

**IN THE
SUPREME COURT OF MISSOURI**

No. SC86519

SIX FLAGS THEME PARKS INC.,

RESPONDENT,

v.

DIRECTOR OF REVENUE,

APPELLANT.

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The parties submitted this matter to the Missouri Administrative Hearing Commission (the “Commission”) on a stipulation of facts (L.F. 240-244, 246). The Commission adopted the stipulation of facts as its findings of fact (L.F. 247-249). The Commission’s decision (L.F. 246-253) is attached hereto as an appendix (App. A1-A8). The facts in the record are not in dispute. However, the Director’s statement of facts is inaccurate and not supported by the record in one key respect and the Director’s statement of facts is otherwise incomplete in other respects. Therefore, under Rule 84.04(f), Respondent includes the following statement of facts.

Respondent Six Flags Theme Parks Inc. (“Six Flags”) is a Delaware corporation in good standing and duly registered to do business in Missouri (L.F. 247). Respondent operates a theme park (the “Park”) located at 4900 Six Flags Road, Eureka, Missouri 63025 (L.F. 247). The Park contains amusement rides, such as roller coasters and ferris wheels, and a water park area (L.F. 247). The Park is a place of amusement. Respondent charges an admission fee to enter the Park (L.F. 247). Respondent collects and remits sales tax on the admission fee (L.F. 247).

Various amusement rides in the water park area are water rides for which the use of an inner tube is required (L.F. 247). There is no separate charge to go on these water rides (L.F. 247). Respondent makes inner tubes available without charge for use at each water ride for which the use of an inner tube is required (L.F. 247). Inner tubes that are provided to patrons without charge (“Free Inner Tubes”) must remain at the ride location where they are provided (L.F. 247). The Free Inner Tubes are color-coded (L.F. 247). A patron is not

permitted to remove a Free Inner Tube from the ride location at which that inner tube was obtained (L.F. 247).

Respondent also operates a wave pool in the water park area (L.F. 247). The wave pool is a very large, rectangular pool with artificial waves traveling the length of the pool (L.F. 247). There is no separate charge to swim in the wave pool (L.F. 247).

A patron can obtain an inner tube (a “Paid Inner Tube”) for his immediate and exclusive use, possession and control by paying a fee at a separate kiosk that is located near the showers and changing room, roughly equidistant from the wave pool and the water rides (L.F. 247). Paid Inner Tubes are the same size as Free Inner Tubes, but are clearly distinguishable from Free Inner Tubes by color (L.F. 248). There is no evidence in this record that Respondent charged its patrons sales tax on the charges for Paid Inner Tubes.¹

After a patron has paid a fee for a Paid Inner Tube, the patron can take the Paid Inner Tube anywhere within the water park where the use of an inner tube is not prohibited (L.F. 248). Inner tubes cannot be taken outside of the water park area and are prohibited on body

¹ Although the record is silent in this regard, contrary to Appellants assertions, (App. Br. 10, 14-15, 17, 19, 27, 64, and 67), Respondent did not charge its patrons sales tax on the charge for Paid Inner Tubes nor did Respondent represent to patrons that the charge included sales tax. None of Appellant’s citations to the record support Appellant’s assertion that Respondent collected sales tax on Paid Inner Tube charges. The Commission did address Appellant’s unjust enrichment argument in its decision (L.F.

253), but nowhere found that Respondent had collected the tax in dispute from its patrons.

slides, in Hook's Lagoon and on one water slide where the use of a larger raft-type flotation device is required (L.F. 248).

The wave pool is the only activity in the Park at which inner tubes are permitted to be used, but at which inner tubes are not provided to patrons without charge (L.F. 248). Free Inner Tubes cannot be used in the wave pool (L.F. 248). Therefore, if a patron desires to float on an inner tube in the wave pool, the patron must use a Paid Inner Tube (L.F. 248). However, an inner tube is not required to use the wave pool and patrons using the wave pool frequently do so without an inner tube (L.F. 248).

Periodically, patrons will have to wait in line for a moderate period of time to obtain a Free Inner Tube to use at a ride at which the use of an inner tube is required (L.F. 248). Patrons wanting an inner tube to be available for their immediate and exclusive use on these rides can use a Paid Inner Tube (L.F. 248).

