

**IN THE
SUPREME COURT OF MISSOURI**

No. SC89547

**MUSIC CITY CENTRE MANAGEMENT, LLC,
Respondent,**

v.

**DIRECTOR OF REVENUE, STATE OF MISSOURI,
Appellant.**

**On Petition for Review from the
Missouri Administrative Hearing Commission
The Honorable Douglas M. Ommen, Commissioner**

**BRIEF OF RESPONDENT
MUSIC CITY CENTRE MANAGEMENT, LLC**

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JURISDICTIONAL STATEMENT

Exclusive jurisdiction is vested, pursuant to Article V, Section 3 of the Missouri Constitution, in this Court because this appeal involves the construction of a revenue law of this state.

STATEMENT OF FACTS

I. Procedural Background

During the calendar tax years 2003, 2004, and 2005, Music City Centre Management, LLC (“Music City”) reported the gross amounts received from FITs as gross taxable amounts and remitted the sales tax due on those amounts. (App. A5 No. 16) Music City timely filed a refund claim with respect to sales tax paid for the filing periods in question. (App. A5 No. 17). The basis of the refund claims was that the sale of Tickets to FITs did not constitute retail sales and were thus excluded from sales tax. (App. A5 No. 17) The Director of Revenue issued final decisions to Music City denying the claims. (App. A1) Music City timely appealed the Director of Revenue’s final decisions to the Administrative Hearing Commission (“AHC”). (App. A5 No. 17)

The AHC determined that Music City’s receipts from the FITs are excluded from sales tax as sales for resale. (App. A1). No evidence was offered to refute Music City’s calculation of the refund amount; therefore, the AHC awarded Music City a refund of \$83,113, plus interest. (App. A16).

II. Factual Background

Music City is a limited liability company in good standing under the laws of the State of Missouri. (App. A2 No. 1). During the calendar tax years 2003, 2004, and 2005, Music City produced and promoted live entertainment attractions at Music City Centre (the “Theater”), located in Branson, Missouri. (App. A2 No. 2). During the tax periods in question, Music City marketed tickets (individually, a “Ticket” or collectively, the

“Tickets”) to its Theater attractions through contractual arrangements (individually an “FIT Contract” or collectively, the “FIT Contracts”) with Branson based businesses (individually, an “FIT” or collectively, the “FITs”). (App. A2 No. 3).

Pursuant to the FIT Contracts, Music City offered discounted Ticket rates to the FITs. (App. A3 No. 5). For example, Music City’s “Box Office” rate for the Haygoods’ Show in 2004 was Twenty-Seven Dollars and Eighty-Seven Cents (\$27.87) and the “FIT Rate” was Thirteen Dollars and Fifty Cents (\$13.50). (App. A3 No. 5). The Tickets would either be pre-paid by an FIT, or alternatively, Music City would bill the FIT monthly. (App. A3 No. 6). The payment made by the FIT to Music City would be calculated based on the discounted FIT Rate. (App. A3 No. 6).

The Tickets were not used by the FIT or its employees, but were sold to customers (referred to hereinafter as a “Customer” or collectively, the “Customers”). (App. A3 No. 7). Each FIT determined the amount and type of consideration given by each Customer for a Ticket. (App. A4 No. 9).

The consideration given by the Customer consisted of one of the following scenarios:

(1) Cash Sales. The FIT receives cash from the Customer. For instance, the FIT pays to Petitioner Thirteen Dollars and Fifty Cents (\$13.50) for an adult Ticket to the Theater. The FIT then charges the Customer Twenty-Seven Dollars and Eighty-Seven Cents (\$27.87), payable in cash. These Customer transactions are referred to hereinafter as “Cash Sales.” (App. A3 No. 8(a)).

(2) Timeshare Companies. Some FITs are timeshare companies. FITs that are timeshare companies typically engage in one of two types of Customer transactions:

(a) First, timeshare companies operate as a concierge for their existing timeshare customers, whereby the FIT sells the Tickets in Cash Sales transactions, as described above. (App. A3 No. 8(b)(i)).

(b) Second, timeshare companies transfer the Ticket to a Customer, without charge, in exchange for the Customer taking a timeshare sales tour. (App. A3 No. 8(b)(ii)).

(3) Bundling. FITs purchase a discounted Ticket from Music City, package or bundle the Ticket with other products such as a discounted meal at a restaurant and lodging at a hotel, and then offer that package for sale at a single price to a Customer, payable in cash by the Customer. (App. A4 No. 8(c)).

