No. SC85331

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IN THE
SUPREME COURT OF MISSOURI

_____

SURREY'S ON THE PLAZA, INC.,

Respondent/Cross-Appellant,

v.

DIRECTOR OF REVENUE,

Appellant/Cross-Respondent.

_____

PETITION FOR JUDICIAL REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE CHRISTOPHER GRAHAM, COMMISSIONER

_____

APPELLANT'S/CROSS-RESPONDENT'S SECOND BRIEF

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I.

The AHC erred in determining that Surrey's was not liable for the Director's sales tax assessments, because this decision was unauthorized by law, not supported by competent and substantial evidence on the record as a whole, was contrary to the reasonable expectations of the General Assembly, and Surrey's sales of horse-drawn carriage rides were taxable under the amusement tax (§ 144.020.1(2), RSMo) in that: 1) Surrey's operated a "place of amusement" by charging fees for sightseeing rides in horse-drawn carriages that it owned; and 2) Surrey's controlled the amusement activity occurring in its carriages by directing the manner and operation of its rides.

Surrey's contends that this case is controlled by *Moon Shadow v. Director of Revenue*, 945 **S.W.2d** 436 **(Mo. banc 1997),** and that the "place" where the amusement activity occurred was Country Club Plaza, which Surrey's did not own or control. The amusement activity, however, was not simply being in Country Club Plaza; rather, it was riding in the horse-drawn carriage that Surrey's owned and controlled.

In addition, Surrey's claims that its sales are not subject to the amusement tax because the record contains no evidence that its horse-drawn carriage rides were amusing or entertaining. But the record contains sufficient evidence that Surrey's rides were entertaining or amusing as against Surrey's self-serving claims that they were not.

A. Surrey's operated a place of amusement.

Although Surrey's argues that *Moon Shadow* controls, the facts in that case are distinguishable. In *Moon Shadow*, the taxpayer simply rented inner tubes to customers and then transported these customers to a "river, owned and controlled mostly by the federal government." *Id.* at 436-37. The customers then floated on their own back to the taxpayer's place of business located near the river. *Id.* The amusement activity at issue in *Moon Shadow* was floating on the river, but neither the float trip, nor the river, was controlled by the taxpayer. The customers merely rented equipment that they used as they wished.

Here, on the other hand, Surrey's controlled the amusement activity, a horse-drawn carriage ride, from beginning to end. Although Surrey's did not own or control Country Club Plaza, the amusement activity was not visiting the Plaza, but taking a horse-drawn carriage ride.

Surrey's contends that the Director has not identified any location where amusement activities occurred. Its argument also narrowly assumes that to be considered a "place of amusement" the amusement activity must occur in a building or on a piece of real estate. This argument, however, ignores the holdings in *Fostaire v. Director of Revenue*, 679 **S.W.2d** 272 **(Mo. banc 1984)**, and *Lynn v. Director of Revenue*, 689 **S.W.2d** 45 **(Mo. banc 1985)**. In those cases, the "place of amusement" was not the skies over St. Louis or the waters of the Missouri River, but a helicopter (*Fostaire*) and a river boat (*Lynn*). As "places of amusement," the helicopter and river boat are indistinguishable from Surrey's horse-drawn carriage.

The Court in *Moon Shadow* recognized that the word "place" is not restricted to a building or piece of real estate. There, this Court held that a "'place' is a building or locality used for a special purpose." *Moon Shadow*, 945 **S.W.2d** at 437. It then relied on *Fostaire* and *Lynn* to support that holding and identified the "place of amusement" in those cases as a "helicopter" and "vessel," respectively. *Id.*

Although the *Fostaire* and *Lynn* opinions do not indicate whether the taxpayers in those cases owned or controlled the barge and dock from which the helicopter and river boat departed and returned, ownership or control of the barge and dock was not relevant to the Court's analysis of whether the taxpayers operated places of amusement. The amusement activities in those cases did not occur on the barge or dock, but in the helicopter and on the river boat. Consequently, under *Fostaire* and *Lynn*, the definition of a "place of amusement" is not restricted to amusement activities occurring only in buildings or on real estate owned or controlled by the taxpayer. In *Fostaire*, this Court plainly stated that "[h]elicopter flight tours come under a description of a place of amusement." *Fostaire*, 679 S.W.2d at 273. In *Lynn*, this Court held that *Fostaire* was "directly on point" and stated that the river boat "excursions . . . in this case are within the same category as the helicopter tours involved in *Fostaire*." *Lynn*, 689 S.W.2d at 48.

