IN THE SUPREME COURT OF MISSOURI

No. SC95102

MISS DIANNA'S SCHOOL OF DANCE, INC.

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

From the Administrative Hearing Commission of Missouri
The Honorable Karen W. Winn, Commissioner

APPELLANT'S BRIEF

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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 the Appellant, Miss Dianna's School of Dance (Miss Dianna's), was liable for sales tax assessment on certain fees it charged to its students.

The issue is whether Miss Dianna's is liable for an assessment of sales tax it failed to collect for dance lessons and other fees paid to Miss Dianna's under § 144.020.1(2) RSMo. The AHC found that the fees collected by Miss Dianna's for dance lessons, along with numerous other fees it collected from its students, are fees paid to, or in, a place of recreation and are therefore subject to sales tax under § 144.020.1(2) RSMo. 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.

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 RSMo.

STATEMENT OF FACTS[1]

A. Procedural Statement.

Miss Dianna's filed a complaint on July 17, 2013, challenging the Director of Revenue's ("Appellant") assessment of sales tax from January 1, 2007 to December 31, 2010. Respondent filed an answer on August 23, 2013. The Administrative Hearing Commission ("AHC") convened a hearing on the complaint on August 6, 2014. On June 5, 2015 the AHC filed its Decision concluding Miss Dianna's was liable for sales tax in the amount of $23,378.97 and use tax in the amount of $605.96, plus interest at the statutory rate. Miss Dianna's filed its Petition for Review in this Court on July 1, 2015.

B. Factual Statement.

Miss Dianna's is a dance school located in Kansas City, Missouri.[2] Dianna Pfaff is the Director and sole shareholder of Miss Dianna's.[3] Ms. Pfaff started the business 40 years ago to teach the art of dance.[4] At all relevant times she has owned and operated Miss Dianna's as a dance school.[5] Since April 19, 2010, Miss Dianna's has been a

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[1] For purposes of this Appellate Brief, the transcript shall be referred to as "TR:__:__"; Petitioner's exhibits shall be PE ___; and the Respondent's exhibits shall be RE ___.

[2] (TR 36:4-36:6).

[3] (TR 35:2-35:6).

[4] (TR 35:11-35:13).

[5] (TR 35:2-35:6).

corporation organized under the laws of the State of Missouri and doing business in Kansas City, Missouri.[6] Prior to this date, Miss Dianna's operated as a limited liability company.[7] For the last 10 years, Miss Dianna's has been a member of the National Association of Schools of Dance.[8]

Miss Dianna's offers a range of dance classes from Modern Stretch, Pom Pom, Technique, Pointe/Pre-Pointe, Power-Tumble, Jazz, Tap, Ballet, Hip Hop, Jumps & Turns, Shining Lights, Beginning Competition, Tap Production, and Lyrical Production.[9] In each class, students learn a particular technique and style of dance.[10] Technique is taught for muscle development in order to accomplish the movement taught in Miss Dianna's dance classes.[11] Miss Dianna's students range from young children to adults.[12] Many of Miss Dianna's students continue dance throughout their lives and go on to receive dance scholarships in college and some continue to perform professionally.[13] Miss Dianna's employs three (3) dance instructors, including Ms. Pfaff; her daughter,

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[6] (TR 35:11-36:3).

[7] (TR 35:18-36:3).

[8] (TR 50:1-50:25).

[9] (TR 44:15-49:9; PE #2).

[10] (TR 45:9-45:21; TR 46:14-46:19; PE #2).

[11] (TR 46:14-46:19; PE #2).

[12] (TR 37:9-37:15).

[13] (TR 37:9-37:15; 47:24-48:5).

Marissa Clevenger; and her son, Alex Pfaff. Miss Dianna's also employs student teachers who assist the instructors.[14]

Miss Dianna's has Competition Classes which requires students to audition.[15] Students who make the Competition Class have a curriculum in which they must attend a minimum of one technique class per week and one ballet class.[16] It is also recommended that all students take tap, jazz, ballet, acrobats, and technique classes as well.[17] If students do not meet the requirements and complete the curriculum, they are not allowed to continue in the Competition Class.[18]

Miss Dianna's has a strict dress code.[19] All students are required to wear form fitting athletic attire so that the teacher can correct any individual muscle: leotard, black shorts, ballet shoes, and tan tights.[20]

During tax years 2010 and 2011, Miss Dianna's offered classes such as Zumba and Bootcamp Fitness Class.[21] These classes were taught by an independent third party

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[14] (TR 36:24-37:8).

