

**No. SC89547**

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**IN THE MISSOURI SUPREME COURT**

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**MUSIC CITY CENTRE MANAGEMENT, LLC,**

**Respondent,**

**v.**

**DIRECTOR OF REVENUE, STATE OF MISSOURI,**

**Appellant.**

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**BRIEF OF APPELLANT DIRECTOR OF REVENUE**

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Argument

    The Administrative Hearing Commission erred when it concluded that Music City Centre Management, LLC is entitled to a resale exclusion from tax on amounts paid to it by distributors of admission tickets to its theater, because the sale of admission tickets to a theater is an amount paid to a place of amusement, entertainment, or recreation at retail under § 144.020.1(2), RSMo, in that § 144.010.1(10)(a), RSMo, deems the sale of tickets to distributors to be the sale at retail.

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## **JURISDICTIONAL STATEMENT**

This is a petition for review filed by the Director of Revenue from a decision of the Administrative Hearing Commission concluding that Music City Centre Management, LLC is entitled to a resale exclusion from sales tax on the sale of admission to its theater. Section 621.189, RSMo Cum. Supp. 2007. This petition involves the construction of the revenue laws of this state, namely, § 144.020.1(2), RSMo Cum. Supp. 2007, taxing amounts paid to a place of amusement, entertainment, or recreation at retail. Mo. Const. art. V, § 3 (as amended 1982). Therefore, the Missouri Supreme Court has jurisdiction.

## STATEMENT OF FACTS

### Procedural background

Music City Centre Management, LLC applied to the Director of the Department of Revenue for a refund of sales tax paid for the filing period of April through June 2003. (Sep. App. A5). Then, Music City applied to the director for a refund of sales tax paid for the period from July through September 2003. (Sep. App. A5) Finally, Music City applied to the director for a refund of sales tax paid from October 2003 through December 2005. (Sep. App. A5) The director denied each application for the same reason: “This refund request is being denied because refund does not qualify under section 144.020.1(2). Fees paid to or in a place of amusement or entertainment are subject to tax.” (Sep. App. A22, A23, A24)

Music City filed two petitions with the Administrative Hearing Commission (AHC) that challenged the director’s decisions. (Sep. App. A1) The AHC consolidated the petitions. (Sep. App. A1) Music City and the director filed a joint stipulation of facts, including exhibits. (Sep. App. A2) The AHC concluded that Music City sold the right of admission to its theater to distributors, known as FITs: Music City “is selling the admission rights to the FITs” and “the FIT paid Music City for the right to enter the theater.” (Sep. App. A12) The AHC decided that Music City “is not subject to sales tax on its sales of tickets and admission

rights to distributors. These sales were for resale. Music City is entitled to a refund of \$83,113, plus interest.” (Sep. App. A1)

### **FIT contracts to market theater tickets**

During the calendar tax years 2003, 2004, and 2005, Music City produced and promoted live entertainment at its theater, Music City Centre, in Branson, Missouri. (Sep. App. A2) Music City marketed tickets to its theater through contractual arrangements, called FIT contracts, with Branson-based businesses, called FITs. (Sep. App. A2)<sup>1</sup> Under the FIT contracts, the FITs paid a discounted ticket rate to Music City. (Sep. App. A3) For example, Music City’s box office rate for The Haygoods show in 2004 was \$27.87, including sales tax, and the FIT rate was \$13.50, including tax. (Sep. App. A3, A30) Likewise, the FIT rates for the Red Skelton show in 2003, the Red Skelton show in 2004, and the Red Skelton, The Elvis Experience, and The Haygoods shows in 2005 were lower than the box office rates and included sales taxes. (Sep. App. A26, A29, A32) Music City reported to the director the gross amounts received from the FITs, less the inclusive sales tax amounts, as gross taxable amounts and remitted the sales tax on the gross amounts. (Sep. App. A5)

