No. SC95102

In the
Supreme Court of Missouri

MISS DIANNA'S SCHOOL OF DANCE, INC.,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

Petition For Judicial Review
From The Administrative Hearing Commission
The Honorable Karen A. Winn, Commissioner

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT
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JURISDICTIONAL STATEMENT

Appellant, Miss Dianna's School of Dance, Inc. (Miss Dianna's), filed a petition for judicial review from an Administrative Hearing Commission (AHC) decision, issued under section 621.050, RSMo 2000,[1] determining that Miss Dianna's was liable for a sales-tax assessment on the fees it charged for dance classes and on its sales of costumes and other personal property.

The issue is whether Miss Dianna's was a place of recreation, thus making the fees it charged for dance classes a "taxable service at retail" under section 144.020.1(2). This subsection imposes a sales tax "upon sellers…rendering a taxable service at retail," which includes any "fees paid to or in any place of amusement, entertainment or recreation." *Id.* The retail sale of tangible personal property is taxable under subdivision 1 of this subsection. Resolution of this case, therefore, involves the construction of a state revenue law.

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.

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[1] All further sectional references are to the 2013 Cumulative Supplement of the Revised Statutes of Missouri (2000), unless otherwise indicated.

STATEMENT OF FACTS

Miss Dianna's, which offered dance classes to both children and adults, charged its students fees to participate in those classes.[2] Miss Dianna's founder, who was also its corporate president and sole shareholder, along with her two children who were employed as dance instructors and a few student teachers, taught the classes.[3] Miss Dianna's owner believed that Miss Dianna's, which was a member of the National Association of Dance Schools, was an "institute of learning," though she conceded that her students got "recreation" and had fun while learning to dance.[4]

Each person wanting to participate in a dance class was required to sign up in advance and be scheduled to attend the class.[5] Participants were required to wear clothing that enabled them to move easily and that also permitted instructors to view the dancer's muscles.[6] Participation in the

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[2] L.F. 73, 75; Tr. 37, 42–43, 64.

[3] L.F. 73.

[4] L.F. 73; Tr. 39–40, 50.

[5] Tr. 58.

[6] L.F. 74.

dance class required the learning of a dance technique from an instructor.[7] Miss Dianna's bought costumes for its dance students from a third party and then sold the costumes directly to its students.[8]

Miss Dianna's students could also audition for competition-level classes after they had completed a pre-competition class.[9] Students in the competition-level classes participated in two dance competitions per year.[10] Miss Dianna's collected the entry fees for these competitions and for performance "conventions" from the students' parents, and it used that money to pay the entry fees for the competition.[11]

Dance classes were offered in tap, jazz, ballet, tumbling, hip hop, salsa, and ballroom dancing.[12] Miss Dianna's website described itself as a "dance studio focused on performance quality in a fun and family atmosphere."[13] It

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[7] Tr. 45.

[8] L.F. 74.

[9] Tr. 41–42, 59–60.

[10] Tr. 67.

[11] L.F. 74; Tr. 55, 57.

[12] L.F. 73; Tr. 25–26.

[13] L.F. 73.

also stated that that there were classes for all ages in a "fun and family friendly atmosphere" and that there was a class that "will make you and your family happy."[14] One brochure stated that the classes were "full of energy, fun, and structure," and a brochure for a dance class entitled "Mommy and me," described it as a "fun" dance class for mom and child.[15]

In 2012, the Director of Revenue audited Miss Dianna's, which had not filed a sales or use tax return, for the tax periods beginning January 2007 until December 2011.[16] The Director relied on Miss Dianna's profit-and-loss statements in determining whether any tax was owed.[17] The Director determined that Miss Dianna's owed unpaid sales tax on the following: dance-class fees; the money it collected for competition and convention entry fees; the income it received from a school district for teaching semester

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[14] L.F. 73.

[15] Tr. 60.

[16] L.F. 75.