[15] (TR 42:14-42:23; TR 59:17-59:22).

[16] (TR 41:18-43:19).

[17] (TR 41:18-43:19).

[18] (TR 41:18-43:19).

[19] (TR 43:20-44:6; PE #3).

[20] (TR 43:20-44:6; PE #3).

[21] (TR 48:17-48:24; TR 64:5-64:7; TR 77:6-77:16; PE #3; RE #C, E, F, G, H).

licensed instructor who paid rent to Miss Dianna's in order to use its facility to teach the class.[22] These classes were not performed by, nor was money ever collected by, Miss Dianna's.[23] Miss Dianna's marketing pamphlets also mention that Miss Dianna's offers classes like Kung Fu and Yoga.[24] However, these programs were never taught at Miss Dianna's facility due to lack of interest.[25]

Students pay on a per month basis for each type of class in which the student would like to attend.[26] Students must sign up for the class in advance and be on the schedule for that class.[27] Students may not come to the school and pay for the class that day nor are students allowed to attend a class they were not signed up for.[28]

Miss Dianna's organizes an annual performance for the parents of its students.[29] There are no ticket sales or fees charged to attend these performances.[30] The

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[22] (TR 48:17-48:24; TR 77:6-77:16).

[23] (TR 48:17-48:24; TR 77:6-77:16).

[24] (TR 48:20-49:4; TR 60:22-61:3).

[25] (TR 48:20-49:4; TR 60:22-61:3).

[26] (TR 42:24-43:3; TR 58:22-59:10; PE #3).

[27] (TR 58:22-59:10; PE #3).

[28] (TR 58:22-59:25; PE #3).

[29] (TR 44:7-44:14).

[30] (TR 44:7-44:14).

performance night is for the parents to see what their children have accomplished throughout the year.[31]

Miss Dianna's advertises that it offers such classes through pamphlets and other promotional materials.[32] The advertisements showcase the variety of classes offered with a brief description.[33] Although terms like "full of energy" and a "fun dance class" are used, Miss Dianna's advertisements and promotional material do not place great weight on "amusement", "entertainment", or "recreational" aspect, but rather on the technique being taught in the particular class.[34]

Miss Dianna's received a notice of assessment of unpaid sales tax from the Missouri Department of Revenue, Taxation Division (the "Department") all dated May 31, 2013.[35] These notices covered all four quarters from 2010 through 2011.[36] Pursuant to the Notices, the Miss Dianna's was assessed the following amounts of unpaid sales/use tax:

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[31] (TR 44:7-44:14).

[32] (TR 44:15-44:24; TR 60:1-61:3; TR 62:1-62:18; RE #C, E, F, G, H).

[33] (TR 44:15-44:24; TR 60:1-61:3; TR 62:1-62:18; RE #C, E, F, G, H).

[34] (TR 44:15-44:24; TR 60:1-61:3; TR 62:1-62:18; RE #C, E, F, G, H).

[35] (PE #5).

[36] (PE #5).

Quarter	Amount
01/01/2010-03/31/2010	$310.00
01/01/2010-03/31/2010	$3,928.23
04/01/2010-06/30/2010	$136.09
04/01/2010-06/30/2010	$3,900.57
07/01/2010-09/30/2010	$3,873.80
10/01/2010-12/31/2010	$3,847.03
10/01/2010-12/31/2010	$213.33
01/01/2011-03/31/2011	$3,708.18
04/01/2011-06/30/2011	$3,682.19
07/01/2011-09/30/2011	$3,656.21
10/01/2011-12/31/2011	$3,629.96[37]

In 2012, Miss Dianna's was selected for an audit by Respondent. The tax periods for the audit included January 2007 through December 2011.[38] Upon the conclusion of the tax audit, Respondent assessed sales and use tax for tax periods January 2007 through December 2011 of $73,927.75 (this amount includes sales tax of $73,276.21 and $651.54 of use tax).[39] Respondent filed a Motion to Withdraw Certain Assessments From Hearing and For Settlement Conference on July 25, 2014, wherein the Director abated the

[37] (PE #5).