Neither the FITs nor their employees could use the discounted tickets to attend shows at Music City’s theater. (Sep. App. A3) Rather, the FITs sold the

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<sup>1</sup>The record does not reveal what FIT, presumably an acronym, stands for.

tickets to customers. (Sep. App. A3) The FITs that sold tickets to customers for cash usually charged the same amount Music City charged for its box office rate, including sales tax. (Sep. App. A3)

### **Agent pickup accounts and voucher billed accounts**

Under the FIT contracts used in 2004 and 2005, the FITs are referred to as “consignees.” (Sep. App. A28–A30, A32–A33) The contract used in 2005 states: “It is expressly understood that Consignee is not an employee or agent of DSP [David Sandy Productions, apparently another name for Music City] or Music City Centre. Furthermore, both parties agree that Consignee is purchasing tickets for the purpose of resale.” (Sep. App. A33)

Under the FIT contracts used in 2003, 2004, and 2005, tickets could be either pre-paid by the FIT, called “agent pickup accounts,” or paid for by the FIT after Music City sent the FIT a weekly invoice, called “voucher billed accounts.” (Sep. App. A26, A29, A32) New accounts had to be “agent pickup.” (Sep. App. A30) Because most FITs cannot directly access Music City’s computerized box office ticketing system and print tickets, the FITs could issue ticket vouchers to customers. (Sep. App. A4) When a FIT issued a ticket voucher, the customer would pay the FIT its required price, and the FIT would make a reservation with Music City, verifying a specific date, show time, and seating. (Sep. App. A4)

Then, the customer would travel to Music City's theater and use the voucher to gain entrance and view the show. (Sep. App. A4)

### **Ticket cancellation**

Once a reservation was made by the FIT, the FIT became obligated to pay Music City for the ticket even if the customer failed to attend the show, unless the reservation was cancelled by either the FIT or the customer. (Sep. App. A4) To cancel a reservation without charge, either the FIT or the customer had to contact Music City within two hours prior to show time. (Sep. App. A4) Any refund owed to a customer for cancellation was handled by the FIT. (Sep. App. A5)

### **Amount and type of consideration**

Each FIT determined the amount and type of consideration given by customers for tickets. (Sep. App. A3) As mentioned above, some FITs sold tickets for cash. (Sep. App. A3) The FITs that were timeshares either sold tickets for cash or transferred tickets without charge to customers in exchange for customers' taking timeshare sales tours. (Sep. App. A3–A4) And some FITs bundled tickets with other products, such as a discounted meal at a restaurant and two nights' lodging at a hotel, and offered that package for a single price to customers, payable in cash. (Sep. App. A4)

**POINT RELIED ON**

**The Administrative Hearing Commission erred when it concluded that Music City Centre Management, LLC is entitled to a resale exclusion from tax on amounts paid to it by distributors of admission tickets to its theater, because the sale of admission tickets to a theater is an amount paid to a place of amusement, entertainment, or recreation at retail under § 144.020.1(2), RSMo, in that § 144.010.1(10)(a), RSMo, deems the sale of tickets to distributors to be the sale at retail.**

*Eighty Hundred Clayton Corp. v. Director of Revenue*, 111 S.W.3d 409

(Mo. banc 2003)

*Kansas City Power and Light Co. v. Director of Revenue*, 83 S.W.3d 548

(Mo. banc 2002)

*Michael Jaudes Fitness Edge, Inc. v. Director of Revenue*, 248 S.W.3d 606

(Mo. banc 2008)

*Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526

(Mo. banc 2003)

§ 144.010, RSMo Cum. Supp. 2007

§ 144.020, RSMo Cum. Supp. 2007

## ARGUMENT

**The Administrative Hearing Commission erred when it concluded that Music City Centre Management, LLC is entitled to a resale exclusion from tax on amounts paid to it by distributors of admission tickets to its theater, because the sale of admission tickets to a theater is an amount paid to a place of amusement, entertainment, or recreation at retail under § 144.020.1(2), RSMo, in that § 144.010.1(10)(a), RSMo, deems the sale of tickets to distributors to be the sale at retail.**

