IN THE SUPREME COURT OF MISSOURI

Case No. SC 85331

SURREYS ON THE PLAZA, INC.,

Respondent/Cross-Appellant,

v.

DIRECTOR OF REVENUE,

Appellant/Cross-Respondent.

RESPONDENT/CROSS APPELLANT'S BRIEF

Respectfully submitted,

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JURISDICTIONAL STATEMENT

This case appears before the Court on a Petition for Judicial Review from a decision of the Administrative Hearing Commission finding that Respondent/Cross Appellant, Surreys on the Plaza, Inc., was not liable for the assessment of sales tax issued by the Director of Revenue. The Administrative Hearing Commission determined that Surreys on the Plaza, Inc. was a successor, under the provisions of Section 144.150, RSMo 2000, to the previous owner, Harbour-Wholesale, Inc., but that there was no actual tax liability since Surreys on the Plaza, Inc. did not operate a place of amusement under Section 144.020.1(2), RSMo Cum. Supp. 2002.

A Petition for Review was filed by the Department of Revenue and a Cross Petition for Review was filed by Surreys on the Plaza, Inc. This case involves the construction of the revenue laws of the State of Missouri.

Accordingly, jurisdiction is proper in this Court pursuant to Article V, Section 3 of the Missouri Constitution.

STANDARD OF REVIEW

The standard of review of an Administrative Hearing Commission decision regarding taxation was stated by this Court in *Herman v. Director of Revenue*, 47 S.W.3d 362 (Mo. banc 2001):

> Interpretations of the state's revenue laws by the AHC are reviewed de novo and are upheld when authorized by law and supported by competent and substantial evidence upon the record as a whole unless clearly contrary to the reasonable expectations of the General Assembly.

Id. at 364.

This Court owes no deference to the Administrative Hearing Commission's decisions on questions of law, which are matters for this Court's independent judgment. *Id.* and *La-Z-Boy Chair Company v. Director of Economic Development*, 983 S.W.2d 523, 524-525 (Mo. banc 1999).

STATEMENT OF FACTS

The current case comes before this Court on a Petition for Judicial Review of a decision by the Administrative Hearing Commission dismissing an assessment imposed by the Director of Revenue against Surreys on the Plaza, Inc., and a cross-appeal of the decision finding that Surreys on the Plaza, Inc., was a successor to Harbour-Wholesale, Inc.[1]

A.

Harbour Wholesale's Operations

Historically, guided tours were given on the Country Club Plaza (a large shopping area in Kansas City, Missouri) by two entities. The two entities had a dispute which ultimately resulted in one of the entities, M.J. Surreys, going out of business. (Tr. 95.) Harbour-Wholesale, Inc., owned by Ed Becker, purchased the entire assets of M.J. Surreys prior to the audit period in this case. (Tr. 94-96.) The assets purchased included a building at 4538 Troost, Kansas City, Missouri and a number of horses and carriages. (Tr. 94-97.) At the time of purchase Harbour-Wholesale, Inc. already owned horses. (Tr. 97.) The additional assets were purchased by Mr. Becker's company, Harbour-Wholesale, Inc. (Tr. 94.)

During most of the period of the audit, Harbour-Wholesale, Inc. operated non-motorized guided tours on the Country Club Plaza consisting of a horse, carriage and driver giving a tour of the Country Club Plaza. (Tr. 100.) These tours consisted of giving a history

[1] A third issue, the amount of tax, was not appealed by either party.

of the Plaza and pointing out places to shop at the Country Club Plaza. (Tr. 103-104.) The testimony shows that the merchants of the Country Club Plaza received the primary benefit of the tours. (Tr. 104.)

The City of Kansas City imposed numerous different restrictions on the operations. (Tr. 105-106.) The City established and frequently changed where in the Plaza tours could commence. (Tr. 106.) Exhibit 1 demonstrates the testimony of both the Department of Revenue's Auditor Mr. Massey and Mr. Becker that there were a multitude of different locations throughout Country Club Plaza where the non-motorized guided tours may have started on any given date. (Exhibit 1, Tr. 73 and 107-108.)

