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 REPLY BRIEF

CHRIS KOSTER
Attorney General

EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-4129
Fax: (573) 751-5391
evan.buchheim@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

ARGUMENT 3

CONCLUSION 7

CERTIFICATE OF COMPLIANCE 8

TABLE OF AUTHORITIES

Statutes

Section 144.010.1(11), RSMo Cum. Supp. 2013 5

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.

Powerhouse contends that the monthly-fee arrangement between it and Custom was nothing more than the mere rental of office space and that the AHC made this determination in setting aside the assessment. Although the AHC's findings of fact refer to the payment of a $6,000 "rental fee," (L.F. 5–6), the AHC's decision did not rest upon this fee being solely for the rental of real property. Instead, the AHC determined that the fee Custom paid to Powerhouse was not a taxable sale or service at retail under the sales tax

law. (L.F. 8–10). The AHC's decision contains no express legal determination that the monthly fee was solely for the rental of real property. Even if it had made such a legal determination, that ruling would be subject to de novo review by this Court.

The record shows that the $6,000 monthly fee Powerhouse charged Custom was for something more than the 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. (L.F. 5). This included the use by Custom and its employees of Powerhouse's facility and equipment in providing those services.

The amount of the monthly fee itself—$6,000—is inconsistent with idea that Custom was merely renting an office inside Powerhouse's Joplin facility. In addition, Custom did not have a key to the building in which their office was located, and its employees could only access this office during Powerhouse's normal business hours. (Tr. 20). These attributes cut against Powerhouse's claim that the fee represented only the rental of office space. Although the Director's auditor referred to the amount in question as "lease income" or "sublease income," this was done because that was how Powerhouse described the fee. (Tr. 40). The auditor testified that simply

because the word lease or sublease was used to describe the fee did not define the transaction as the mere rental of real property. (Tr. 39).

Powerhouse also contends that whether a transaction is a sale at retail is a question of commercial custom and practice and not of sales tax law. Resp. Brief 10. But the General Assembly has defined the phrase "sale at retail" in the sales tax law to provide clear guidance to the Director and taxpayers alike in determining which transactions are subject to sales tax and which are not. Allowing business practices, which may vary from business to business and place to place, to define the taxability of a transaction would create undue confusion and introduce unpredictability to the tax law. This is precisely what the General Assembly sought to avoid by defining the phrase "sale at retail" and incorporating that definition into a comprehensive sales tax act.

Finally, Powerhouse contends that the fee it charged Custom constituted a "wholesale," not a retail, transaction that was not subject to sales tax. This argument, however, finds no support in the sales tax law. Although the phrase "sale at retail" applies to the transfer of tangible personal property for "use or consumption and not for resale in any form as tangible personal property," § 144.010.1(11), RSMo Cum. Supp. 2013, this provision does not apply to the transaction between Powerhouse and Custom because no

tangible personal property was involved. Moreover, the General Assembly specifically included within the definition of "sale at retail" any "charges and fees to or in places of amusement, entertainment, and recreation…." *Id.*

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,

CHRIS KOSTER
Attorney General

/s/ Evan J. Buchheim
EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-4129
Fax: (573) 751-5391
evan.buchheim@ago.mo.gov

ATTORNEYS FOR APPELLANT
DIRECTOR OF REVENUE

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 746 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 November 13, 2014, to:

Paul A. Boudreau
312 East Capitol Avenue
P.O. Box 456
Jefferson City, Missouri 65102

/s/ Evan J. Buchheim

EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-4129
Fax (573) 751-5391
evan.buchheim@ago.mo.gov

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