Although some FITs have the ability to print a Ticket that is the same as that issued by Music City's Theater box office, the FIT Contracts authorize the FIT to issue Ticket vouchers (a "Voucher") to a Customer. (App. A4 No. 10). Upon the FIT's sale of a Ticket to a Customer via a Voucher, (a) the Customer would pay the FIT the FIT's required price, and (b) the FIT would make a reservation with Music City, verifying a specific date, show time and seating. (App. A4 No. 12). Thereafter, Customer would travel to Music City's Theater and use the Voucher to gain entrance to the Theater attraction and view the production. (App. A4 No. 12).

Subject to the standard cancellation policy, once the reservation was made by the

FIT, the FIT was obligated to pay Music City for the Ticket, even if the Customer failed to show up for the Theater production. (App. A4 No. 13). Music City has the same standard cancellation policy for FITs as it does for a regular customer. (App. A4 No. 14). Customer must request and obtain a refund directly from the FIT, as opposed to obtaining a refund from Music City. (App. A4 No. 16).

Responded calculated the refunds to total \$83,113.00. (App. A6 No. 17).

POINTS RELIED ON

The Administrative Hearing Commission did not err in granting Music City's claims for refund. The AHC's Decision was correct pursuant to section 144.010.1(10), which excludes sales made for the purpose of resale from the imposition of the sales tax.

Kansas City Power and Light Co. v. Director of Revenue, 83 S.W.3d 548, 550 (Mo. banc 2002);

Westwood Country Club v. Director of Revenue, 6 S.W.3d 885, 889-90 (Mo. banc 1999).

MO. REV. STAT. § 144.020.1

MO. REV. STAT. § 144.010.1(10)

ARGUMENT

I. The Standard of Review for a Determination of the Administration Hearing Commission Is De Novo.

The Missouri Supreme Court reviews the Administration Hearing Commission's ("AHC") determination of issues of law de novo and defers to the AHC's findings of fact. *Michael Jaudes Fitness Edge, Inc., v. Director of Revenue*, 248 S.W.3d 606, 608 (Mo. banc 2008). The "evidence must be considered in a light most favorable to the [AHC's] decision, together with all reasonable inferences which support it." *Shell Oil Co. v. Director of Revenue*, 732 S.W.2d 178, 180 (Mo. banc 1987). The decision of the AHC is upheld when authorized by law and supported by competent and substantial evidence upon the whole record. MO. REV. STAT. § 621.193.¹

¹ All statutory references are to the Revised Statutes of Missouri (2000) (as amended) unless otherwise noted.

II. The Administrative Hearing Commission Did Not Err in Granting Music City’s Claims for Refund because Music City’s Sales of Tickets to the FITs Are Not Made at Retail rather the Sale is Made for the Purpose of Resale Which is Statutorily Excluded from Application of the Missouri Sales Tax.

A. Summary of Music City’s Argument.

The Administrative Hearing Commission correctly concluded that the tickets purchased by the FITs² from Respondent (hereafter referred to as “Music City”) are “for the express purpose of resale to customers and the transaction between Music City and the FITs is not subject to sales tax.” (App. A4 No. 12).

In Missouri, a sales tax is imposed on “all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service *at retail*.” MO. REV. STAT. § 144.020.1 (emphasis added). A sale “at retail” is defined as “any transfer made by any person engaged in business...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.” MO. REV. STAT. § 144.010.1(10) (emphasis added). “Accordingly, under MO. REV. STAT. § 144.010.1(10),

² While the meaning and source of the acronym “FIT” is immaterial to the resolution of this matter, it is believed by some in the tourism industry that FIT is a European term meaning Free Independent Traveler or Tourist (free as in free from a group).

only transfers of property for use or consumption by the buyer, and not for resale, constitute ‘sales at retail.’” *Kansas City Power and Light Co. v. Director of Revenue*, 83 S.W.3d 548, 550 (Mo. banc 2002) (hereinafter referred to as “*KCP&L*”); *see also Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885, 889-90 (Mo. banc 1999). “In other words, if a person purchases a tangible or intangible product in order to sell it to another, the purchase is not subject to sales tax.” *KCP&L* at 551.

B. *KCP&L* is Controlling of the Retail Sale Issue Raised by The Director in this Appeal.

In its Brief, the Director of Revenue (“Director”) states that Missouri statutes make clear that the sale of “admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation,” when sold at retail, are subject to sales tax. (Brief of Appellant, P. 13). Music City agrees with this statutory analysis.

The Director also asserts that, to find a transaction taxable under MO. REV. STAT. § 144.020.1(2), there must be (1) fees or charges that are (2) paid in or to a place of amusement, entertainment or recreation. (Brief of Appellant, P. 13). Each of these two elements is established by the AHC’s Finding of Facts. (App. A3 No. 6). The Director further asserts that the only dispute before this Court is whether the fees or charges for the service of amusement were paid to Music City “at retail”. (Brief of Appellant, P. 13). Music City agrees with this assertion.