Surreys on the Plaza, Inc. is a separate corporation from Harbour-Wholesale, and Mr. Becker is not an owner or operator of Surreys on the Plaza, Inc. (Tr. 116.) Harbour-Wholesale, Inc., did operate the non-motorized guided tours from August, 1998 through February, 2001. (Tr. 137-142.) During that time period Harbour-Wholesale, Inc. paid all its federal income taxes and state income taxes, including income tax on all revenues for the non-motorized guided tour operations. (Tr. 120-121.) Additionally, yearly Earnings Tax returns for the City of Kansas City were filed, simply for the non-motorized guided tour portion of Harbour-Wholesale's operations, for 1998, 1999 and 2000. (Tr. 142.) All gross receipts were reported and earnings taxes were paid to the City of Kansas City on these amounts. (Tr. 129.)

On April 23, 2001, Harbour-Wholesale, Inc. sold a small portion of its total assets, consisting of several carriages, horses and a building, to Surreys on the Plaza, Inc. (hereinafter Surreys). (Exhibit D.)

Prior to the sale, Mr. Becker corresponded by e-mail with the Department of Revenue to determine whether any tax would be due and owing for the non-motorized guided tours which he offered. (Tr. 170.) The e-mail was sent to the Sales and Use Tax Division of the Department of Revenue using the e-mail address of salestax@maildor.state.mo.us. (Tr. 188.) A copy of that e-mail is at Pages R-1-2 of Exhibit A. The e-mail sent stated:

> Non-motorized guided tours billed as labor. I want to know if this is correct - - not to charge tax.

(Pages R-1-2, Exhibit A and Tr. 62.)

The response came from Beverly Krumman with the Department of Revenue and stated:

> The fee charged for non-motorized guided tours are not subject to sales tax. Please let me know if I can provide additional information.
>
> Bev Krumman, Technical Support Section, Division of Taxation and Collection.

(Exhibit A, page R-1-2.)

Surreys did not purchase all the buildings or even most of the buildings owned by Harbour-Wholesale. (Tr. 189.) Surreys did not purchase all the carriages owned by Harbour-Wholesale, Inc. (*Id.*) Surreys did not purchase all of the horses owned by Harbour-Wholesale.

(Tr. 190.) Harbour-Wholesale continues in operation with the majority of its assets and stock of goods. (Tr. 190-191.)

B.

The Department's Actions

The first contact Mr. Becker had with the Department of Revenue, after the sale of some assets to Surreys, regarding the operations of the non-motorized guided tours by Harbour-Wholesale, was a meeting with an investigator from the Criminal Division of the Department of Revenue, a Mr. VanCamp. (Tr. 182.) The sales tax auditor, Mr. Massey, first met with Mr. Becker in the presence of Special Agent VanCamp in the course of a criminal investigation. (Tr. 50-51.) At the time of that meeting Mr. Massey was operating at the Criminal Investigations Bureau behest. (Tr. 51.) Mr. Becker had his rights read to him by Mr. VanCamp. (Tr. 182.) Mr. Becker was never informed in writing that the criminal investigation has concluded or was in fact concluded at any time. (Tr. 51-52.)

Mr. Massey conducted an audit to determine the amounts of assessments of sales tax. Mr. Massey never even visited the Plaza or observed any of the operations of Surreys at the time of the audit. (Tr. 71.) At the conclusion of the audit Mr. Massey assessed taxes and interest and penalties in a total amount of $93,865.61. (Tr. 81.)

The Director's assessment was issued against Surreys on January 25, 2002. Surreys timely filed its complaint against the assessment before this Commission on March 26, 2002. On September 12, 2002, a hearing was held before this Commission on the matter.

On May 7, 2003, the Commission issued its decision holding that (1) the revenues from operations of Surreys were not fees paid to a place of amusement and were thus not subject to sales tax (L.F. 97); (2) Surreys was a successor to Harbour Wholesale, Inc. under Section 144.157 (L.F. 94); and (3) the total amount of tax that could be owed by Surreys was $11,146.00. (L.F. 99). The Petition and Cross Petition for Judicial Review ensued.

I.

THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN ITS DECISION THAT NO SALES TAX LIABILITY WAS INCURRED BY THE OPERATIONS OF SURREYS ON THE PLAZA, INC. AND HARBOUR WHOLESALE, INC. IN THAT THE PAYMENTS WERE NOT FEES PAID TO A PLACE OF AMUSEMENT OR ENTERTAINMENT BECAUSE:

(1) THE COUNTRY CLUB PLAZA IS NOT A "PLACE" OF AMUSEMENT UNDER CHAPTER 144, RSMo AND THE DIRECTOR DEMONSTRATED NO OTHER "PLACE" OF AMUSEMENT USED BY SURREYS ON THE PLAZA OR HARBOUR WHOLESALE THUS *MOON SHADOW, INC. V. DIRECTOR OF REVENUE* IS CONTROLLING; AND

(2) THE CARRIAGE RIDES ARE NOT AN AMUSEMENT OR ENTERTAINMENT ACTIVITY BUT RATHER AN EDUCATIONAL AND COMMERCIAL ADVERTISING ACTIVITY.

Moon Shadow, Inc. v. Director of Revenue, 945 S.W.2d 436 (Mo. banc 1997)

Six Flags Theme Parks, Inc. v. Director of Revenue, 102 S.W.3d 526 (Mo. banc 2003)

II.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN ITS DECISION THAT SURREYS ON THE PLAZA, INC., WAS A SUCCESSOR ENTITY TO HARBOUR WHOLESALE, INC., IN THAT:

A) THE DIRECTOR DID NOT FULFILL HER BURDEN OF PROOF UNDER SECTION 144.157, RSMo 2000 BECAUSE SHE ELICITED NO EVIDENCE THAT MONEY WAS NOT WITHHELD FROM THE PURCHASE PRICES OF THE CARRIAGES AND HORSES AS IS REQUIRED BY *HARPER V. DIRECTOR OF REVENUE*, 872 S.W.2D 481 (MO. BANC 1994); AND

B) THE SALES OF ASSETS FROM HARBOUR WHOLESALE, INC. TO SURREYS ON THE PLAZA, INC., WAS NOT A SALE OF A BUSINESS BECAUSE HARBOUR WHOLESALE, INC.'S BUSINESS WAS NOT THE CARRIAGE OPERATION AND THE SALE DID NOT TRANSFER ALL OR MOST

OF HARBOUR WHOLESALE'S BUSINESS TO SURREYS ON THE PLAZA, INC.; AND

C. PENALTIES ARE NOT APPROPRIATE BECAUSE SURREYS RELIED UPON THE WRITTEN STATEMENTS OF THE DIRECTOR THAT THE PREDECESSOR'S OPERATION WERE NOT TAXABLE.

Harper v. Director of Revenue, 872 S.W.2d 481 (Mo. banc 1994)

Six Flags Theme Parks, Inc. v. Director of Revenue, 102 S.W.3d 526 (Mo. banc 2003)

Section 144.150, RSMo 2000

ARGUMENT

I.

THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN ITS DECISION THAT NO SALES TAX LIABILITY WAS INCURRED BY THE OPERATIONS OF SURREYS ON THE PLAZA, INC. AND HARBOUR WHOLESALE, INC. IN THAT THE PAYMENTS WERE NOT FEES PAID TO A PLACE OF AMUSEMENT OR ENTERTAINMENT BECAUSE:

(1) THE COUNTRY CLUB PLAZA IS NOT A "PLACE" OF AMUSEMENT UNDER CHAPTER 144, RSMo AND THE DIRECTOR DEMONSTRATED NO OTHER "PLACE" OF AMUSEMENT USED BY SURREYS ON THE PLAZA OR HARBOUR WHOLESALE THUS *MOON SHADOW, INC. V. DIRECTOR OF REVENUE* IS CONTROLLING; AND

(2) THE CARRIAGE RIDES ARE NOT AN AMUSEMENT OR ENTERTAINMENT ACTIVITY BUT RATHER AN EDUCATIONAL

AND COMMERCIAL ADVERTISING ACTIVITY.

A.

In Missouri, taxing statutes are to be strictly construed against the taxing authority. *Six Flags Theme Parks, Inc. v. Director of Revenue,* 102 S.W.3d 526, 529 (Mo. banc 2003) and *May Department Stores Company v. Director of Revenue,* 791 S.W.2d 388, 389 (Mo. banc 1990).[2] The taxes assessed are allegedly due as gross receipts from fees paid in or to a place of amusement under Section 144.020.1(2):

> (2) A tax equivalent to four percent of the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events;

Section 144.020.1(2), RSMo Cum. Supp. 2002.

This particular provision has been no stranger to litigation over the years. This Court's decisions have developed a number of components to this test, each of which when reviewed against the facts in this case show that there is no tax to be assessed against Surrey's under this

[2] Surreys is not seeking an exemption from tax; it is the Director who is seeking to apply a taxing statute against Surreys. Thus, *May* is controlling.

provision. The absence of the necessary components of the test results here in no tax liability against Surrey's.

