

IN THE SUPREME COURT OF MISSOURI

No. SC95102

MISS DIANNA'S SCHOOL OF DANCE, INC.

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

From the Administrative Hearing Commission of Missouri
The Honorable Karen W. Winn, Commissioner

APPELLANT'S REPLY BRIEF

SUBMITTED BY:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

ARGUMENT.....1

CONCLUSION.....9

CERTIFICATE OF COMPLIANCE11

TABLE OF AUTHORITIES

Cases

<i>Kanakuk-Kanakomo Kamps, Inc. v. Director of Revenue,</i> 8 S.W.3d 94 (Mo. Banc 1999).....	2, 4, 5, 6
<i>Michael Jaudes Fitness Edge, Inc. v. Director of Revenue,</i> 248 S.W.3d 606 (MO 2008).....	2, 4
<i>Wilson’s Total Fitness Center, Inc. v. Director of Revenue,</i> 38 S.W.3d 424 (Mo. Banc 2001).....	2, 4

Statutes

Section 144.020, RSMo (2013).....	1, 7, 9
Section 144.021, RSMo (2015).....	7

ARGUMENT

THE AHC ERRED IN DETERMINING THAT THE MONTHLY FEES MISS DIANNA'S COLLECTED FROM STUDENTS FOR COSTUMES, DANCE LESSONS, AND MISCELLANEOUS INCOME WERE TAXABLE UNDER § 144.020.1(2) RSMo, WHICH IMPOSES A SALES TAX ON ALL FEES PAID TO OR IN A PLACE OF AMUSEMENT, ENTERTAINMENT, OR RECREATION, BECAUSE THIS DECISION WAS UNAUTHORIZED BY LAW AND UNSUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE THAT MISS DIANNA'S WAS A PLACE OF RECREATION.

A. Miss Dianna's is Not a Place of Recreation.

The AHC found that Miss Dianna's was a place of recreation and therefore any such fees paid to Miss Dianna's are subject to sales tax pursuant to § 144.020.1(2) RSMo. However, as stated in its name, Miss Dianna's School of Dance, the purpose of Miss Dianna's business is instruction; to teach a form of art, dance. Miss Dianna's is a learning institute. These lessons include dance instruction, technique and coaching to help students become professional dancers. A dance studio is a program of the arts, not a sporting or recreational activity.

Respondent asserts in its brief that the consideration paid to Miss Dianna's for dance lessons is subject to tax because Miss Dianna's is a "place of amusement, entertainment or recreation." In support of its position, Respondent relies on the decision

of *Kanakuk-Kankomo Kamps, Inc. v. Director of Revenue*, *Wilson's Total Fitness v. Director of Revenue*, and *Michael Jaudes Fitness Edge, Inc. v. Director of Revenue*.

Miss Dianna's facts are distinguishable from the facts of *Kanakuk-Kankomo Kamps, Inc. v. Director of Revenue*, *Wilson's Total Fitness v. Director of Revenue*, and *Michael Jaudes Fitness Edge, Inc. v. Director of Revenue*. In *Kanakuk-Kankomo Kamps, Inc. v. Director of Revenue* this Court held that there was substantial evidence to support the Administrative Hearing Commission's finding that the primary purpose of the children's sports camps was recreation, games, and athletic, and *not* (emphasis added) athletic training or instruction.¹ In support of this holding, this Court emphasized that *Kanakuk-Kankomo Kamps, Inc.* did not mention instruction or lesson on any of its brochures, instructor manuals, or promotional literature.²

Unlike *Kanakuk-Kankomo Kamps, Inc.*, Miss Dianna's brochures and promotional literature does in fact emphasize dance instruction and learning. Respondent highlights that Miss Dianna's brochures mention the classes are "full of energy, fun, and structure" and a "fun dance class". What Respondent failed to include is that the pamphlet also highlights the dance skills being taught in each class, "One hour combination classes are focused on giving your dance a strong basis in tap, ballet, &

¹ *Kanakuk-Kankomo Kamps, Inc. v. Director of Revenue*, 8 S.W.3d 94, 98 (Mo. Banc 1999).