### **Standard of review**

This court reviews de novo the Administrative Hearing Commission's (AHC) interpretation of revenue laws. *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526, 527 (Mo. banc 2003). This court defers to the AHC's factual findings if they are supported by the law and substantial evidence on the entire record. *Id.*

The burden of proving a tax liability rests upon the director. *Id.* at 529. This court construes tax liabilities strictly against the taxing authority in favor of the taxpayer. *Id.*

### **Taxation of the service of amusement**

Section 144.020.1, RSMo Cum. Supp. 2007, imposes a tax upon sellers of tangible personal property or of taxable services at retail in this state. The statute

defining the words “sale or sales,” § 144.010.1(9), and the statute defining the term “sale at retail,” § 144.010.1(10)(a), make clear that one service which is taxable when sold at retail in this state is the sale of “admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation[.]” § 144.010.1(10)(a), (Sep. App. A18). The true object of the sale of admission tickets is “the service of amusement, not the sale of tangible personal property,” the taxable event is “admission to a place of amusement,” and the object of taxation is the “amounts paid to a place of amusement.” *Six Flags*, 102 S.W.3d at 528. The tax imposed is a percentage of “the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation[.]” § 144.020.1(2), (Sep. App. A20).

To find a transaction taxable under § 144.020.1(2), “two elements are essential — that there be fees or charges and that they be paid *in* or *to* a place of amusement, entertainment, or recreation.” *Michael Jaudes Fitness Edge, Inc. v. Director of Revenue*, 248 S.W.3d 606, 609 (Mo. banc 2008) (emphasis in original). In this case, there is no dispute over these two elements. Fees or charges for shows such as the Red Skelton, The Haygoods, and The Elvis Experience were paid to Music City. The dispute is over whether the fees or charges for the service of amusement were paid to Music City “at retail.” §§ 144.020.1, (Sep. App. A20). That question is answered by § 144.010.1(10)(a).

## **No resale exclusion**

The AHC decided that Music City’s “sale of tickets and admission rights” ( Sep. App. A1, A12) to the FITs were not for their use or consumption, but were for resale, and thus were not taxable. This is known as the “sale for resale exclusion” from taxation. *Kansas City Power and Light Co. v. Director of Revenue*, 83 S.W.3d 548, 550–51 (Mo. banc 2002) (*KCPL*). The resale exclusion is derived from the text of the statutory definition of sale at retail.

**“Sale at retail”** means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration[.]

§ 144.010.1(10), (Sep. App. A18); *KCPL*, 83 S.W.3d at 550. The AHC overlooked, however, an additional part of the statutory definition that deems the sale of admission tickets to distributors to be the sale at retail.

**Where necessary to conform to** [emphasis added] the context of 144.010 to 144.525 and **the tax imposed thereby** [emphasis added], the term **“sale at retail”** shall be construed to embrace:

(a) Sales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events[.]

§ 144.010.1(10)(a), (Sep. App. A18). The fact that neither the FITs nor their employees could use the discounted tickets to attend shows at Music City’s theater and that the FITs sold the tickets to their customers (Sep. App. A3) is irrelevant. The legislature simply decided to subject to taxation the sale of admission and seating and fees when paid “to or in” a place of amusement, § 144.020.1(2), and directed state agencies and courts to construe the term sale at retail “to conform” to that decision, § 144.010.1(10)(a). Therefore, the sale at retail occurs when Music City sells admission tickets to the FITs, rather than when the FITs sell those tickets to their customers.