Although Surrey's did not own or control Country Club Plaza as a whole, it did "control" that part of Plaza in which the city gave it permission to operate. The AHC found

that Surrey's "operated on fixed routes from starting points fixed by the city."[1] Under Kansas City ordinances, operation of a horse-drawn carriage ride required a permit.[2] The city required the rides to begin and end at the same place in the Plaza, which it designated and sometimes changed, and for the carriages to remain in that place between hires.[3] In effect, Surrey's controlled–to the extent permitted by its city permit–a place in the Plaza from which it operated its carriage-ride business.

Finally, Surrey's contends that the Director misdirects this Court by arguing that the element of control was not a basis for this Court's holding in *Moon Shadow*. But the plain language of this Court's opinion in *Moon Shadow* suggests otherwise: "An eight-mile stretch of river, *owned and controlled* mostly by the federal government–is not a locality used as a 'place of amusement.'" *Moon Shadow*, 945 S.W.2d at 437 (emphasis added). Control or ownership of the place where the amusement activity occurred was a factor this

[1]L.F. 84.

[2]Ex. A, p. B4; Tr. 108.

[3]Ex. A, p. B4; Tr. 17, 105-06.

Court considered in *Moon Shadow.*

B. Surrey's carriage rides were amusing and entertaining.

Surrey's argues that its carriage rides were offered not for amusement, but for educational or informational purposes. This precise argument was rejected in *Fostaire*:

> Helicopter tours of historic sites can be educational, but they are also entertaining and recreational. These are not mutually exclusive. . . . '[I]f in fact a place or facility provides something edifying or educational in addition to enjoyment, entertainment or amusement, it is no less a place of amusement.'

Fostaire, 679 S.W.2d at 273, *quoting Wien v. Murphy*, 28 A.2d 222, 284 (N.Y. 1967).

Surrey's also relies on the testimony of Harbour Wholesale's president, Ed Becker, to support its claim that the carriage rides were not, in fact, amusing or entertaining. Surrey's relies on Becker's claims that he was not an "entertainer" and that the Plaza's merchants were the primary beneficiaries of the carriage rides. Surrey's Brief, pp. 24-25. But, "such post-tax assessment declarations are suspect and may be rejected by the AHC." *Kanakuk-Kanakomo Kamps, Inc. v. Director of Revenue*, 8 S.W.3d 94, 98 (Mo. banc 1999) (rejecting the "self-serving and subjective claims" of the taxpayer and its customers that the primary purpose of the taxpayer's sports camp was for instruction and not recreation); *see also Bolivar Road News, Inc. v. Director of Revenue*, 13 S.W.3d 297, 302 (Mo. banc 2000) (rejecting the taxpayer's "self-serving and subjective" claim that its "arcade" where patrons could pay to view adult videos in private booths was not a place of amusement). The self-serving nature of Becker's testimony was apparent in that

immediately after he testified that his customers were amused by the carriage rides, he quickly added that "amuse is not the word I want to use today."[4]

Surrey's contends that the Director offered no evidence to prove that the horse-drawn carriage rides were amusing or entertaining. The simple fact that Surrey's customers paid to ride in a horse-drawn carriage that departed and returned from the same place is proof enough that the rides were entertaining or amusing. The AHC could find that Surrey's operated a place of amusement by the simple fact that customers paid money to ride in the carriages. In fact, this Court previously held that a wild game ranch was a place of amusement based only on the fact that customers paid to hunt there:

> This finding is so clearly correct, legally and factually, that extended discussion is not necessary. The taxpayer's argument that the patrons are "trophy seekers" who do not necessarily enjoy what they are doing borders on the frivolous. The [AHC] commissioner could have found that their amusement and entertainment is demonstrated by their patronage.

