IN THE
SUPREME COURT OF MISSOURI

No. SC 84948

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

v.

DIRECTOR OF REVENUE,
Respondent.

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This action involves a question of whether the taxpayer is entitled to a use or sales tax exemption for purchases of machinery, equipment and parts, used to replace rides and expand an amusement park, which taxpayer contends is engaged in manufacturing or producing a product. Because this appeal involves the construction of two revenue statutes of the State of Missouri, § 144.030.2(4) RSMo, 2000, and § 144.030.2(5) RSMo, 2000[1], the Supreme Court of Missouri has exclusive jurisdiction over the issues in this appeal pursuant to Article V, §3 of the Missouri Constitution.

[1]Unless otherwise indicated, all statutory references are to those sections of the Revised Statutes of Missouri (RSMo) in effect with respect to the tax periods in issue.

STATEMENT OF FACTS

Appellant Branson Properties USA, L.P. (Branson) purchased an amusement and entertainment area formerly known as Mutton Hollow (Tr. 13). Branson made improvements at the site, including the replacement of some existing rides and the installation of several new rides and amusements (Tr. 15 - 16 - 21; Exhibit 1). The park area also was expanded in size (Tr. 15, 25). The park reopened under Branson's direction in May 1999 (Tr. 30).

The rides installed by Branson are mechanical devices with moving parts and are fixed assets which are depreciated as equipment for accounting purposes over a seven year period (Tr. 16-21, 59-60). Nearly all of the rides require electricity to operate and some require water (Tr. 28). Employees operate each ride (Tr. 29).

In addition to replacement and new rides, Branson adopted an ongoing safety program to replace parts as needed (Tr. 29). Some of the parts installed may have been only for maintenance purposes (Tr. 37). Subsequent to the improvements made by Branson to the former Mutton Hollow property, the Branson property experienced an increase in sales and wages (Exhibit 3, Tr. 25-26, 57-58).

Customers who visit the Branson amusement park are not charged a fee for entering the park, but they may purchase individual tickets for each ride or purchase an arm band to ride all of the rides an unlimited number of times (Tr. 26-27). Approximately 80 percent of the customers purchase the arm band (Tr. 26). From the date the amusement park opened in 1999 and in the year 2000, Branson paid sales tax on the ride fees charged its customers (Tr. 59).

The Missouri Department of Revenue conducted an audit of the Branson amusement park in the year 2000 (Tr. 5). This resulted in assessments issued on January 3, 2001 (Tr. 5). In determining Branson's liability for use or sales tax, the Department's auditor looked at purchase invoices and found that tax had not been paid on equipment used to provide the amusement rides (Tr. 63). Branson's representative indicated to the Department's auditor that it paid no sales or use tax on the amusement park purchases of rides, equipment and replacement parts because Branson believed it was entitled to a "manufacturing exemption"(Tr. 64).

On June 24, 2002, the Administrative Hearing Commission conducted an evidentiary hearing on Branson's appeal of the assessments of sales and use tax imposed by the Missouri Department of Revenue (Tr. 1- 72). On November 7, 2002, Commissioner Willard C. Reine issued the Administrative Hearing Commission decision affirming the assessments of $1,717.30 in sales tax and $95,800.79 in use tax, plus interest (L.F. 40). In so ruling, the Administrative Hearing Commission stated that Branson's position "construing its amusement park as a manufacturing plant is without merit." (L.F. 39). The Administrative Hearing Commission declined to expand the term manufacturing to include the activities of an amusement park, noting that no Missouri Court reached such a result in the past (L.F.40). Branson thereafter filed this appeal.

ARGUMENT

I. THE ADMINISTRATIVE HEARING COMMISSION CORRECTLY DENIED A TAX EXEMPTION UNDER SECTION 144.030.2(4), RSMo, TO BRANSON, BECAUSE THIS TAX EXEMPTION IS ONLY FOR PURCHASES OF REPLACEMENT MACHINERY, EQUIPMENT, AND PARTS USED DIRECTLY IN MANUFACTURING, MINING, FABRICATING, OR PRODUCING A PRODUCT WHICH IS INTENDED TO BE SOLD FOR FINAL USE OR CONSUMPTION, AND BRANSON, DOES NOT MANUFACTURE, MINE, FABRICATE, OR PRODUCE A PRODUCT, IN THAT IT OPERATES AN AMUSEMENT PARK.

Branson operates an amusement park. Branson replaced some rides and purchased additional rides and amusements in refurbishing and expanding a park previously known as Mutton Hollow. It has paid sales tax on the fees charged to its customers within its amusement park, as required by § 144.020.1(2), RSMo, to all places of entertainment, amusement, recreation, games and athletic events. Despite unequivocal evidence that Branson operates an amusement park,[2] it has asked this Court to find that it really operates a manufacturing plant, so that it can avoid paying sales or use tax on the equipment of its replacement rides and parts it has installed at the Mutton Hollow property.

