property for any person that will pay the charge for the transportation. (Tr. 28). Some examples of members of the public that have used Cook Tractor's hauling services are: Hart Equipment, Colorado Trucking Company, Greg P. Crozier, Rick Nikkel and Hennessy Motors, Allen Bank and Trust Company. (Tr. 53-58). Allen Bank & Trust Company learned of Cook Tractor's services to haul property for hire by seeing one of their trucks. (Tr. 36). Although Cook Tractor ultimately sold Allen Bank & Trust Company's machinery it did so only after Cook Tractor's hauling services were used. (Tr. 48).

Cook Tractor has a fleet of trucks used to haul machinery for others. (Tr. 12). The trucks and trailers used for hauling equipment are limited to what can be hauled. The trucks and trailers used by Cook Tractor are not equipped to haul

furniture, produce, expensive motorcycles, or anything else that is not large machinery. (Tr. 64). This fleet of trucks requires routine maintenance and repairs. (Tr. 38).

Cook Tractor obtained the Interstate Commerce Commission registration so it could haul machinery for property belonging to others, not Cook Tractor's property. (Tr. 14). Cook Tractor's business was expanding and Cook Tractor was receiving several calls from people to haul equipment so Cook Tractor obtained there ICC registration so Cook Tractor could haul the equipment when requested by customers. (Tr. 13). Cook Tractor has complied with all the requirements set forth by the United States Department of Transportation. (Tr. 27). Cook Tractor has paid all fees and costs to obtain its common carrier status with the Interstate Commerce Commission and the Unites States Department of Transportation. It has also paid for licenses and permits that are required by the United State Department of Transportation and the State of Missouri. (Tr. 38). Cook Tractor has also registered with the Missouri Department of Transportation, and any other state that the employees must travel into while hauling equipment as a common carrier. (Tr. 16).

Linda Christy made a clerical error in filing the 2002 United States Department of Transportation registration form. In that error Linda Christy mistakenly marked the box for "private carrier." (Tr. 21). Linda Christy went back to review the form from the Internet version and, at that point in time caught the error and fixed the registration form to show the correct information which is

“for hire.” (Tr. 21-22). This is shown in Petitioner’s Exhibit "U". Petitioner’s Exhibit "X" is a Missouri Department of Transportation Equipment Registration Form for 2004. Petitioner’s Exhibit "Y" is a Missouri Department of Transportation annual renewal application for 2005, which shows that the Department of Transportation still referred Cook Tractor as private carrier. (Tr. 183).

STATEMENT OF THE ISSUE

Section 144.030.2(3), RSMo provides a sales tax exemption for “[m]aterials, replacement parts and equipment purchased for use directly upon, and for the repair and maintenance or manufacture of, motor vehicles, watercraft, railroad rolling stock or aircraft engaged as a common carriers of persons or

property[.]” Cook Tractor purchased motor vehicle materials and parts during 2000, 2001 and 2002. Are the purchases of the motor vehicle materials and parts exempt under Section 144.030.2(3), RSMo?

STANDARD OF REVIEW

The decision of the Administrative Hearing Commission shall be reversed if it is not authorized by law and not supported by competent and substantial evidence upon the whole record. Section 621.193, RSMo. This Court reviews the Administrative Hearing Commission’s interpretations of Missouri revenue statutes

de novo. Zip Mail Services, Inc. v. Director of Revenue, 16 S.W.3d 588, 590 (Mo. Banc 2000). Tax exemptions are to be construed strictly, but reasonably, against the taxpayer. *Emerson Electric Co. v. Director of Revenue*, 133 S.W.3d 31, 32 (Mo. Banc. 2004).

