TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00534-CV

Fitness International, LLC, Appellant

v.

Glenn Hegar, Comptroller of Public Accounts of The State of Texas; and Ken Paxton, Attorney General of The State of Texas, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 98TH JUDICIAL DISTRICT NO. D-1-GN-14-003869, HONORABLE GISELA D. TRIANA, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Fitness International, LLC (Fitness), appeals the trial court's final judgment denying in part its refund claim for alleged overpayment of sales taxes for certain items purchased for use by members in its health clubs. Fitness had claimed its refund entitlement under the "Sale for Resale" exemption in section 151.302 of the Tax Code. *See* Tex. Tax Code § 151.302(a) ("The sale for resale of a taxable item is exempted from the taxes imposed by this chapter."); *see also id.* § 151.006 (defining "sale for resale"). After a bench trial, the trial court rendered a final judgment allowing the exemption for some of the claimed items (such as towels and basketballs) and disallowing it for others (such as cardio machines and weight racks). Fitness raises several arguments contending that the trial court erred in denying the exemption on all of its requested items. We will affirm the trial court's final judgment.

BACKGROUND[1]

Fitness owns and operates health clubs in Texas that sell memberships under "Membership Agreements" granting customers access to use its facilities and amenities. The Membership Agreements provide that Fitness may at its sole discretion and at any time amend the clubs' policies, including the hours of operation and facilities it makes available to members and may, upon notice and refund of pre-paid dues, terminate a member's membership and right to use its facilities and exercise equipment. Use of the large exercise equipment in Fitness's facilities, including cardio machines, is limited to Fitness's hours of operation and the fixed location of the equipment within the facilities, which Fitness determines at its sole discretion. Fitness's employees are charged with cleaning, repairing, and maintaining the exercise equipment although members are encouraged to wipe off equipment after using it. Fitness also maintains property and liability insurance covering the exercise equipment.

Fitness's operation of its health clubs constitutes the provision of taxable "amusement services" as that term is defined in the Tax Code and the Comptroller's rules. *See* Tex. Tax Code §§ 151.0028(a), (b) (providing that "amusement services" means "the provision of amusement, entertainment, or recreation" and "includes membership in a private club or organization that provides entertainment, recreational, sports, dining, or social facilities to its members"), .0101(a)(1), (b)

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[1] The factual background is drawn from the trial court's findings of fact. While Fitness challenges the "materiality" of several of the fact findings, claiming that they address requirements not set out in the relevant statutes, it does not challenge their evidentiary support. *See Trevino v. Munoz*, 583 S.W.2d 840, 843 (Tex. Civ. App.—San Antonio 1979, no writ) (holding that where appellant does not challenge sufficiency of evidence to support trial court's findings of fact, appellate court will accept findings as correct recitation of facts).

(providing definition of "taxable services" under chapter 151 to include "amusement services" and that Comptroller has "exclusive jurisdiction" to interpret definition of "taxable services" under subsection (a)); *see also* 34 Tex. Admin. Code § 3.298(a)(1)(D) (Comptroller of Pub. Accounts, Amusement Services) (noting that "amusement services" include physical fitness centers).

Fitness timely brought this suit under chapters 112 and 151 of the Tax Code for a refund of sales taxes it paid with respect to its purchases of certain tangible personal property for use by its members at its health clubs. Fitness claimed that the purchases at issue were exempt from the sales tax under the "Sale for Resale" exemption. *See* Tex. Tax Code §§ 151.302(a), .006. After a bench trial, the court rendered judgment that certain of the purchased items were exempt from the tax but that certain other items were not. The items that the trial court determined were entitled to the exemption include towels, basketballs, and personal sanitation consumables (e.g., body wash, shampoo, and hand sanitizer).[2] The items that the trial court determined were not exempt include cardio machines, abdominal machines, stretch machines, arm/shoulder equipment, leg equipment, weight racks, scales, and promotional flyers.

DISCUSSION

Fitness makes several arguments in support of its contention that the trial court erred in disallowing the exemption on the items at issue. Firstly, it contends that the evidence showed that its purchases met the exemption requirements because either (a) members paid a monthly fee to

[2] The Comptroller's appellate brief notes that, while he disagrees with the trial court's determination with respect to these "exempt" items, he has withdrawn his cross appeal and that, therefore, "the items the trial court found to be exempt are not an issue in this appeal." We, therefore, do not address the propriety of the trial court's determination about the "exempt" items.

"rent" the items, *see id.* §§ 151.005(2) (noting that "sale" means rental of tangible personal property), .006(a)(1) (noting that "sale for resale" means sale of tangible personal property to purchaser who acquires it for purpose of "reselling" it as integral part of taxable service); or (b) the items were "transferred" to members, *see id.* § 151.006(a)(3) (noting that "sale for resale" means sale of tangible personal property to purchaser who acquires it for purpose of "transferring" it as integral part of taxable service). Secondly, Fitness contends that the sections of the Tax Code on which the trial court relied to conclude that Fitness does not meet the requirements of the exemption—sections 151.058(a) and 151.302—do not apply to Fitness because it does not use the items at issue to "perform" any services. *See id.* §§ 151.058(a) ("A person performing services taxable under this chapter is the consumer of machinery and equipment used in performing the services."), .302 (tangible personal property "used to perform a taxable service is not considered resold unless the care, custody, and control" of it is transferred to purchaser).

