

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 REPLY BRIEF

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
ARGUMENT	3
CONCLUSION	12
CERTIFICATE OF ATTORNEY	14
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

<i>Conagra Poultry Co. v. Director of Revenue</i> , 862 S.W.2d 915 (Mo. banc 1993)	11
<i>Harper v. Director of Revenue</i> , 872 S.W.2d 481 (Mo. banc 1994)	3, 4, 5, 6, 7, 13
<i>Herman v. Director of Revenue</i> , 47 S.W.3d 362 (Mo. banc 2001)	10
<i>Moon Shadow, Inc. v. Director of Revenue</i> , 945 S.W.2d 436 (Mo. banc 1997)	12
<i>Sipco, Inc. v. Director of Revenue</i> , 875 S.W.2d 539 (Mo. banc 1994)	11
Section 144.010.1(2), RSMo Cum. Supp. 2002	10
Section 144.150, RSMo 2000	4, 5, 6, 7, 8, 9, 10, 11, 12
Section 144.150.1, RSMo 2000	10
Section 144.150.3, RSMo 2000	6

ARGUMENT

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 144.150, 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);

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.

Throughout the portions of the Director's Brief on successor liability she overstates the law and misstates the facts. The Director failed to carry her burden of proof under Section 144.150 and thus the AHC's determination that Surreys on the Plaza, Inc., is a successor and has liability for sales taxes should be reversed.

A. Director Failed to Carry Her Burden of Proof

The Director argues that this Court's decision in *Harper v. Director of Revenue*, 872 S.W.2d 481 (Mo. banc 1994) is no longer valid law because minor revisions to Section 144.150, RSMo have effectively overruled *Harper*. An analysis of *Harper* and both the prior and current versions of Section 144.150 belies the Director's position. Section 144.150, RSMo. 2000,¹ currently states, in part, as follows:

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

¹ The 1994 amendment, reflected in RSMo 2000, applies in the current case at hand.

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.

The prior version of Section 144.150, RSMo Cum. Supp. 1993, stated as follows:

If the purchaser of a business or stock of goods shall fail to withhold the purchase money as above provided, the purchaser shall be personally liable for the payment of taxes, interest, additions to tax and penalties accrued and unpaid on account of the operation of the business by the former owner and person.

Harper held that the burden to prove the liability of a taxpayer as a successor falls completely upon the Director of Revenue. *Harper* remains good case law and its holding is controlling. In *Harper*, just as in the current matter, the Director was asserting that Harper owed taxes as a successor to a prior business.² This Court held, in *Harper*, that the burden falls upon the Director of Revenue to establish liability under Section 144.150. *Id.* Specifically, the Director had to show that the successor entity had in fact failed to withhold purchase

² Interestingly, unlike the current case, 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. Conversely, in the present case a number of assets of Harbour-Wholesale (Surrey's predecessor) were retained, including horses and carriages. See discussion, *infra*.

money to cover any sales taxes that might be outstanding:

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.

Contrary to the Director's argument, the current case is exactly the same as *Harper*. The Director did not establish or even attempt to establish by any evidence that part of the purchase price was not withheld by Surreys on the Plaza, Inc. ("Surreys") as alleged.

Even if this Court were to accept the argument of the Director that the legislative changes in 1994 have substantive impact, the Director would still fail the test as established in that provision. The amendments to Section 144.150 are designed to keep the prior requirements and add some minor new language having the money withheld under the statute paid to the Director. This change only clarified the existing intent of Section 144.150 and did not substantively modify the statute.

Since the current matter is an assessment of taxes, the burden of proof falls, as to all key issues, upon the Director of Revenue. Assuming that the changes to Section 144.150.3 do add a new provision requiring that such withheld amounts (not addressed with evidence by the Director) be remitted to the Director at time of purchase, the effect under *Harper* is simply

to create two elements which must be proven by the Director instead of one.

First, the question of whether the Director produced evidence to prove that the purchase price was not withheld, which has been discussed thoroughly in this and prior Briefs. However, the second question of whether all amounts withheld were remitted has not been addressed by the Director at any previous point. Not one question was asked or one piece of evidence presented in the Administrative Hearing Commission hearing by the Director in an attempt to carry her burden of proof that (1) money was not withheld from the purchase price, and/or (2) that such money was not remitted to the Director. The Director failed to carry her burden.

A review of the transcript, exhibits and the record as a whole shows that at no point was any specific allegation even raised that Surreys failed to remit any money out of the purchase price to the Director of Revenue. Accordingly, even under the assumption that the legislative change to Section 144.150 had the effect of adding to the burden of proof, the Director has failed to carry her burden of proof.

The Commission, throughout its Findings of Fact and Conclusions of Law, ignores the burden of proof requirements for successor liability established by this Court in *Harper*. There is no reference in the record, or in the Commission's decision, to any facts showing that the "successor did not withhold." *Id.* at 482. A review of the decision, and the Brief of the Director reflects the complete and utter absence of facts to support the Commission's decision. The Commission recognized the necessity for the Director to show that Mr. Allenbrand, the purchaser of the assets in question from Harbour-Wholesale, did not withhold tax from the purchase price. (Commission Finding of Fact No. 3, L.F. 85.) A detailed review

of the transcript references and exhibits relied on by the Commission shows that there is no evidence to support the finding made by the Administrative Hearing Commission. Mr. Allenbrand was not called to testify by the Department. At no time was any question directed to Mr. Allenbrand (the purchaser), Mr. Massey (the Director's Auditor), or Mr. Becker (the owner of Harbour-Wholesale) as to whether there was any withholding or remittance of sales tax from the purchase price of the business. No documentary evidence was offered on the issue. The failure to even attempt to illicit such evidence is fatal to this finding. It is not supported by competent and substantial evidence, not supported by any evidence, and thus should be disregarded by this Court. The burden is upon the Director to prove her case, including every element thereof, and the Director has not done so. The Director has failed to show that taxes were not withheld or remitted to the Department, the Director fails to carry her burden in this matter. As a matter of law, Surrey's is not a successor under Section 144.150, RSMo. Thus, there is no successor liability.