[38] (TR 14:2-14:19).

[39] (TR 15:20-16:13; TR RE #A).

sales tax and statutory interest assessed for the tax periods from January 1, 2007 through December 31, 2009.[40] Therefore, for the purposes of this Appeal, only tax years 2010 and 2011 are in dispute. The amount at issue for the AHC was $23,235.09 for sales tax and $651.54 for use tax.[41]

In 2010, Miss Dianna's had the following types of income: lesson fees of $45,960.94, competitions of $15,533.10, costumes of $8,930.47, school district semester classes of $1,979.00, conventions of $3,618.00, retail of $3,435.65 and miscellaneous income of $346.75.[42] Ms. Adrienne Lewis, a supervising tax auditor for the Missouri Department of Revenue ("Lewis"), testified that these figures are from a partial year profit and loss statement.[43] Therefore, Respondent took an average per month income, and multiplied by 12 months, the estimated total income for 2010 was $79,807.20.[44]

Miss Dianna's collected money from parents for dance competitions, costumes for the students, and dance conventions.[45] This income is then used to pay for the competitions, costumes, and the conventions.[46] These items are collected from the

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[40] (TR 27:10-27:20; TR 29:9-29:14).

[41] (TR 27:16-28:3).

[42] (TR 19:14-19:22; RE # B).

[43] (TR 19:8-19:13; RE # B).

[44] (TR 19:8-20:5; RE # B).

[45] (TR 55:13-56:21; TR 57:5-8; RE: #B).

[46] (TR 55:13-56:21; TR 57:5-8; RE: #B).

parents and entered into as income and immediately charged as an expense on the profit-and-loss statement ("Flow-Through Items").[47] Miss Dianna's merely acts as a conduit in order to enter into competitions, conventions, and order costumes, since parents are unable to do so themselves.[48] Ms. Pfaff teaches dance lessons for the North Kansas City School District and receives fifty percent (50%) of the profits.[49] The $1,979.00 shown on the profit-and-loss statement labeled school district semester class is Ms. Pfaff's income from teaching such classes.[50] Miss Dianna's also sells items such as shoes, tights, and clothing and files an annual sales tax return for such retail items sold at the end of every taxable year.[51]

Respondent based the amount of sales tax owed by Miss Dianna's on $79,807.20 of income in 2010.[52] This amount includes the Flow-Through Items and Ms. Pfaff's salary from teaching for the North Kansas City School District.[53] In 2010, the sales tax rate was 7.475.[54]

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[47] (TR 55:13-56:21; TR 57:5-8; RE: #B).

[48] (TR 55:13-56:21; TR 57:5-8; RE: #B).

[49] (TR 56:22-57:4).

[50] (TR 56:22-57:4).

[51] (TR 57:9-57:17).

[52] (TR 19:8-11; RE: #B).

[53] (TR 30:17-32:6).

[54] (TR 20:6-20:8).

In 2010, Miss Dianna's purchased a portable wall system for $1,670.00 from Screenflex in Lake Zurich, Illinois and three floor mats in the amount of $1,387.50, $2,394.00 and $2,655.00 from Tiffin Mats in Elkton, Maryland. Miss Dianna's did not pay sales tax on the above purchases.[55] Respondent concluded that these items were subject to use tax because they were purchased out-of-state and Miss Dianna's paid no sales tax at the time of purchase.[56] The use tax rate in 2010 was 7.475.[57]

In 2011, Miss Dianna's had the following types of income: lesson fees of $135,688.62, exercise $8,710.00, music $3,270.00, costumes of $22,767.48, retail of $13,338.23 and miscellaneous income of $2,143.00.[58] Total income for the 2011 tax year was $185,916.33.[59] The $8,710.00 for exercise is rent paid to Miss Dianna's for leasing out its facility to a licensed instructor who provides exercise classes to the community.[60] The $3,270.00 for music is rent paid to Miss Dianna's for leasing out its facility to a licensed instructor who teaches music to the community.[61] The exercise and music

[55] (TR 21:19-22:24).

