

Missouri Supreme Court: Catalogs printed and mailed into state determined to be exempt from Missouri use tax

Overview

On April 5, 2016, in *Office Depot, Inc. v. Director of Revenue*, the Missouri Supreme Court upheld an administrative hearing commission ruling and held that catalogs printed and delivered to the United States post office outside Missouri for shipment to Missouri customers were exempt from Missouri use tax because Office Depot did not exercise any right or power over the catalogs in Missouri incident to the ownership or control of that property.¹

In this Tax Alert, we summarize the Missouri Supreme Court's decision in *Office Depot, Inc. v. Director of Revenue* and provide some taxpayer considerations.

Background

Office Depot operated retail stores in Missouri, and promoted and advertised to its existing and potential customers in Missouri, in part, by the mailing of unsolicited product catalogs. Office Depot contracted with a non-Missouri vendor (Printer) to print and mail these catalogs. Office Depot purchased paper from vendors outside of Missouri and delivered the paper to the Printer's facilities in Illinois and Indiana, along with specific addresses indicating where the catalogs should be shipped. The Printer printed the catalogs at its facilities and delivered the finished product to a local post office outside Missouri, from where they were then mailed to Missouri residents.²

Office Depot accrued and remitted Missouri use tax on the cost of the paper (and the printing and mailing services) and subsequently filed use tax refunds.³ The Department of Revenue denied the refund claims and Office Depot appealed the Department's decision to the Commission.⁴ The Commission found that Office Depot was entitled to the refunds because it did not "use" the catalogs as required under Missouri statute.⁵ The Department appealed the Commission's decision to the Missouri Supreme Court.

The Missouri Supreme Court upheld the Commission's decision, holding that "Office Depot did not exercise any right or power incident to ownership or control over the catalogs in Missouri," thus the paper, printing, and mailing services were not subject to Missouri use tax.⁶

"Use" under Missouri statute

The main issue in this case was whether Office Depot used or, by definition, exercised rights or power over the catalogs while they were in Missouri. Missouri statute section 144.610.1 imposes a tax on the storage, use, or consumption of tangible personal property in the state.⁷ Missouri defines "use" as "the exercise of any right or power over tangible personal property incident to the ownership or control of that property...."⁸

Citing its 1988 decision in *May Dep't Stores Co. v. Dir. Of Revenue*, the Missouri Supreme Court held that mailing catalogs from another state to Missouri residents does not constitute use of the catalogs in Missouri.⁹ May Department Stores (May) had provided its vendor, located in Illinois, with the mailing information for its ultimate recipients in Missouri. The vendor then printed and brought the catalogs to the local post office for delivery to the Missouri addresses.¹⁰ The Missouri Supreme Court held that May had no possession of the catalogs at any time in Missouri, and therefore did not exercise power over the property to subject May to Missouri use tax.¹¹ Determining

¹ *Office Depot, Inc. v. Dir. of Revenue*, No. SC95029, (Mo. Apr. 5, 2016) at 1, available [here](#).

² *Id.* at 2.

³ *Id.*

⁴ *Id.* at 2 and 3.

⁵ *Id.* at 3; Mo. Rev. Stat. § 144.605(13).

⁶ *Id.* at 10.

⁷ *Id.* at 3; Mo. Rev. Stat. § 144.610.1.

⁸ Mo. Rev. Stat. § 144.605(13).

⁹ *Office Depot, Inc.*, No. SC95029 at 4 (citing *May Dep't Stores Co. v. Dir. Of Revenue*, 748 S.W.2d 174, 175 (Mo. banc 1988)).

¹⁰ *Id.* at 4; *May Dep't Stores*, 748 S.W.2d at 174.

¹¹ *Id.* at 4; *May Dep't Stores*, 748 S.W.2d at 175.

that “[t]here is no legal distinction between [Office Depot] and *May*,” the court noted that Office Depot does not have possession of the catalogs in Missouri “even for an instant.”¹²

The Missouri Supreme Court rejected the Director of Revenue’s argument (premised on decisions from other states) that because Office Depot benefited from delivery of the catalogs to Missouri customers, and because its labels “controlled” where and how the catalogs would be delivered in Missouri, it should be held to have “used” the catalogs in Missouri.¹³ Citing *May*, the Missouri Supreme Court noted it had previously rejected this reasoning, specifically “a company ‘cannot be said to...use...the catalogs in Missouri by giving directions which are executed outside the state.’”¹⁴

The Missouri Supreme Court also distinguished an earlier decision in *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, where Southwestern Bell arranged for a printer to ship directories to an independent contractor in Missouri who was “employed by and under the direction of Southwestern Bell.”¹⁵ Unlike Southwestern Bell, Office Depot’s catalogs were delivered directly to a post office outside Missouri and from there delivered to Missouri residents; the finished catalogs were “never in the possession of Office Depot or its agents in Missouri.” Thus, the Missouri Supreme Court held that “Office Depot cannot be said to have exercised any right or power incident to its ownership or control of the catalogs in Missouri.”¹⁶

Considerations

Taxpayers may wish to consult with their tax advisers regarding the potential for Missouri use tax refunds if they have previously remitted Missouri use tax on catalogs shipped from outside Missouri to customers or potential customers inside the state. No motion for rehearing was filed in this case and mandate was issued, making the decision final through the highest court in Missouri. The Director has 90 days from entry of judgment to file a writ of certiorari seeking leave to appeal to the US Supreme Court.¹⁷

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¹² *Id.* at 5; *May Dep’t Stores*, 748 S.W.2d at 175.

¹³ *Id.*

¹⁴ *Id.* at 5,6; *May Dep’t Stores*, 748 S.W.2d at 175.

¹⁵ *Office Depot, Inc.*, No. SC95029 at 7 (citing *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388, 389 (Mo. banc 2002)).

¹⁶ *Office Depot, Inc.*, No. SC95029 at 8.

¹⁷ SUP. CT. R. 13.