Whether the fees were paid to Music City “at retail” is controlled by the precedent established by this Court in *KCP&L*.

In *KCP&L*, this Court determined that electricity, an intangible, *could be* sold at retail. *See KCP&L*, 83 S.W.3d 548; *see also United States v. Wagner*, 1992 WL 427478 (W.D. Mo. 1992).³ The Court cited MO. REV. STAT. §§ 144.020.1(3) and 144.010.1(10)(b) as clear guidance that sale of electricity “can qualify” as a sale at retail. *Id.* at 550. This Court made it clear that, although the sale of electricity can qualify as a sale at retail, each sale of electricity must be analyzed to determine whether a sale at retail under MO. REV. STAT. § 144.010.1(10) had *in fact* occurred. *Id.* In making this determination, this Court confirmed that an intangible (i.e., electricity) could be sold at retail, but that the intangible could be excluded from sales tax if sold for purposes of resale. *See Id.* at 553.

The sale of admission tickets, like electricity, is one of the six designated intangibles that the legislature specifically identified in the subparagraphs of MO. REV.

³ In *Wagner* the court stated,

There is no meaningful basis for distinction between the tangible personal property...and the intangible electrical power sold in the instant case. The Missouri sales tax statutes explicitly include retail sales of electrical power as taxable to the same extent as retail sales of tangible personal property.

Likewise, the “resale” of electrical power should be exempt from the Missouri sales tax just as the resale of tangible personal property.

United States v. Wagner, 1992 WL 427478, *3.

STAT. § 144.010.1(10) as being subject to sales tax. *See* MO. REV. STAT. § 144.010.1(10)(a) (providing sales of admission tickets are subject to sales tax); *see also* MO. REV. STAT. § 144.010.1(10)(b) (providing sales of electricity are subject to sales tax). MO. REV. STAT. § 144.010.1(10) does not state that any one of the six intangibles listed in its subparagraphs should be treated differently than the other five. Therefore, the analysis of MO. REV. STAT. § 144.010.1(10), as clearly set forth by this Court in *KCP&L*, should be consistently applied to all six intangibles.

Under the rationale of *KCP&L*, the “sale of admission tickets” *can qualify* as a “sale at retail” but only if the underlying sales transaction satisfies the “sale at retail” test set forth in MO. REV. STAT. § 144.010.1(10). This analysis is conducted by applying the facts to the statutory analysis. The AHC determined in its Findings of Fact that Music City sold the tickets to the FITs (App. A3 No. 6) and that the FITs resold the tickets to the FITs’ customers. (App. A3 No. 7).⁴ The AHC decided, after applying *KCP&L*’s analysis of MO. REV. STAT. § 144.010.1(10) to the facts, that Music City made the sales of admission tickets to the FITs for the express purpose of the FITs reselling the admission tickets. In light of this decision, the AHC concluded that the resale exclusion applied. (App. A13 and A14).

⁴ The Director does not contest the factual findings of the AHC. (Brief of Appellant, P. 14).

Therefore, applying the analysis of *KCP&L* to the undisputed facts of this appeal, the sales of tickets by Music City to the FITs are exempt from the sales tax. Such sales are made for purposes of resale, which prevents the sale from being a sale at retail, a prerequisite to the imposition of the sales tax.

C. Alleged Legislative Intent Does Not Prevent *KCP & L* From Applying To The Undisputed Facts of This Appeal.

The Director does not dispute that the tickets were sold to the FITs by Music City for the purpose of resale. Instead, the Director argues that the factual “retail sale” analysis is irrelevant and should be disregarded when analyzing application of sales tax to sales of admission tickets under MO. REV. STAT. § 144.010.1(10)(a). (Brief of Appellant, P. 15) According to the Director, the sale of tickets cannot qualify for the resale exclusion due to statutory language stating:

Where necessary to conform to the context of sections 144.010 to 144.525 and the tax imposed thereby, the term “sale at retail” shall be construed to embrace...[s]ales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events.

MO. REV. STAT. § 144.010.1(10)(a). (Brief of Appellant, P. 14-15). Based upon this statutory language, the Director argues that the sale at retail is *deemed* to have occurred whenever fees are paid to or in a place of amusement regardless of whether the sale

occurs for resale purposes. (Brief of Appellant, P. 15). Under the Director’s theory, a portion of the definition of a sale “at retail” as set forth in MO. REV. STAT. § 144.010.1(10) (i.e., a transfer made to a purchaser, for use or consumption and not for resale) is disregarded with respect to the sale of admission tickets.

With respect to electricity, this Court in *KCP&L* held that the sale of electricity was not “deemed” to be a sale “at retail” but that the tests and analysis established in MO. REV. STAT. § 144.010.1(10) and the precedents established by this Court must be applied to determine, in fact, whether a sale “at retail” had occurred.