POINTS RELIED ON

POINT I

**THE ADMINISTRATIVE HEARING COMMISSION ERRED IN
DENYING THE EXEMPTION CLAIM BECAUSE UNDER SECTIONS
621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW**

IN THAT, CONTRARY TO THE COMMISSION’S CONCLUSION, COOK TRACTOR MEETS THE STATUTORY DEFINITION UNDER SECTION 390.020(6) TO BE EXEMPT UNDER SECTION 144.030.2(3) FOR THE PURCHASE OF MATERIALS, REPLACEMENT PARTS AND EQUIPMENT PURCHASED FOR MOTOR VEHICLES ENGAGED IN THE BUSINESS OF COMMON CARRYING OF PROPERTY, BECAUSE THEY HELD THEMSELVES OUT TO THE GENERAL PUBLIC AS A COMMON CARRIER.

King v. Laclede Gas Co., 648 S.W.2d 113 (Mo. Banc 1983);

State ex rel. Anderson v. Witthaus, 102 S.W.2d 99 (Mo. Banc 1937);

State ex rel. Public Service Comm’n v. Logan, 411 S.W.2d 86 (Mo. 1967);

U.S. v. One Rockwell Intern. Commander, 754 F.2d 284, 8th Cir. (N.D.) Feb 08, (1985);

Section 144.030.2(3), RSMo 2000;

Section 390.020(6), RSMo 2000;

Section 390.020(7), RSMo 2000;

Section 390.020(23), RSMo 2000;

12 CSR 10-110.300(2)(A)

12 CSR 10-110.300(2)(B)

POINT II

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING THE EXEMPTION CLAIM BECAUSE, UNDER SECTION 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW IN THAT, CONTRARY TO THE COMMISSION'S CONCLUSION, COOK TRACTOR DID MEET THE REQUIREMENTS OF THE DIRECTOR'S REGULATION 12 CSR 10-110.300(2)(A) WHICH REQUIRES A COMMON CARRIER TO BE REGISTERED WITH ALL AGENCIES THAT REQUIRE SUCH REGISTRATION.

Section 226.008, RSMo 2000;

Section 390.020(18), RSMo 2000;

12 CSR 10-100.300(2)(A);

ARGUMENT

POINT I

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING THE EXEMPTION CLAIM BECAUSE UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW IN THAT, CONTRARY TO THE COMMISSION’S CONCLUSION, COOK TRACTOR MEETS THE STATUTORY DEFINITION UNDER SECTION 390.020(6) TO BE EXEMPT UNDER SECTION 144.030.2(3) FOR THE PURCHASE OF MATERIALS, REPLACEMENT PARTS AND EQUIPMENT PURCHASED FOR MOTOR VEHICLES ENGAGED IN THE BUSINESS OF COMMON CARRYING OF PROPERTY, BECAUSE THEY HELD THEMSELVES OUT TO THE GENERAL PUBLIC AS A COMMON CARRIER.

Section 144.030.2(3) allows a sales/use tax exemption for “[m]aterials, replacement parts and equipment purchased for use directly upon, and for the repair and maintenance or manufacture of, motor vehicles, watercraft, railroad rolling stock or aircraft engaged as common carriers of persons or property[.]” Since Chapter 144 does not contain a definition of “common carrier,” the Administrative Hearing Commission looked at the definition of common carrier in Section 390.020(6) which states, that a common carrier is “any person which holds itself out to the general public to engaged in the transportation by motor vehicle of the passengers or property for hire or compensation upon the public highways and airlines engaged in intrastate commerce.”

Section 390.020(7) states that a contract carrier is “any person under individual contracts or agreement which engage in transportation by motor vehicles of passenger or property for hire or compensation upon the public highways.”

Section 390.020(23) states that a private carrier is “any person engaged in the transportation of property or passengers by motor vehicle upon public highways, but not as a common or contract carrier by motor vehicle; and includes any person who transports property by motor vehicle where such transportation is incidental to or in furtherance of his commercial enterprises.”

The Director’s Regulation 12 CSR 10-110.300(2)(A) defines a common carrier as “any person that holds itself out to the public as engaging in the transportation of passengers or property for hire. A common carrier is required by law to transport passengers or property for others without refusal if the fare or charge is paid. To qualify as a common carrier, a carrier must be registered as a common carrier with all agencies that require such registration, such as the United States Department of Transportation.”

