IN THE
SUPREME COURT OF MISSOURI

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No. SC84956

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EIGHTY HUNDRED CLAYTON CORPORATION.
d/b/a TROPICANA LANES,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

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PETITION FOR JUDICIAL REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE WILLARD C. REINE, COMMISSIONER

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APPELLANT'S REPLY BRIEF

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ARGUMENT

The AHC erred in awarding Tropicana a refund of the sales tax that its customers paid on the fee Tropicana charged to use bowling shoes and in holding that Tropicana's bowling shoe fee was not taxable, because this decision was unauthorized by law, not supported by competent and substantial evidence on the record as a whole, was contrary to the reasonable expectations of the General Assembly, and these sales were taxable under the amusement tax (§ 144.020.1(6), RSMo), which taxes all fees paid in or to a place of amusement in that: 1) Tropicana operated a bowling center, a place of amusement, and the fee it charged to use bowling shoes was a fee paid in or to a place of amusement; 2) this Court's decision in *Westwood Country Club v. Director of Revenue*, which held that the lease tax was more "specific" than the amusement tax and that "rental" fees charged to use golf carts was tax exempt when tax had been paid when the carts were purchased, was wrongly decided and should be overruled.

Alternatively, Tropicana's shoe fee transaction did not constitute the lease or rental of tangible personal property, and, thus, the lease tax (§ 144.020.1(8), RSMo) did not apply. Finally, even if the transaction was a lease or rental, the tax exemption contained within the lease tax itself did not apply because Tropicana did not purchase the bowling shoes "under the conditions of sale at retail."

When reduced to it basic premise, Tropicana's argument is that this Court should apply the most "specific" taxing provision to a transaction, even if the tax

imposed by that provision does not apply to the transaction in question. In other words, Tropicana contends that the lease tax applies to the fee it charges customers to use bowling shoes, but then relies on that same taxing provision to argue that its fee is exempt from tax altogether.

Tropicana offers no analysis regarding why the lease tax is more specific than the amusement tax in general or in the context of this case. Its argument is apparently based on the assumption that the lease tax was found to be more specific in *Westwood* and *Six Flags* so it must be in this case as well. *See Westwood Country Club v. Director of Revenue*, 6 S.W.3d **885 (Mo. banc 1999); *Six Flags Theme Parks, Inc. v. Director of Revenue*, No. SC84563 (Mo. banc Jan. 14, 2003). This Court's holdings in *Westwood*, *Six Flags*, or even *Greenbriar I*, in which this principle of law was first applied, offer no guidance in determining which taxing provisions are more specific than others. *See Greeenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36 (Mo. banc 1996) ("*Greenbriar I*"). Indeed, it appears that neither taxing provision "on its face seems more specific than the other." *Six Flags*, slip op. at 9 (Wolff, J., concurring in part and dissenting in part). In fact, one could reasonably argue that the amusement tax is more specific in this case because all bowlers were required to wear bowling shoes. In other words, Tropicana's customers were required to pay the fee to use Tropicana's bowling shoes, or bring their own, to participate in the amusement. This was not true in either *Westwood* or**

***Six Flags*, in which the customers were not required to rent a cart to play golf or pay to play a video game to gain entrance to the amusement park.**

Tropicana also does not reconcile its argument that the specific-vs-general canon of construction applies in cases in which two statutes or statutory provisions conflict, with this Court's statement in *J.B. Vending* that no conflict among the taxing provisions existed in *Greenbriar I*. *J.B. Vending v. Director of Revenue*, 54 S.W.3d **183, 189 n.2 (Mo. banc 2001) Since this canon of construction applies only when statutory provisions conflict, then how can it apply in this case when the taxing provisions themselves do not conflict with one another, but simply tax different transactions?**

To bolster its argument that not all fees or charges paid in a place of amusement are taxable, Tropicana relies on the Director's rule 12 CSR 10-3.176. This rule excludes from the amusement tax amounts paid for lessons and other services not related to amusement, recreational, or entertainment activities:

> **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.**

12 CSR 10-3.176(12). But Tropicana overlooks another section of this same rule that expressly taxes the transaction at issue in this case:

> **Example: Mr. A is the owner and operator of a bowling alley and purchases**

bowling shoes for use in operating the bowling alley. Mr. A shall pay tax on the purchase of the bowling shoes. When Mr. A charges his customers for the use of the bowling shoes, the usage fees are subject to sales tax as a fee paid in a place of amusement even though sales tax was previously paid on the purchase of the shoes.