Because the Director’s position is in direct conflict with the precedent established by this Court in *KCP&L*, the Director attempts to distinguish *KCP&L* from this case. The Director argues that its interpretation of § 144.010.1(10)(a) does not conflict with *KCP&L* because in *KCP&L*, a tax could be imposed at a later stage in the stream of commerce. The Director further argues that if this case would result in no tax being collected at a later stage in the stream of commerce, then the legislature intended for the resale exclusion not to apply. (Brief of Appellant, P. 15-16). Music City disagrees with the Director’s arguments attempting to distinguish this case from *KCP&L* for the following five reasons:

First, the lengthy “legislative intent” argument is made without citation to supporting legal authority. On its face, MO. REV. STAT. § 144.010.1(10) does not provide support for the legislative intent that is asserted by the Director. Furthermore, the Director cites no legislative history supporting this argument.

Second, the Director takes a policy that is desired by the State for financial reasons (i.e., avoidance of transactions that might not be subject to sales tax) and argues that the policy evidences an intention of the Legislature in drafting a statute. A desirable conclusion is not evidence of legislative intent.

Third, the legislative intent argument fails the common sense test. The Director argues that the legislature intended for a tax to be imposed upon Music City's sales of tickets to the FITs (which are ticket brokers). If the Court is going to be asked to guess as to the legislature's intent, Music City argues that a better guess would be that the legislature intended for the statute to cause collection of sales tax at the retail sale level (i.e., the FITs sale to the end user). That is where Missouri sales taxes are historically collected; Missouri collects more money imposing sales tax at the retail level than at the wholesale level.

Fourth, the underlying premise of the Director's legislative intent argument is that the Director believes it cannot collect sales tax when the FITs sell tickets to their customers. The Director urges this Court to conclude that because the State will be unable to collect the sales tax at a later stage in the stream of commerce, the legislature did not intend for the resale exclusion to apply. (Brief of Appellant, P. 15-16). The problem with this argument is that it is not known whether the FITs are subject to sales

tax upon their resale of the tickets.⁵ (See AHC Decision, P. 15 note 30). There is no record at the AHC as to whether FITs collect and remit sales tax on their sales of tickets to their customers or whether the Director has tried to collect sales tax on those transactions. That issue was not before the AHC in this case and has never been addressed by the AHC or by this Court. Because the issue is not before the Court, it should not be considered a factor in making this determination. *See Michael Jaudes Fitness Edge, Inc.*, 248 S.W.3d at 609 n. 3.⁶

⁵ It is believed that a colorable argument could be made that the FITs are subject to the Missouri sales tax.

⁶ It should be noted that the Director also makes the policy argument that an unfavorable ruling might foster the avoidance of sales tax through the artifice of selling admission to places of amusement through distributors. This argument fails for two reasons. First, this hypothetical “artifice” transaction argument is inappropriate for purposes of this real-life analysis wherein the FITs are separate companies legitimately formed for the bona fide purpose of reselling tickets for a profit. Second, this Court has already been faced with a similar argument in *Acme Royalty Co. v. Director of Revenue*, 96 S.W.3d 72, 75 (Mo. banc 2002), and the Court found that the out-of-state business was not subject to Missouri’s sales tax, notwithstanding a lengthy discussion of whether such a finding might foster tax avoidance through the use of an out-of-state tax corporate artifice.

Fifth, to the extent that the Director is attempting to argue a favorable interpretation of a taxing statute, it is clear that “if the statute imposing a tax is ambiguous, it is read favorably to the taxpayer.” *Moore Leasing, Inc. v. Director of Revenue*, 869 S.W.2d 760, 761 (Mo. banc 1994); *see also Acme Royalty Co. v. Director of Revenue*, 96 S.W.3d 72, 74 (Mo. banc 2002) (stating taxing statutes are to be strictly construed in favor of the taxpayer and against the taxing authority when any ambiguity exists).

CONCLUSION

Based on the foregoing, the AHC’s decision was authorized by law and supported by substantial evidence. For this reason, this Court should uphold the decision of the AHC.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that (1) a true and accurate paper copy and (2) an electronic copy in PDF and Microsoft Word format written to CD-ROM disc of the foregoing instrument was forwarded this 17th day of February, 2009, by first class mail, postage prepaid, to the following:

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The undersigned further certifies that this brief contains the information required by Rule 55.03, that it complies with the limitations contained in Rule 84.06(b), that it contains 3,689 words, more or less, and that all electronic copies hereof delivered as indicated above and all electronic copies hereof delivered to the court, if any, have been scanned for viruses and are virus-free.

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**APPENDIX TO FOREGOING
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