We first consider the statutory text establishing the exemption that Fitness is claiming: "The sale for resale of a taxable item is exempted from the taxes imposed by this chapter." *Id.* § 151.302(a). Section 151.006 defines what a "sale for resale" is:

> (a) Sale for resale means a sale of:
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> > (1) tangible personal property . . . to a purchaser who acquires the property . . . **for the purpose of reselling it** with or as a taxable item . . . in the normal course of business in the form or condition in which it is acquired or as an . . . integral part of other . . . taxable service;
> >
> > * * *
> >
> > (3) tangible personal property to a purchaser who acquires the property **for the purpose of transferring it** . . . as an integral part of a taxable service.

Id. § 151.006(a) (emphases added). It follows, therefore, that the ultimate question in this case is: Did Fitness purchase the items at issue (1) for the purpose of "reselling" or "transferring" them to its members (2) as an integral part of a taxable service?

While this determination requires an inquiry into the facts surrounding the purchases at issue as well as the structure and operation of the taxable services that Fitness provides, the ultimate question—whether Fitness bought the exercise equipment to "resell" or "transfer" it to its members—is a legal determination turning on statutory construction, which we consider de novo. *See Titan Transp., LP v. Combs*, 433 S.W.3d 625, 636–37 (Tex. App.—Austin 2014, pet. denied).

The legislature did not define "transfer" or "resell" in the Tax Code. We therefore give the words their plain and common meanings. *See McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). "Transfer" means "to make over or negotiate the possession or control of (a right, title, or property) by a legal process usually for a consideration: convey." Webster's Third New Int'l Dictionary 2426–27 (2002). "Possession" is not defined in the Tax Code, but its common meaning is "the act or condition of having in or taking into one's control or holding at one's disposal" and "actual physical control or occupancy of property by one who holds for himself and not as a servant of another without regard to his ownership and who has legal rights to assert interests in the property against all others having no better right than himself." *Id.* at 1770. "Resell" means to "sell again," *id.* at 1930, and "sell" means "to give up (property) to another for money or other valuable consideration: hand over or transfer title to (as goods or real estate) for a price" and "to offer for sale: deal in as an article of sale." *Id.* at 2061. Because the common meaning of "sell" encompasses offering items for "sale," we are also guided by the legislature's definition of that term:

> Sale or purchase means any of the following when done or performed for consideration:
>
> > (1) a **transfer of title or possession** of tangible personal property;
> > (2) the exchange, barter, **lease, or rental** of tangible personal property[.]

Tex. Tax Code § 151.005 (emphases added).

Based on these definitions and this record, there can be no reasonable conclusion that Fitness purchased the exercise equipment and other items at issue for the purpose of (1) reselling them, (2) transferring (i.e., legally conveying) them, (3) transferring legal possession of them (so as to make members' property rights equal or superior to Fitness's rights), or (4) offering them for lease or rental. While Fitness cites the testimony of several of its witnesses stating that through membership dues their members "rent" the exercise equipment and that the equipment is repeatedly "transferred" from one member to another for short periods of time, these are merely the legal conclusions of a party. The determination of whether Fitness purchases the at-issue items for the purpose of "transferring" or "reselling" them as an integral part of its selling gym memberships and operating gym facilities depends upon the making of legal conclusions from the facts, which is the province of the courts, not a party's witnesses, regardless of the terminology they use. Even those witnesses' direct testimony that Fitness's "intent" in purchasing the items was so that they could be "transferred" or "rented" to members for use while at the clubs and that such purposes are "why [Fitness] exist[s] as a company" are not dispositive. Such testimony is at odds with Fitness's business model and operations, the Membership Agreements, and the fact findings made by the trial court. The Membership Agreements cannot reasonably be construed as leases or rental agreements, nor can Fitness's making the equipment available to members for use while at the gyms be construed

as "transferring possession," despite its witness's testimony that a member is in "control" of particular equipment while using it by, for example, adjusting the amount of weight on a machine. Rather, Fitness retains superior legal possession of the items and merely provides access to and use of its facilities—including whatever exercise equipment may or may not be on site and functioning at any given time—under terms and conditions completely within its own discretion for a specified monthly fee. We hold that the trial court did not err in determining that Fitness is not entitled to the "Sale for Resale" exemption for the items at issue.[3]

CONCLUSION

The trial court properly determined that Fitness is not entitled to the "Sale for Resale" exemption in Tax Code chapter 151 for the items identified as non-exempt in its final judgment. Accordingly, we affirm its final judgment.

David Puryear, Justice

Before Justices Puryear, Goodwin, and Field

Affirmed

Filed: June 16, 2016

[3] Because we conclude that Fitness did not acquire the items at issue for the purpose of reselling or transferring them, we need not reach its arguments about other provisions in the Tax Code on which the trial court relied and which Fitness contends do not apply to it because it does not use the items in "performing" any services. *See* Tex. Tax Code §§ 151.058(a), .302(b); Tex. R. App. P. 47.1 (court of appeals must hand down written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition).