No. SC94260

In the Supreme Court of Missouri

TATSON, LLC d/b/a POWERHOUSE GYM OF JOPLIN,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

Petition For Judicial Review
From The Administrative Hearing Commission
The Honorable Sreenivasa Rao Dandamudi, Commissioner

APPELLANT'S BRIEF

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ATTORNEYS FOR RESPONDENT
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JURISDICTIONAL STATEMENT

This case is a petition for judicial review from an Administrative Hearing Commission (AHC) decision, issued under the authority of § 621.050, RSMo 2000, finding that Respondent, Powerhouse Gym of Joplin (Powerhouse) was not liable for a sales tax assessment on certain monthly fees it charged.

The issue is whether Powerhouse is liable for an assessment of sales tax it failed to collect on monthly fees Powerhouse charged a company for access to, and use of, Powerhouse's fitness facility so that this company could sell and provide personal-training services to Powerhouse's paying members. Although the AHC found that Powerhouse was a place of recreation, it nevertheless determined that Powerhouse was not liable for the sales tax assessment because the monthly fee Powerhouse collected from the company was not a "taxable service at retail" under § 144.020.1(2).[1] This subsection imposes a sales tax "upon sellers…rendering a taxable service at retail," which specifically includes any "fees paid to or in any place of amusement, entertainment or recreation." Resolution of this case, therefore, involves the construction of a state revenue law.

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[1] All sectional references are to the 2013 cumulative supplement to the Revised Statutes of Missouri, unless otherwise indicated.

Jurisdiction is proper in this Court because this appeal involves the construction of one or more revenue laws of this state. MO. CONST. art V, § 3; § 621.189.

STATEMENT OF FACTS

Powerhouse owned a building out of which it operated a fitness facility equipped with a full selection of strength and cardiovascular equipment.[2] Only persons with paid memberships could use the facility.[3] Membership fees were charged on a monthly basis under one- or two-year contracts.[4] Powerhouse paid sales tax on the membership fees it collected from its members.[5]

Powerhouse did not itself provide personal-training services to its members.[6] To avoid the administrative burdens of maintaining its own staff of personal trainers, Powerhouse entered into an agreement with a company called Atlanta Fitness d/b/a Custom Built (Custom) to provide personal-training services to Powerhouse's members.[7] Custom used its own employees,

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[2] (Tr. 7, 24).

[3] (Tr. 8, 13).

[4] (Tr. 8).

[5] (Tr. 9, 13, 37).

[6] (Tr. 11–12, 16).

[7] (Tr. 10–13, 18).

over whom Custom had sole control, to provide these services.[8] Under the agreement, Powerhouse also allowed Custom to use an office within Powerhouse's facility.[9]

Powerhouse and Custom discussed two payment options to compensate Powerhouse for giving Custom access to Powerhouse's facility and members so that Custom could sell and provide personal-training services.[10] One option was for Custom to pay a percentage of the personal-training income Custom received from charges it made to Powerhouse's members for personal-training services.[11] The other option was for Custom to pay a flat fee of $6,000 per month.[12] Powerhouse chose the flat-fee option in part to insure a steady stream of income.[13]

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[8] (Tr. 11, 15–16, 22).

[9] (Tr. 13, 15, 19). Although Custom had "exclusive access" to this office, Custom's employees could only use it during Powerhouse's regular business hours; Custom did not have a key to Powerhouse's building. (Tr. 20–21).

[10] (Tr. 18–19, 30–31).

[11] (Tr. 30).

[12] (Tr. 14, 18–19, 30).

[13] (Tr. 30).