1. Country Club Plaza is not a "Place" of Amusement

An essential element to determine taxability under Section 144.020.1(2) is that there must be the existence of a "place" of the entertainment or amusement. *Spudich v. Director of Revenue*, 745 S.W.2d 677,680 (Mo. banc 1988). Because there is no "place" in this case, Section 144.020.1(2) simply cannot apply.

The concept of a "place of amusement" has been thoroughly addressed by this Court. In *Moon Shadow, Inc. v. Director of Revenue*, 945 S.W.2d 436 (Mo. banc 1997), this Court was specifically asked to determine what constituted a "place of amusement" under the sales tax statute. In *Moon Shadow* the Director asserted that Moon Shadow owed sales taxes on its rentals of inner tubes to be used on the Current River. *Id.* at 436-437. This Court stated:

> An essential element is the existence of a *place* of amusement, entertainment or recreation. See *Spudich v. Director of Revenue*, 745 S.W.2d 677, 680 (Mo. banc 1988). According to the director, that place here is either Moon Shadow's business location or an eight mile stretch of the Current River.

Id. at 437.

This is exactly the Director's position in the current case: that the "place" where the "amusement or entertainment" occurs is the Country Club Plaza. This assertion of the Director flies in the face of this Supreme Court's language in *Moon Shadow* which continued:

> The general assembly did not intend a "broad and restrained construction" of the term "place of amusement." *L & R Distributing, Inc. v. Missouri Department of Revenue*, 529 S.W.2d 375, 378 (Mo. 1975). ...a "place" is a "building or locality used for a special purpose <place of amusement>. *Webster's Third New International Dictionary* 1727 (1976).

Id.[3] Quite simply, the Country Club Plaza does not fit within this definition and thus was properly rejected as a "place of amusement" by the Administrative Hearing Commission.

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[3] The Director now seeks to show a different definition of "place" from that which this Court has specifically adopted. The Director seeks to cherry pick her definition, by searching other lesser definitions. Using the same dictionary as the Director shows that a higher definition of "place" is "a definite location especially: a. A house, apartment, or other abode. b. A business establishment or office." *American Heritage Dictionary* 946

(2d Coll. Ed. 1985). In any event, this Court's decision in *Moon Shadow* is the controlling definition.

After a review of the cases cited by the Director of Revenue which indicated a place of amusement was a building used for a special purpose; this Court held that *Moon Shadow's* building, where the customers obtained the inner tubes was not a place of amusement because the amusement, entertainment or recreation activities did not occur at that site. *Id.* The Director therefore alternatively asserted if the building was not the "place," that the eight mile stretch of the Current River upon which the inner tubes were used by customers was the "place of amusement or entertainment." *Id.* This Court rejected this out of hand:

> An eight-mile stretch of river - - owned and controlled mostly by the federal government - - is not a locality used as a "place of amusement" within the meaning of section 144.020, subd. 1(2).

Id. Thus, this Court rejected the assessments levied by the Director.

Review of the facts in the current case shows that *Moon Shadow* is not just on point but is controlling on this issue. The Director asserts that the "place of amusement" is the Country Club Plaza, an area consisting of a number of square blocks in the City of Kansas City, none of which is owned or leased by the Surrey's.[4] Like an eight mile stretch of river available for

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[4] This Court has held that placement of an amusement device (a pinball machine) in a place that is not otherwise a place of amusement (hotel lobby, restaurant, motel, bus station or airport) does not convert that place into a place of amusement. *L&R Distributing, Inc. v. Missouri Department of Revenue*, 529 S.W.2d 375, 378 (Mo. 1975). Accordingly, even if carriages are an amusement device (a questionable proposition, not

use by the public, it is not in any way "a locality used as a place of amusement within the meaning of Section 144.020, subd. 1(2)." *Moon Shadow, supra*. Furthermore, there is no specific location identified by the Director where the "entertainment" or "amusement" occurs and which could qualify as a "place." While Surreys (like *Moon Shadow*) owns a building, there are no amusement activities which take place in or at that location. Just as with Moon Shadow's Lodge in the *Moon Shadow* case, no identifiable "place" other than "the Plaza" is proposed by the Director to satisfy the test for application of tax under Section 144.020.1(2).

