8-14-2009

Gracie LLC, v. Idaho State Tax Com'n Respondent's 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

RESPONDENT'S BRIEF

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

Honorable Patrick H. Owen
District Judge Presiding

Lawrence G. Wasden
Attorney General

Brian D. Nicholas, ISB #3585
Deputy Attorney General
State of Idaho
Idaho State Tax Commission
P.O. Box 36
Boise, Idaho 83722-0410
Phone: (208) 334-7530

ATTORNEY FOR RESPONDENT

Derek A. Pica, ISB #3559
Attorney at Law
199 N. Capitol Blvd., Suite 302
Boise, Idaho 83702
Phone: (208) 342-2444

ATTORNEY FOR APPELLANTS

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

RESPONDENT'S BRIEF

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

Honorable Patrick H. Owen
District Judge Presiding

Lawrence G. Wasden
Attorney General

Brian D. Nicholas, ISB #3585
Deputy Attorney General
State of Idaho
Idaho State Tax Commission
P.O. Box 36
Boise, Idaho 83722-0410
Phone: (208) 334-7530

ATTORNEY FOR RESPONDENT

Derek A. Pica, ISB #3559
Attorney at Law
199 N. Capitol Blvd., Suite 302
Boise, Idaho 83702
Phone: (208) 342-2444

ATTORNEY FOR APPELLANTS

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

Cases

Statutes

Page No.

Other Authorities

Rules

STATEMENT OF THE CASE

Nature of the Case

This is a sales and use tax case whereby the Tax Commission (Commission) asserts the appellants, Gracie LLC and Barnes & Barnes LLC (hereinafter appellants), owe use tax on the purchase of their tanning beds and related spa equipment. The appellants operate tanning spas under the name Planet Beach. The Commission audited the books and records of the appellants' business and determined that Gracie owed $27,966 in use tax and interest and that Barnes and Barnes LLC owed $1,315 in use tax and interest. The Commission issued deficiency determinations to the appellants, and after an administrative process, the appellants challenged the deficiency determination in District Court. There, the court ruled in favor of the Commission.

Course of Proceedings

The Tax Commission agrees with the appellants' Statement on the Course of Proceedings.

Facts

The appellants operate six Planet Beach tanning spa franchises in the state of Idaho. In the course of their business, the appellants purchased tanning beds and spa equipment related to the tanning beds. The appellants did not pay sales or use tax on the purchase of the beds and equipment. For a fee, a customer of the appellants, is entitled to use a tanning bed or piece of spa equipment for a certain period of time. All use of tanning beds and spa equipment is strictly controlled by the appellants' employees. All tanning beds and spa equipment is controlled by a computer and a "T-max" that is hooked up to each tanning bed and piece of spa equipment. A customer cannot turn on a tanning bed or piece of spa equipment from inside one of the tanning

beds. The tanning beds and spa equipment are turned on by an employee of the appellants from the computer at the front desk.

All use of tanning beds and spa equipment is strictly controlled by the appellants' employees as to the amount of time the customer can use the tanning bed or spa equipment. Customers normally make appointments. The maximum time a customer can use any tanning bed or piece of spa equipment is twenty minutes. A customer can only use an elite tanning bed for a maximum of ten minutes. The time limits are for safety reasons, as customers cannot be over exposed. Further, no customer is allowed to tan more than one (1) time in a twenty-four hour period.

The Planet Beach website describes the services provided by the franchisees as the sale of services whereby the customer receives premier wellness, relaxation, UV therapy, and skin rejuvenation. The website indicates that customers receive a "private spa experience" and that this experience is "the perfect hybrid of spa services and UV therapy."

Issue on Appeal

The issue on appeal is whether the appellants' purchase of the tanning beds and spa equipment are subject to Idaho sales and use tax.

ARGUMENT

Standard of Review

The parties submitted stipulated facts and filed cross-motions for summary judgment. Generally, when a trial judge passes upon a motion for summary judgment, the standard of review for the appellate court is the same general standard as set out in Rule 56 of the Rules of Civil Procedure. All facts and inferences are to be construed in a light most favorable to the nonmoving party, and a summary judgment is inappropriate if any genuine issue of material fact

remains unresolved. Meridian Bowling Lanes, Inc. v Meridian Athletic Ass'n Inc., 105 Idaho 509, 512, 670 P.2d 1294, 1297 (1983). However, because both parties moved for summary judgment based on stipulated facts and on the same theories and issues, there is no genuine issue of material fact. Kromrei v. AID Ins. Co., 110 Idaho 549, 716 P.2d 1321 (1986); Riverside Development Co. v. Ritchie, 103 Idaho 515, 650 P.2d 657 (1982). The trial court then is responsible for resolving any conflicting inferences. Old West Realty, Inc. v. Idaho State Tax Commission, 110 Idaho 546, 716 P.2d 1318 (1986); Riverside Development Co. v. Ritchie 103 Idaho 515, 650 P.2d 657 (1982). The Supreme Court's review of the issues of the facts in this case, as decided by the trial court, "extends only to determining whether the record is sufficient to justify the district court's finding[s]...." Ritchie, 103 Idaho at 520, 650 at 662. However, when the interpretation of a statute is at issue, the Supreme Court will exercise free review. Dyet v. McKinley 139 Idaho 526, 81 P.3d 1236 (2003).