12 CSR 10-110.300(2)(B) states that a contract carrier is “any person under individual contract or agreements that engages in transportation of passengers or property for hire or compensation. A contract carrier is a carrier that meets the special needs of certain customers to transport its passengers or property.”

In looking at the plain language of the statute Cook Tractor is eligible for the tax exemption because it is a common carrier. Cook Tractor does hold itself

out to the general public in that it will transport property belonging to individuals for hire. The public is invited to the sales that Cook Tractor has and at these sales Cook Tractor advertises its services to those people. The people at the sale are the most likely people to use Cook Tractor's services not only for that sale but also for transportation of that type of equipment in the future. By looking at the plain language of the Section 390.020(6) Cook Tractor falls within this definition, because Cook Tractor holds itself out to the public as a common carrier by announcing at the auctions, by engaging in the business of transportation and by its agents and employees advertising Cook Tractor's services on a regular basis out of state.

The cases that have defined "common carrier" supports a finding that Cook Tractor is a common carrier. According to *U.S. v. One Rockwell Intern. Commander*, 754 F.2d 284, 287, 8th Cir. (N.D.) Feb 08, (1985), a carrier is a common carrier if it holds itself out to the public as willing to carry all passengers for hire indiscriminately. The holding out may be either by advertising or by actually engaging the business of carriage for hire. In *One Rockwell Intern*, the court found that the company was a common carrier because they actually engaged in transporting people for hire when requested to do so. *Id.*

As in *One Rockwell Intern*, Cook Tractor does engage in transporting for hire anyone that requests their services. Cook Tractor will transport property for anyone as long as the customer will pay the charge for the hauling which meets the requirement of Cook Tractor being for hire indiscriminately. (Tr. 37). By Cook

Tractor actually engaging in the practice of transporting property, Cook Tractor is holding itself out as common carrier as required by law.

The Administrative Hearing Commission was correct when they stated that “Everybody who undertakes to carry for any one who asks him is a common carrier[.]” citing to *State ex rel. Anderson v. Witthaus*, 102 S.W.2d 99, 101-102 (Mo. Banc 1937). (L.F. 22). This is exactly what Cook Tractor is doing. Linda Christy stated in her testimony that Cook Tractor would haul for any one that was willing to pay for the fee. (Tr. 37). The Administrative Hearing Commission erroneously found that Cook Tractor “sometimes” would haul property when a customer calls requesting their hauling services. (L.F. 17). Linda Christy stated that Cook Tractor is selective only as to the type of property hauled by it, due to the design of its trucks. (Tr. 64). Cook Tractor is not equipped to haul produce or motorcycles for example. (Tr. 64 & 66) Linda Christy testified that Cook Tractor would haul for anyone willing to pay the fees. (Tr. 37 & 67). There is nothing to support the Administrative Hearing Commission’s conclusion that Cook Tractor “sometimes” answer in the affirmative when asked to haul property. As also stated in *State ex rel. Anderson v. Witthaus*, if a person “professes to carry on a certain kind, [of property] this does not take from him (sic) his status as a common carrier.” *Id.* at 102. This means that just because Cook Tractor will not haul for customers wanting anything other than farm machinery hauled does not mean that Cook Tractor does not meet the definitional requirements of "common carrier."

Anderson also states that the “test is whether he [the common carrier] has invited the trade of the public.” (*Id.* at 102). *Anderson* went on to state “the public does not mean everybody all the time.” *Id.* The advertisement at the public action is sufficient advertisement because Cook Tractor is advertising to the public that will use their hauling services in the future. In *State ex rel. Public Service Comm’n v. Logan*, 411 S.W.2d 86, 88 (Mo. 1967), the court stated that the “holding out” could be done by a course of “business or conduct.” *Logan* stated a carrier may make known its services of hauling for hire “by advertising, solicitation, or the establishment in a community of a known place of business where requests for service will be received.” (*Id.* at 89). Cook Tractor has established itself in the community by actually engaging in the business of hauling for hire since 1997. (Tr. 174).