Burden of Proof and Standard of Review

[2] A place of amusement, entertainment or recreation is defined in 12 C.S.R. 10-3.176 as any place where facilities are provided (not including coin-operated amusement devices, except as indicated in this rule) for entertainment, amusement or sports.

Because this case involves an exemption from use and sales tax, it was Branson's burden to show that it qualifies for such exemption. *Westwood County Club v. Director of Revenue,* 6 S.W.3d 885, 887 (Mo. banc 1999). The exemption is allowed only upon clear and unequivocal proof that it is required by the statute. *House of Lloyd v. Director of Revenue,* 824 S.W.2d 914, 918 (Mo. banc 1992). This Court reviews de novo the Administrative Hearing Commission's interpretation of revenue laws, *Jackson Excavating Co. v. Administrative Hearing Commission,* 646 W.2d 48, 49 (Mo. 1983), but must affirm the decision of the Commission if it is supported by the law and competent and substantial evidence on the record and is not clearly contrary to the reasonable expectations of the Missouri General Assembly. *L & R Egg Company, Inc. v. Director of Revenue,* 796 S.W.2d 624, 625 (Mo. banc 1990).

The Business Of Amusement Is Not Manufacturing

Missouri law offers an exemption from sales or use tax for purchases of replacement machinery, equipment, and parts that are "used directly in manufacturing, mining, fabricating or producing a product which is intended to be sold ultimately for final use or consumption" § 144.030.2(4) RSMo. The Administrative Hearing Commission correctly found that Branson operated an amusement park and was not in the manufacturing business and not entitled to the exemption for replacement of equipment.

Manufacturing is 1) the process that takes something practically unsuitable for common use and modifies it so that it is adapted to a common use, or 2) the transformation of original raw material through the use of machinery, skill and labor into a product for sale that has

intrinsic value. *Southwestern Bell Telephone Co. v. Director of Revenue*, 78 S.W.3d 763 (Mo. banc 2002), and cases cited therein at 767. It "requires the manipulation of an item in such a way as to create a new and distinct item, with a value and identity completely different from the original." *House of Lloyd v. Director of Revenue*, 824 SW 2d. at 919. Not every service is manufacturing. Merely repackaging products is not manufacturing. *Id*. Cleaning and inspecting eggs is not manufacturing because the fundamental use for a batch of eggs remains the same both before and after the eggs have entered the plant. *L & R Egg Co. v. Director of Revenue, supra.* Manufacturing does not include the retreading or recapping tires. *State ex rel. AMF Inc. v. Spradling*, 518 S.W.2d 58 (Mo. 1975). And as held in *Unitog Rental Services, Inc.*, 779 S.W.2d 568, 568 (Mo. banc 1989), the cleaning and repairing of uniforms is not manufacturing. The term "manufacturing" consistently has been construed as "the creation of a new product capable of a different use than the original article." 779 S.W.2d at 571.

Branson's amusement park creates no new products that are capable of a use different from the articles it begins with at the start of each day. While it might employ water, lights and electricity to operate its machinery, there are no raw materials being input that are altered as a result of the day's efforts. A customer occupying a seat on a ride might enjoy or abhor the experience, but he or she remains the same person. The water, lights and electricity used during operation of the amusement park also are not altered.

Manufacturing And Producing Are Functionally Equivalent

Branson next contends that even if it is not engaged in manufacturing, a 1998 amendment to § 144.030.2 (4) RSMo, expanded the tax exemption to include replacement machinery and parts used in "producing a product"(Appellant's Brief 27-32). Branson charges that the Administrative Hearing Commission erred in not addressing the distinction between "manufacturing" and "producing." Without citation of legal authority, Branson asserts that the definition of "producing" is broader than the term "manufacturing" (Appellant's brief 31). It tenders for this Court's consideration definitions from *Webster's Third New International Dictionary* (1986). (Appellant's brief 31).

The Commission considered, but simply rejected the contention that Branson had proven it was entitled to the tax exemption under the amended statutory language (Legal File 7). Further, Branson's citation from *Webster's Third New International Dictionary* (1986), employs the word "manufacture" in one of the definitions for the term "producing." (Appellant's brief 31). Unquestionably, the very definition tendered by Branson indicates that the terms "manufacturing" and "producing" have the same or nearly the same meaning. For purposes of this case, however, any distinction does not matter because Branson does not provide a "product."

