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IN THE SUPREME COURT OF THE STATE OF IDAHO

GRACIE, LLC, an Idaho Limited Liability Company, and BARNES & BARNES ENTERPRISES, LLC, an Idaho Limited Liability Company, Petitioners / Appellants, vs. IDAHO STATE TAX COMMISSION, a Political Subdivision of the State of Idaho, Respondent.	Supreme Court Case No. 36111

APPELLANTS' BRIEF

On Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada

The Honorable Patrick H. Owen, District Judge, Presiding

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Supreme Court ____ Court of Appeals ____
Entered on ATS by: ____

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STATEMENT OF THE CASE

A.

NATURE OF THE CASE

This case arises out of a Determination of Deficiency Determination made by the Idaho State Tax Commission, hereinafter "Tax Commission," determining that Petitioners, Gracie, LLC and Barnes & Barnes Enterprises, LLC, hereinafter collectively, "Planet Beach," owe use tax for tanning and spa equipment purchased by Planet Beach for their spas. Planet Beach protested the determination before the Tax Commission and the Tax Commission upheld the determination of deficiency. Planet Beach then filed a Petition for Judicial Review in the district court to appeal that determination of deficiency. On December 24, 2008, the district court filed its Memorandum Decision and Order upholding the Tax Commission's determination of deficiency.

B.

COURSE OF PROCEEDINGS IN THE TAX COMMISSION

1. On March 20, 2007, the Tax Commission issued a Notice of Deficiency Determination against Petitioner, Barnes & Barnes Enterprises, LLC stating that Petitioner, Barnes & Barnes Enterprises, LLC owed $1,315.00 for use taxes and interest owed on equipment purchased for its Planet Beach Tanning Spas. (R. p. 45, Exhibits 1 and 2).

2. On March 23, 2007, the Tax Commission issued a Notice of Deficiency Determination against Petitioner, Gracie, LLC stating that Petitioner, Gracie, LLC owed $27,966.00 for use taxes and interest owed on equipment purchased for its Planet Beach Tanning Spas. (R. p. 45, Exhibits 1 and 2).

3. On April 26, 200[7], a Written Petition for Redetermination of Notice of Deficiency Determination Dated March 23, 2006 was filed by Petitioner, Gracie, LLC with the Tax Commission. (R. p. 45, Exhibits 1 and 2).

4. On May 1, 2007, a Written Petition for Redetermination of Notice of Deficiency Determination Dated March 20, 2007 was filed by Petitioner, Barnes & Barnes Enterprises, LLC with the Tax Commission. (R. p. 45, Exhibits 1 and 2).

5. On May 11, 2007, the Tax Commission notified Petitioner, Gracie, LLC that a proper tax protest had been filed. In that notification, the Tax Commission enclosed a copy of an Idaho Board of Tax Appeals Decision entitled In the Matter of the Appeal of Cowgirls Tanning Salon, Appeal. No. 05-B-1132 (August 8, 2006). (R. p. 45, Exhibits 1 and 2).

6. On June 25, 2007, an informal hearing was held before the Tax Commission. No record was made of the hearing.

7. On August 9, 2007, the Tax Commission entered a Decision affirming the Notice of Deficiency Determination entered against both Petitioners. (R. pp. 10 – 17).

8. On July 14, 2005, the Tax Commission issued a "Seller's Permit" to Gracie, LLC. (R. p. 45, Exhibits 1 and 2).

9. On November 2, 2007, Planet Beach filed a Petition for Judicial Review of the Tax Commission's Decisions affirming the Deficiency Determination. (R. pp. 5 – 9).

C.

COURSE OF PROCEEDINGS IN THE DISTRICT COURT

1. On November 2, 2007, Planet Beach filed a Petition for Judicial Review of the Tax Commission's Decisions. (R. pp. 5 – 9).