The agreement allowed Custom to sell Powerhouse's paying members services such as personal training, fitness programs, and nutritional counseling.[14] Custom's personal trainers used the facilities and equipment in Powerhouse's fitness center to service their clients.[15] They would also use Powerhouse's strength and cardiovascular equipment to instruct or coach Powerhouse's members on the use of that equipment.[16]

The agreement allowed Custom to sell and provide personal-training services only to Powerhouse's members.[17] Custom entered into their own agreements or contracts with Powerhouse's members; Powerhouse had no control over these arrangements and received no revenue directly tied them.[18]

Powerhouse did not collect and remit sales tax on the monthly fees paid to it by Custom.[19] The Director of Revenue issued an assessment against Powerhouse for unpaid sales tax of $12,207 on the monthly fees charged

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[14] (Tr. 13–14).

[15] (Tr. 15, 21, 24).

[16] (Tr. 21).

[17] (Tr. 13–17).

[18] (Tr. 14, 17).

[19] (Tr. 29).

during the audit period of October 1, 2008, to November 30, 2010.[20] Powerhouse challenged that assessment, and it argued during the AHC hearing that the monthly fee was merely for the rental of real property in the form of the office Custom was allowed to use in Powerhouse's facility.[21]

The Administrative Hearing Commission (AHC) found that the monthly-fee arrangement gave Custom access to Powerhouse's facility during normal business hours, which included the use of an office, so that Custom could market, sell, and provide personal-training services to Powerhouse's members.[22] Although the AHC found that Powerhouse was a place of recreation and had charged a fee to Custom, it nevertheless determined that Powerhouse was not liable for the sales-tax assessment because it was neither selling nor renting tangible personal property, nor was it providing a taxable service at retail to Custom.[23]

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[20] (Tr. 9, 29, 36; L.F. 6).

[21] (Tr. 42).

[22] (L.F. 5–6, 9).

[23] (L.F. 5–7).

POINT RELIED ON

The AHC erred in determining that the monthly fees Powerhouse collected from Custom were not taxable under § 144.020.1(2) (the amusement tax), which imposes a sales tax on all fees paid to or in a place of amusement, entertainment, or recreation, because this decision was unauthorized by law and unsupported by competent and substantial evidence in that Powerhouse operated a fitness facility (a place of recreation) and charged a monthly fee to Custom that allowed Custom and its employees access to Powerhouse's facility for the purpose of selling and providing personal-training services to Powerhouse's members, which included Custom's use of Powerhouse's facility and fitness equipment to provide those services.

Michael Jaudes Fitness Edge v. Director of Revenue,

248 S.W.3d 606 (Mo banc. 2008);

Wilson's Total Fitness v. Director of Revenue,

38 S.W.3d 424 (Mo. banc 2001);

Blue Springs Bowl v. Spradling,

551 S.W.2d 596, 599 (Mo. banc 1977);

L & R Distrib., Inc. v. Missouri Dep't of Revenue,

529 S.W.2d 375, 378 (Mo. 1975);

Section 144.020.1;

Section 144.010.1(10).

ARGUMENT

The AHC erred in determining that the monthly fees Powerhouse collected from Custom were not taxable under § 144.020.1(2) (the amusement tax), which imposes a sales tax on all fees paid to or in a place of amusement, entertainment, or recreation, because this decision was unauthorized by law and unsupported by competent and substantial evidence in that Powerhouse operated a fitness facility (a place of recreation) and charged a monthly fee to Custom that allowed Custom and its employees access to Powerhouse's facility for the purpose of selling and providing personal-training services to Powerhouse's members, which included Custom's use of Powerhouse's facility and fitness equipment to provide those services.

Although Powerhouse operated a fitness center, which made it a place of recreation under the sales tax law, and charged a monthly fee to Custom so that Custom and its employees could use Powerhouse's facility and equipment to provide personal-training services to Powerhouse's members, the AHC nevertheless determined that those fees were not subject to sales tax because they did not constitute "sales at retail." This decision is contrary to the plain language of the taxing statute, which specifically defines a "sale

at retail" to include *any* fee or charge paid to or in any place of recreation. Since Powerhouse was a place of recreation and had charged a fee to Custom that allowed Custom to use the fitness facility to provide personal-training services to Powerhouse's members, that fee was subject to sales tax.