This reading of the resale exclusion does not conflict with *KCPL*, which does not involve amounts paid to places of amusement. There, this court found the resale exclusion to apply to the sale of electricity to a hotel. Tax could be imposed at a further stage in the stream of commerce — upon the resale of electricity by the hotel to its guests — under a statute that imposes tax upon “all sales of electricity[.]” § 144.020.1(3). The legislature intended for the resale exclusion to apply only where, as in *KCPL*, tax can be imposed at a further stage in the stream

of commerce. The legislature did not intend for the exclusion to apply where, as in this case, every stage in the stream would escape taxation.

This court has recognized that intention. Missouri taxes the sale of property “once and not at various stages in the stream of commerce, regardless of who is receiving the benefit of the property.” *Six Flags*, 102 S.W.3d at 530 (receipts from use of video game machines not taxable where taxes previously paid on purchase of machines). Here, no tax can be imposed upon the FITs’ sale of admission tickets to their customers because nothing is paid in or to a place of amusement. § 144.020.1(2); *Michael Jaudes Fitness*, 248 S.W.3d at 609.

In contrast, tax could be imposed upon, for example, distributors’ sale of tickets for intrastate transportation under a statute that imposes tax upon “intrastate tickets[.]” § 144.020.1(7); *Ryder Student Transportation Services, Inc. v. Director of Revenue*, 896 S.W.2d 633 (Mo. banc 1995) (receipts from transportation provided under contracts not taxable). The plain language of that statute imposes tax upon the sale of tickets, unlike § 144.020.1(2), which imposes tax only upon amounts paid in or to places of amusement. So, to give effect to the legislature’s intent, no resale exclusion applies to Music City’s sale of admission tickets to the FITs, and no retail sale occurs between the FITs and their customers.

This result would prevent the avoidance of sales tax through the artifice of selling admission to places of amusement through distributors. For example, if a

place of amusement in Missouri, say Six Flags at Eureka, were to sell admission tickets and season passes to out-of-state customers through a distributor (whether located within or without Missouri), rather than directly by mail or telephone, the sale would escape taxation. That artifice would effectively avoid the holding of *Six Flags*, which is that direct sales to out-of-state customers of permission to enter a Missouri place of amusement to receive the service of amusement do not take place in interstate commerce and, thus, are taxable. That artifice would frustrate Missouri's goal of taxing the sale of property and services once and only once. *Six Flags*, 102 S.W.3d at 530.

This result is also consistent with the concept of a gross receipts tax, which includes the sales tax, *Golde's Department. Stores, Inc. v. Director of Revenue*, 791 S.W.2d 478 (Mo. banc 1990) (refund of taxes paid upon gross sales), and with the plain language of § 144.020.1(2), which imposes tax upon receipts paid for 1) admission to places of amusement, 2) seating accommodations in places of amusement, and 3) "such other fees as are paid to or in said establishments. That simple general language is not limited or qualified in any way. It applies to *all* such fees paid to or in such establishments." *Eighty Hundred Clayton Corp. v. Director of Revenue*, 111 S.W.3d 409, 411 n. 2 (Mo. banc 2003) (fees for bowling shoes taxable), quoting *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 599 (Mo.

banc 1977) (emphasis in original). Here, Music City has received amounts for the service of amusement.

Simply put, Missouri intends for the resale exclusion not to apply to amounts paid to places of amusement by distributors of admission tickets when the sale of the service of amusement would escape taxation further in the stream of commerce. The amounts paid to Music City by the FITs for their customers' admission to Music City's theater are taxable as amounts paid to a place of amusement, entertainment, or recreation at retail.

## CONCLUSION

For the reasons stated above, the decision of the Administrative Hearing Commission should be reversed.

Respectfully submitted,

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## **CERTIFICATES OF SERVICE AND COMPLIANCE**

I hereby certify that 1 copy and 1 computer diskette of the foregoing was served by first-class mail, postage prepaid, this 17<sup>th</sup> day of December, 2008, upon:

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I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 3,194 words and that the diskettes provided this court and counsel have been scanned for viruses and are virus-free.

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