2. On December 4, 2007, Tax Commission filed its Answer to Petition for Judicial Review. (R. pp. 19 – 22).

3. On July 16, 2008, Planet Beach and Tax Commission filed in the district court Stipulated Facts. (R. pp. 23 – 28).

4. On November 25, 2008, the district court heard argument on Planet Beach's appeal from the Tax Commission's Decisions. The appeal was essentially heard on cross-motions for summary judgment. (R. p. 29).

5. On December 24, 2008, the district court filed its Memorandum Decision and Order upholding the Tax Commission's Decisions finding Planet Beach owed use taxes on its equipment purchases. (R. pp. 29 – 37).

6. On February 3, 2009, Planet Beach filed a Notice of Appeal, appealing the district court's Memorandum Decision and Order. (R. pp. 38 – 40).

D.

STATEMENT OF FACTS

Planet Beach and Tax Commission filed Stipulated Facts on July 16, 2008. Those facts need not be reiterated here. The district court, in its Memorandum Decision and Order stated:

> The tanning and spa equipment at each [Planet Beach] location is located in individual rooms. Petitioners' employees control the use of all tanning and spa equipment. Each piece of equipment is hooked up to, and controlled by, a computer. When a customer wants to use a piece of equipment, an employee turns it on using the computer at the front desk. Customers are unable to turn on the tanning and spa equipment from the individual rooms. The employees also control the amount of time a customer can spend in each piece of equipment. Following each use of a tanning bed or piece of spa equipment by a customer, employees clean and sanitize the tanning bed.

> Customers are charged a fee to use a tanning bed or spa equipment. The fee charged is based on the type of equipment used and the amount of time the customer wants to use it. Sales tax is collected by Petitioners for the fees charged. Customers can also purchase protective eyewear, tanning lotions and skin care products at Planet Beach tanning spas. Sales tax is collected from the sale of these items. Each month Petitioners remit the sales taxes derived from the sale of their tanning services and retail products to the State of Idaho. (Emphasis added).

(R. p. 30).

Petitioner, Gracie, LLC, d.b.a. Planet Beach, in year 2007, remitted sales tax to the Idaho State Tax Commission for its customers' purchases of the use of tanning beds and spa equipment in the amount of $37,354.42. Gracie, LLC remitted sales tax to the Idaho State Tax Commission in the amount of $11,773.88 for lotion and accessory sales (e.g. eyewear) in 2007. The total remittance for sales tax in 2007 by Gracie, LLC was $49,128.83. Sales tax is remitted on all sales made by Planet Beach. (R. p. 45, Exhibit 1, paragraph 3).

ISSUES ON APPEAL

Whether the tanning and spa equipment purchased by Planet Beach constitutes a sale subject to imposition of sales and use taxes pursuant to Idaho Code § 63-3601 et seq. where the use of the equipment is being sold or rented by Planet Beach as defined in Idaho Code § 63-3612(2)(f) & (h).

ARGUMENT

I.

STANDARD OF REVIEW

In Fieldturf, Inc. v. State, Dept. of Admin., Div. of Public Works, 140 Idaho 385, 94 P.3d 690 (2004), the Idaho Supreme Court held:

> "In reviewing the district court's decision on a motion for summary judgment, the standard of review is whether there are any genuine issues of material fact, and, if not, whether the prevailing party was entitled to a judgment as a matter of law." *Sacred Heart Med. Ctr. V. Boundary County*, 138 Idaho 534, 535, 66 P.3d 238, 239 (Idaho 2003). "If the evidence shows no disputed issues of fact, what remains is a question of law, over which the appellate court exercises free review." *Id.* Therefore, legal questions resolved by a district court are subject to de novo review by this Court. *Doolittle v. Meridian Joint Sch. Dist.*, 128 Idaho 805, 811, 919 P.2d 334, 340 (1996); *see Iron Eagle Dev., L.L.C. v. Quality Design Sys., Inc.*, 138 Idaho 487, 491, 65 P.3d 509, 513 (2003).

140 Idaho at 387. In this action, there are no disputed issues of fact, only questions of law relating to the interpretation of certain tax statutes.