The District Court Properly Held That the Appellants are Liable for the Use Tax

Idaho Code § 63-3621 imposes a use tax on the storage, use, or other consumption of tangible personal property within the state measured by the value of the property, and a recent sales price is presumptive evidence of its value. Every person storing, using, or otherwise consuming tangible personal property is liable for the use tax. The liability is not extinguished until the tax has been paid except that a receipt from a retailer maintaining a place of business in this state or engaged in business in this state given to the purchaser is sufficient to relieve the purchaser for the tax to which the receipt refers. Pursuant to Idaho Code § 63-3621(h), a presumption exists that all tangible personal property shipped or brought into Idaho by the purchaser was purchased from a retailer for storage, use, or other consumption. Accordingly, the use of tangible personal property is subject to use tax, unless the party paid sales tax upon the

purchase of the property, or the party can establish that the property was bought for resale or that he is entitled to an exemption contained in Idaho Code §§ 63-3622A through 63-2622TT (the statutes that contain all of the exemptions from the sales and use tax).

Thus, the appellants' purchase of the equipment at issue in this case is presumed to be subject to the sales and use tax imposed in the Idaho Sales Tax Act. The appellants owe tax on the purchase of the equipment, unless they can establish that they are reselling the property or are entitled to an exemption. The appellants do not claim they are entitled to an exemption, but they do claim they are renting the equipment in the regular course of business. Idaho Code § 63-3622(c) provides the following:

> A resale certificate shall be signed by and bear the name and address of the purchaser or his agent, shall indicate the number of the permit issued to the purchaser or that the purchaser is an out-of-state retailer, and shall indicate the general character of the tangible personal property sold or rented by the purchaser in the regular course of business. A resale certificate relieves the seller from the burden of proof only if taken from a person who is engaged in the business of selling or renting tangible personal and who holds a permit provided for in this section, or who is a retailer not engaged in business in this state, and who, at the time of purchasing the tangible personal property, intends to sell or rent in the regular course of business . . . . (Emphasis added.)

Thus, the appellants can only claim a resale exemption for the equipment if they intend to sell or rent it in the regular course of business. For the appellants to prevail in this case, they must establish that they rent the equipment to their customers. If the appellants cannot establish that they are renting the equipment, then they must pay use tax on the equipment because there is no other available exemption that applies. The District Court properly found that the appellants were not renting the spa beds and related tanning equipment.

The District Court's opinion provides:

> In the Court's view, the decision in Boise Bowling Center v. State (93 Idaho 367, 461 P.2d 262 (1969)) 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. Record at pages 35 and 36.

The District Court properly applied Boise Bowling to the facts of this case. In Boise Bowing, the Court ruled that a bowling alley owner did not rent the pinsetting equipment to the bowling patrons and thus owed use tax on the equipment it provided in the process of providing bowling services to the public. The Supreme Court stated:

> 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, viz., 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" The mere fact that goods bought are used for the benefit of the customer or clients of the purchaser in no way detracts from their character as consumer goods. The goods are consumed by the purchaser in furtherance of his enterprise. The fact that the goods are used for the benefit of the purchaser's customer or in the case of a bowling establishment or hotel, that the goods are used by the patrons themselves does not alter their character in the hand of the original purchaser (hotel owner or proprietor of a bowling establishment). They are and remain consumer goods which are consumed by the original purchaser in the course of his business. *Id. At 369-370.*

Here, the equipment, like the pinsetting equipment in a bowling alley, is controlled by the appellants. The customers do not turn the equipment on or off. That function is controlled by the employees of the appellants. The customers pay to receive a tan or spa service. The District Court correctly concluded, the customers are paying for a service package when they use tanning and spa equipment. This is similar to equipment at an amusement park. The customer pays money to ride a ride, but it cannot be said the payment is to rent the equipment used to provide the ride. The amusement park operator controls the operation of the ride and would owe sales or use tax on its purchase of the equipment. Similarly, a health club member pays to use the facility including the various exercise equipment in the facility. The member is not renting the exercise equipment, but is paying for a service package. The District Court properly determined that the appellants, like the bowling alley proprietors, are providing a service to their customers and are not renting the equipment. Like the bowling alley customers, the appellants' customers do not exercise control over the equipment. They cannot turn the equipment on and off, they cannot clean the equipment, nor can they clean the rooms where the equipment is located. It also should be noted, though not relied upon by the District Court, the appellants own advertising provides that a tanning service is being provided, not an equipment rental. See Stipulated Facts, Paragraph 16. (R. pg 27.)