12 CSR 10-3.176(10).

If this Court construes the revenue statutes as taxing all fees or charges paid in or to a place of amusement, including amounts paid for lessons or other service-based transactions that are neither amusement activities themselves or related to an amusement or recreational activity, then the Director's rule should not be followed to the extent it is inconsistent with this construction of the statute. *See Bridge Data, Inc. v. Director of Revenue*, 794 S.W.2d 204, 207 (Mo. banc 1990), overruled on other grounds by *International Bus. Mach. v. Director of Revenue*, 958 S.W.2d 554, 559 (Mo. banc 1997).

The same is true of the rules and letter rulings regarding leases. Currently, the rules, as well as previous letter rulings, have provided that a lessor or renter or tangible personal property has the option to pay sales tax on the purchase of the property or to collect sales tax on the subsequent leases or rentals of that property. Of course, the Director did not consider this principle applicable to usage fees or charges imposed by a place of amusement, which the Director viewed as separate transactions not falling under the lease tax, but taxable under the amusement tax.

Therefore, the Director did not consider the lease tax and the lease tax exemption applicable to such transactions.

Depending on how this Court resolves this issue, the notion that a purchaser of tangible personal property alone determines the taxability of future leases or rentals of that property simply by paying or not paying tax when the property is purchased, may be rendered obsolete. If this Court determines that purchases of personal property intended to be rented or leases are not purchases made "under the conditions of sale at retail" because they are sales for resale, then a purchaser may not unilaterally exempt future leases and rentals from tax simply by paying tax at the time of purchase. Again, depending on how this Court resolves this case, those purchases may be exempt from tax as purchases for resale in the form of a lease or rental, but the subsequent leases or rentals of that property may be taxable under the lease tax.

For instance, the example from 12 CSR 10-3.176(10) quoted above suggests that the operator of a bowling alley must pay tax on bowling shoe purchases and collect tax on fees charged to bowlers to use the shoes. This result is not inconsistent with the statute if one considers the purchase of the shoes taxable under § 144.020.1(1) as the sale of tangible personal property and the fee imposed to use the shoes as a separate transaction taxable under § 144.020.1(2) as a charge or fee paid in or to a place of amusement.

But if this Court determines that the lease tax applies and holds that the shoe

"rentals" do not fall under the lease tax exclusion, then Tropicana's shoe purchases may be excluded from tax as sales for resale in that the shoes were resold to Tropicana's customers as rentals. Consequently, that part of the rule quoted above suggesting that Tropicana owes sales tax on its purchases of shoes would be inconsistent with the statute and this Court's construction of it. The option to pay sales tax on either the purchase of property or on each subsequent lease or rental thereof is provided in § 144.070, RSMo 2000, with respect to the purchase of motor vehicles, trailers, boats, and outboard motors. But no similar provision exists pertaining to the purchase of other tangible personal property.

Tropicana's reliance on letter rulings is even more unavailing considering that they apply only to the person requesting the letter and to a specific set of facts, and that they bind the Director for only three years. Section 536.021.10, RSMo 2000; 12 CSR 10-1.020(8) and (9). None of the letter rulings cited by Tropicana involve the specific fact situation present in this case and the most recent one cited was issued in 1998, more than three years ago. Not surprisingly, rule 12 CSR 10-1.020(9) provides that a letter ruling ceases to be binding if "[a] pertinent change in the interpretation of the law is made by a court of law . . . ." This case provides a forum for just such a change.

Regardless of what the Director's rules provide or of the content of previous letter rulings, this Court's resolution of this, or any other case, has the potential to make the Director's rules and letter rulings obsolete. This Court has the ultimate

authority to construe the revenue laws. Tropicana's refund claim raises issues not addressed by the current rules or previous letter rulings. This requires the Director to advocate positions in the context of this case that could not have been contemplated before Tropicana forced this issue by filing a refund claim seeking to collect sales taxes it collected from its customers. Tropicana's complaint that the some of the Director's positions in this case are inconsistent with the Director's rules rings hollow considering that Tropicana's refund claim is directly contrary to 12 CSR 10-3.176(10), as quoted above. This Court's resolution of the issues in this case will determine what, if any, rules or letter rulings are inconsistent with the statutes.

CONCLUSION

The AHC erred in setting aside the Director's decision denying Tropicana's refund claim and in awarding Tropicana $23,888.65 in sales taxes Tropicana collected from its customers and remitted to the Director. The AHC's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 1889 words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk, which contains a copy of this brief, filed with this Court has been scanned for viruses and is virus-free; and

(3) That a copy of this brief and a floppy disk containing this brief, were mailed, postage prepaid, on April 28, 2003, to:

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