In Dyet v. McKinley, 139 Idaho 526, 81 P.3d 1236 (2003), the Idaho Supreme Court held:

> The interpretation of a statute is an issue of law over which this Court exercises free review. *Idaho Fair Share v. Idaho Public Utilities Comm'n,* 113 Idaho 959, 961-62, 751 P.2d 107, 109-10 (1988), *overruled on other grounds by J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991).
>
> * * *
>
> The plain meaning of a statute will prevail unless clearly expressed legislative intent is contrary or plain meaning leads to absurd results. *George W. Watkins Family*, 118 Idaho at 540, 797 P.2d at 1388.

139 Idaho at 528.

In AIA Serv. Corp. v. Idaho State Tax Comm'n, 136 Idaho 84, 30 P.3d 962 (2001), the Idaho Supreme Court held:

> Generally, "The Idaho Income Tax Act, like all tax statutes, must be construed as favorably as possible to the taxpayer and strictly against the taxing authority." *Futura Corp. v. State Tax Comm'n*, 92 Idaho 288, 291, 442 P.2d 174, 177 (1968).

136 Idaho at 187. See also, In re Potlatch Forests, Inc., 72 Idaho 291, 240 P.2d 242 (1952) and Idaho Gold Dredging Co. v. Balderston, 58 Idaho 692, 78 P.2d 105 (1938).

II.

PLANET BEACH IS NOT OBLIGATED TO PAY IDAHO USE TAX ON TANNING BEDS AND SPA EQUIPMENT PURCHASED BY PLANET BEACH PURSUANT TO IDAHO CODE § 63-3601 ET SEQ.

Idaho Code § 63-3621 provides in part

> **63-3621. Imposition and rate of the use tax – Exemptions.** – An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property acquired on or after October 1, 2006, for storage, use, or other consumption in this state at the rate of six percent (6%) of the value of the property, and a recent sales price shall be presumptive evidence of the value of the property unless the property is wireless telecommunications equipment, in which case a recent sales price shall be conclusive evidence of the value of the property.
>
> (a) Every person storing, using, or otherwise consuming, in this state, tangible personal property is liable for the tax. His liability is not extinguished until the tax has been paid to this state.
>
> * * *
>
> (b) Every retailer engaged in business in this state, and making sales of tangible personal property for the storage, use, or other consumption in this state, not exempted under section 63-3622, Idaho Code, shall, at the time of making the sales or, of storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefore in the manner and form prescribed by the state tax commission. (Emphasis added).

Idaho Code § 63-3615 provides in part:

> **63-3615. Storage – Use.** – (a) The term "storage" includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer.
>
> (b) The term "use" includes the exercise of any right or power over tangible personal property incident to the ownership or the leasing of that property or the exercise of any right or power over tangible personal property by any person in the performance of a contract, or to fulfill contract or subcontract obligations, whether the title of such property be in the subcontractor, contractor, contractee, subcontractee, or any other person, or whether the titleholder of such property would be subject to the sales or use tax, unless such property would be exempt to the titleholder under section 63-3622D, Idaho Code, except that the term "use" does not include the sale of that property in the regular course of business. (Emphasis added).

The tanning and spa equipment purchased by Planet Beach is defined by statute as "tangible personal property." Idaho Code § 63-3616 provides in part:

> **63-3616. Tangible personal property.** – (a) the term "tangible personal property" means personal property which may be seen, weighed, measured, felt or touched, or which is in any other manner perceptible to the senses.

Planet Beach is not storing, using or otherwise consuming tanning and spa equipment by statutory definition. Planet Beach is selling and/or renting the use of tanning and spa equipment at each of its locations and is collecting sales tax on each use and/or rental it sells. Paragraph 9 of the Stipulated Facts agreed upon by Planet Beach and Tax Commission states:

> 9. At all six (6) locations, Petitioners have tanning and spa equipment located in individual rooms. For a fee, a customer is entitled to use a tanning bed or piece of spa equipment for a certain period of time. Sales tax is collected on all fees charged and collected by Petitioners and remitted to the Idaho State Tax Commission monthly pursuant to Idaho Code § 63-3612(2)(f). The fee varies depending on the type of tanning bed or piece of spa equipment the customer wants to use.