A. Standard of Review.

"This Court reviews the AHC's determination of issues of law de novo." *Michael Jaudes Fitness Edge v. Director of Revenue*, 248 S.W.3d 606, 608 (Mo banc. 2008) (*Fitness Edge*). "By contrast, this Court defers to the AHC's findings of fact." *Id.* "The AHC's decision is affirmed if supported by competent and substantial evidence upon the whole record." *Id.*

B. Sales tax applies to all fees paid to or in a place of recreation.

Missouri law authorizes a tax "upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state." Section 144.020.1. The legislature intended to broadly tax all sales of tangible personal property or taxable services and to identify specific tax rates applicable to particular types of sales: "Considered in context, the statute as a whole evinces a legislative intent to tax all sellers for the privilege of selling tangible personal property or rendering a taxable service." *J.B. Vending Co. v. Director of Revenue*, 54 S.W.3d 183, 188 (Mo. banc 2001). Section 144.020.1 divides sales into nine

categories relating to sales of either personal property or taxable services and applies a specific tax rate for each category. *Id.* One of these categories is the so-called amusement tax, which imposes:

> 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).

Authority for this tax is also found in the statutory definition of "sale at retail," which includes "[s]ales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events." Section 144.010.1(10). Sellers are required to pay sales tax on their gross receipts, which is composed of "the total amount of the sale price of the sales at retail." Section 144.021.

This Court has held that the "simple general language" of the amusement tax "is not limited or qualified in any way." *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 599 (Mo. banc 1977). "It applies to *all* such fees paid to or in" places of amusement. *Id.* (emphasis in original); *see also Bally's LeMan's Family Fun Centers, Inc. v. Director of Revenue*, 745 S.W.2d 683, 685 (Mo. banc 1988) ("Section 144.020.1(2)…expresses a legislative intent to tax all fees paid in places of amusement….").

Consequently, to find a transaction taxable under the amusement tax only "two elements are essential, —that there be fees or charges and that they be paid in or to a place of amusement." *L & R Distrib., Inc. v. Missouri Dep't of Revenue*, 529 S.W.2d 375, 378 (Mo. 1975); *see also Fitness Edge*, 248 S.W.3d at 609. A "location in which amusement or recreational activities 'comprise more than a *de minimis* portion of the business activities' occurring at that location is considered a place of amusement or recreation" under the sales tax law. *Fitness Edge*, 248 S.W.3d at 609 (quoting *Spudich v. Director of Revenue*, 745 S.W.2d 677, 682 (Mo. banc 1988) and *Wilson's Total Fitness v. Director of Revenue*, 38 S.W.3d 424, 426 (Mo. banc 2001)).

C. The monthly fees Powerhouse collected from Custom were subject to sales tax.

No one disputes that Powerhouse was a place of recreation under Missouri's sales tax law. Moreover, the $6,000 monthly fee Powerhouse charged Custom involved much more than the simple rental of office space. The AHC found that Custom paid the monthly fee to gain access to Powerhouse's fitness center so that it could sell and provide Powerhouse's members with personal-training services. This included the use by Custom and its employees of Powerhouse's facility and equipment in providing those services. Consequently, since the record shows that Powerhouse was a place

of recreation and charged a monthly fee to Custom that allowed Custom to use Powerhouse's fitness center to sell and then provide personal-training services to Powerhouse's members, the monthly fees Powerhouse charged were taxable under the amusement tax the same as any other fee Powerhouse charged for the use of its fitness facility. *See Wilson's*, 38 S.W.3d at 426 ("Athletic and exercise or fitness clubs are places of recreation for the purposes of section 144.020.1(2), and the fees paid to them are subject to sales tax."); *see also Fitness Edge*, 248 S.W.3d at 609–10.

But rather than applying the plain and unambiguous language of the amusement tax, the AHC engaged in an unnecessary and unwarranted exercise of statutory construction to find that Powerhouse's monthly fee was not taxable since it did not represent a "sale at retail."[24] There are at least two problems with the AHC's approach.