[56] (TR 23:2-4).

[57] (TR 22:25-23:1).

[58] (TR 20:16-20:22).

[59] (TR 20:9-20:11).

[60] (TR 57:24-58:4).

[61] (TR 57:24-58:4).

classes are not performed by, nor was money ever collected by, Miss Dianna's.[62] The $22,767.48 for costumes is a Flow-Through Item, in which Miss Dianna's collected money from parents to purchase student costumes for performances and competitions.[63]

Similar to 2010, Respondent based the amount of sales tax owed by Miss Dianna's on $185,916.33 of income in 2011.[64] This amount includes the Flow-Through Items and rent received.[65] The sales tax rate in 2011 was 7.475.[66]

Respondent concluded that Miss Dianna's was a place of amusement, entertainment or recreation and therefore all fees paid to Miss Dianna's are subject to sales tax pursuant to § 144.020.1(2) RSMo.[67]

A hearing was held on August 6, 2014 in front of the Administrative Hearing Commission (AHC). The AHC found that fees collected for dance instruction at Miss Dianna's are fees paid to, or in, a place of recreation.[68] Additionally, the AHC found that fees paid to Miss Dianna's for costumes fit the definition of "sale at retail" under § 144.010(11) RSMo and accordingly are subject to sales tax under § 144.020.1(2)

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[62] (TR 57:24-58:4).

[63] (TR 56:9-56:21; TR 58:9-10).

[64] (TR 32:7-33:2).

[65] (TR 32:7-33:2).

[66] (TR 20:23-20:25).

[67] (TR 24:20-25:1-12).

[68] Administrative Hearing Commission's Decision, pg. 9 (June 5, 2015).

RSMo.[69] The AHC concluded that because Miss Dianna's did not produce evidence that established the nature of the miscellaneous income, it must assume that the income was derived from taxable sales and, therefore, was subject to sales tax under § 144.020.1(2) RSMo.[70] The AHC also determined that Miss Dianna's was responsible for use tax for the wall system and the floor mats.[71] The AHC did however determine that Miss Dianna was not subject to sales tax under § 144.020.1(2) RSMo for fees collected for Conventions and Competitions, rental fees for music lessons and exercise classes, and income from North Kansas City School District.[72] Miss Dianna's does not dispute AHC's conclusion with regards to the use tax, or sales tax on convention and competition income, rental fees or income from North Kansas City School District.

[69] Administrative Hearing Commission's Decision, pg. 10 (June 5, 2015).

[70] Administrative Hearing Commission's Decision, pg. 10 (June 5, 2015).

[71] Administrative Hearing Commission's Decision, pg. 12 (June 5, 2015).

[72] Administrative Hearing Commission's Decision, pg. 10-11 (June 5, 2015).

POINT RELIED ON

THE AHC ERRED IN DETERMINING THAT THE MONTHLY FEES MISS DIANNA'S COLLECTED FROM STUDENTS FOR COSTUMES, DANCE LESSONS, AND MISCELLANEOUS INCOME WERE TAXABLE UNDER § 144.020.1(2) RSMo, 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 THAT MISS DIANNA'S WAS A PLACE OF RECREATION.

ARGUMENT

THE AHC ERRED IN DETERMINING THAT THE MONTHLY FEES MISS DIANNA'S COLLECTED FROM STUDENTS FOR COSTUMES, DANCE LESSONS, AND MISCELLANEOUS INCOME WERE TAXABLE UNDER § 144.020.1(2) RSMo, 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 THAT MISS DIANNA'S WAS A PLACE OF RECREATION.

Although Miss Dianna's operates a dance school, the AHC nevertheless determined that it was a place of recreation under the sales tax laws and fees paid to, or in, are subject to sales tax because they constitute "sales at retail" under § 144.020.1(2) RSMo. This decision is contrary to the plain language of the taxing statute, because Miss Dianna's is not a place of amusement, entertainment, or recreation, games and athletic events; it is a learning institute that teaches dance to students.