(R. p. 25). In year 2007, Petitioner, Gracie, LLC, d.b.a. Planet Beach, remitted sales tax to the Tax Commission in the amount of $37,354.42 for its customers' purchase of the

use of tanning beds and spa equipment and $11,773.88 for lotion and accessory sales. The total remittance for sales tax in 2007 by Petitioner, Gracie, LLC for its three (3) locations was $49,128.83. (R. p. 45, Exhibit 1, p. 2, paragraph 3).

Idaho Code § 63-3612 provides in part:

> **63-3612. Sale.** – (1) The term "sale" means any transfer of title, exchange or barter, conditional or otherwise, of tangible personal property for a consideration and shall include any similar transfer of possession found by the state tax commission to be in lieu of, or equivalent to, a transfer of title, exchange or barter.
> (2) "Sale" shall also include the following transactions when a consideration is transferred, exchanged or bartered:
>
> * * *
>
> (f) The use of or the privilege of using tangible personal property or facilities for recreation.
>
> * * *
>
> (h) The lease or rental of tangible personal property.

Black's Law Dictionary defines the term "rent" in part as follows:

> **Rent.** Consideration paid for use or occupation of property. In a broader sense, it is the compensation or fee paid, usually periodically, for the use of any property, land, buildings, equipment, etc.

Black's Law Dictionary 673 (5th ed. 1983). Because Planet Beach is not storing, using or otherwise consuming tanning and spa equipment, Planet Beach is not required to pay a use tax pursuant to Idaho Code § 63-3621 on its purchase of that equipment.

III.

THE TAX COMMISSION AND THE DISTRICT COURT ERRED BY NOT CONSTRUING IDAHO CODE § 63-3601 ET SEQ. AS FAVORABLY AS POSSIBLE TO PLANET BEACH AND STRICTLY AGAINST THE TAX COMMISSION

As cited above, the Idaho Supreme Court, in AIA Serv. Corp. v. Idaho State Tax Comm'n, 136 Idaho 84, 30 P.3d 962 (2001), the Idaho Supreme Court held:

> Generally, "The Idaho Income Tax Act, like all statutes, must be construed as favorably as possible to the taxpayer and strictly against the taxing authority." *Futura Corp. v. State Tax Comm'n,* 92 Idaho 288, 291, 442 P.2d 174, 177 (1968).

136 Idaho at 187. See also, In re Potlatch Forests, Inc., 72 Idaho 291, 240 P.2d 242 (1952) and Idaho Gold Dredging Co. v. Balderston, 58 Idaho 692, 78 P.2d 105 (1938). In its decision upholding the Deficiency Determination against Planet Beach the Tax Commission held:

> The Tax Commission has long held that sales of tanning services are charges for the privilege of using tangible personal property of facilities for recreation and therefore included within the definition of "sale" in Idaho Code § 63-3612(2)(f).
>
> * * *
>
> As noted earlier, the Commissioner has ruled that the beds are not purchased for resale.

(R. p. 45, Ex. 2, Exhibit G, p. 2). The Tax Commission then cites Boise Bowling Center v. State of Idaho, 93 Idaho 367, 461 P.2d 262 (1969) to support its decision. The Tax Commission chooses to interpret Idaho Code § 63-3612 as favorably as possible to itself instead of the tax payer.

In Energy Squared, Inc. v. Arizona Department of Revenue, 203 Ariz. 507, 56 P.3d 686 (2002), the Arizona Court was dealing with an almost identical fact pattern involving a tanning salon, except that the Arizona Department of Revenue was asserting that the tanning salon was not offering a service, but was in fact renting tanning beds and booths in an effort to collect taxes on the rental sale. (56 P.3d at 507). In ruling in favor of the tanning salon, the Arizona Court of Appeals held:

> ¶ 19 Although both sides' characterizations of the taxpayer's business activities are reasonable and plausible, two considerations lead us to prefer that offered by the taxpayer.