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[24] The AHC's decision in this case seemingly conflicts with its decision in *GM Fitness, Inc. v. Director of Revenue*, No. 06-1071 RS (Administrative Hearing Comm'n, June 20, 2007). In *GM Fitness*, the AHC determined that fees paid to a fitness center by personal trainers who were providing personal-training services to the fitness center's members were subject to the amusement tax. The AHC does not mention *GM Fitness* in its decision in this case.

First, the definition of "sale at retail" in § 144.010.1 and the use of that phrase in the introductory language of § 144.020.1 demonstrate that the payment of any fee to or in a place of recreation is, by definition, a "sale at retail" under the amusement tax. In other words, no further analysis is required to determine whether fees or charges paid to or in places of amusement, entertainment, or recreation constitute sales at retail under the amusement tax. This Court has consistently held, as evidenced by the cases outlined above, that only two showings are required to establish whether a transaction is subject to the amusement tax: (1) whether the taxpayer is a place of amusement, entertainment, or recreation; and (2) whether there was a charge or fee paid to or in such a place. The AHC's attempt to analyze whether a specific fee or charge is also a "sale at retail" is unnecessary since the statute already establishes that such a fee or charge constitutes a "sale at retail." The AHC's conclusion that the fee charged in this case was not a "sale at retail" is thus contrary to the plain language of the statute.

Second, because this statutory language is plain and unambiguous, the law precludes the AHC or a court from construing it to mean something other than its specific wording provides. "The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in the

statute in their plain and ordinary meaning." *Blue Springs Bowl*, 551 S.W.2d at 598. When "the [statutory] language is clear and unambiguous, there is no room for construction. *Metro Auto Auction v. Director of Revenue*, 707 S.W.2d 397, 401 (Mo. banc 1986). The AHC's creation of an ambiguity in what constitutes a sale at retail under the amusement tax, despite the statute's plain language, was unauthorized by law. "There is no basis to resort to statutory construction to create an ambiguity where none exists." *Baldwin v. Director of Revenue*, 38 S.W.3d 401, 406 (Mo. banc 2001).

The AHC determined that the fee Custom paid was not subject to sales tax because it did not "inure[ ] to the benefit of the patron."[25] This has never been part of the analysis under the amusement tax, and the AHC's creation of it as a requirement in this case simply muddles an otherwise simple and predictable test for both taxpayers and the Director.

But even under the AHC's newly minted—but unauthorized—addendum to the test used by this Court for the past 30 years, the record shows that both Custom and Powerhouse's membership benefitted from the arrangement. Custom benefitted by having access to Powerhouse's members and the use of Powerhouse's facility and fitness equipment to sell and provide

[25] (L.F. 5).

personal-training services. Powerhouse's membership benefitted by having access to personal-training services performed on site since Powerhouse itself did not provide them. Powerhouse itself obviously benefitted by receiving a fee and having Custom provide personal-training services to its members, who apparently wanted such services, rather than having to undertake the task and expense of offering its own personal-training services.

If the AHC's decision were to stand, it would create unnecessary confusion in the administration of the sales-tax law. The statute clearly provides that any fee or charge made in or to a place of recreation is subject to sales tax. The AHC's attempt to create another layer of confusing analysis on what the phrase "sale at retail" actually means is not only inconsistent with the statutory language, it is also unworkable and would lead to chaotic results. The statutory language provides a predictable method of determining what transactions are taxable under the amusement tax. The AHC's decision in this case departs from that statutorily-mandated approach and is inconsistent with the General Assembly's intent as gleaned from the statute's plain language. The AHC's decision in this case should be reversed.

CONCLUSION

The AHC's decision setting aside the sales-tax assessment in this case was unauthorized by law and not supported by substantial and competent evidence upon the record. That decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 2,849 words, excluding any uncounted material identified by rule, as determined by Microsoft Word 2007 software; and that a copy of this brief was sent through the electronic filing system on September 17, 2014, to:

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