The Director's assertions in this case are identical to the flawed assertions the Director made and which were rejected in the *Moon Shadow* case. Just as this Court did in *Moon Shadow*, this Court should affirm the Commission's decision that there is no "place" of amusement or entertainment as required for taxation under Section 144.020.1(2), RSMo.

First the Director concentrates on other, older, decisions for her position. In none of the decisions referred to by the Director is there any discussion of the "place" component. All the Director's cases are silent on that issue, whereas *Moon Shadow* directly addresses what constitutes a "place of amusement" and is controlling precedent.

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established by the evidence), their location on the Country Club Plaza similarly cannot convert that place into a "place of amusement."

The Director's assertion that Surreys on the Plaza, Inc. is a place of amusement principally relies upon three cases, *Lynn v. Director of Revenue*, 689 S.W.2d 45 (Mo. banc 1985); *Fostaire Harbor, Inc. v. Director of Revenue*, 679 S.W.2d 272 (Mo. banc 1984) and *Branson Scenic Railway v. Director of Revenue*, 3 S.W.3d 788 (Mo. App. W.D. 1999). The first two make no analysis of what constitutes a "place of amusement." In fact, it appears that this issue was not even presented to this Court for review by either party.

Both *Lynn* and *Fostaire Harbor* require the Director here to show the "place of amusement." This has not been done. The Director asserts no facts identifying the "place" of amusement that the Director is asserting as the critical element of its tax assessment. Instead, the Director diverts her discussion to what is "amusement" with respect to Surreys on the Plaza supposedly an issue under *Lynn* and *Fostaire Harbor*.[5] Most importantly, both *Lynn* and *Fostaire Harbor* we specifically rejected by this Court as applying to the current situation. *Moon Shadow*, 945 S.W.2d at 437.

> In the cases cited by the Director, the place of amusement was a building used for a special purpose... *Lynn v. Director of Revenue*, 689 S.W.2d 45, 48 (Mo. banc 1985) (vessel); *Fostaire Harbor, Inc. v. Director of Revenue*, 679 S.W.2d 272, 273 (Mo. banc 1984) (helicopter)...

Id.

[5] Surrey's activities are not "amusement" as more fully addressed below.

The *Branson Scenic Ry*. involved an argument regarding an exemption from taxation being sought by the railway operators. *Branson*, 3 S.W.3d at 790. In fact the Western District went so far as to note that the burden of proof on an exemption case is squarely upon the taxpayer and not the Director. *Id.* This is the opposite of the current matter where no exemption is in question.

Furthermore, the train in *Branson* all originated at the exact same location or "place" – a train station in Branson. *Id.* This Court, as noted above, has already rejected similar enterprises as applying to the current facts. See, *Moon Shadow*, 945 S.W.2d at 437 (see quote supra.) Once again, the Western District conducted no analysis of what the "place" of amusement was and just assumed that taxpayer fell within some, unidentified place.[6] *Branson*, just like *Lynn* and *Fostaire Harbor* are not on point to the current case.

The Director then attempts to misdirect this Court by arguing that an element of control should be reviewed in determining what is or is not a "place" of amusement. (Director's Brief at 18). *Moon Shadow* contained no discussion of "control" of the "place" of amusement; instead this Court explicitly held that a place required a "building or locality." *Moon Shadow*, 945 S.W.2d at 437. Because the vehicle (be it an inner tube or a carriage) is not the "place"

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[6] The only reference to "mobile places of amusements," so important to the Director's brief, related to whether they were for the purpose of transportation or not. There was no substantive discussion, or even a cursory discussion, of what entailed a "place" under Section 144.020.1(2).

of amusement under this Court's decisions, the control is irrelevant to any analysis under Section 144.020.1(2) and therefore, the Director's argument should be rejected by this Court.

When determining the liability for tax in Missouri, the burden to show that liability falls squarely upon the Director of Revenue. *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526, 529 (Mo. banc 2003).[7] Section 136.300.1 reinforces the *Six Flags* rule, stating, in part, that:

> With respect to any issue relevant to ascertaining the tax liability of a tax payer all laws of the state imposing a tax shall be strictly construed against the taxing authority in favor of the taxpayer.

Section 136.300.1, RSMo.

