No. SC89547

IN THE MISSOURI SUPREME COURT

MUSIC CITY CENTRE MANAGEMENT, LLC,

Respondent,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Appellant.

REPLY BRIEF OF APPELLANT DIRECTOR OF REVENUE

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Music City misunderstands the true object of the sale of admission tickets to places of amusement, the scope of one of this court's decisions, and when the legislature intended for the resale exclusion to apply.

Music City asserts that the sale of admission tickets to places of amusement is one of six types of intangible personal property identified in § 144.010.1(10) as subject to sales tax. (Music City Brief at 13–14). This court, however, has described the sale of admission tickets to places of amusement as the sale of "the service of amusement." *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526, 528 (Mo. banc 2003). The sale of amusement and five other services are subject to tax. Those services are: amusement; electricity; telecommunications; telegraphy; rooms, meals, or drinks sold to the public; and transportation. §§ 144.020.1(2)–(7); 144.010.1(10)(a)–(f). Those services are the only services taxable in Missouri. The statutes list no others.

Music City is again incorrect when it asserts that the director is "in direct conflict with" a decision of this court, which, it says, held that the sale of electricity is not deemed to be a sale at retail. (Music City Brief at 16) This court decided in *KCPL* that the resale exclusion applied to the sale of electricity to a hotel. This court made its decision, however, under the circumstance where tax could be imposed upon the resale of the electricity by the hotel to its guests. A

statute authorizes taxation of "all sales of electricity[.]" *Kansas City Power and Light Co. v. Director of Revenue*, 83 S.W.3d 548, 550 (Mo. banc 2002) (*KCPL*); § 144.020.1(3). This court did not examine in *KCPL*, and has not examined in any other case, the question whether the sale of a taxable service is by operation of law, § 144.010.1(10), a sale at retail where tax cannot be imposed at a later stage in the stream of commerce. That question remains open.

Music City is ultimately incorrect when it disagrees with the legislature's intention for the resale exclusion to apply only where tax can be imposed at a later stage in the stream of commerce. Music City argues that the director's argument is without citation to authority, result oriented, and results in collecting tax at the wholesale (rather than retail) level. (Music City Brief at 16–17) The authority, cited in the director's opening brief at 14–15, is the statutory definition of sale at retail itself.

> **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). There is no ambiguity here, as Music City argues. (Music City Brief at 18) The legislature simply decided to subject to taxation the sale of admission and seating and fees when paid "to or in any place of amusement," § 144.020.1(2), and directed state agencies and the courts to construe the term sale at retail "to conform" to that decision, § 144.010.1(10)(a). Following the legislature's directive, the result can only be that in this case, the retail sale occurs when Music City sells admission tickets to the FITs, rather than when the FITs sell those tickets to their customers. In this case, the legislature is not concerned with at what level tax is collected.

Music City argues that this court should not consider that the FITs are not subject to taxation upon their sale of admission tickets to their customers because no court or tribunal has decided whether they are and there is no record below whether they pay taxes or whether the director collects tax from them. (Music City Brief at 17–18) But it does not take litigation to determine that the sale of admission tickets by brokers cannot be taxed. The statutes do not authorize taxation of ticket brokers, and the director does not collect tax from brokers. See LR2326 at http://dor.mo.gov/tax/rulings/LR2326.htm (ticket brokers provide a nontaxable service and "are not required to collect sales tax on their sales"). Section 144.020.1(2) imposes tax upon amounts paid for admission, seating, and fees "paid to or in any place of amusement." There is no ambiguity here. Ticket

brokers are not places of amusement. The FITs do not manage the Music City Centre theatre in Branson; Music City Centre Management, Inc. does.

Finally, Music City argues that because it and the FITs are separate companies, there is no danger of tax avoidance through the artifice of selling admission to places of amusement through distributors. (Music City Brief at 18 n. 6) But tax avoidance can result regardless of whether ticket distributors are legally separate or part of places of amusement. Legal separation is no guarantee that tax will not be avoided, as the case Music City cites illustrates. Moreover, that case does not involve the sales tax, as Music City says it does. *Acme Royalty Co. v. Director of Revenue*, 96 S.W.3d 72, 75 (Mo. banc 2002) (two corporations related to corporation conducting business and paying income tax in Missouri were separate legal entities with no Missouri source income).

Because Missouri intends for the resale exclusion to apply only where sales tax can be imposed at a later stage in the stream of commerce, this court should affirm the decision of the AHC.

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 ____ day of February, 2009, 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 1,203 words and that the diskettes provided this court and counsel have been scanned for viruses and are virus–free.

_____
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