² *Kanakuk-Kankomo Kamps, Inc. v. Director of Revenue*, 8 S.W.3d 94, 97 (Mo. Banc 1999).

acrobats”; the Boy’s Combination Classes are “taught by Alex, these classes are full of energy, fun, and structure. These classes do 15 min Tap, 15 min Hip Hop, and 30 min acrobats.”³ In the Broadway Bound class “Miss Dianna will spend this time working with your dancer on the basics of auditioning. Students will learn short routine, take a Headshot, and get pointers on how to write up an audition resume. The last bit of the workshop will be a mock-audition so that students get a chance to see how it all comes together.”⁴ In the Classic Ballet with Miss Lauren, a former teacher at Miss Dianna’s who now is with the touring dance company, Quixotic, “Students will learn Ballet Technique in an active workshop that introduces you to the basics of ballet barre and center exercises and emphasizes the development of correct body alignment and basic core strength. Workshop covers fundamental movement concepts, ballet terminology, and body and foot positions.”⁵ The Transition to Competition Class is a “90 minute dance class [which] covers 3 major styles of dance: Tap, Jazz & Ballet. Dance Class is followed by a 30 min acrobat class to work flexibility, balance, and tumbling skills. These classes take more focus and are geared toward the intermediate to advance dancer who is planning to be a part of our Performance Team.”⁶ The Technique Class is a “quickly moving class [which] will focus on jumps, turn, flexibility, and staying sharp

³ Petitioner’s Ex. 2.

⁴ Petitioner’s Ex. 2.

⁵ Petitioner’s Ex. 2.

⁶ Petitioner’s Ex. 2.

during the ‘off-season’.”⁷ Miss Dianna’s is distinguishable from Kanakuk-Kankomo Kamps, Inc. because the primary purpose of Miss Dianna’s is instruction and training, not recreation, games, and athletics. Miss Dianna’s brochures stress the fact that extensive time is spent on dance instruction and dance technique. Additionally, a dance school is not viewed within normal contemplation as a place of recreation, it is viewed as a learning institute.

As stated in our Opening Brief, in *Wilson’s Total Fitness v. Director of Revenue*, and *Michael Jaudes Fitness Edge, Inc. v. Director of Revenue*, this Court emphasizes the fact that members were entitled to access full use of the facility for their own subjective purposes in exchange for membership fees. Members could go to the facility and use the fitness equipment at any time without an appointment with a trainer or oversight by an instructor. As Respondent pointed out, in *Fitness Edge* there was personal training and targeted exercise that was offered to clients on a one-to-one basis along with diet and nutrition education and provided exercise instruction by appointments only. However, Fitness Edge allowed clients, who had two or more appointments with a trainer per week, to use the cardiovascular equipment, free of charge, without the assistance of a trainer at any time.⁸

⁷ Petitioner’s Ex. 2.

⁸ *Michael Jaudes Fitness Edge, Inc. v. Director of Revenue*, 248 S.W. 3d 606, 608 (MO 2008).

Unlike a fitness or exercise center, Miss Dianna's is a dance school providing dance lessons and instructions with a professional curriculum that attracts children and adults who wish to pursue dance. It is neither an athletic club, nor a fitness center, nor an exercise center, nor a camp where you pay a fee for the personal use of the facilities or to play a sport. Miss Dianna's students pay a fee to Miss Dianna's to have a dance instructor present; who teach dance, dance lessons, and dancing technique during each class period.⁹ Students do not pay a fee to Miss Dianna's for the personal use of Miss Dianna's facility without the dance instructor present, nor for the personal use of the facility.¹⁰ Miss Dianna's students cannot come to its school and use the facility at any time nor do the students have unlimited use of the facility; the students must be signed up for the class with an instructor present.¹¹ The purpose behind Miss Dianna's students' attendance is not to exercise; the purpose is to learn dance techniques and receive instruction.

Respondent cites this Court's ruling in *Kanakuk-Kankomo Kamps, Inc.* that:

"The presence or absence of skilled coaching during the performance of sports activities does not change the nature or purpose of the camps.

⁹ (TR 42:24-43:3; TR 58:22-59:10; PE #3).

¹⁰ (TR 42:24-43:3; TR 58:22-59:10; PE #3).

¹¹ (TR 58:22-59:25; PE #3).

Coaching may change the skill level of the participants but, by itself, it does not change the primary purpose of the activities from athletic to academic.¹²

We agree that in a sporting activity the presence or absence of skilled coaching during the performance of a sporting activity does not change the nature or purpose of the game.¹³

However, dance is not a sporting activity, it is a form of art. Dance, in a school of dance, is not a sport nor a game that you can gather a group of your friends and go out and play at any time. It is a form of art that requires teaching to learn, with instruction and a skilled teacher at all times. Students need to learn technique, movements, positions, and choreography from a skilled instructor.