Missouri statute and case law clearly requires that the burden of proof falls upon the Director. All remaining questions of law or fact relating to application of tax to Surrey's's business must be resolved against the Director. The Director has not carried this burden of proof with respect to the "place" of amusement and, thus, this Court should find that there is no tax liability.

2. The Activities of Surreys on the Plaza, Inc. were not "Amusement" or "Entertainment"

[7] Surrey's is not seeking an exemption from tax liability, thus there is no burden on this issue upon the Surrey's. *Id.*

The general test to determine whether an activity constitutes an amusement or not is the *deminimus* test originally set out in *Spudich v. Director of Revenue, supra*. See *Wilson's Total Fitness Center, Inc. v. Director of Revenue,* 38 S.W.3d 424 (Mo. banc 2001). Under the *deminimus* test, the gross receipts from tours conducted by Surreys on the Plaza do not fall within those gross receipts taxed as paid to or in a place of amusement or entertainment.

Section 144.020.1(2) imposes a tax liability. As this Court stated this year in *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526 (Mo. banc 2003), where the issue is application of tax to transactions (rather than exemption from a tax otherwise applicable) "it is the Director's burden to show a tax liability." *Id.* at 529. This Court continued by stating:

> Section 136.300 states in part "with respect to any issue relevant to ascertaining the tax liability of a taxpayer all laws of the state imposing a tax shall be strictly construed against the taxing authority and in favor of the taxpayer ***" *Id.*

Id., citing *Utilicorp United, Inc. v. Director of Revenue*, 75 S.W.3d 725, 731 (Mo. banc 2001). As made clear from the recent decision in *Six Flags*, the burden falls upon the Director to show that the business operation of Surreys is in fact that of an amusement.

The Director wholly fails to carry this burden. The unrebutted testimony of Mr. Becker indicates that the primary purpose of the tour was to "educate" tourists on the background and history of the Plaza. (Tr. 103). The collateral or secondary purpose is to advertise and identify businesses located there for shoppers. In fact, when asked who received the most benefit out of the tours, Mr. Becker confidently answered "the merchants." (Tr. 104). Time and again Mr.

Becker testified that the tours were educational and not for amusement and not for entertainment. (See Tr. 104, 157 and 160.) In fact, on numerous occasions in response to vigorous cross-examination from counsel for the Department of Revenue, Mr. Becker said that he did not want to be an entertainer, nor did he entertain the persons who were taking the tours. (See e.g. Tr. 162). There was no rebutting or contradicting testimony from the Director, in fact the sales tax auditor (the Director's sole witness) had **never** even seen a carriage in person or taken a tour.

On the record, the only supportable characterization of the tours is that they educated customers and encouraged them to spend money with the Plaza merchants - - hardly a classic amusement or recreational activity.

The facts are clear: **all** the evidence put before the Commission demonstrates that the operations of the non-motorized guided tours were not "amusement." The Department itself, by its own admission, specifically informed Becker that "the fee charged for non-motorized guided tours are not subject to sales tax." (Exhibit A, page R1). There is no question that the operations of Mr. Becker were those of a non-motorized guided tours business. Becker operated no amusement device nor was his business operated in any recognized place of amusement. In fact, the tours were conducted for the benefit of the merchants on the Plaza, and as an educational service to that community. (Tr. 103-104.)

The record is clear that the activities of Surreys on the Plaza were not amusement or entertainment. The Department's own witness testified that he had never even bothered to go

to the Plaza to witness the activities of Surreys on the Plaza. (See e.g., Tr. 76 and 77). In fact, his direct testimony at Tr. 54 states as follows:

> Q. Let's talk a little about Surreys during your audit. I think you testified - - and please correct if I am wrong here - - that you never observed any of their operations in person, did you?
>
> A. No.
>
> Q. You never rode on any of their carriages?
>
> A. No.

(Tr. 54.)

The Department itself never even attempted to put on any evidence that the activities of Surreys were amusement or entertainment, or that anyone was ever even amused or entertained. In fact, the only testimony elicited was to the contrary - - that the tours were educational, informational and stimulated economic activity for the merchants.[8]

As this Court emphasized in *Six Flags*, the burden in this case is upon the Director to show that the activities and transactions sought to be taxed are amusement or entertainment. The Director has failed to carry his burden on this issue. Thus, if bound by the evidence of

[8] After extensive cross examination, Mr. Becker specifically refuted the Director's position that the tours were entertaining or amusing. (Tr. 157).

record in this case, the Commission should have ruled that the activities of Surreys on the Plaza are educational and promotional, and not entertainment or amusement. Accordingly, no tax is applicable under Section 144.020.1(2).

