IN THE
SUPREME COURT OF MISSOURI

———————————

No. SC85428

———————————

HOOTERS OF SPRINGFIELD (MISSOURI) LLC,

Respondent (Petitioner below),

v.

DIRECTOR OF REVENUE,

Petitioner (Respondent below).

———————————

PETITIONER'S BRIEF

———————————

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor
Missouri Bar No. 45631

Supreme Court Building
Post Office Box 899
Jefferson City, MO 65102-0899
(573) 751-3321

ATTORNEYS FOR PETITIONER
DIRECTOR OF REVENUE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL AND STATUTORY AUTHORITIES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This case came before the Administrative Hearing Commission on a complaint filed by Hooters of Springfield (Missouri) LLC. Hooters protested the assessment by the Director of Revenue of sales tax for eight months in 2001. The Commission reversed the Director's decision. This appeal involves the construction of a Missouri revenue law, § 144.150, RSMo. 2000 – *i.e.*, it requires the court to construe, for the first time, the term, "business" in that section. Thus jurisdiction is proper in this court pursuant to Article V, § 3 of the Missouri Constitution, and § 621.189, RSMo. 2000.

STATEMENT OF FACTS

This case addresses sales taxes incurred by the Hooters restaurant in Springfield, Missouri. At the time the taxes were incurred, the restaurant was owned by Springfield Wings, Inc., and Hazzard-Burdick Group, Inc. Appendix ("App.") at A2. The restaurant filed sales tax returns for April-September 2001 under a tax identification number assigned to Springfield Wings. *Id*. Except for a payment of $262.99 for April, the restaurant did not remit any sales tax for these months. *Id*.

"By bill of sale dated October 5, 2001," Hazzard-Burdick and Springfield Wings sold "all of the assets of the restaurant" on East Independence Avenue in Springfield, Missouri, to Hooters of Springfield (Missouri) LLC. App. A3; *see* App. A11-13 (the bill of sale). That included:

1. All present or future goods, stock-in-trade, and inventory of whatever kind or nature, wherever located, . . . [and] materials used or consumed in the business of Seller;
2. All of the furniture, fixtures, equipment, supplies, telephone numbers, transferable licenses, leasehold improvement, and other tangible assets located in or upon the Premises and/or currently used in the operation of the Business . . . ;
3. . . . all of the tangible and intangible assets of the Business and Seller used in or relating to the Business . . . .

App. A11-12.

Soon after, Hooters of Springfield filed a tax registration describing "the business" it operated as "Restaurant, Alcohol Sales & Merchandise." App. A14-16. The application confirmed that Hooters of Springfield had purchased "Fixtures and Equipment" from Springfield Wings. App. A14. But the application also listed as a seller "Arrow Restaurants," though with the Springfield Wings tax identification number and – like Springfield Wings – at the Independence Avenue address. App. A15.

On February 1, 2002, the Director issued a final decision assessing $77,655.84 in unpaid sales tax, additions, interest, and penalties against Hooters of Springfield as successor to Springfield Wings. App A1; A17-20. On February 14, 2002, Hooters of Springfield challenged that decision at the Administrative Hearing Commission. App. A1; Legal File at 1. After a hearing at which Hooters of Springfield did not appear (*see* Transcript of February 6, 2003 hearing), on June 13, 2003, the Commission held that the Director had not born her burden of proof and reversed the Director's decision (App. A9-10). On July 11, 2003, the Director filed a petition for review in this court.

POINT RELIED ON

The Administrative Hearing Commission erred in holding that Hooters of Springfield was not liable for unpaid sales taxes because the Director met her burden under § 144.150 to establish that Hooters of Springfield purchased the business of a person legally obligated to remit sales tax in that the Director showed that the tax was incurred in the business of operating a restaurant in Springfield,

that Springfield Wings and Hazzard-Burdick were the owners of and were obligated to remit the tax, and that Hooters of Springfield acquired the restaurant business from Springfield Wings and Hazzard-Burdick.