High Adventure Game Ranch v. Director of Revenue, 824 S.W.2d 905, 906 (Mo. banc 1992).

[4]Tr. 160-61.

Surrey's own evidence provided more than enough proof that its carriage rides were entertaining. Becker not only testified that his customers were "amused" by the carriage rides, but he also described the rides as "entertaining."[5] Although Becker denied that the carriage rides were "fun," he did say that he was "a lot of fun" and that he made his customers "laugh."[6] The record contains substantial evidence to support the AHC's determination that Surrey's operated a place of amusement.

[5]Tr. 160-61.

[6]Tr. 160-61.

II.

Surrey's was liable as a successor under § 144.150, RSMo 2000, for the sales tax liability of the carriage-ride business's previous owner, Harbour Wholesale, Inc., from whom Surrey's purchased the business.[7]

Surrey's contends that the AHC erred in determining that it was a successor liable not only for its own unpaid sales tax, but also for the unpaid sales tax of its predecessor, Harbour Wholesale, Inc. Surrey's argues that the Director did not prove that Surrey's failed to withhold the unpaid tax from the purchase price when it bought the business or that Surrey's purchased all, or substantially all, the business's assets. Neither argument, however, has any merit.

A. Burden of Proof.

Much of Surrey's argument on this issue relies on the burden of proof in administrative tax cases. Under § 621.050.2, the Director has the burden of proving "whether the petitioner is liable as the transferee of property of a taxpayer (but not to show that the taxpayer was liable for the tax)." Section 621.050.2(1), RSMo 2000. Section 136.300 places on the Director "the burden of proof with respect to any factual issue relevant to ascertaining the liability of a taxpayer only if . . . [t]he taxpayer has produced evidence that establishes that there is a reasonable dispute with respect to the issue."

[7]Responds to Point II of Surrey's brief.

Section 136.300.1(1), RSMo 2000.

B. Proof that Surrey's failed to withhold was unnecessary.

Surrey's, relying on *Harper v. Director of Revenue*, 872 **S.W.2d** 481 **(Mo. banc 1994),** argues that the Director did not prove that Surrey's failed to withhold from the purchase price a sufficient amount to cover its predecessor's unpaid sales tax. While *Harper* requires the Director to prove that the buyer of a business failed to withhold from the purchase price enough money to cover the seller's unpaid sales tax, the General Assembly amended the statute upon which that decision was based just months after the *Harper* opinion was issued. Under the amended version of the statute, effective January 1, 1995, the purchaser not only must withhold from the purchase price an amount to cover the unpaid taxes, but must also remit that amount to the Director at the time the business is purchased:

> Except as provided in subsections 4, 5 and 6 of this section, all successors, if any, shall be required to withhold sufficient of the purchase money to cover the amount of such taxes and interest, additions to tax or penalties due and unpaid until such time as the former owner or predecessor, whether immediate or not, shall produce a receipt from the director of revenue showing that the taxes have been paid, or a certificate stating that no taxes are due. If the purchaser of a business or stock of goods shall fail to withhold the purchase money as provided *in this section and remit at the time of purchase all amounts so withheld to the director to pay all unpaid taxes, interest, additions to tax and penalties due from the former owner*

> *or predecessor*, the purchaser shall be personally liable for the payment of the taxes, interest, additions to tax and penalties accrued and unpaid on account of the operation of the business by the former owner and person.

Section 144,150.3, RSMo 2000 (emphasis added). The legislature added the italicized language during the 1994 legislative session immediately following this Court's decision in *Harper*.