A. Standard of Review.

"This Court reviews the AHC's determination of issues of law de novo."[73] "By contrast, this Court defers to the AHC's finding of facts."[74] "The AHC's decision is affirmed if supported by competent and substantial evidence upon the whole record."[75]

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[73] *Michael Jaudes Fitness Edge v. Director of Revenue*, 248 S.W.3d 606, 608 (Mo. Banc.

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 services at retail in this state."[76] Section 144.020.1 RSMo divides sales into nine categories related to sales of either personal property or taxable services, and applies a specific tax rate for each category. Section 144.020.1(2) RSMo provides that "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."[77] Under § 144.021 RSMo, sellers are required to pay sales tax on their gross receipts, which is composed of "the total amount of the sales price of the sales at retail."[78]

The Supreme Court must determine the true intent of the legislature, giving reasonable interpretation in light of the legislative object.[79] Additionally, taxing statutes are to be construed strictly against the taxing authority.[80] The AHC intentionally cites

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2008) (Fitness Edge).

[74] *Id.*

[75] *Id.*

[76] RSMo § 144.020.1 (2013).

[77] RSMo § 144.020.1(2) (2013).

[78] RSMo § 144.021(2013).

[79] *Acme Royalty Co. v. Director of Revenue*, 96 S.W.3d 72, 74 (Mo. Banc 2002).

[80] *May Dep't Stores Co. v. Director of Revenue,* 791 S.W.2d 388, 389 (Mo. 1990).

only part of the statute and leaves out, "games and athletic events." In reviewing the complete statute, it is clear the legislative intent was to impose a tax on amounts paid for admissions and seating accommodations, or fees paid for admission to any place of amusement, entertainment or recreation, sporting and athletic events, not for dance instruction or for students participating in dance lessons and instruction. In *Columbia Athletic Club v. Director of Revenue*, this Court held that "as a matter of proper grammar, the five terms-amusement, entertainment, recreation, games and athletic events are effectively grouped together in three categories: 1) places of amusement; 2) places of entertainment; and 3) places of recreation, games and athletic events…as to the third category, the use of the conjunction "and" requires that all three elements - recreation, games and athletic events - must be present, and it is not sufficient to determine only whether the facility is a place of recreation."[81] Although *Columbia Athletic Club* was overruled by *Wilson's Total Fitness Center, Inc. v. Director of Revenue*, the Court in *Wilson's Total Fitness Center, Inc.* did not discuss its grammatical interpretation of the statute in *Columbia Athletic Club*, but instead focused on and ultimately overruled the *Columbia Athletic Club's* primary purpose test by reinstating the *de minimus* test previously set out in *Spudlich v. Director of Revenue*.[82]

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[81] *Columbia Athletic Club v. Director of Revenue v. Director of Revenue*, 961 S.W.2d 806, 810 (Mo. Banc. 1998).

[82] *Wilson's Total Fitness Center, Inc. v. Director of Revenue*, 38 S.W.3d 424, 426 (Mo. Banc 2001).

In *Michael Jaudes Fitness Edge, Inc. v. Director of Revenue*, this Court held that the elements required for taxability under § 144.020.1(2) RSMo are: "(1) that there be fees or charges and (2) that they be paid in or to a place of amusement, entertainment or recreation."[83] The parties do not dispute the first element, that there were fees paid to Miss Dianna's. The sole issue is whether Miss Dianna's school is a place "of amusement, entertainment or recreation, games and athletic events." This Court has also held that a location in which amusement or recreational activities "comprise more than a *de minimus* portion of the business activities" is considered a place of amusement or recreation under this provision.[84]

Respondent had the burden of proof to show that Miss Dianna's is liable for sales tax assessment since Miss Dianna's produced evidence establishing a reasonable dispute as to the factual issue.[85] Miss Dianna's produced tax returns, profit and loss statements, balance sheet statements, bank statements, hand written reports, and invoices for specific vendors for purchases made by Miss Dianna's to Respondent. Miss Dianna's also gave Respondent access to its QuickBooks file.[86] However, Miss Dianna's disputes the very fact that it is a "place of amusement, entertainment, recreation, games and athletic

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[83] *L&R Distrib., Inc. v. Missouri Dep't of Revenue,* 529 S.W.2d 375, 378 (Mo. 1975).