[17] L.F. 75. Since Miss Dianna's provided only a partial statement for 2011 covering the first 5 months of the year, the income for the remainder of the year was estimated by taking the income shown on the partial statement, dividing it by 5, and then multiplying that total by 12. L.F. 75; Tr. 19–20.

classes; the amount it charged for the sale of costumes; rental fees it received from third-party exercise and music instructors; and other unidentified miscellaneous sales it had made.[18] The Director also assessed unpaid use tax on Miss Dianna's out-of-state purchases of floor mats and a portable-wall system.[19]

The Director later withdrew the assessment for the tax periods 2007, 2008, and 2009. After a hearing, the AHC upheld the Director's assessment of sales tax on the dance-class fees Miss Dianna's charged in 2010 and 2011 because they were charges paid to a place of recreation.[20] The AHC also determined that the amounts Miss Dianna's charged for the costumes it sold were taxable as a sale at retail of tangible personal property.[21] Finally, the AHC determined that Miss Dianna's school-district income, the entry fees it

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[18] L.F. 75–76.

[19] L.F. 76–77.

[20] L.F. 78–80.

[21] L.F. 81. The AHC also determined that Miss Dianna's owed use tax on its out-of-state purchases. (L.F. 83), which Miss Dianna's does not challenge.

collected and forwarded for students to participate in competitions and conventions, and its rental income were not subject to sales tax.[22]

[22] L.F. 81–82.

ARGUMENT

The AHC did not err in determining that Miss Dianna's owed the assessed sales tax on its dance-class fees and costume charges because Miss Dianna's was a "place of recreation."

A. Standard of review.

In reviewing the AHC's decision, this "Court defers to the AHC's findings of fact" and "views the evidence 'in a light most favorable to the [AHC's] decision, together with all reasonable inferences that support it.'" *Michael Jaudes Fitness Edge v. Director of Revenue*, 248 S.W.3d 606, 608 (Mo banc. 2008) (*Fitness Edge*) (quoting *Kanakuk–Kanakomo Kamps, Inc. v. Director of Revenue*, 8 S.W.3d 94, 95 (Mo. banc 1999)). The AHC's determination on issues of law, on the other hand, are reviewed de novo." *Id.* "The AHC's decision is affirmed if supported by competent and substantial evidence upon the whole record." *Id.*

B. Sales tax applies to 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." § 144.020.1. The legislature intended to broadly tax all sales of tangible personal property or taxable services: "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 tangible 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;

§ 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." § 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." § 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. Miss Dianna's was a place of recreation.

The issue here is whether Miss Dianna's was a place of recreation under the sales tax law. Under well-settled Missouri law, a location is a place of recreation if more than a de minimis portion of its income is derived from recreational activities. The record shows that the majority of Miss Dianna's

income was derived from its dance-class fees.[23] In addition, Miss Dianna's costume sales were related to these dance activities.[24] In determining whether Miss Dianna's is a place of recreation, this Court must first consider whether dancing is a recreational activity.

Because the words *amusement*, *entertainment*, and *recreation* as used in the sales tax law are not statutorily defined, this Court has relied on dictionary definitions. *Amusement* has been defined as a "pleasurable diversion: entertainment." *Spudich*, 745 S.W.2d at 680 (citation and internal quotation marks omitted). *Entertainment* "means something that diverts, amuses, or occupies the attention agreeably." *Id. Recreation* "is a means of getting diversion or entertainment." *Id.* It has also been defined as "refreshment of the strength and spirits after toil: DIVERSION, PLAY…a means of getting diversion or entertainment." *Columbia Athletic Club v.*

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[23] L.F. 75–76.

[24] The AHC determined that Miss Dianna's costume sales were taxable under subdivision 1 of section 144.020.1 as sales at retail of tangible personal property. (L.F. 81). But Miss Dianna's point relied on claims that the AHC erroneously determined that the costume fees were subject to the amusement tax, which is contained in subdivision 2 of that section.

Director of Revenue, 961 S.W.2d 806, 814–15 (Mo. banc 1998) (Benton, C.J., dissenting) (citation omitted) (emphasis in original). The word *dance* has been defined as "[t]o *move* rhythmically to music, using prescribed or improvised steps and gestures." AMERICAN HERITAGE DICTIONARY 364 (2d college ed. 1985) (emphasis added).

In determining whether a facility is recreational, "a court must consider how the facility is viewed within normal contemplation." *Kanakuk*, 8 S.W.3d at 97; *see also Blue Springs Bowl*, 551 S.W.2d at 598 (considering whether a location is a place of amusement "within normal contemplation").