The decision of the Administrative Hearing Commission on this issue are unsupported by an facts, much less competent and substantial evidence as this Court mandates. *Herman v. Director of Revenue*, 47 S.W.3d 362, 364 (Mo. banc 2001). The record is devoid of any evidence demonstrating that Surrey's activities are "amusement" or "entertainment" and as a result this Court must reverse the Commission's decision to the contrary.

II.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN ITS DECISION THAT SURREYS ON THE PLAZA, INC., WAS A SUCCESSOR ENTITY TO HARBOUR WHOLESALE, INC., IN THAT:

A) THE DIRECTOR DID NOT FULFILL HER BURDEN OF PROOF UNDER SECTION 144.157, RSMo 2000 BECAUSE SHE ELICITED NO EVIDENCE THAT MONEY WAS NOT WITHHELD FROM THE PURCHASE PRICES OF THE CARRIAGES AND HORSES AS IS REQUIRED BY *HARPER V. DIRECTOR OF REVENUE*, 872 S.W.2D 481 (MO. BANC 1994); AND

B) THE SALES OF ASSETS FROM HARBOUR WHOLESALE, INC. TO SURREYS ON THE PLAZA, INC., WAS NOT A SALE OF A BUSINESS BECAUSE HARBOUR WHOLESALE, INC.'S BUSINESS WAS NOT THE CARRIAGE OPERATION AND THE SALE DID NOT TRANSFER ALL OR MOST

OF HARBOUR WHOLESALE'S BUSINESS TO SURREYS ON THE PLAZA, INC.; AND C. PENALTIES ARE NOT APPROPRIATE BECAUSE SURREYS RELIED UPON THE WRITTEN STATEMENTS OF THE DIRECTOR THAT THE PREDECESSOR'S OPERATION WERE NOT TAXABLE.

In Missouri, the liability of a successor entity is controlled by statute, Section 144.150, RSMo. 2000.

> 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.

A. No Evidence to Show a Failure to Withhold

This Court has held that the burden to prove the liability of a taxpayer as a successor falls completely upon the Director of Revenue. See *Harper v. Director of Revenue*, 872

S.W.2d 481 (Mo. banc 1994). In *Harper*, as in this case against Surreys, the Director was asserting that Harper owed taxes as a successor to a prior business. Harper had purchased the complete inventory of the former business and began operating in the same building in which the prior business existed. *Id.* at 482. Nevertheless, this Court held that the burden falls upon the Director of Revenue to establish liability under Section 144.150. *Id.* The specific question in *Harper* was whether the Director had to show that the successor entity had in fact failed to withhold purchase money to cover any sales taxes that might be outstanding. *Id.*

In affirming the decision of the Commission, this Court held that the Director is required to establish that the successor entity did not withhold. *Id.*

> The failure to withhold is a condition of personal liability. The director did not establish that Harper had not withheld. Therefore the director failed to establish one of the essential elements of her case. Harper was not personally liable under the [successorship] statute and the director cannot proceed against him by assessment.

Id.

The current case is exactly the same as *Harper*. The Director is asserting that Surreys on the Plaza, Inc., is a successor to a prior operation, Harbour-Wholesale, Inc., in conducting non-motorized guided tours on the Country Club Plaza. The Director in the course of presenting his case called one witness, the sales tax auditor. The Director also had the

opportunity to cross-examine the witness for Surrey's. At no time did the Director establish or even attempt to establish by any evidence that part of the purchase price was not withheld by Surreys on the Plaza, Inc. as alleged. Needless to say, no other element for establishing liability of Surreys under Section 144.150, RSMo is found in the evidence of record either.

Review of the decision of the Administrative Hearing Commission finds an even more shocking deficiency on the issue of successor liability. The Commission makes no effort throughout its Findings of Fact and Conclusions of Law to show the **minimal** requirements for successor liability mandated by *Harper v. Director of Revenue,* 872 S.W.2d 481 (Mo. banc 1994). There is absolutely **no** reference in the transcript, in the evidence, or in the Commission's decision, to any attempted showing that the "successor did not withhold." *Id.* at 482. This Court should hold that Surrey's is not a successor, and has no successor liability under Section 144.150, RSMo.