¶ 20 First, the question whether the legislature intended activities like those of the taxpayer to fall within A.R.S. § 42-5071(A) is not clear. Uncertainty about the scope and meaning of a taxing provision is to be resolved in favor of the taxpayer and against the taxing authority. *City of Phoenix v. Borden Co.*, 84 Ariz. 250, 252-53, 326 P.2d 841, 843 (1958) (any doubts about meaning of statute that imposes tax are to be determined in taxpayer's favor); *accord Shamrock Foods Co. v. City of Phoenix*, 157 Ariz. 286, 288, 757 P.2d 90, 92 (1988).

¶ 21 Additionally, our supreme court has made it clear that the scope and application of A.R.S. § 42-5071(A) and its predecessor hinges on the degree of control over the property in question that is ceded to its putative "lessee" or "renter." *See State Tax Commission v. Peck*, 106 Ariz. 394, 476 P.2d 849 (1970). *Peck* dealt with the analogous question whether the business of coin-operated self-service laundries and car washes constituted leasing or renting tangible personal property for a consideration. To resolve this issue, the *Peck* court adopted a dictionary definition of the verb "to rent":

> Webster's Third International dictionary defines the verb "to rent" as "(1) to take and hold under an agreement to pay rent," or "(2) to obtain the possession and use of a place or article for rent."

Id. at 396, 476 P.2d at 851. The court determined that:

> There is no question that when customers use the equipment on the premises of the plaintiffs herein, such customers have an exclusive use of the equipment for a fixed period of time and for payment of a fixed amount of money. It is also true that the customers themselves exclusively control all manual operations necessary to run the machines. In our view such exclusive use and control comes within the meaning of the term "renting" as used in the statute.
>
> . . . .
>
> [T]he operation of plaintiffs' businesses is characterized by the lack of personal services provided by the owner.

Id. (Emphasis added).

56 P.3d at 689. The Arizona Court of Appeals ruled in favor of the tanning salon primarily because it was construing the Arizona revenue statutes as favorably as possible to the tanning salon and against the tax commission. Further, the Arizona Court had

previously interpreted and ruled what rental meant under the Arizona revenue statutes. The Idaho Supreme Court has not made such a ruling.

Like Arizona, it is not clear whether or not the legislature intended activities like Planet Beach's providing the use of tanning beds and spa equipment to fall within the scope of Idaho Code § 63-3612(2)(h). The Idaho Board of Tax Appeals decision in In the Matter of the Appeal of Cowgirls' Tanning Salon, Appeal No. 05-B-1132 (August 8, 2006) makes it clear that even the Board of Tax Appeals considered Cowgirls' activities as "close to the line of demarcation" as to rental. (R. p. 45, Ex. 2, Exhibit F, p. 4). However, the Board of Tax Appeals resolved the "ambiguity in favor of the Tax Commission." This result was clearly contrary to well established Idaho law that tax statutes must be construed as favorably as possible to the tax payer and strictly against the taxing authority. AIA Serv. Corp. v. Idaho State Tax Comm'n., 136 Idaho 184, 187, 30 P.3d 962, 965 (2001). In contrast, the Arizona Court of Appeals correctly chose to follow well established law and resolve the ambiguity in favor of the taxpayer.

In the case at bar, the Tax Commission and the district court erred by not interpreting Idaho Code § 63-3612(2)(f) & (h) as favorably as possible to Planet Beach as Planet Beach's sale of the use of tanning and spa equipment should clearly be construed as a rental under Idaho Code § 63-3612(2)(f) & (h).

IV.