Respondent states that under well-settled Missouri law, a location is a place of recreation if more than a de minimis portion of its income is derived from recreational activities. In determining whether a facility is recreational, “a court must consider how the facility is viewed within normal contemplation.”¹⁴ Respondent goes on to state that “when viewed within normal contemplation, dancing is a recreational activity.”¹⁵ This premise is incorrect. As stated in its name, Miss Dianna’s School of Dance, the primary

¹² *Kanakuk-Kankomo Kamps, Inc. v. Director of Revenue*, 8 S.W.3d 94, 98 (Mo. Banc 1999).

¹³ Respondent’s Reply Brief, pg. 17.

¹⁴ *Kanakuk-Kankomo Kamps, Inc. v. Director of Revenue*, 8 S.W.3d 94, 97 (Mo. Banc 1999).

¹⁵ Respondent’s Reply Brief, page 15.

business purpose is a school for dance, not a place of recreation. Miss Dianna's is not a dance hall, nor a place where people pay and go to watch people dance. Miss Dianna's students are not going to a place to dance recreationally, they are going to a school to pursue dance, to learn an art form, to learn a life skill. As stated previously, many of Miss Dianna's students go on to receive dance scholarships for college and become professional dancers. Respondent incorrectly compares Miss Dianna's to a dance hall or other facilities with a dance floor. Again, Miss Dianna's is not merely a place for people to come and dance; it is a learning institute that teaches an art form.

If the AHC's and Respondent's statutory interpretation is correct and relied on, then all art programs (i.e. music lessons, piano lessons, guitar lessons, voice lessons, acting lessons, art lessons, and all other art classes or performing art lessons) will become subject to sales tax, as all involve instructive learning, can be fun or entertaining, and have a de minimus amount of recreation at the same time, making them a place of amusement, entertainment, or recreation. As stated previously, this is clearly not the intent of the legislation.

Respondent states that Miss Dianna's does not expressly argue that the amendment to §144.021 RSMo applies in this case. That is incorrect, we clearly stated that this bill was enacted for this exact situation and does apply to this case. As stated in our Opening Brief, Respondent stated in Letter Ruling 4912, dated July 17, 2008 that "fees charged to its members for dance instruction was not subject to sales tax under §144.020." This Letter Ruling is a clear, unambiguous, unequivocal statement by the Director of Revenue stating that dance lessons are not subject to sales tax. Although

Letter Rulings only apply to the applicant, Letter Rulings are published written interpretations of the law by the Director of Revenue and may be used as guidance for taxpayers in the State of Missouri. Without notice, the Respondent changed its position and reinterpreted the Missouri tax code, penalized a business for not knowing about these new interpretations of the law, and retroactively assessed taxes and penalties for prior years. Miss Dianna's is the only dance studio Respondent has attacked, retroactively, for sales tax on fees for dance lessons. Respondent mentions another Letter Ruling the Director issued in 2009 which supersedes the 2008 Letter Ruling. However, Miss Dianna's has been unable to obtain this Letter Ruling, nor has Respondent shown this letter ruling to Miss Dianna's.¹⁶

Respondent states in its brief that the amendment is not retroactive. Although the law does not specifically state it is retroactive, we believe it was the intent of the legislature for it to be retroactive in this case. The bill was created and enacted in part due to Miss Dianna's audit and being targeted for violations of new sales tax policies that were never publicized. Respondent has overstepped its authority and has raised taxes by

¹⁶ Respondent mentions that the AHC noted that the 2008 Letter Ruling has been superseded by another letter ruling the Director issued in 2009. This note by the AHC was all based on the Director's statement that such Letter Ruling existed. The Director never entered into evidence such Letter Ruling at the AHC. In fact, Miss Dianna's has performed a search on the Missouri Department of Revenue website "Ruling Search" and no Letter Ruling was found using the terms "Dance Lessons", "Sales Tax", in 2009.

changing a definition and re-interpreting the Missouri tax code, and the legislature agreed.

Miss Dianna's is a performing arts dance school, it does not consider itself to be a place of entertainment, amusement, or recreation; rather it is a place where people come to learn an art form; a life skill. If the AHC's and Respondent's statutory interpretation is correct and relied on, then all art programs will become subject to sales tax. This is clearly not the intent of the legislature. The AHC erred, as a matter of law, in concluding that Miss Dianna's operations fell under §144.020.1(2) RSMo. For all these reasons the portions of the AHC's decision at issue on this appeal should be reversed.

CONCLUSION

The AHC's decision that Miss Dianna's was a place of recreation and therefore is liable for sales tax in the amount of \$23,378.97 was an error of law and not supported by substantial and competent evidence in the record. That decision should be reversed.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellant's Brief complies with the limitations contained in Rule 84.06(b) and that the word count is 2,236.

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