[84] *Spudich v. Director of Revenue*, 745 S.W.2d 677, 682 (Mo. Blanc 1988); *Wilson's Total Fitness v. Director of Revenue,* 38 S.W.3d 424, 426 (Mo. Banc 2001).

[85] RSMo §136.300.1 (2013).

[86] (RE #A, pages C6, C7, and D2).

events."[87] Miss Dianna's provided sufficient evidence establishing a reasonable dispute as to the factual issue upon which tax liability was based and therefore the burden of proof shifted to Respondent under § 136.300.1 RSMo.[88] Even if the burden of proof remained with Miss Dianna's, Miss Dianna's established by clear and convincing evidence that it is not a place of amusement, entertainment, recreation, games and athletic events.

C. The fees Miss Dianna's collected are not subject to sales tax.

The AHC found that Miss Dianna's was a place of recreation and therefore any such fees paid to Miss Dianna's are subject to sales tax pursuant to § 144.020.1(2) RSMo. However, the purpose of Miss Dianna's business is instruction, to teach dance. Miss Dianna's is a learning institute. These lessons include dance instruction, technique and coaching to help students become professional dancers. This is evidenced by the fact that many of Miss Dianna's students grow into dancers and performers. Most students make their high school dance teams and cheerleading squad, receive college scholarships and become professional dancers. Although some students are getting exercise, recreation and enjoy dance, Miss Dianna's purpose is to teach, teaching students how to dance; not to amuse, entertain, or provide recreation to students. Even Respondent agreed with this rationale in Letter Ruling 4912 dated July 17, 2008. Letter Ruling 4912 specifically states that "fees charged to its members for dance instruction was not subject to sales tax

[87] RSMo §144.020.1(2) (2013).

[88] RSMo §136.300.1 (2013).

under § 144.020." This Letter Ruling is a clear, unambiguous, unequivocal statement by the Director of Revenue stating that dance lessons are not subject to sales tax.

In Letter Ruling 4912, Applicant operated a health club. Applicant charged its members fees for personal services including: personal training, massages, swimming lessons, tennis lessons, rock climbing instructions, karate instructions, dance instructions, group fitness classes, and hair salon services. Fees were directly paid to Applicant. Applicant asked whether fees Applicant charged to its members for swimming lessons, tennis lessons, rock climbing instruction, karate instruction, dance instruction, massages and hair salon services were subject to sales tax? Respondent answered, "No, fees Applicant charge[d] [to] its members for swimming lessons, tennis lessons, rock climbing instruction, karate instructions, dance instruction, massage and hair salon services [were] not subject to sales tax." Although Letter Rulings only apply to the applicant, Letter Rulings are published written interpretations of the law by the Director of Revenue and may be used as guidance for taxpayers in the State of Missouri. As stated above, there is no factual ambiguity under this Letter Ruling. This is a clearly expressed statement of the Director of Revenue's interpretation of the law.

The AHC improperly found that Miss Dianna's arrangement was too similar to the provision of personal training and individualized instruction provided in *Michael Jaudes*. In *Michael Jaudes Fitness Edge, Inc. v. Director of Revenue*, Mr. Jaudes opened a fitness training facility in St. Louis equipped with stationary cycles, treadmills, stairmasters, climbers, weights, and elliptical training equipment ("Fitness Edge"); essentially, an athletic or exercise club. When a client was accepted, Fitness Edge performed a

personalized assessment and developed a customized fitness and nutritional workout, training plan, and offered lifestyle advice. At most, clients paid fees ranging from $62.00 to $75.00 per hour to use the equipment with the one-on-one assistance of a personal trainer pursuant to their customized training program. Fitness Edge paid Missouri sales tax on the fees it received from its clients. But, pursuant to § 144.190 RSMo, Fitness Edge then sought a refund of those payments. The Director of Revenue denied Fitness Edge's refund claim. The Supreme Court of Missouri held that Fitness Edge is a place of recreation and reinstated the "*de minimus* test previously set out in *Spudich*, under which, unless the exercise occurring there is *de minimus*, all athletic and exercise or fitness clubs are places of recreation for the purposes of § 144.020.1(2) RSMo, and the fees paid to them are subject to sales tax."