Respondent remitted Missouri sales or use tax on all of its purchases of inner tubes used at the Park, including all Free Inner Tubes and Paid Inner Tubes (L.F. 248). Respondent also timely remitted Missouri sales tax on fees paid by patrons for Paid Inner Tubes ("Inner Tube Fees") during the period from June 2000 through September 2000 (L.F. 248).

In 2003, Respondent timely filed claims for refund of Missouri sales taxes remitted on Inner Tube Fees that were paid with respect to the June 2000 through September 2000 tax period (L.F. 248-249). Appellant denied these claims (L.F. 249) and Respondent appealed the denial to the Commission (L.F. 1-3). The parties filed a stipulation of facts and waived a hearing (L.F. 246).

On December 3, 2004, the Commission ordered Appellant to refund the sales tax Respondent had paid on Inner Tube Fees (L.F. 246-253). The Commission relied on this Court's holdings in *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526 (Mo. banc 2003) and *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999) as controlling and distinguished *Eighty Hundred Clayton Corporation, d/b/a Tropicana Lanes v. Director of Revenue*, 111 S.W.3d 409 (Mo. banc 2003) ("*Tropicana Lanes*") and *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596 (Mo. banc 1977), the cases relied upon by Appellant (L.F. 251). The Commission thus concluded that § 144.020.1(8)² is controlling and that Respondent is entitled to a refund under § 144.190.

In reaching its decision, the Commission noted that Appellant's arguments have been addressed and rejected by prior decisions of the Missouri Supreme Court.

² All statutory citations are to the Revised Statutes of Missouri of 2000, as amended, unless otherwise noted.

STANDARD OF REVIEW

The decision of the Commission shall be upheld: (1) if it is authorized by law; (2) if it is supported by competent and substantial evidence upon the whole record; (3) if no mandatory procedural safeguards are violated; and (4) if it is not clearly contrary to the Legislature's reasonable expectations. Section 621.193; *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W.2d 186 (Mo. banc 1996). The first and second standards are at issue before this Court.

Finally, this Court's interpretation of Missouri's revenue laws is *de novo*. *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000).

ARGUMENT

This appeal is governed by a straightforward construction of § 144.020.1(8) and by a straightforward application of two cases that have already construed that statute in this context: *Westwood* and *Six Flags*. Respondent paid tax when it purchased the inner tubes at issue in this case. According to the express words of § 144.020.1(8), Respondent “shall not apply or collect the tax on the subsequent lease or rental receipts for that property.”

In her efforts to defeat § 144.020.1(8)’s exclusion from double taxation, Appellant rehashes a series of arguments that have, with minor exceptions, been rejected by this Court not just once, but on multiple occasions. Respondent will address each of these arguments separately. However, as a preliminary matter, Respondent would like to set the record straight with regard to Appellant’s repeated, unsupported, and erroneous assertion that Respondent collected sales tax from its customers on Paid Inner Tube rental fees (App. Br. 10, 12, 14-15, 17, 19, 22, 27, 64, 67). There is no support in the record for this assertion and it is factually incorrect. Appellant cites the Legal File (L.F. 242, 243, 248, 249 and 253) as purportedly supporting her assertion that Respondent collected tax from its customers on inner tube rental fees (App. Br. 12-15). However, the Legal File in fact says no such thing. There is no reference of any kind in the stipulated facts -- or otherwise in the Legal File -- relating to this issue, except for a reference at L.F. 253, which contains the Commission’s incorrect supposition that the taxes it ordered to be refunded had actually been collected by Respondent from its customers. There, the Commission stated:

The Director argues that [Respondent] would be unjustly enriched by receiving a refund because it is not required to return that money to its

customers. *Buchholz Mortuaries v. Director of Revenue*, 113 S.W.3d 192, 195-97 (Mo. banc 2003) (Wolff, J., concurring). Therefore, any refund to it would be a windfall. *Central Hardware Co. v. Director of Revenue*, 887 S.W.2d 593, 595 (Mo. banc 1994). However, we find no statutory requirement that the money be returned to [Respondent's] customers. Although we find this result inequitable, this Commission cannot change or add to the requirements of the statute. *Lynn v. Director of Revenue*, 689 S.W.2d 45, 49 (Mo. banc 1985).