In *Harper*, this Court stated that the "reason for withholding a portion of the purchase price is to provide a fund from which any unpaid taxes may be paid. *Harper*, 872 **S.W.2d** at 482; *see also Gammaitoni v. Director of Revenue*, 786 **S.W.2d** 126, 129 **(Mo. banc 1990). Under the old version of the law, if a withholding occurred, then the Director could "proceed against the fund in an action at law or other appropriate proceeding" to recover the unpaid tax. *Harper*, 872 S.W.2d at 482. Because such a remedy was available, this Court held that it was unnecessary to construe the statute to find that a successor was personally responsible notwithstanding whether any money had been withheld from the purchase price.** *Id.* **As a result, proof that the purchaser withheld no money from the purchase price was required under the old version of the law. In other words, the Director was required to prove that no fund existed before holding the successor personally liable for the unpaid tax.**

This reasoning does not apply to the amended statute. Now successors must not only withhold money from the purchase price to cover the unpaid taxes, they must also remit that money to the Director when they purchase the business. Based on the

content and timing of the amendment, the legislature obviously intended to undo the holding in *Harper* and to relieve the Director from having to proceed against a "fund" to recover unpaid taxes. Instead, the legislature logically placed on the successor the burden of remitting this money to the Director. Indeed, it was the successor who was initially responsible for creating this fund by withholding money from the purchase price. As a result, the Director is no longer required prove a negative, i.e., that the successor failed to withhold money from the purchase price, but must simply show that the successor failed to remit the unpaid tax money when the business was purchased.

C. Surrey's failed to withhold the unpaid tax from the purchase price.

In any event, not only did the Director prove that Surrey's failed to remit the unpaid taxes when Harbour sold the business, she also proved that Surrey's failed to withhold the unpaid sales tax from the purchase price when it bought the business. The AHC expressly found that because the purchaser, Charles Allenbrand, "did not believe that the carriage rides were subject to sales tax . . . he did not withhold any sales tax from the purchase price of the business."[8] In analyzing the issue of successor liability, the AHC held that "the Director established that neither the seller nor the purchaser believed that the carriage rides were subject to sales tax; thus, there would have been no reason for [Surrey's] to withhold sales tax."[9] The AHC concluded that the Director did, in fact, prove that Surrey's failed to

[8]L.F. 85.

[9]L.F. 94.

withhold, notwithstanding whether such proof was required under the new statute.[10]

Harbour Wholesale's president, Ed Becker, testified that the parties relied on an e-mail from the Department of Revenue, obtained after the sales agreement was entered, for their belief that no sales tax was owed.[11] Consequently, Surrey's would have no reason to

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[10]L.F. 94.

[11]Tr. 115-16. Becker's e-mail only asked generally whether sales tax applied to "non-motorized guided tours billed as labor." L.F. 85; Ex. A, p. R2. Surrey's does not argue that the doctrine of equitable estoppel applies. *See Lynn*, 689 **S.W.2d** at 48-49. Moreover, the e-mail inquiry and the department's response to it did not constitute a binding letter ruling under § 536.021.10, RSMo 2000, because Surrey's failed to follow the procedures outlined under 12 CSR 10-1.020. Tr. 65.

withhold unpaid sales tax from the purchase price if it believed no tax was due. In fact, the sales agreement mentions nothing about withholding money from the purchase price to cover unpaid sales tax.[12] Finally, Surrey's offered no evidence establishing that any real dispute exists with respect to this issue.

Surrey's contention that it cannot be held liable as a successor because the Director failed to prove that it did not withhold money from the purchase price is untenable. First, it relies on a case construing an old version of the statute. Second, the overwhelming weight of the evidence shows that no money was withheld from the purchase price. And, third, Surrey's offered no evidence suggesting that this was a disputed issue.

D. Surrey's purchased all the assets of the carriage-ride business.

Surrey's also claims that the successor liability statute does not apply because a sale of a business did not occur and because Harbour Wholesale did not transfer all or substantially all of its business as part of the sale to Surrey's.

Subsection 3 of § 144.150 potentially imposes successor liability on a "purchaser of a business or stock of goods." Surrey's contends that the Director must show that "a sale of all or substantially all" of Harbour's business occurred. Presumably, Surrey's relies on subsection 1, which requires persons who "sell all or substantially all of his or their business or stock of goods" to file a final sales tax return with the Director within fifteen

[12]Ex. D.

days after the sale. Section 144.150.1, RSMo 2000. The record, however, shows that while all the assets of Harbour-Wholesale, Inc. were not transferred during the sale, the carriage-ride business, which was a distinct part of the corporation, was sold to Surrey's.