THE DISTRICT COURT ERRED WHEN IT RULED BOISE BOWLING CENTER v. STATE IS DISPOSITIVE OF THE ISSUE RAISED IN THE CASE AT BAR

The district court in this action ruled:

> In the Court's view, the decision in *Boise Bowling Center v. State* is dispositive on the issue raised in this appeal. In this case Planet Beach provides tanning and related services to its customers, and it is the

> combination of these services that the customer is charged for. Each customer is provided with the use of an individual room that has been cleaned and sanitized by an employee following each customer use, the use of tanning or spa equipment and assistance in turning the equipment on and off. Customers are unable to turn on the tanning and spa equipment from the individual rooms. Customers are unable to rent the tanning machine by itself and do not have the option of cleaning and sanitizing the equipment themselves. Customers also purchase lotions and other products related to the tanning process. Like the bowling patrons in the *Boise Bowling Center* case, customers of Planet Beach spas are paying for a service package when they use tanning and spa equipment. The Court finds that Petitioners are not re-selling the use of the tanning and spa equipment, and as such, are subject to liability for payment of the Idaho use tax for the tanning and spa equipment they purchased from their out of state franchisor.

(R. pp. 35 – 36). The district court's reliance on Boise Bowling Center v. State of Idaho, 93 Idaho 367, 461 P.2d 262 (1969) is in error. In that case, the Bowling Center was primarily selling the use of a bowling lane which also included the use of pin setting equipment. A bowling lane is not tangible personal property. It is a fixture attached to real property. In Boise Bowling Center v. State of Idaho, 93 Idaho 367, 461 P.2d 262 (1969), the Idaho Supreme Court held:

> I.C. s 63-3612(h) defines as a sale, receipts from the lease or rental of tangible personal property.
>
> As the statute clearly indicates a sale or leasing of tangible personal property for any other purpose than resale or releasing that property is a retail sale. Given this information the only question remaining is whether or not the respondent proprietors re-sell or re-lease the equipment originally leased to them. If they do, the transaction between A.M.F. and the owners of the bowling establishments loses the taint of being classified as a 'retail sale' and is not taxable under the act.
>
> We will now analyze the function of the leased automatic pinsetting machines and specifically with respect to whether or not it can fairly be said that these machines are re-rented or re-leased by the proprietors of the bowling establishments to their customers. Operation of a bowling business involves providing the bowling patron with a diverse assortment of services and properties, vix., use of a bowling ball, use of the bowling alley upon which the ball is thrown, use of a score sheet, and use of the

automatic pinsetting machine.

> It is the combination of these services and properties for which a charge is exacted by the proprietor of the establishment. The bowling patron does not rent the automatic pinsetting device by itself but rather rents or pays a fee for a 'package' or bowling service which is supplied by the proprietor. (Emphasis added).

93 Idaho at 369. In Boise Bowling Center, the pinsetting equipment is but an incident of what the bowling patron is paying the use of. The same cannot be said when a Planet Beach customer pays for the use or rental of a piece of tanning or spa equipment. In fact, the fee the customer is charged is based solely on the type of equipment being used. (R. p. 25, paragraph 9). Because Planet Beach charges a usage or rental fee based upon the equipment used, Planet Beach's purchase of that equipment is not taxable.

V.

THE TAX COMMISSION AND THE DISTRICT COURT ERRED BY ARBITRARILY RULING THAT THE TANNING AND SPA EQUIPMENT ARE COMPONENTS OF A "FACILITY" IN VIOLATION OF THE IDAHO STATE CONSTITUTION

Both the Tax Commission and district court ruled that customers of Planet Beach spas are paying for a service package when they use tanning and spa equipment and therefore, Planet Beach is not reselling the use of the tanning and spa equipment. (R. pp. 35 – 36). The district court ruled that Planet Beach customers also purchase lotions and other products related to the tanning process. This is true, but the undisputed evidence is that those lotions and products are not sold as part of a package. (R. p. 27, paragraph 15). The district court ruled:

> [Planet Beach] customers are unable to rent the tanning machine by itself and do not have the option of cleaning and sanitizing the equipment themselves.