§ 144.150, RSMo. 2000

Gammaitoni v. Director of Revenue, 786 S.W.2d 126 (Mo. banc 1990).

STANDARD OF REVIEW

This is an appeal from a decision by the Missouri Administrative Hearing Commission (AHC). The AHC's decisions are upheld when authorized by law and supported by competent and substantial evidence upon the record as a whole, and when they are not clearly contrary to the reasonable expectations of the General Assembly. *See Becker Elec. Co. v. Director of Revenue*, 749 S.W.2d 403, 405 (Mo. banc 1988); § 621.193, RSMo. 2000. The appellate court, in essence, adopts the AHC's factual findings. *See Concord Publ'g House v. Director of Revenue*, 916 S.W.2d 186, 189 (Mo. banc 1996).

The AHC's decisions on questions of law are matters for this court's independent judgment. *La-Z-Boy Chair Co. v. Director of Economic Development*, 983 S.W.2d 523, 524-25 (Mo. banc 1999); *Hewitt Well Drilling & Pump Service, Inc. v. Director of Revenue*, 847 S.W.2d 797 (Mo. banc 1993).

Hooters of Springfield had the burden of proof before the AHC. *See* § 621.050.2, RSMo. 2000.

ARGUMENT

The Administrative Hearing Commission erred in holding that Hooters of Springfield was not liable for unpaid sales taxes because the Director met her burden under § 144.150 to establish that Hooters of Springfield purchased the business of a person legally obligated to remit sales tax in that the Director showed that the tax was incurred in the business of operating a restaurant in Springfield, that Springfield Wings and Hazzard-Burdick were the owners of and were obligated to remit the tax, and that Hooters of Springfield acquired the restaurant business from Springfield Wings and Hazzard-Burdick.

There is no question here that Hooters of Springfield operates the same restaurant – Hooters, on East Independence Avenue in Springfield – that was previously operated by Springfield Wings and Hazzard-Burdick. Nor is there any question that Hooters of Springfield purchased the restaurant business from Springfield Wings and Hazzard-Burdick. Nor is there any question that the prior owners sold without remitting sales taxes for April through October 2001. The only question is whether Hooters of Springfield incurred "successor liability" for the unpaid taxes.

"The purpose of successor liability is to secure collection of taxes by imposing derivative liability on purchasers of a business who are generally in a better financial position to collect or pay the tax from the sale price than the seller quitting the business." *Gammaitoni v. Director of Revenue*, 786 S.W.2d 126, 129 (Mo. banc 1990). As to sales tax, successor liability in Missouri is created by § 144.150, RSMo. 2000. That section

attempts to "ensure a fund from which to pay the tax in the event the predecessor fails to produce a receipt or a no-tax-due certificate from the Director." *Gammaitoni*, 786 S.W. 2d at 129. The sole question addressed by the Administrative Hearing Commission in this case was whether the Director showed that § 144.150 applied to Hooters of Springfield.

A transaction is subject to § 144.150 if it meets two criteria. The Director's proof was sufficient as to both.

1. Hooters of Springfield purchased the restaurant from a person who was obligated – but failed – to remit sales tax.

The first requirement in § 144.150 is that the seller be a "person required to remit a tax." § 144.150.1. The Commission held that the Director's proof was inadequate on this point. But that holding is contrary to the Commission's own findings of fact.

The Commission unequivocally found that the prior owners of the Hooters restaurant were Springfield Wings and Hazzard-Burdick. App. A2. It also found that the restaurant filed sales tax returns under the number assigned to Springfield Wings. *Id*.; see also App A7. Combined, those facts are sufficient to make a prima facie case that Springfield Wings and Hazzard-Burdick were required to remit the tax.