Miss Dianna's facts in this case are distinguishable from the facts of *Michael Jaudes Fitness Edge Inc. v. Director of Revenue*. In Fitness Edge, the Court emphasizes the fact that members were entitled to access full use of the facility for their own subjective purposes in exchange for membership fees. Members could go to the facility and use the fitness equipment at any time without an appointment with a trainer or oversight by an instructor. Although in Fitness Edge, there was personal training and targeted exercise that was offered to clients on a one-to-one basis along with diet and nutrition education and provided exercise instruction by appointments only. Fitness Edge allowed clients who had two or more appointments with a trainer per week were permitted to use the cardiovascular equipment, free of charge, without the assistance of a

trainer at any time.[89] Unlike a fitness center, Miss Dianna's is a dance school providing dance lessons and instructions with a professional curriculum that attracts children and adults who wish to pursue dance. It is neither an athletic club, nor a fitness center, nor a camp where you pay a fee for the personal use of the facilities. Miss Dianna's students pay a fee to Miss Dianna's to have a dance instructor present; who teach dance, dance lessons, and dancing technique during each class period. Students do not pay a fee to Miss Dianna's for the personal use of Miss Dianna's facility without the dance instructor present, or for the personal use of the facility. In fact, Miss Dianna's does not have any equipment; all that is located at Miss Dianna's facility is a big room filled with floor mats to teach dance lessons and instructions. Additionally, Miss Dianna's students cannot come to its school and use the facility at any time nor do the students have unlimited use of the facility; the students must be signed up for the class with an instructor present. The purpose behind Miss Dianna's students' attendance is not to exercise; the purpose is to learn dance techniques and receive instruction.

The AHC improperly found that entertainment, amusement, and recreation are not a *de minimus* component of Miss Diann's dance lessons. The AHC concluded that "if personal training instruction at a gym is recreation, then dance is, also."[90] However, personal training instruction and dance instruction are very different. When an individual attends a personal training session at a gym the individual is there for the purpose of

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[89] *Michael Jaudes Fitness Edge, Inc. v. Director of Revenue*, 248 S.W. 3d 606, 608 (MO 2008).

[90] Administrative Hearing Commission's Decision, pg. 9 (June 5, 2015).

recreation and exercising. Whereas, at Miss Dianna's, students attend classes not for exercise, but to learn a skill. Although students are receiving exercise and recreation, that is not the purpose of their attendance. Miss Dianna's only purpose is to teach dance lessons and instruction. Exercise and recreation is a very *de minimus* factor, at best, in attending Miss Dianna's classes.

Respondent argued that all of Miss Dianna's income is subject to sales tax under § 144.020.1(2) RSMo because Miss Dianna's is a place of entertainment, amusement and recreation. Respondent pointed out that on Miss Dianna's Facebook page, there were pictures of smiling students "looking happy", "having fun", and "having a good time". Additionally, there were comments on Facebook regarding how proud the instructors were of their students, fun events Miss Dianna's hosted, and how fun the dance classes were. Respondent also argued that Miss Dianna's advertisements emphasize that the lessons are "full of energy" and a "fun dance class" and therefore indicate that Miss Dianna's is a place of amusement and entertainment. Respondent contended that advertisements and promotional material are an indication of the Miss Dianna's purpose. Respondent placed emphasis on Ms. Pfaff's testimony that she "believes that you can learn and have fun at the same time" and the school "is a family where all can come together" which in turn makes the Miss Dianna's a "place of amusement, entertainment, recreation, games and athletic events." Miss Dianna's is still a business trying to make a profit and obtain new students to attend its classes. And just like any other business, Miss Dianna's markets itself and uses terms such as "fun" and "family" to get individuals excited and signed up for its classes.

