IN THE
SUPREME COURT OF MISSOURI

No. SC 84948

BRANSON PROPERTIES U.S.A., L.P.
Appellant,

v.

DIRECTOR OF REVENUE,
Respondent.

On Petition for Review from the
Missouri Administrative Hearing Commission
Honorable Willard C. Reine, Commissioner

REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

Appellant Branson Properties U.S.A., L.P. ("Branson Properties") submits the following brief in reply to the brief of Respondent, Director of Revenue.

I. THE BUSINESS OF AMUSEMENT IS MANUFACTURING

Branson Properties, at its Amusement Park, manufactured and produced intangible entertainment services and products. The intangible entertainment services and products were manufactured and produced by taking Rides and Attractions[1], adding power (by water and/or electricity), adding lights, designs and other atmosphere or esthetic items, performers and operators, to create for its customers a new and different intangible product of entertainment having a new market value. Websters Third New International Dictionary defines the word "Intangible" as "1. incapable of being touched or perceived by touch; not tangible; impalpable, imperceptible 2. incapable of being defined or determined with certainty or precision." The intangible entertainment services and products, provided by Branson Properties, included, the thrills, sensations, excitement, enjoyment, amusement and fun created by the Rides and Attractions, the atmosphere and the other entertainment activities at the park.

This Court has already determined that intangibles can be manufactured. In *Southwestern Bell Telephone Services v. Director of Revenue, 78 S.W. 3d 763 (Mo. banc 2002)* this Court dealt with an intangible, the human voice. Branson Properties also deals with an intangible, the providing of an entertainment product. This Court in *Southwestern*

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[1] All capitalized terms used herein have the same meaning as set forth in Appellant's initial brief.

Bell overruled whatever was left of *GTE Automatic Elec. v. Director of Revenue*, 780 S.W. 2d 49 (Mo. banc 1989), which held that telecommunications did not create a product, stating "Primarily, this argument is so dependent upon the premise that an intangible product cannot support the exemption, that it falls of its own weight..."

Branson Properties' manufacturing and producing of the entertainment products here in issue are similar, in nature, to that of the telephone services in *Southwestern Bell*. Branson Properties' Rides and Attractions and Replacement Parts together with other items and services such as power, operators, lights, designs, performers, atmosphere and aesthetics creates a new and different product having a new market value to its customers as evidenced by their willingness to pay for such entertainment services and products. The Commission's decision wrongly concluded in *Southwestern Bell* that telephone services could not be manufactured or produced. The Commission has also wrongly concluded that the entertainment products created by Branson Properties in this case could not be manufactured or produced.

The Director would like this Court to apply the traditional tangible personal property cases like the *House of Lloyd v. Director of Revenue*, 824 S.W. 2d 914 (Mo banc 1992) and *L & R Egg Co. v. Director of Revenue*, 796 S.W. 2d 624 (Mo. banc 1990) to Branson Properties. In *House of Lloyd* the taxpayer received products in shipping cartons. The taxpayer then removed the products from the cartons, inspected the products, repaired, sorted and repackaged the products for sale to its customers. In *L & R Egg Co*. the taxpayer cleaned

and inspected eggs. These cases are distinguishable from this case not only because they involve tangible personal property but because there was no change to the physical product as a result of the repackaging and cleaning. Appellant's entertainment products clearly involve a change. The combination of the mechanical rides, power, operators and other intangible aesthetics creates a change in the mood, emotion or other sensory perceptions of customers to create the entertainment experience and products. As this Court noted in *Southwestern Bell*, intangibles do not fit neatly into the traditional raw material manufacturing cases. Branson Properties' entertainment products are more analogous to those in *Southwestern Bell* (telephone services), *Bridge Data Co. v. Director of Revenue*, 794 S.W. 2d 204 (Mo. banc 1990) (exemption allowed for equipment used to collect, process and transmit financial data), *Concord Pub. House, Inc. v. Director of Revenue*, 916 S.W. 2d 186 (Mo. banc 1996) (organizing information through computer technology is manufacturing), and *International Business Machines Corp. v. Director of Revenue*, 958 S.W. 2d 554 (Mo. banc 1998)(equipment used to analyze financial data and to transmit this data to customers, either in hard copy or electronic form was exempt).

Missouri law provides that manufacturing is the production of a product with a use, identity and value different from the use, identity and value of what has been imputed. Tangible products can fit easily into this formula. With respect to intangibles, the critical inquiry is whether the end product was different in value and use than what was in existence at the start of the manufacturing process. The precise physical changes occurring during the manufacturing process of intangibles are not always readily identified because by definition,

an intangible product does not have a physical existence. The Director's position is non-sequitur because her arguments attempt to impose traditional, raw material type manufacturing to intangible products which have no physical characteristics. There is no question after this Court's decision in *Southwestern Bell* that the Manufacturing Exemptions apply to the creation of intangible products. Branson Properties creates an intangible product that is manufactured and produced at its amusement park; and therefore, it should be granted the Manufacturing Exemption on the purchase of its Rides and Attractions and Replacement Parts.