The Commission confuses the issue by citing the sales tax application filed – after the sales transaction – by Hooters of Springfield. That application does list as a prior owner, "Arrow Restaurants, Inc." App. A15. But Arrow does not appear on the bill of sale. App. A11-14. And again, the Commission found that the owners were those on the bill of sale, Springfield Wings and Hazzard-Burdick. App. A2. The Commission did not find that

Arrow, despite its later listing on the Hooters of Springfield application, was a seller of the restaurant. A finding that Hooters of Springfield – for whatever reason – listed on a later form a different name as a seller does not change the Commission's finding. Nor could it logically do so, given the unequivocal language of the bill of sale. And to allow a unilateral statement on a later application to create a basis to avoid successor liability would open a door to abuse.

Springfield Wings and Hazzard-Burdick were, with regard to the Hooters restaurant in Springfield, persons required to remit tax. Thus Springfield Wings filed sales tax returns – albeit without the required payments. App. A2. And their sale of the restaurant while sales tax was still owing transferred the liability to the purchaser, provided the second requirement of § 144.150 was met.

1. Hooters of Springfield acquired the business that incurred the tax liability.

The second requirement in § 144.150 is that the person "sell all or substantially all of his or their business." § 144.150.1. There is no question here that Springfield Wings and Hazzard-Burdick sold all of the Springfield Hooters restaurant business to Hooters of Springfield. The question posed by the Commission was whether the Director, by virtue of the bill of sale, met her burden of showing that Springfield Wings and Hazzard-Burdick had sold "all or substantially all of . . . . their business" to Hooters of Springfield.

The pertinent facts were beyond dispute. Even the Commission recognizes that Hooters of Springfield purchased all of the assets of the Springfield restaurant. *See* App.

A8. But according to the Commission, that Hooters of Springfield purchased "one particular restaurant at one particular address" is not enough. *Id*.

The Commission's analysis turns on its definition of "their business" in § 144.150.1. The Commission demanded evidence that the Springfield restaurant "constituted all or substantially all of the business or stock of goods of any of the possible sellers." *Id*. The Commission interpreted "their business," as used in § 144.150.1, to encompass *everything* that the seller has, not just a particular restaurant. Thus, according to the Commission, the Director's evidence could not be sufficient so long as there was a possibility that a seller "owned other restaurants or business enterprises." App. A8. The Commission cites neither authority nor logic to support that view.

That view is not required by any definition of "business." That term is not defined in the statute, nor elsewhere in the Missouri tax code. Its lay dictionary definition encompasses a broad range of interpretations. The most pertinent are: "a commercial or industrial enterprise" and "a place where such an enterprise is carried on." Webster's Third New International Dictionary (1993), p. 302. Both definitions suggest a discrete operation. The legal dictionary definition is parallel: a business is "a commercial enterprise carried on for profit." Black's Law Dictionary (7th ed. 1999), p. 192. The Commission made no finding inconsistent with the obvious conclusion that the Springfield restaurant was a discrete operation – either an "enterprise" or a "place where such an enterprise is carried on." Yet the Commission insisted that the Director prove that the restaurant was Springfield Wings' and Hazzard-Burdick's *only* business. The dictionary definition may

permit "business" to be used in the sense of all commercial enterprises owned by a particular company, or of an organization that brings together individual enterprises such as restaurants. But it certainly does not demand it.

And using it in that broad sense is illogical in this context, for at least four reasons.

The first comes from the essential nature of the sales tax. The state is not taxing a person's entire effort, as income tax does. It is taxing specific transactions – that take place at a discrete location – here, the Springfield restaurant. It is only because Springfield Wings and Hazzard-Burdick made their sales at a location within the State of Missouri that the State can tax those sales. The logical dictionary definition of "business" in the context of Missouri sales tax is the place of commerce where the taxable sales occurred.