The Administrative Hearing Commission found that Cook Tractor is not a common carrier but a contract carrier. (L.F. 30). The Administrative Hearing Commission’s decision is not supported by the weight of the evidence. Linda Christy testified that Cook Tractor would haul for **any** customer willing to pay the fees. (Tr. 67). Cook Tractor does not meet the requirements of a contract carrier because they will haul for anyone who requests their services. A contract carrier only contracts with certain individuals.

Cook Tractor does not meet the requirements of a contract carrier under Section 390.020(7) because they do not haul just for individuals under contract. They will haul for anyone that request large machinery to be hauled and willing to

pay the fees for the hauling. Cook Tractor does not meet the requirements of a contract carrier under 12 CSR 10-110.300(2)(B) either. Cook Tractor will meet the needs of any customer not “certain customers” as indicated in the 12 CSR 10-110.300(2)(B).

The Administrative Hearing Commission found that Cook Tractor was not a common carrier because it did not have a sufficient amount of income from hauling for hire. (L.F. 30).

The Commission placed requirements on the status of being a common carrier that are not in the statute. The statute does not create a requirement of a specific amount of income to be met in order to be common carrier. Nowhere in the definition of a common carrier under Section 390.020 is there a required amount of income to be a common carrier. Since the General Assembly did not impose this requirement in Section 144.030.2(3) this Court should not uphold the Commission’s additional requirement to be considered a common carrier.

The Commission is to construe the legislative intent of Section 144.030.2(3) by looking to the statute and to give effect to that intent if at all possible. *King v. Laclede Gas Co.*, 648 S.W.2d 113, 115 (Mo. Banc 1983). The Commission did not do that in this case. The Commission imposed its own requirements as to what it believes the requirements should be.

The reoccurring theme in the cases and in the statute defining "common carrier" is that the carrier must hold itself out to the public as willing to engage in the transportation of property for hire, for any person willing to pay the fee for

such services. There is no quantitative or qualitative amount of holding out. The Administrative Hearing Commission heavily faulted Cook Tractor for not advertising, in a particular manner to wit: newspapers and yellow pages. (L.F. 30). There is no statutory, regulatory, or judicial requirement that one must advertise in a particular manner before claiming common carrier status. Cook Tractor advertised to the public, by having announcements made at the public action that Cook Tractor is willing to haul for hire. The public that Cook Tractor announced this to are the people in the public those are most like to use those services. Cook Tractor actually engages in the practice of hauling for hire. By Cook Tractor holding itself out by advertising, at the auctions, by actually engaging in the business of hauling for hire indiscriminately, and by solicitation of its agents and employees. Cook Tractor meets all the requirements required by case law and by statute to obtain the status of a common carrier. Therefore, for the reasons previously stated, Cook Tractor should be entitled to the exemption under Section 144.030.2(3).

POINT II

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING THE EXEMPTION CLAIM BECAUSE, UNDER SECTION 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW IN THAT, CONTRARY TO THE COMMISSION'S CONCLUSION, COOK TRACTOR DID MEET THE REQUIREMENTS OF THE DIRECTOR'S

REGULATION 12 CSR 10-110.300(2)(A) WHICH REQUIRES A COMMON CARRIER TO BE REGISTERED WITH ALL AGENCIES THAT REQUIRE SUCH REGISTRATION.

Regulation 12 CSR 10-100.300(2)(A) states a “[c]ommon carrier- - any person that holds itself out to the public as engaging in the transportation of passengers or property for hire. A common carrier is required by law to transport passengers or property for others without refusal if the fare or charge is paid. To qualify as a common carrier, a carrier must be registered as a common carrier with all agencies that require such registration, such as the United State Department of Transportation.”