If the AHC's and Respondent's statutory interpretation is correct and relied on, then all music lessons, piano lessons, guitar lessons, voice lessons, mathematic lessons, science lessons, self-defense lessons and other lessons will become subject to sales tax, as all involve instructive learning and having fun at the same time, making them a place of amusement, entertainment, recreation, games and athletic events. This is clearly not the intent of the legislation.

The assessment of sales tax on Miss Dianna's is improper as such assessment is nothing more than an attempt to unreasonably expand the scope of § 144.020.1(2) RSMo. Within four years, Respondent has completely changed its position on the taxability of dance lessons and instruction without any explanation or notice. Respondent has overstepped its authority and has raised taxes by changing a definition and reinterpreting the Missouri tax code.

Respondent never informed businesses about these changes. Instead, businesses, like Miss Dianna's, received a notice in the mail of its tax liability and Respondent penalized these businesses for not knowing these new interpretations of the laws and retroactively assessed taxes and penalties for prior years . Respondent has not been fair or consistent in enforcing tax laws. In fact, Miss Dianna's is the only dance studio Respondent has attacked, retroactively, for sales tax on fees for dance lessons. Early this year the legislature agreed that Respondent was overstepping its authority and introduced House Bill Nos. 517 and 754 and Senate Bill No. 18. On July 6, 2015 Governor Jay Nixon signed all three bills into law. Effective August 28, 2015, § 144.021 RSMo was

repealed and a new § 144.021 RSMo was enacted. Currently subsection (2) and (3) of § 144.021 state the following:

> 2. 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.

> 3. The notification required by subsection 2 of this section shall be delivered by United States mail, electronic mail, or other secure electronic means of direct communications. The department of revenue shall update its website with information regarding modifications in sales tax law but such updates shall not constitute a notification required by subsection 2 of this section.[91]

Respondent now has to notify businesses when they change its interpretation of sales tax laws. This bill was enacted for this exact situation. Respondent re-interpreted the law without any precedent and went after Miss Dianna's without notice of this reinterpretation. Miss Dianna's was not informed about the changes in Respondent's analysis of the tax laws and was penalized for not following the laws, even though they did not know about nor did it have reason to know about these changes.

The AHC erred as a matter of law in rendering its Decision in this case. Instead of construing the applicable taxing statute strictly against the taxing authority it, instead, took a very liberal view in construing the provisions of § 144.020.1(2) RSMo to cover the operations of Miss Dianna's. The AHC's error was further compounded by its conclusion that the *Michael Jaudes Fitness Edge, Inc. v. Director of Revenue* case required it to make its determination. The clear and convincing evidence introduced at the hearing on this matter established that Miss Dianna's was a place of instruction and learning, not a place of entertainment, amusement, or recreation. The AHC's Decision incorrectly found Miss Dianna's to be subject to a tax that is not supported by the

[91] RSMo § 144.021 (2015).

language of the statute passed by the Missouri legislature. Finally, the AHC's decision, under the undisputed facts as presented in this case, clearly invites the Director of Revenue conclude that many other places of instruction are subject to sales tax under any circumstances where a client or customer gains the benefit of any enjoyment through participation. The Missouri legislature clearly recognized this anger when it passed § 144.021 RSMo early this year.

Miss Dianna's had no reason to believe that its operations were subject to sales tax and continues to believe they are not pursuant to § 144.020.1(2) RSMo. It does not consider itself to be a place of entertainment, amusement, or recreation; rather it is a place where people come to learn a life skill. The AHC erred, as a matter of law, in concluded that Miss Dianna's operations feel under § 144.020.1(2) RSMo. For all these reasons the portions of the AHC's decision at issue on this appeal should be reversed.

CONCLUSION

The AHC's decision that Miss Dianna's was a place of recreation and therefore is liable for sales tax in the amount of $23,378.97 was an error of law and not supported by substantial and competent evidence in the record. That decision should be reversed.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically via e-mail service and/or U.S. Mail pre-paid on September 23, 2015, to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellant's Brief complies with the limitations contained in Rule 84.06(b) and that the word count is 6,010.

/s/ Anthony L. Gosserand
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