The second comes from the practicalities of the sales tax system. To obtain a tax identification number, a person submits an application that includes both the nature of the "business activity, stating the major products sold and/or services provided," and the "physical location" of the business. App. A14. In fact, the applicant must specify if there are "additional locations" where sales for this business will take place. *Id*. The entire scheme – in keeping with the location-based nature of sales tax – is aimed at identifying sales by seller and location. The Director, then, is not given information about the applicant's "business" in the broad sense in which the Commission used that term. Indeed, such information is entirely irrelevant to the collection of sales tax – unless or until there is a transfer, and even then only if the Commission's expansive view of "business" is correct.

The third comes from comparing § 144.150 with other uses of "business" in Missouri law. To define "business" broadly could dramatically change the meaning of some statutory provisions. For example, § 301.442 provides for the transfer of vehicle registration plates when "a business is sold by the owner thereof and as part of the sale the ownership of one or more commercial motor vehicles is transferred." Under the Commission's reading of "business," that provision would not apply – to create a hypothetical matching the facts here – to a vehicle that was used by and transferred in connection with the sale of the Springfield restaurant, unless the sellers sold every restaurant or other business they owned. Section 469.427, RSMo. Supp. 2002, addresses the sale of "assets of the business" by a trustee. Under the Commission's definition of "business," the trustee could sell an entire restaurant yet not be required to "account for the net amount received" if there were additional restaurants or other businesses in the trust.

That a "business" requires some physical location finds further support in the motor fuels tax chapter, which requires the Director to issue "a license for the principal place of business" (§ 142.899.1) and bars its transfer to "another place of business" (§ 142.899.3) – then shortens the reference to "the business" when speaking of the surrender of the license to the Director (§ 142.899.7). That statute continues using the shortened form in the provision that parallels § 144.150.1 and .2:

> Whenever any person licensed to do business under this chapter discontinues, sells, or transfers the business, the licensee shall immediately notify the director in writing of the discontinuance, sale, or transfer. . . . The licensee shall be liable for

all taxes, interest, and penalties that accrue or may be owing and any criminal liability for misuse of the license that occurs prior to the cancellation of the license.

§ 142.899.7. The statute ties "the business" to the establishment being taxed, *i.e.*, the enterprise that is selling fuel. It matters not at all that the motor fuel vendor may continue in the fuel sales business elsewhere under a different license. And it should not matter here whether Springfield Wings and Hazzard-Burdick operate other restaurants – or other enterprises – in Missouri or elsewhere.

The fourth comes from the actions of Hooters of Springfield itself: it obtained the Springfield restaurant through a bill of sale that repeatedly described it as "the business." App. A11-12.

The Commission's reading would lead to rather peculiar results. If Springfield Wings and Hazzard-Burdick had other restaurants, even outside Missouri, Hooters of Springfield would be off the hook based merely on the size of the seller's operations – regardless of the size or solvency of those operations. In fact, a buyer and seller would have a perverse incentive to have the buyer purchase some cheap but insolvent business before closing on the restaurant sale, because the subsequent failure to sell that business as part of the package would remove the sale from the scope of § 144.150.

Again, the only logical reading of "business" in the sales tax context of § 144.150 is the enterprise where the sales tax liability was incurred. And here, that was the Springfield restaurant that Hooters of Springfield purchased, as the Commission found, from Springfield Wings and Hazzard-Burdick.

CONCLUSION

For the reasons stated above, the court should reverse the decision of the Commission and hold that the Director met her burden of showing that Hooters of Springfield was subject to successor liability under § 144.150.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor
Missouri Bar No. 45631
Supreme Court Building
207 West High Street
Jefferson City, MO 65102
(573) 751-3321
(573) 751-0774 (facsimile)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the foregoing were mailed, postage prepaid, via United States mail, on this 8th day of October, 2003, to:

Mr. A. J. Block, Jr.
Fine & Block
2060 Mt. Paran Rd., NW
Atlanta, GA 30327

_____
James R. Layton

CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 2,859 words. The undersigned further certifies that the disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

_____
James R. Layton

APPENDIX