(R. p. 35). Planet Beach customers are paying for the use or rental of the particular

tanning and spa equipment for a fee based upon the equipment they choose to use. (R. p. 25, paragraph 25). This falls under the definition of "rent" as is set forth in Black's Law Dictionary. What else are Planet Beach customers "renting" when they use a piece of tanning or spa equipment? The fact that Planet Beach chooses to clean and sanitize the beds is irrelevant. Surely automobile rental companies clean and wash each rental car in between each customer's use. Cleaning and sanitizing the tanning and spa equipment is not a service. It is a good business practice as it is doubtful a customer would want to pay for the use of equipment that was not cleaned and sanitized. The fact that the tanning and spa equipment is located in individual rooms is incidentalto the use of the equipment. Use of tanning and spa equipment requires disrobing. Customers are very unlikely to disrobe in a lobby or other area open to the public. Planet Beach does not charge a fee on the basis of the room the equipment is located in. Nowhere in Idaho Code § 63-3612(h) does it state that use or rental of equipment cannot accompany other items in order to be construed as reselling that equipment.

In In the Matter of the Appeal of Cowgirl's Tanning Salon, Appeal No. 05-B-1132 (2006), the Idaho Board of Tax Appeals made the following finding:

> The STC however holds that customers' purchase of a tanning service may include not only a tanning bed, but a private room, towels, lotion and goggles or other protective supplies; i.e. it is the purchase of the whole tanning facility which is considered akin to renting a bowling lane and the associated pin setting equipment, shoes, and bowling ball (*Boise Bowling Center v. State*, 93 Idaho 367 (1969).)

(R. p. 45 Ex. 2, Exhibit F, p. 4). The Idaho Board of Tax Appeals went on to hold:

> Appellant presented other arguments which are not persuasive. That is not to say a customer's tanning service purchase is not largely related to the tanning bed. The case is closer to the "demarcation line" than many others. Ultimately however, the Board concludes that customers are primarily paying for a recreational service that involves the use of a

> facility and its varied services. It is not reasonable to characterize the tanning service purchase, at a salon location, as the rental of a tanning bed (single piece of equipment.) (Emphasis added).

(R. p. 45 Ex. 2, Exhibit F, p. 4). Where is the demarcation line? Who decides what is a reasonable characterization? Certainly the Tax Commission's ruling is not based on statutory language. Otherwise, the Tax Commission would point to that language. Clearly it is some arbitrary line that the Tax Commission seeks to establish. Because of the arbitrariness, the Tax Commission is violating Article VII § 5 of the Idaho State Constitution which requires taxes to be uniform. This brings us full circle back to the interpretation of Idaho Code § 63-3612.

In Ada County Highway District v. Total Success Investments, LLC, 145 Idaho 360, 179 P.3d 323 (2008), the Idaho Supreme Court held:

> Courts are obligated to seek an interpretation of a statute that upholds its constitutionality.

179 P.3d at 332. Further, tax statutes must be construed as favorably as possible to the taxpayer and strictly against the taxing authority. AIA Serv. Corp. v. Idaho State Tax Comm'n, 136 Idaho 184, 187, 30 P.3d 962, 965 (2001). Clearly, Planet Beach is selling the use of tanning beds and spa equipment. The Tax Commission and the district court are construing Idaho Code § 63-3612(2)(f) & (h) in an arbitrary and unconstitutional manner.

CONCLUSION

The district Court's Decision upholding the Tax Commission's Notice of Deficiency should be reversed and the Idaho Supreme Court should rule that the purchase

of tanning and spa equipment by Planet Beach is not taxable under the sales tax act.

DATED this 23rd day of June, 2009.

DEREK A. PICA
Attorney for Petitioners

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 23rd day of June, 2009, I caused a true and correct copy of the foregoing PETITIONERS' APPELLANT'S BRIEF to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Brian D. Nicholas
Deputy Attorney General
Idaho State Tax Commission
800 Park Plaza IV
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Boise, Idaho 83722-0410

Hand Deliver
U.S. Mail ✓
Facsimile
Overnight Mail

Derek A. Pica