When viewed within normal contemplation, dancing is a recreational activity. If this case involved a dance hall or other facility with a dance floor and music where people paid to dance, there would be little dispute that the fees charged to participate in that activity were subject to the amusement tax. Miss Dianna's class descriptions not only stress the physical aspects of each dance class, but also emphasize how "fun" the classes are.[25] The physical demands of dancing, especially in some of Miss Dianna's competitive classes, are no less than that required for most exercising. If athletic, exercise, and fitness clubs are places of recreation, as this Court held in *Wilson's* and

[25] Petitioner's Ex. 2.

Fitness Edge, then dance studios that charge fees for dance classes involving a wide range of physical activity are taxable as well. *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. Moreover, the record shows that Miss Dianna's dance classes were designed and promoted to be "fun" and enjoyable. In its brief, Miss Dianna's concedes that its dance students were getting exercise and recreation.[26] Its owner and founder testified that the dancers received a recreational benefit, and she hoped that they had fun while participating in the classes.[27]

Although Miss Dianna's cannot escape the fact that it was providing a recreational activity, it instead offers several arguments in an effort to demonstrate that it was not a place of recreation. Miss Dianna's primary argument on this score is that it was not a place of recreation, but merely a "learning institute" whose purpose was to teach dance. Similar arguments were rejected by this Court in *Kanakuk* and *Fitness Edge*.

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[26] App's Brief, p. 21–22.

[27] Tr. 39–40.

In *Kanakuk*, the taxpayer, an organization that ran summer camps for children, argued that while its campers participated in sports and other recreational activities, the purpose of the camp was to provide training and instruction.[28] *Kanakuk*, 8 S.W.3d at 97. In rejecting this claim, this Court noted that the presence of instructors did not eliminate the recreational nature of the camps:

> [T]he presence or absence of skilled coaching during the performance of sports activities does not change the nature or purpose of the camps. Coaching may change the skill level of the participants but, by itself, it does not change the primary purpose of the activities from athletic to academic.

Id. at 98.

In *Fitness Edge*, the taxpayer argued that it was not a place of recreation since its customers' exercise was regulated by a customized exercise program and directed by a personal trainer. *Fitness Edge*, 248 S.W.3d at 610. This Court found that merely because the recreational activity was structured did not affect the taxability of the fees charged by the fitness center because the

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[28] One of those recreational activities in which the campers received instruction was dance. *Id.* at 96.

amusement tax "draws no distinction between whether a person exercises pursuant to a plan of her own devising or under the immediate and direct supervision of a fitness trainer." *Id.* at 610. The same is true for a dance studio that directs the recreational act of dancing as part of a class or provides instruction to individual dancers.

In a related argument, Miss Dianna's contends that its "purpose" was not to provide amusement or recreation for its dance students but to teach them.[29] Although Miss Dianna's "tries mightily to avoid using the word 'primarily' when describing the purpose" of its facility, its argument tacitly relies on the now discredited primary-purpose test. *Id.* at 609; s*ee also Wilson's*, 38 S.W.3d at 426 (overruling *Columbia Athletic Club* and abandoning the primary-purpose test). Moreover, in several cases this Court has held that merely because an activity can "partake of a dual nature"—one educational and the other entertaining or recreational—does not prevent it from being subject to the amusement tax. *Spudich*, 745 S.W.2d at 680; *Fostaire Harbor, Inc. v. Missouri Dept. of Revenue*, 679 S.W.2d 272, 273 (Mo. banc 1984) (fees for helicopter rides over historic sites were taxable despite the taxpayer's claim that the rides were educational); *Surrey's on the Plaza,*

[29] App's Brief, p. 21–22.

Inc. v. Director of Revenue, 128 S.W.3d 508, 510 (Mo. banc 2004) (fees for horse-drawn carriage rides were taxable even if the rides were also educational). *See also Bolivar Road News, Inc. v. Director of Revenue*, 13 S.W.3d 297, 302 (Mo. banc 2000) (rejecting an argument that fees paid to view adult videos in private booths were not taxable because the customers were simply previewing the videos for potential purchase).