B. Harbour-Wholesale Was Not Sold

The seller of the business, Harbour-Wholesale, Inc.,³ did not sell its entire business to anyone. (Tr. 189-191.) It did not "quit the business" or go out of business. (Tr. 191.) Harbour-Wholesale did not even sell all of its carriages, horses or all related personal property to Surreys on the Plaza, Inc. (Tr. 189-190.) There was no evidence presented by the Director

³ Harbour-Wholesale, Inc. operated the non-motorized guided tours on the Country Club Plaza prior to the sale of a portion of its assets to Surreys.

to the contrary, and it is undisputed that Harbour-Wholesale, Inc. operated a number of different business activities under the umbrella of its one business. Harbour-Wholesale even remitted sales tax for some other activities which it operated. (Tr. 114.)

Section 144.150, RSMo, states in pertinent part with regard to successorship:

1. If any person required to remit a tax levied hereunder or his successors shall sell all or substantially all of his or their business or stock of goods or shall quit the business, such person or successor shall file a final return under oath within fifteen days after the date of selling or quitting business.
2. If any person required to remit a tax levied hereunder or his successors shall contract to sell all or substantially all of his or their business, the seller shall request from the director of revenue a statement or certificate as provided in subsection 4 of this section.

Since all or substantially all of Harbour-Wholesale was not sold, and because in fact, Harbour-Wholesale continued in business⁴ and did not “quit the business,” Section 144.150

⁴ The definition of “business” in Section 144.010.1(2) offers no assistance to the Director. The question of the sale of a portion of a business’s activities, under Section 144.150, has never been addressed by this Court, any statute or even the Director’s own regulations.

is inapplicable to this case. Under Section 144.150, the Director has the burden of proof to demonstrate that a sale of “all or substantially all” of the business occurred. She has failed to carry her burden, and the evidence demonstrates she could not and cannot carry that burden. The Commission’s decision is unsupported by competent and substantial evidence and thus must be reversed by this Court. *Herman v. Director of Revenue*, 47 S.W.3d 362, 364 (Mo. banc 2001).

The Commission’s findings ignore and are not supported by facts. Surreys on the Plaza, Inc. was a new business and did not exist until formed after some assets were purchased from Harbour-Wholesale, Inc. Section 144.150.1 specifies that a person liable to collect tax has responsibilities under Section 144.150 only “if” that person “shall sell all or substantially all of his or their business or stock of goods or shall quit the business.” The language of the statute, which the Director has conveniently omitted, specifies that a person must sell all or substantially all of his or her business or stock of goods (i.e., quit the business). Ed Becker, the person who owned and owns Harbour-Wholesale, Inc., was clear that he did not sell all or substantially all of his business or stock of goods and did not go out of business. (Tr. 189-191.) He testified that he retained not only horses and carriages for use in continuing the business of tours, but also buildings and equipment used in various different business activities. (Tr. 189-190.) The simple fact is that there is no evidence that “all or substantially all” of a business or stock of goods was sold, and, thus, the Commission’s decision should be reversed with respect to successor liability as being contrary to law.

In summary, the Director has failed to carry her burden of demonstrating successor

liability under both law and fact, and this Court should reverse the unsupported decision of the Administrative Hearing Commission on successor liability and find that there is no successor liability under Section 144.150.

C. No Penalties Due

The evidence in this case is overwhelming that the taxpayer had a good faith belief that no tax is due, and thus no penalties should be assessed. *Conagra Poultry Co. v. Director of Revenue*, 862 S.W.2d 915 (Mo. banc 1993). *Sipco, Inc. v. Director of Revenue*, 875 S.W.2d 539 (Mo. banc 1994).

Penalties are not appropriate because of the undisputed reliance by Surreys on the Plaza on the Department of Revenue's assurances that the operations of Surreys were not taxable, based on the non-taxation of other similar non-motorized guided tours by the Director of Revenue. Both the specific response of the Department to a direct inquiry and the conduct of the Department in not assessing tax on similar businesses support the good faith reliance of Surreys.

If this issue is remanded,⁵ then this Court should instruct the Commission to set aside any penalties which may be assessed against Surreys, based upon the successor liability issue.

CONCLUSION

⁵ If this case is reversed it must be remanded so that other issues, which the Commission did not adjudicate based upon its decision regarding place of amusement, may be determined by the Commission.

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 definite location such as a building. *Id.* at 437. There is no building or location demonstrated in the current matter, and thus the decision of the Administrative Hearing Commission was correct and should be affirmed on this issue.

The Commission's determination that the operations were "amusement" or "entertainment" is unsupported by competent and substantial evidence and that portion of the Commission's decision should be reversed. Such a reversal, on this issue, would result in the overall decision of the Commission that Surreys does not operate a "place of amusement or entertainment" being affirmed.

Surreys on the Plaza, Inc., is not a successor to the Harbour-Wholesale, Inc since it did not purchase all or substantially all of the business, as required by Section 144.150. The Director failed to meet her mandated burden of proof to show that no amounts were withheld from the purchase price mandating reversal on the issue of successor liability. *Harper v. Director of Revenue*, 872 S.W.2d 481 (Mo. banc 1994).

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.

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Reply 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 _____ words, 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/Cross-Appellant's Reply Brief and a copy in electronic format on a 3 ½" disk was sent U.S. Mail, postage prepaid, to the following parties of record on this 18th day of December, 2003.

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