Section 144.010 (10)(a) RSMo makes the receipts from admissions, fees and charges in and to a place of amusement a "sale at retail". Section 144.030.2 RSMo then grants certain exemptions to the taxes imposed by Sections 144.010 to 144.525 (sales tax) and 144.600 to 144.745 (use tax). Branson Properties clearly falls within this category and is entitled to the exemptions afforded in Section 144.030.

The Director gladly accepts the sales tax paid by Branson Properties on its entertainment products. However, the Director wrongly denies Branson Properties the manufacturing exemptions provided for by the legislature for manufacturing and producing activities which create the taxable entertainment product.

II. MANUFACTURING AND PRODUCING ARE NOT FUNCTIONALLY EQUIVALENT.

The Director wrongly concludes that the terms manufacturing and producing are functionally equivalent. One of the cases cited by the Director is *Mid-America Dairymen, Inc. v. Director of Revenue*, 924 S.W. 2d 280 (Mo. banc 1996). However, it is important to note that the Dairymen case was decided before the 1998 legislative change that added the term "producing" to §144.030.2(4). Moreover, a careful reading of this case clearly reveals that this Court did not conclude that producing was synonymous with manufacturing. The question there was the relationship between fabricating and manufacturing.

The legislature in 1998 amended §144.030.2(4) adding the word "parts" and adding the words "or producing". Section 144.030.2(4) then read as follows:

> "(4) Replacement machinery, equipment, and parts and the materials and supplies solely required for the installation or construction of such replacement machinery, equipment, and parts, used directly in manufacturing, mining, fabricating or producing a product which is intended to be sold ultimately for final use or consumption;"(emphasis added).

The Director takes the position that producing and manufacturing are basically the same. Therefore, under the Director's analysis the language specifically added to the statute in 1998 would be surplusage. The Director attempts to cast dispersion on Appellant's use of Webster's Third New International Dictionary in describing the difference between

producing and manufacturing. The dictionary authority which the Director seemingly takes issue is precisely what the law requires. As this Court stated in *Hadlock v. Director of Revenue*, 860 S.W. 2d 335 at 337 (Mo banc 1993):

> Under traditional rules of statutory construction, we are required to ascertain the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute...Further, each word, clause, sentence and section of a statute should be given meaning...

It is also common practice to refer to the dictionary when ascertaining an undefined term in a statute. As stated in *Westrope & Associates v. Director of Revenue*, 57 S.W. 3d 880 (Mo. Ct. of App. WD 2001) the plain and ordinary meaning of statutory language expressly defined by statute is typically found in the dictionary. The term producing is not defined in the statute and therefore the Appellant looked to the plain and ordinary meaning in the dictionary. The dictionary defined the term as follows:

> "to give being, form or shape to; to make other from raw materials; manufacture . . . to make economically valuable; to make or create so as to be available for satisfaction of human wants" *Webster's Third New International Dictionary* (1986).

The dictionary indicates that the plain and ordinary meaning of the word "producing" has a much broader meaning than the word "manufacture". It not only includes manufacturing

but any creation having economic value to satisfy human wants. The addition of the word "producing" to the replacement exemption in 1998 was clearly not surplusage.

The Commission's decision focused solely on the term "manufacturing" and wholly failed to consider or address whether the entertainment products created by Appellant constituted "producing" within the meaning of the replacement exemption as amended in 1998.

Respondent cites, this Court's decision in *Utilicorp United, Inc. v. Director of Revenue*, 75 S.W. 3d 725 (Mo banc 2001), for the proposition that producing and manufacturing are the same. The parties in *Utilicorp* stipulated that electrical service was manufacturing and therefore neither the parties nor this Court addressed the producing issue.

III. BRANSON PROPERTIES DOES PRODUCE A "PRODUCT"

We have previously stated that Branson Properties produces intangible entertainment products. Logic dictates that if Branson Properties has no product then what are customers paying for and why did the legislature deem receipts from places of entertainment to be considered a sale at retail? The legislature could have simply taxed places of amusement under §144.020 and not included the receipts from places of amusement in the definition section of §144.010.10.

In *Bridge Data Company v. Director of Revenue*, 794 S.W. 2d 204 (Mo. banc 1990), this Court determined that the term "product" as used in the Manufacturing Exemptions, was not limited to tangible personal property. In *International Business Machines Corporation*

v. Director of Revenue, 958 S.W. 2d 554, this Court made it clear that there is no requirement that a product be tangible to qualify for the Manufacturing Exemptions. In *Southwestern Bell* this Court again made it clear that intangible products can be manufactured.

