9-22-2009

Gracie LLC, v. Idaho State Tax Com'n Appellant's Reply Brief Dckt. 36111

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' REPLY 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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STATEMENT OF THE CASE

A.

NATURE OF THE CASE

Petitioners / Appellants, Gracie, LLC and Barnes & Barnes Enterprises, LLC, hereinafter collectively, "Planet Beach," previously set forth the Nature of the Case in their Appellant's Brief and need not restate the same here.

B.

COURSE OF PROCEEDINGS IN THE TAX COMMISSION

Planet Beach previously set forth the Course of Proceedings in the Tax Commission in their Appellant's Brief and need not restate the same here.

C.

COURSE OF PROCEEDINGS IN THE DISTRICT COURT

Planet Beach previously set forth the Course of Proceedings in the District Court in their Appellant's Brief and need not restate the same here.

D.

STATEMENT OF FACTS

Planet Beach previously set forth its Statement of Facts in their Appellant's Brief and need not restate the same here.

REPLY ARGUMENT

I.

THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT RELIED ON BOISE BOWLING CENTER V. STATE, 93 Idaho 367, 461 P.2d 262 (1969) IN RULING PLANET BEACH IS LIABLE FOR USE TAX ON ITS PURCHASE OF SPA AND TANNING EQUIPMENT

The ruling in Boise Bowling Center v. State, 93 Idaho 367, 461 P.2d 262 (1969) is fact specific. While the issue is the same (e.g. whether Planet Beach purchased tangible personal property for re-sale versus whether the purchase was a "retail sale"), the similarity ends there. When a patron enters a bowling alley, they are purchasing the use of a lane on which to throw their bowling ball, in addition to the convenience of a pin setting machine that resets the pins. The bowling lane is not tangible personal property. It is a fixture to real property, integral to the bowling activity. A pin setting machine is not integral to bowling. In fact, a person can bowl without a pin setting machine, although the pin setting machine makes the activity much more efficient as otherwise, the proprietor would have to hire manual labor to reset the pins or the bowler would have to manually reset them.

In the case of a tanning bed or piece of spa equipment, the equipment is integral to the customer's purchase. Without the equipment, the activity cannot occur. The customer is paying to rent and/or use a specific piece of equipment. The price the customer pays is specifically based on the equipment the customer chooses to rent and/or use. Nothing else is needed to use the equipment. A lotion is not necessary, although it enhances the experience. If a customer chooses to purchase a lotion, the purchase is a separate transaction from the purchase of the use of the equipment. There is no "service

package." The fact that each piece of equipment is located in a separate room is solely to allow customers the ability to disrobe in privacy, if they choose to do so. (R. p. 45, Exhibit 1, pp. 2 – 3). The room does not add to the use as customers are inside the equipment when using it. With regard to the fact that each piece of equipment is cleaned and sanitized by Planet Beach after each customer uses the equipment in fact, supports the position of Planet Beach that each customer's use is a rental. Rental car companies clean each car after a customer returns it. After a tenant vacates an apartment, the owner will clean and sanitize it before renting it again. Such a practice enhances the value and the ability to re-rent the car or apartment. The same holds true for the renting of equipment (e.g. you don't find dirty equipment to rent at Tates Rents).

Tax Commission wants Idaho Code § 63-3612(f) & (h) to be interpreted so that if anything incidental to the use or rental is provided, the use or rental becomes part of a "package." Is a rental car with gas in it, a clean windshield and a proprietor who provides directions, both as to its use and geographical by providing a map a "service package?" Where is the "line of demarcation?" Clearly the car is integral to the car rental. Without it, there is no rental. The use of a tanning bed is no different. For Tax Commission to engage in an analysis of whether a "service package" is being paid for creates an arbitrary application of Idaho Code § 63-3612 which is not consistent with the law.

II.

TAX COMMISSION'S ARGUMENT THAT PLANET BEACH IS SELLING A SERVICE PACKAGE IS ERRONEOUS

Tax Commission cites Energy Squared, Inc. v. Arizona Department of Revenue, 203 Ariz. 507, 56 P.3d 686 (2002) to argue that Planet Beach is providing a service. In

Energy Squared, the Arizona Department of Revenue argued that the tanning salon in that case was renting tanning equipment so they could collect sales tax on that rental. The tanning salon in that case argued they were providing a service, and as such, their customers did not have to pay sales tax as services are not taxable. The Arizona Court ruled in favor of the tanning salon in large part, because of the uncertainty about the scope and meaning of the Arizona tax statute in question. The Arizona Court clearly stated that the Arizona Department of Revenue's position had merit. Further, the Arizona Court had previously made a decision as to the meaning of the term rent.

In this action, Tax Commission has been receiving sales tax on each Planet Beach customer's rental/use of tanning and spa equipment. If Planet Beach is found to be offering a service, then the service would not be taxable to Planet Beach customers. In this case, Planet Beach is clearly renting the use of equipment to its customers. As in Arizona, Idaho's sales tax statutes must be construed as favorably as possible to Planet Beach. AIA Serv. Grp. V. Idaho State Tax Comm'n., 136 Idaho 84, 30 P.3d 962 (2001). Idaho's sales tax statutes and case law do not define the term rent or rental. Black's Law Dictionary 673 (5th ed. 1983) defines 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. (Emphasis added).