B. No sale of Business or Stock of Goods Occurred

As the testimony demonstrated time and time again, Harbour-Wholesale, Inc., the entity operating the non-motorized guided tours prior to Surreys on the Plaza, Inc., was not sold in its entirety to anyone. (Tr. 189-191.) In fact, the evidence is clear that Harbour-Wholesale did not even sell all of its carriages or all of its horses to or all of its related personal property to Surreys on the Plaza, Inc. (Tr. 189-190.) This evidence was unrefuted by the Director of Revenue. The Director must show that a sale of all or substantially all of Harbour-Wholesale, Inc.'s business occurred. That burden falls upon the Director, not upon Surrey's. *Harper* at 842. No such showing has been made; and the evidence demonstrates that no such showing can

be made. The Commission's decision, with respect to successor liability, is unsupported by competent and substantial evidence (more correctly is unsupported by ANY evidence) and thus must be reversed by this Court. *Herman*, 47 S.W.3d at 364.

Accordingly, because the Director has utterly failed to demonstrate successor liability, this Court should find that there is no successor liability under Section 144.150 and reverse the decision of the Administrative Hearing Commission on successor liability. Surreys on the Plaza, Inc. is not liable for any taxes which may have occurred in the operation of the non-motorized guided tours for the tax periods up to and through April 27, 2001.

C. Penalties are not Appropriate

Penalties have been assessed by the Director of Revenue in this matter. These penalties are not appropriate and should not be enforced against Surreys.

Penalties should not be assessed if a taxpayer has a good faith belief that no tax is due. *Conagra Poultry Co. v. Director of Revenue*, 862 S.W.2d 915 (Mo. banc 1993). Even if the taxpayer does not prevail, penalties are not appropriate where the reason for not paying the tax was reasonable. *Sipco, Inc. v. Director of Revenue*, 875 S.W.2d 539 (Mo. banc 1994).

The penalties are not appropriate due to the reliance of Surreys on the Plaza on two factors. First, other operations across the State of Missouri of a similar type have not been taxed nor are they currently being taxed by the Department of Revenue. Second, the e-mail from the Department of Revenue stating that the non-motorized guided tours were not taxable makes any failure of the taxpayer to know that the tax law may be contrary to what the Department stated reasonable cause and excusable from attachment of penalties for refusal to file or pay. The Department specifically told Mr. Becker that such tours were not taxable. (See Pages R-1-2 of Exhibit A and Tr. 170-188.) This is a reasonable cause for not filing tax returns and thus no penalties lie under Section 144.250.

Accordingly, this Court should set aside any penalties assessed against Surreys based upon the successor liability issue.

CONCLUSION

The Commission's decision with respect to a "place" of amusement is correct. *Moon Shadow, Inc. v. Director of Revenue*, 945 S.W.2d 436 (Mo. banc 1997) establishes that a "place" of amusement must be a building or a location. *Id*. at 437. There is no building or location that has been demonstrated in the current matter and thus the decision of the Administrative Hearing Commission should be affirmed on this issue.

The Commission's decision that no tax was due should also be affirmed since the operations of Surreys was not "amusement" or "entertainment" and thus is not taxable under Section 144.020.1(2). The Commission's decision is unsupported by any evidence, much less competent and substantial evidence, that the actions of Surreys, non-motorized guided tours, consist of entertainment or amusement.

Surrey's on the Plaza, Inc., is not a successor to the Harbour-Wholesale, Inc since it did not purchase the entire business as is required by Section 144.150. Furthermore, the Director failed to meet her mandated burden of proof to show that no proceeds were withheld from the purchase price This failure of proof mandates that the Commission's decision on successor liability be reversed. *Harper v. Director of Revenue*, 872 S.W.2d 481 (Mo. banc 1994). Finally any penalties assessed against Surrey's are inappropriate as Surrey's had reasonable cause to believe that the activities of Harbour-Wholesale, Inc., with respect to Surreys were non taxable due to the direct statements of the Director.

WHEREFORE this Court should affirm the decision of the Administrative Hearing Commission that no sales tax, interest or penalties are due from Surrey's on the Plaza, Inc.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 6,475words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 ½" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____
Marc H. Ellinger

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Respondent's Brief and a copy in electronic format on a 3 ½" disk was sent U.S. Mail, postage prepaid, to the following party of record on this 3rd day of November, 2003.

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