Miss Dianna's claims it is not a place of recreation because its stated purpose is to provide dance instruction, not recreation. But the AHC is not required to accept the taxpayer's self-serving claim that it did not operate a place of recreation. *See Kanakuk*, 8 S.W.3d at 98 (holding that a taxpayer's "self-serving and subjective" claims that its sales are not taxable is "suspect" and may be rejected by the AHC); *Bolivar Road News*, 13 S.W.3d at 302 (the AHC could properly reject the taxpayer's "self-serving and subjective" claims that it did not operate a place of amusement).

Miss Dianna's also contends that even if it was a place of recreation, its fees were not subject to tax because the taxing statute requires that a location not only be a place of recreation, but that it also offer games and athletic events. *See* § 144.020.1(2) (taxing fees paid to or in "any place of amusement, entertainment or recreation, games and athletic events"). This argument relies on a construction of the taxing statute that was first

advanced in *Columbia Athletic Club*. There are at least three problems with Miss Dianna's statutory-construction argument.

First, *Columbia Athletic Club* was overruled by *Wilson's*. Moreover, in *Wilson's* the court did not adopt, and in fact appears to have tacitly rejected, the statutory-construction argument laid out in the *Columbia Athletic* plurality opinion by stressing that the taxing statute imposes a "sales tax upon fees paid to '*any place of amusement, entertainment or recreation.*'" *Wilson's*, 38 S.W.3d at 425 (emphasis in original).

Second, the construction of the taxing statute in Part II of the *Columbia Athletic Club* opinion was joined by only two members of the majority. *Columbia Athletic Club*, 961 S.W.2d at 811. Two other judges in the majority concurred only in Part III, which applied the later rejected primary-purpose test. *Id.* Three judges joined in a dissenting opinion that relied on the history of the taxing statute and settled caselaw to refute any construction of the statute linking the word "recreation" with the words "games" and "athletic events." *Id.* at 811–14.

Third, no decision by this Court either before or after *Columbia Athletic Club* has adopted the construction of the statute urged by Miss Dianna's, and any effort to do so now would call into question decades of caselaw applying the now well-settled construction of the amusement tax.

Miss Dianna's final argument appears to be based on a theory of estoppel premised on the Director allegedly changing her position on the taxability of dance lessons without notice. Although at one time the Department of Revenue had a rule excluding amounts paid for lessons, including dance lessons, from tax, this rule was rescinded over 10 years ago. *See* 12 CSR 10-3.176 (rescinded Dec. 30, 2003).[30] During the AHC proceeding, Miss Dianna's counsel referred to a letter ruling the Director had issued in 2008 to a place of recreation (a health club) in which it was stated that fees charged by the health club for various lessons, including dance instruction, were not subject to sales tax.[31] But in its decision, the AHC noted that the 2008 letter ruling had been superseded by another letter ruling the Director issued in 2009 stating that "fees for dance lessons and personal training instruction were

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[30] This rule generally dealt with various aspects peculiar to places of amusement. One section of the rule provided: "Amounts paid for lessons, whether within or not within a place of amusement, are not subject to tax. Examples of those lessons or other nontaxable activities include dance, karate, gymnastic, piano and singing lessons, haircuts, shoe polishing and child care."

[31] L.F. 64–66; Tr. 9–10.

subject to sales tax."[32] In any event, Miss Dianna's cannot avoid a tax assessment by relying on a superseded 2008 letter ruling that was not issued to it. *See* § 536.021.10, RSMo Cum. Supp. 2013 (permitting the Department of Revenue to issue "letter rulings" subject to terms and conditions established by rule); 12 CSR 10-1.020(7) (stating that a letter ruling "shall apply only to the particular fact situation stated in the letter ruling request" and that the "letter ruling shall apply only to the applicant"). Finally, the assessment in this case applied only to the years 2010 and 2011. The Director withdrew Miss Dianna's sales-tax assessments for the years 2007, 2008, and 2009.[33]

Arguments suggesting that principles of estoppel should thwart otherwise lawful actions taken by the government are not well-received by courts. "As a general proposition, the doctrine of estoppel is not applicable to acts of a governmental body, and [it] has been jealously withheld and only sparingly applied against governmental bodies and public officials acting in their official capacity when necessary to prevent manifest injustice." *Bartlett & Co. Grain v. Director of Reven*ue, 649 S.W.2d 220, 224 (Mo. 1983). In *St. Louis Country Club v. Administrative Hearing Comm'n*, 657 S.W.2d 614 (Mo. banc

[32] L.F. 8 n.5.