The Administrative Hearing Commission correctly found that Cook Tractor was registered as a common carrier with the federal government. However, the Administrative Hearing Commission incorrectly determined that Cook Tractor was not registered with the state government. (L.F. 27). Cook Tractor showed that it was registered with the Highway Reciprocity Commission. The Highway Reciprocity Commission was abolished and those duties were transferred to the Missouri Department of Transportation. (L.F. 26). Cook Tractor showed registration forms from the Division of motor carrier and railroad safety that it was registered with them. (Exhibit O). This registration form does not require the applicant to claim their status as a common carrier, private carrier, or contract carrier. This registration form does require that the applicant indicate if they have

liability insurance. The Division of Motor Carrier and Railroad Safety was abolished in 2002 and transferred to the Department of Transportation. RSMo Section 226.008. Cook Tractor does not have any registration forms showing that they registered with the Missouri Department of Transportation during this tax audit because they were registering with the Department of motor carrier and railroad safety. During the time period in question the Highway Reciprocity commission and the Division of Motor Carrier and Railroad Safety were the agencies that required registration.

Cook Tractor has registration receipts from the Missouri Department of Transportation showing that it is registered. (Exhibit N). The Administrative Hearing Commission is heavily faulting Cook Tractor for producing receipts from the Division of Motor Carrier and Railroad Safety as a motor carrier, because the division did not distinguish between a common carrier and a contract carrier. A motor carrier is defined in Section 390.020(18) as common carrier and a contract carrier. The Administrative Hearing Commission stated that they do not fault Cook Tractor for registering improperly with the agencies. (L.F. 25). The agencies have a “confusing” (L.F. 24) and “complicated registration process with the state and federal regulatory authorities.” (L.F. 25). Cook Tractor was registered with the correct agencies but through error was registered incorrectly. Cook Tractor should not be faulted for that because it did not affect the way that Cook Tractor operated the common carrier business. Cook Tractor carried the proper insurance on the vehicles and paid the appropriate fees for the common

carrier status. (Tr. 173). These registration errors did not prevent Cook Tractor from holding itself out to the public as a common carrier nor did it affect the way they actually conducted business. Cook Tractor has nothing to gain by registering as a private carrier as opposed to a common carrier.

The Administrative Hearing Commission found Cook Tractor to be a contract carrier, even though it was incorrectly registered as a private carrier. The Department of Transportation's fleet inquiry system, which the Director of Revenue used as evidence of their status in Respondent's Exhibit 3 showed that Cook Tractor was registered as a private carrier for 2000, 2001, and 2002. This was a clerical error on the part of Cook Tractor. After Cook Tractor realized the error they made the appropriate changes to the application to show that they were a common carrier. (Tr. 21) Despite this error the Administrative Hearing Commission still found that Cook Tractor to be a contract carrier instead of a private carrier as Exhibits X and Y indicated.

The Administrative Hearing Commission erred in finding that Cook Tractor was not a contract carrier because it was not registered with all agencies that require such registration. Cook Tractor was registered with all agencies that required such registration. Although registration was wrong, Cook Tractor should not be punished for the clerical error. The Administrative Hearing Commission stated that Cook Tractor would not be faulted for the clerical error and then turned around and faulted them for it. (L.F. 28).

CONCLUSION

Is the Commission's decision denying Cook Tractor the common carrier exemption reasonable, as this Court has recently indicated it must be in order to stand? For all of the foregoing reasons, Cook Tractor submits that it is not. It is entitled to a tax exemption for the purchase and repairs of all equipment engaged in the business of common carrying. This Court should reverse the Administrative Hearing Commission with instruction to enter a decision granting Cook Tractor the exemption.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing, as well as a labeled disk containing the same, were hand delivered this _____ day of December 2005, to:

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RULE 84.06(c) CERTIFICATION

The undersigned counsel hereby certifies that this brief includes the information required by Rule 55.03, and this brief complies with the limitations contained in Rule 84.06(b). This brief contains _____ words counted using Microsoft Word Office XP. Counsel also certifies that the attached floppy disk containing this brief has been scanned for viruses and is virus-free.

JAMES K. JOURNEY