With most identical facts relating to this case, the Arizona Court of Appeals concluded that a tanning salon did not rent the beds and related spa equipment to its customers. Energy Squared, Inc. v. Arizona Department of Revenue, 56 P.3d 686, Az. App. (2002). In that case, the Arizona Department of Revenue asserted that the taxpayer, an owner and operator of a tanning spa business, rented the beds and, therefore, should pay the Arizona transaction tax imposed on the business of leasing or renting tangible personal property. The taxpayer contended that it was

not renting the tanning beds. The Court of Appeals sided with the taxpayer holding that the transactions were not rentals because of the lack of control over the property by the customers. The Arizona Court stated:

> The business activities of the taxpayer in this case do not meet these criteria. The taxpayer's customers do not "themselves exclusively control all manual operations necessary to run" the tanning beds or booths in question. They may select within a five-minute window when the tanning session begins and may terminate it early. By design, however, the question whether a tanning session may be commenced at all, and the question of how long the tanning session may last, are in the exclusive control of the taxpayer's tanning technician. The question of which particular tanning device is appropriate is also significantly within the technician's control. In sum, the "exclusive use and control" by the customer that *Peck* (*State Tax Commission v. Peck*,476 P.2d 849 (Ariz. (1970)) determined to be the essence of "renting" within the taxing statute is not present here. *Energy Squared, Id. at 510*

The appellants nevertheless contend that Idaho Code § 63-3612 is ambiguous and should be construed in their favor because of the rule in Futura Corp. v. State Tax Commission, 92 Idaho 288, 442 P.2d 174 (1968). There, the Court held that if a tax statute is ambiguous, it should be construed in favor of the taxpayer. The appellants argue that they are renting the tanning beds and spas and, therefore, they purchased the equipment for resale. They contend that Idaho Code § 63-3612(2)(f) and (h), based on Futura Corp, should be interpreted in a manner that the appellants are renting the equipment to the customer. However, this Court already addressed the meaning of rental in the context of the Sales Tax Act in Boise Bowling. The Court has given guidance on whether a transaction is a rental or a service, and there is no reason to vary from that standard.

To apply the rule that statutes are to be construed in the favor of the taxpayer in this case leads to inconsistent results. The appellants are attempting to avoid tax on the purchase of the equipment by arguing that it is re-renting these items. Thus, if this is the case, it would collect sales tax on the rental of the equipment to its customers. If that were the case, the customers

would owe use tax on the rental if the appellants did not collect sales tax. However, the customers could argue that Idaho Code § 63-3612 is ambiguous because it is unclear whether they are renting the equipment or are purchasing a service. Applying the same rule of statutory construction, they could argue that the statute should be construed that they are purchasing a service. Thus, the result of these combinations of arguments, using the same rule of statutory construction, would be that, from the perspective of the tanning salon owners, such as the appellants, the equipment is being rented, but, from the perspective of the customers, they are purchasing a service.[1]

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 and then determine whether it is subject to sales tax that would be applied consistently to both parties to the transaction. The appellants' rationale for statutory construction of Idaho Code § 63-3612(f) can lead to anomalous results and does not warrant this Court to overrule the holding of *Boise Bowling*.

The District Court's Decision Does Not Violate the Idaho Constitution

The appellants' argue that the District Court decision, and the Idaho State Tax Commission in its interpretation of Idaho Code § 63-3612, violate Article VII, § 5 of the Idaho State Constitution. There are several problems with the appellants' contention. Article VII § 5 provides that all taxes must be uniform upon the same class of subjects. However, this Court has specifically ruled that the section only applies to property taxes and not excise taxes such as sales and use tax. Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068 (1936).

[1] In this case, the appellants charge a fee to the customer, and that fee is subject to sales tax as a charge for the use of property or facilities for recreation. However, the customer does not owe use tax. Idaho Code § 63-3612(f).

Even assuming Article VII § 5 applies to sales and use tax, the Commission's interpretation of Idaho Code § 63-3612(f) is not arbitrary. The question is whether the appellants are renting the tanning and spa equipment to their customers. The Commission agrees with the District Court that they are not. The District Court relied on Boise Bowling and held that the appellants were providing a service. The appellants exercise control over the equipment during the time the customer receives tanning services. The element of control and the fact that the customer is receiving a package of tanning services indicates that the appellants are not renting out the equipment.

CONCLUSION

The District Court held that Boise Bowling is dispositive of this case. The appellants have not provided a good rationale to distinguish Boise Bowling. They provide spa and tanning services and UV Therapy to their customers. Additionally, the appellants exercise the control over the equipment during the time the customer receives the tanning services and spa treatment. For these reasons, this Court should affirm the Memorandum Decision of the District Court.

DATED this 14 day of August, 2009.

Brian D. Nicholas
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of August, 2009, I caused to be served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by depositing the same in the United States Mail, postage prepaid, and addressed to each of the following:

DEREK A PICA
ATTORNEY AT LAW
199 N CAPITOL BLVD SUITE 302
BOISE ID 83702

BRIAN D. NICHOLAS
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

DEREK A. PICA ATTORNEY FOR APPELLANTS	derekpica@msn.com
CLERK OF THE SUPREME COURT	sctbriefs@idcourts.net

Dated and certified this 14 day of August, 2009.

BRIAN D. NICHOLAS
DEPUTY ATTORNEY GENERAL