The Commission neither stated nor determined that Respondent's customers had paid the tax, nor could it have done so, as there was no support in the record for such a determination. If this Court were inclined to look outside the record with respect to this issue, it should do so with respect to the actual facts. In that regard, Respondent represents that there was no separate sales tax charged to Respondent's customers who rented Paid Inner Tubes. Nor did Respondent represent to those customers that tax was included in the Paid Inner Tube rental fees as the sign at the Paid Inner Tube rental kiosk made no reference to tax, and there was no reference to tax on any customer receipts.

Section § 144.020 imposes tax liabilities "rather than describing an exemption" and, as such, "shall be strictly construed against the taxing authority and in favor of the taxpayer[.]" *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526, 529 (Mo. banc 2003). Rather than give § 144.020.1(8) a strict construction in favor of the taxpayer and against Appellant, Appellant's arguments would have this Court ignore the express words of § 144.020.1(8) to defeat its acknowledged purpose of preventing double

taxation. This Court should reject each of Appellant's arguments and affirm the Commission's decision.

I. THE COMMISSION DID NOT ERR IN GRANTING RESPONDENT'S REFUND REQUEST SINCE RESPONDENT'S INNER TUBE FEES ARE EXPRESSLY EXCLUDED FROM SALES TAX BY § 144.020.1(8)

Appellant argues that § 144.020.1(2) applies without exception "to any and all fees paid by patrons to a place of amusement," and cites Missouri cases that supposedly stand for the proposition that § 144.020.1(2) "is not limited or qualified in any way." (App. Br. 22, 24). This, Appellant believes, means that, notwithstanding the prior and contrary decisions of this Court in *Westwood* and *Six Flags*, tax is imposed under § 144.020.1(2) regardless of § 144.020.1(8)'s express exclusion from the tax for rental fees of property upon which tax had already been paid. As support for her position, Appellant rehashes her argument that the "specific amusement tax exemption for the rental or lease of boats and outboard motors found in [§ 144.020.1(8)] demonstrates that the General Assembly did not intend that fees charged for periodic uses of other personal property be excluded from [§ 144.020.1(2)]." (App. Br. 43). This argument was apparently rejected by this Court in *Westwood* and should be rejected again here. Lastly, by a feat of convoluted logic, Appellant claims to find support in § 144.518 for her shop-worn and also rejected view that § 144.020.1(8) "does not apply to fees paid to use personal property within places of amusement." *Id.* Section 144.518, in Appellant's view, purportedly illustrates the Legislature's belief that charges to use video games in a place of amusement are not exempt rental charges, but taxable fees. This argument was apparently rejected by the *Six Flags*

Court, before which that argument had been fully briefed. The issue of whether § 144.020.1(8)'s prior tax payment exclusion applies in a place of amusement is now well-settled and, notwithstanding the penumbra purportedly divined by Appellant from the "boat and outboard motor" exception and the exemption in § 144.518, § 144.020.1(8) means what it says -- that rental fees are not subject to sales tax if tax was paid by the lessor on the purchase of the leased property.

A. Westwood and Six Flags are the Controlling Authorities in the Present Case

Appellant argues that § 144.020.1(8) "cannot be imported and used to exempt from tax transactions that are taxable under other subdivisions of § 144.020.1." (App. Br. 31). This claim was rejected by this Court on multiple occasions. In *Westwood* and *Six Flags*, the controlling precedents in this case, this Court determined that § 144.020.1(8) expressly excludes certain rental payments from tax, even if the rental payments are made in a place of amusement and would be taxed under § 144.020.1(2), but for the exclusion in § 144.020.1(8).³ As support for her position, Appellant cites *Tropicana Lanes, Blue Springs Bowl, Bally's LeMan's Family Fun Centers, Inc. v. Director of Revenue*, 745 S.W.2d 683 (Mo. banc 1988), *L & R Distrib. Co., Inc. v. Missouri Dep't of Revenue*, 648

³ Section 144.020.1(8) states: "[I]f the lessor ... of any tangible personal property had previously purchased the property ... and the tax was paid at the time of the purchase, the lessor ... shall not apply or collect the tax on the subsequent lease ... receipts from that property.