When a customer buys an admission ticket the true object of the transaction is not the ticket itself but the entertainment product received by the customer. There is no questions that Branson Properties provides something of value. This Court in *Six Flags Theme Parks, Inc. v. Director of Revenue*, 2003 WL 113456 (Mo banc 2003) acknowledges that an amusement park provides something of value. In *Spudich v. Director of Revenue*, 745 S.W.2d 677 (Mo banc 1988) this Court dealt with the meaning of the phrase "places of amusement, entertainment or recreation." Since there is no statutory definition for a place of amusement the Court turned to the dictionary: "Amusement" as a pleasurable diversion; entertainment. Webster's Third New International Dictionary, 74 (1966). "Entertainment" means something that diverts , amuses, or occupies the attention agreeably. Id at 757. "Recreation" is a means of getting diversion or entertainment. Id at 1899."

Commissioner Reine clearly found that "there is no doubt that BPU's customers enjoy the amusement park and the BPU uses electricity, water, operators, and equipment to operate its park..." The Director asserts a specious argument that the product is not the entertainment but the license or right to sit on the amusement ride. The Director's argument not only defies logic but is contrary to the true object test adopted by this Court. No customer would pay

to simply sit on an amusement ride unless that ride created entertainment. The true object is the entertainment product not the right to merely occupy a piece of machinery.

Branson Properties manufactured and produced the product of entertainment. Branson Properties used machinery, equipment and parts to produce the entertainment. Branson Properties then sold this entertainment product to customers. Branson Properties meets all of the requirements for the exemptions under §144.030.2(4) and §144.030.2(5). Branson Properties collected and paid tax on the sale of its entertainment products and should likewise be granted the exemptions afforded by the Missouri statutes.

IV. SALES TAX ON ADMISSIONS IS RELEVANT.

In this case, Branson Properties' entertainment products and services are taxed under Section 144.020.1. Section 144.020.1(2) 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." As stated previously the true object is the entertainment product not the right to merely occupy a piece of machinery. The legislature chose to impose a tax on the sale of entertainment products. The legislature also chose to grant exemptions under §144.030.2. Therefore, sales tax a very relevant part to this matter.

V. BRANSON PROPERTIES WAS ENTITLED TO AN EXEMPTION

UNDER SECTION 144.030.2(5) BECAUSE THE PURCHASES OF MACHINERY, EQUIPMENT AND PARTS WERE PURCHASED AND USED TO MANUFACTURE PRODUCTS IN A NEW OR EXPANDED PLANT.

The Appellant has covered this issue in its initial brief. However, it is important to point out that the Director acknowledges in her brief that ; (i) there is no dispute that Branson expanded the Mutton Hollow property and installed new rides; (ii) she does not "quibble" with Branson's contention that a manufacturing plant can take nontraditional forms and (iii) she acknowledged that amusement rides are a machine or a piece of equipment. The Director then concludes that the amusement ride does not process, change or create any substance that is put into the ride and therefore amusement rides do not manufacture anything and an amusement park is not a manufacturing plant. As Appellant has pointed out there is more than just a piece of equipment involved in the manufacturing of the amusement product. Branson Properties takes its Rides and Attractions, adding power (by water and/or electricity), adding lights, designs and other atmosphere or esthetic items, performers and operators, to create for its customers a new and different intangible product of entertainment having a new market value. The Amusement Park is the facility where these significant manufacturing activities occur and therefore constitutes a manufacturing plant.

The reference to a "manufacturing plant" in Section 144.030.2(5) was not intended to create a substantive definitional requirement. Any place where manufacturing activities occur can be a manufacturing plant. The substantive requirement in Section 144.030.2(5) was that

the facility must be new or expanded. If the new or expanded requirement was not important to the legislature the reference to a manufacturing plant would not have been needed. This term "manufacturing plant" is not in the replacement exemption under Section 144.020.3(4) for the reason it would be superfluous. The statute already requires that a product be manufactured or produced which assumes that there is a place or plant where manufacturing is occurring. The term "manufacturing plant" was required to be included in Section 144.030.2(5) because the legislature intended that the place of manufacturing be expanded or new in order for the exemption to apply. The Director concedes that Appellant has a new or expanded facility. Hence, if , as Appellant contends, manufacturing of an entertainment product is occurring, at its amusement park, then a manufacturing plant (i.e. the place where manufacturing is occuring) exists.

CONCLUSION

Based on the foregoing, and for the reasons set forth in Branson Properties opening brief, Branson Properties respectfully requests that, this Court reverse the Commission with instructions that the assessments against Branson Properties be dismissed.

Respectfully submitted,
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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 31st day of March 2003, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06, and that the brief contains 3147 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Richard E. Lenza