This case is reminiscent of the Court's discussion of the distinction between the terms "fabricating" and "manufacturing" in *House of Lloyd, Inc. v. Director of Revenue*, *supra*. There, as here, the appellant focused on a context of the term most favorable to its factual situation and ignored other interpretations of the term. But, as this Court said, "[i]f there is any doubt of the exemption claimed, then it must operate most strongly against the party claiming

the exemption." 824 SW 2d. at 919. The Court further found that while the term "fabricating" must not be construed as surplusage, it was "functionally synonymous" with "manufacturing" and the minute distinctions raised by the appellant did not change the analysis. *Id.* Likewise, minute distinctions between "producing" and "manufacturing" raised by Branson in this case do not change the analysis.

While Branson would have this court consider "producing" as a more general term than "manufacturing," this Court already has indicated otherwise. "Indeed, we stated that the term "manufacturing" could encompass most of the terms used by the legislature in § 144.030.2(12)." *Mid-America Dairymen, Inc. v. Director of Revenue*, 924 S.W.2d 280, 283 (Mo. banc 1996). Included in 1994 version of § 144.030.2(12) RSMo, that was under consideration in *Mid-America Dairymen, Inc.*,were the terms "processing, compounding, mining or producing of a product....". Thus, "manufacturing" is the general term.

This also is not the first case involving the construction and application of § 144.030.2(4), RSMo, since the statute's amendment in 1998. In *Utilicorp United, Inc. v. Director of Revenue*, 75 S.W.3d 725 (Mo. banc 2001), this Court found that utilities that merely distributed or transmitted electricity were not entitled to a tax exemption of under §§ 144.030.2(4) or (5), RSMo, because the utilities failed to show that through the use of their equipment they made something new or different. Nothing in this Court's *Utilicorp* opinion, indicates that the terms "manufacturing" and "producing" require separate analysis for determining whether the statutory tax exemption applies. As in *Utilicorp*, Branson's

amusement rides do not make, create or produce anything new or different. It is not entitled to the tax exemption in § 144.030.2(4) RSMo.

Branson Does Not Produce A "Product"

Even if the Court would construe the term "producing" to mean something broader than "manufacturing," the statute still requires that at the end of the process, whatever it is called, there be a "product." While this product may be either tangible personal property or a service, *Southwestern Bell Telephone Company v. Director or Revenue,* 78 S.W.3d 763, 767 (Mo. banc 2002), the product must be "an output with a market value." *Id.* 767, which is designed for "final use or consumption." § 144.030.2(4), RSMo.

In *Southwestern Bell Telephone Company, supra,* this Court found that a telephone company was entitled to a tax exemption for the purchase of machinery and equipment used to produce basic telephone service and vertical telephone products, such as call forwarding, call waiting, speed call, and three way calling. This Court found that the end product "is not the same human voice, but a complete reproduction of it, with a new value to a listener who could not otherwise hear or understand it." 78 S.W.3d at 763. There is no comparable end product produced by Branson in the instant case.

Unlike the *Southwestern Bell* case where the human voice was completely reproduced through the taxpayer's equipment with a new value to the listener, amusement rides do not physically change or enhance anything in any way. While Branson might provide what it hopes is an entertainment service by offering rides on amusement devices, such service can not logically be construed as the production of a product within the meaning of

§ 144.030.2(4) RSMo.

Sales Tax On Admissions Is Irrelevant

This analysis is not altered by the statutory requirement that admissions to amusements are subject to sales tax. Sales of admission tickets in places of amusement, sporting events, or recreation are "sales at retail" subject to sales tax under § 144.020.1(2) RSMo. This statute prescribes a "[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 144.010(14) RSMo, defines "a product which is intended to be sold ultimately for final use or consumption" as "tangible personal property, or any service that is subject to state or local sales or use taxes..." Branson postulates that because its purported service of providing thrills is subject to sales tax, it necessarily has produced a product which is intended to be sold ultimately for final use or consumption.

Branson's argument is flawed because § 144.020.1(2) RSMo, does not impose a tax on the "thrills, sensations, excitement, enjoyment, amusement and fun" which is the "product" that Branson contends it "produces" and hopes to impart to its customers (Appellant's brief 16-17). Rather, the thing of value purchased by the customer which is subject to sales tax is the permission, right, or license to enter a recreation area, in an amusement park, to sit on the ride itself. *See Six Flags Theme Parks, Inc. v. Director of Revenue,* No. SC84563 (Mo. banc Jan. 14, 2003) (Slip op. at 3) "[admission fees] are the sale of permission to enter a place of amusement and become a recipient of a service." The license to ride an amusement device,

while subject to sales tax, is not something that is "produced" or "manufactured" through the replacement machinery or parts for which Branson wants a tax exemption.

There also can be no credible argument that this results in a double taxation. Double taxation occurs when two separate taxes are placed on the same item for the same purpose by the same taxing authority during the same taxing period. *State ex rel Spink v. Kemp,* 365 Mo. 368, 283 S.W.2d 502, 518 (banc 1955). Sales taxes are collected on the equipment sale while the amusement park customer pays the sales tax on the license to sit on the amusement ride within the amusement park.

The tax is placed on two different items by separate statues. Every successful business must factor taxes, both on existing equipment and on purchases, into the rate it charges its customers. *GTE Automatic, Electric v. Director of Revenue,* 780 S.W.2d 49, 53 (Mo. banc 1989) (overruled in part on other grounds). "The fact that a different tax is imposed upon sale of the final item to a customer does not result in double taxation . . . ." *Id.*

Predecessor Not A Manufacturer

There is no evidence from Branson that its predecessor, Mutton Hollow, held itself out to be anything other than an amusement area. If Mutton Hollow was not a manufacturing plant and its rides not considered equipment used in manufacturing, fabricating, or producing a product, Appellant can hardly claim that it has installed "replacement" machinery, equipment or parts, used in manufacturing, fabricating or producing a product." *See*

§ 144.030.2(4) RSMo.

II. THE ADMINISTRATIVE HEARING COMMISSION CORRECTLY DENIED A TAX EXEMPTION UNDER SECTION 144.030.2(5) RSMo 2000, TO BRANSON, BECAUSE THE TAX EXEMPTION IS ONLY FOR MACHINERY AND EQUIPMENT USED TO ESTABLISH OR EXPAND EXISTING "MANUFACTURING, MINING OR FABRICATING PLANTS" AND BRANSON, DOES NOT OPERATE A MANUFACTURING, MINING OR FABRICATING PLANT IN THAT IT'S PROPERTY IS AN AMUSEMENT PARK.

Branson alternatively argues that it is entitled to an exemption under § 144.030.2(5) RSMo, for machinery, equipment and parts it purchased in creating a new or expanding an existing amusement park (Appellant's brief 35). Through this statutory provision, property is exempt from sales or use tax when it is "(1) used directly (2) in manufacturing (3) a product which is intended to be sold ultimately for final use or consumption (4) if the machinery or equipment was purchased (a) to replace existing equipment by reason of design or product changes or (b) to expand existing manufacturing." *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000). This exemption was enacted to encourage the production of items subject to sales tax and to foster the location and expansion of industry in Missouri. *Id.*

There is no dispute that Branson expanded the Mutton Hollow property and installed new rides. But that is not enough to qualify for the tax exemption of § 144.030.2(5) RSMo. As argued in the Director's previous point, an amusement park consisting of rides is not a manufacturing plant. The new or replacement rides and parts are not used directly in the

"manufacturing" of anything, under any definition that has been adopted by this Court. The amusement park does not cause an "alteration or physical change of an object or material in such a way that produces an article with a use, identity and value different from the use, identify, and value of the original." *Gallamet, Inc., v. Director of Revenue,* 915 S.W.2d 331, 333 (Mo. banc 1996). The amusement park does not transform original raw material through the use of machinery, skill and labor into a product for sale that has its own intrinsic value. *Southwestern Bell Telephone Co. v. Director of Revenue,* 78 S.W.3d 763 (Mo. banc 2002).

The Director does not quibble with Branson's contention that a manufacturing plant can take nontraditional forms. Computer hardware used in collecting financial data and transmitting data to customers was held to be manufacturing in *Bridge Data Company v. Director of Revenue,* 794 S.W.2d 204 (Mo. banc 1990). But in that case, the taxpayers could identify specific material that was input and identify the creation of the specific, new, usable product that resulted from the manufacturing process. In the instant case, there is no "process" that makes more than a superficial change in an original substance or causes a substantial transformation in quality and adaptability. *See Jackson Excavating Co. v. Administrative Hearing Commission,* 646 S.W.2d 48, 51 (Mo. 1983). An amusement ride, while it is a machine or a piece of equipment, does not process, change or create any substance that is put into the ride. Consequently, an amusement ride does not manufacture anything and an amusement park is not a manufacturing plant.

CONCLUSION

The Administrative Hearing Commission appropriately applied the law in affirming the Director's denial of a use tax exemption under §§ 144.030.2(4) and (5) RSMo. In view of the foregoing arguments and cited authorities, the Director requests that the denial of the tax exemption be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(B) AND (C)

The undersigned hereby certifies that on this 17th day of March, 2003, two true and accurate copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, overnight mail, postage prepaid, to:

Mr. Richard E. Lenza
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The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 884.06(b), and that the brief contains 3865 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.

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Assistant Attorney General