[33] L.F. 76; Tr. 27.

1983), the taxpayer argued that the Director of Revenue was "estopped" from collecting assessed sales taxes based on a letter the Department of Revenue's former general counsel had sent the taxpayer saying the transactions were not subject to tax. *Id.* at 616. This Court rejected that argument because "the incidence of taxes is determined by law" and the "Director and his subordinates have no power to vary the force of a statute." *Id.* Moreover, the Director's employees could only "state the current policy of the Department" and could not "bind future Directors, or limit the state's right to collect taxes properly owing." *Id. See also Lynn v. Director of Revenue*, 689 S.W.2d 45, 48–49 (Mo. banc 1985) (rejecting the taxpayer's claim that the Director should be estopped from collecting back taxes on the ground that Department of Revenue employees had previously stated that the taxpayer's operations were exempt from sales tax); *May Dept. Stores Co. v. Director of Revenue*, 791 S.W.2d 388 (Mo. banc 1990) (holding that the "incidence of taxation is determined by statute and the Director has no power, through regulations or otherwise, to change the force of the law").

Miss Dianna's brief also refers to a recently enacted amendment to section 144.021 that took effect August 28, 2015. That amendment added two new sections relieving a taxpayer of liability for tax when the Director, the AHC,

or a court enters an order that "changes" the taxability of personal property or services and a reasonable person would not have expected the decision:

> If any item of tangible personal property or service determined to be taxable under the sales tax law or the compensating use tax law is modified by a decision or order of:
>
> (1) The director of revenue;
>
> (2) The administrative hearing commission; or
>
> (3) A court of competent jurisdiction;
>
> which changes which items of tangible personal property or services are taxable, and a reasonable person would not have expected the decision or order based solely on prior law or regulation, all affected sellers shall be notified by the department of revenue before such modification shall take effect for such sellers. Failure of the department of revenue to notify a seller shall relieve such seller of liability for taxes that would be due under the modification until the seller is notified. The waiver of liability for taxes under this subsection shall only apply to sellers actively selling the type of tangible personal property or service affected by the decision on the date the decision or order is made or handed down and shall not apply to any seller that has previously remitted tax on the tangible personal property or taxable services

subject to the decision or order or to any seller that had prior notice that the seller must collect and remit the tax.

§ 144.021.2 (as amended eff. Aug. 28, 2015).[34]

Although this amendment is mentioned in its brief, Miss Dianna's does not expressly argue that the amendment applies in this case. In any event, this amendment represented a substantive change in the law that went into effect well after the Director's tax assessment and the AHC's decision, and the legislature expressed no intent that the amendment should apply retroactively. "Statutes are generally construed to operate prospectively unless the legislature specifically provides that the statute have retroactive effect." *State Board of Registration for the Healing Arts v. Warren*, 820 S.W.2d 564, 565 (Mo. App. W.D. 1991) (holding that § 536.087, which allowed a prevailing party in certain administrative proceedings to recover attorney's fees, did not apply retroactively). *See also Wellner v. Director of Revenue*, 16 S.W.3d 352 (Mo. App. W.D. 2000) (holding that § 302.536, which allowed a driver whose license had been suspended to recover court costs and attorney's fees if a court later reversed the Department of Revenue's ruling, did not

[34] Available at http://www.moga.mo.gov/mostatutes/stathtml/14400000211.html.

apply retroactively). "Substantive laws are those which 'take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past.'" *Wellner*, 16 S.W.3d at 355 (quoting *Warren*, 820 S.W.2d at 566). The amendment to section 144.021, which imposes new obligations or duties on the Director, is a substantive law that applies only prospectively.

The AHC did not err in determining that Miss Dianna's was a place of recreation, that the dance fees it charged were subject to the amusement tax, and that it was liable for the Director's sales-tax assessment.

CONCLUSION

The AHC's decision was authorized by law and supported by substantial and competent evidence. This decision should be affirmed.

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 4,621 words, excluding any uncounted material identified by rule, as determined by Microsoft Word 2010 software; and that a copy of this brief was sent through the electronic filing system on November 23, 2015, to:

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