In 1998 Harbour paid the tax liens and purchased the assets of the carriage-ride business previously operated by MJ Surrey's, Ltd.[13] Harbour, however, operated various different businesses under its corporate umbrella. Harbour's corporate headquarters was a used car lot, and Ed Becker, Harbour's president, described the corporation as a real estate investment company that owned commercial real estate.[14] Although Becker testified that all the assets of Harbour Wholesale were not sold to Surrey's, he did state that the carriage-ride business Harbour owned was sold to Surrey's.[15] Becker testified that the reason for the sale was that he was engaged in other "businesses" which were profitable, but that the carriage-ride business was not (Tr. 119-20). Becker explained that Surrey's was just "an

[13]L.F. 84; Tr. 42, 94-95, 117; Ex. A, pp. B2-B3, B9, S2-S4, T1-T2, D1.

[14]Tr. 94, 117; Ex. A, p. B3.

[15]Tr. 119-20.

entity" of Harbour (Tr. 190).

The strongest evidence that all the assets of carriage-ride business was sold to Surrey's comes from the sales agreement itself. The agreement expressly states that Surrey's purchased, "[a]ll assets of sellers [Harbour Wholesale] used in the business of Surrey's, Inc."[16] Moreover, the sale hinged on Harbour's transfer to Surrey's of the city permits necessary to operate the carriage-ride business.[17] Under the agreement, Harbour sold Surrey's approximately twenty horses and twenty-eight carriages, and kept only one horse and carriage for itself.[18] The agreement also contained a non-compete clause that prevented Harbour from operating a carriage-ride business within five miles of the Plaza for

[16]Ex. D; Tr. 175.

[17]Ex. D. "It is further agreed by and between the parties hereto that sellers will assist buyers in obtaining permits with Kansas City, Missouri for the operation of the carriage business on the Plaza, and in no event shall this contract close until buyers are satisfied that permits will be transferred to buyer. In the event the assignment of said permits cannot be completed, then this contract shall be null and void."

[18]L.F. 85; Tr. 177-78; Ex. D. The AHC found that sale included twenty-seven carriages, but the sales agreement lists twenty-eight carriages. Ex. D. The AHC also found that Becker kept one carriage and two horses, but Becker testified that he kept only one of each. Tr. 177.

five years.[19]

Business is defined under the sales tax law as "any activity engaged in by any person . . . with the object of gain, benefit or advantage, . . . and the classification of which business is of such character as to be subject to the terms of [the sales tax law]." Section 144.010.1(2), RSMo Supp. 2002. This definition does not restrict itself to the manner in which a business is owned, but on the activity that is being pursued. In other words, the sale of a business or a business's stock of goods does not require the sale of the entire corporate entity that owns the business. Based on this record, no one can seriously dispute that Harbour sold to Surrey's all, or substantially all, the assets of the carriage-ride business.

Surrey's argument is without merit in that it implicitly–and incorrectly–assumes that a corporation can operate only one business. Surrey's evidence in this case proves otherwise. The AHC's finding that Surrey's purchased all, or substantially all, the assets of Harbour's carriage-ride business is supported by competent and substantial evidence in the record.

E. The AHC never considered penalties or additions to tax.

[19]L.F. 85; Ex. D.

Surrey's also contends that this Court should set aside any penalties assessed against it based on the successor liability issue. But the AHC did not consider, and made no findings on the penalties or additions to tax that the Director assessed. The AHC only determined the amount of sales tax that Surrey's would owe if the carriage-ride business was subject to the amusement tax.[20] Consequently, if this Court determines that Surrey's horse-drawn carriage-ride sales were subject to sales tax and that Surrey's is liable as a successor, then on remand the AHC should be instructed to consider whether penalties or additions to tax apply in this case.

[20]L.F. 98-99.

CONCLUSION

The AHC erred in finding that Surrey's was not liable for the sales tax assessments because it did not operate a place of amusement. Its decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 3916 words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk, which contains a copy of this brief, filed with this Court has been scanned for viruses and is virus-free; and

(3) That a copy of this brief and a floppy disk containing this brief, were mailed, postage prepaid, on December 11, 2003, to:

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