The business practices of Planet Beach clearly and unambiguously fall within the ordinary meaning of the term "rent." In State v. Yzaguirre, 144 Idaho 471, 163 P.3d 1183 (2007), the Idaho Supreme Court held:

> Legislative definitions of terms included within a statute control and dictate the meaning of those terms as used in the statute. *White v. Mock*, 140 Idaho 882, 890, 104 P.3d 356, 364, (2004). Statutory definitions

> provided in one act do not apply "for all purposes and in all contexts but generally only establish what they mean where they appear in that same act." *Maguire v. Yanke*, 99 Idaho 829, 836, 590 P.2d 85, 92 (1978). Where the legislature has not provided a definition in the statute, terms in the statute are given their common, everyday meanings. *Landis v. DeLaRosa*, 137 Idaho 405, 407, 49 P.3d 410, 412 (2002).
>
> The open meeting law does not explicitly define "written." It does, however, distinguish recording from taking minutes: "the taking of written minutes" is mandatory, whereas "neither a full transcript nor a recording of the meeting is required." I.C. § 67-2344(1). The common, ordinary meaning of the term "written" refers to words or symbols recorded in visual form. *See* Black's Law Dictionary 1641 (8th ed. 2004).

144 Idaho at 477 – 478.

The district court erred in its decision when it ruled that Planet Beach is not renting tanning and spa equipment because customers cannot turn the beds on themselves, clean them, etc. Nowhere in the ordinary meaning of the term rent do such actions make the customer's use of the equipment something other than a rental.

Tax Commission concedes that Idaho Code § 63-3612(h) is subject to interpretation arguing:

> A better interpretation of Idaho Code § 63-3612(h) is to determine whether the transaction between the spa provider and the customer is a lease or a sale of a service. . .

Respondent's Brief, p. 8. Given an interpretation must be made, that interpretation must be construed in favor of Planet Beach. AIA Serv. Corp. v. Idaho State Tax Comm'n., 136 Idaho 84, 30 P.3d 962 (2001). Tax Commission argues that the sales tax Planet Beach currently collects on the use of its equipment is pursuant to Idaho Code § 63-3612(f) which provides:

> **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

> bound 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.

By selling the use of tangible personal property (e.g. use of a tanning bed or piece of spa equipment), Planet Beach has made a retail sale in the regular course of business which means that Planet Beach does not "use" the equipment by definition pursuant to Idaho Code § 63-3615(b).

Tax Commission's argument equating the sale of the use of tanning / spa equipment with an amusement park ride is confusing at best. Generally, dozens of people share the same ride at a time. With regard to health club members, a club member pays for use of an entire facility, not for an individual piece of equipment. Further, basketball and racquetball courts, swimming pools, etc. that are located at health clubs are not tangible items of personal property. There simply is no comparison.

III.

ARTICLE VII, §5 OF THE IDAHO STATE CONSTITUTION APPLIES TO SALES AND USE TAX ACT

In Evans v. Idaho State Tax Commission, 95 Idaho 54, 501 P.2d 1054 (1972), the Idaho Supreme Court applied Article VII, Section 5 of the Idaho State Constitution to the Idaho Sales Tax Act. As such, Article VII, §5 applies to sales and use tax. While the state of Idaho clearly has a wide scope of discretion, the application of the particular tax provisions cannot be arbitrary. In this action, Tax Commission is attempting to apply Idaho Code § 63-3601 et seq. in an arbitrary fashion by creating classifications that are

based on a subjective basis instead of an objective statutory basis (e.g. the definition of rent; the definition of a facility; the definition of a service, etc.). There cannot and should not be an arbitrary "line of demarcation" to determine whether a party is or is not subject to a use tax in a certain instance.

CONCLUSION

Boise Bowling Center v. State of Idaho, 93 Idaho 367, 461 P.2d 262 (1969) does not apply as the integral component in the customer's purchase when bowling is a fixture to real property, not a tangible piece of equipment. Planet Beach is clearly renting the use of tangible equipment to its customers. As such, Planet Beach is not liable for use taxes on its purchase of tanning and spa equipment.

DATED this 21ST day of September, 2009.

DEREK A. PICA
Attorney for Petitioners

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 21ST day of September, 2009, I caused a true and correct copy of the foregoing PETITIONERS' APPELLANT'S REPLY 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):

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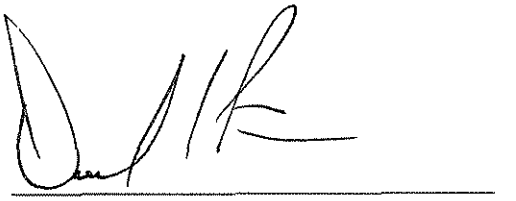
Hand Deliver ✓
U.S. Mail
Facsimile
Overnight Mail



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