S.W.2d 91 (Mo. 1983), *City of Springfield v. Director of Revenue*, 659 S.W.2d 782 (Mo. banc 1983), *Old Warson Country Club v. Director of Revenue*, 933 S.W.2d 400 (Mo. banc 1996), and *L & R Distrib., Inc. v. Missouri Dep't of Revenue*, 529 S.W.2d 375 (Mo. 1975). However, with the exception of *Tropicana Lanes*, discussed in Section II below, all of these cases were decided before *Westwood* and *Six Flags* and none of these cases involves either § 144.020.1(8) or a rental or lease of tangible personal property on which tax was paid at purchase.

The issue raised yet again by Appellant in this case was first addressed by this Court in *Westwood*. *Westwood* involved golf cart rental fees received by a country club. Addressing the arguable conflict between § 144.020.1(2)'s imposition of tax on fees paid in a place of amusement and § 144.020.1(8)'s express exclusion from tax for fees paid to lease tangible personal property where tax had already been paid by the lessor when it purchased the property, this Court held that the express exclusion from tax in § 144.020.1(8) trumps § 144.020.1(2). The *Westwood* Court thus held that the golf cart fees were not subject to tax because the country club had paid tax when it purchased the golf carts, notwithstanding that the fees to rent the golf carts were paid in a place of amusement.

In *Six Flags*, this Court applied *Westwood* to receipts from the rental of video games. Since Respondent's customers rented the video games, and tax was paid by Respondent when the video game machines were purchased, the Court held that the video game receipts were excluded from tax under § 144.020.1(8).

In both *Westwood* and *Six Flags*, this Court gave effect to the purpose of § 144.020.1(8) -- preventing double taxation. The same reasoning applies to the Inner Tube

Fees at issue in this case. Because Respondent paid tax when it purchased the inner tubes, § 144.020.1(8) excludes the inner tube rental fees from tax, notwithstanding that the fees are paid in a place of amusement and would be subject to tax under § 144.020.1(2), but for § 144.020.1(8). Under § 621.193, this conclusion is clearly authorized by law and consistent with the reasonable expectations of the Missouri General Assembly that double taxation be avoided, as evidenced by the words of § 144.020.1(8): “the lesser or renter shall not apply or collect the tax on the subsequent lease or rental receipts[.]”

B. The “Boat and Outboard Motor” Exception Does Not Alter the Result or Require This Court to Overrule *Westwood* and *Six Flags*

To support her argument, Appellant refers to a “rule of statutory construction” that “[w]hen a statute expressly mentions the subjects or things on which it operates, it is construed as excluding from its effect all those not expressly mentioned.” (App. Br. 43). Citing the dissent in *Six Flags*, Appellant asserts that the specific mention of only boats and outboard motors in part of § 144.020.1(8) “demonstrates that the General Assembly did not intend that fees charged for periodic uses of other personal property be excluded from [§ 144.020.1(2)].” (App. Br. 43). Oddly, after citing the dissent on this point, the Appellant claims that the “boat and outboard motor” exception was not considered by the Court in *Westwood* or *Six Flags*. That is not correct. First, to so conclude would be to assume that the majority of this Court in *Six Flags* did not consider the dissent in *Six Flags*. And, as discussed in Section I.B.2 below, this issue was also extensively briefed by both parties in *Westwood* and this Court nevertheless decided that, notwithstanding Appellant’s argument in this regard, that § 144.020.1(8)’s express exclusion from tax applied.

1. This Rule Of Statutory Construction is to Be Used Sparingly

Missouri courts have warned that the rule of statutory construction cited by Appellant must “be used with great caution.” *See, e.g., Pippins v. City of St. Louis*, 823 S.W.2d 131, 133 (Mo. App. E.D. 1992); *State ex. rel. Birk v. City of Jackson*, 907 S.W.2d 181 (Mo. App. E.D. 1995); *Angoff v. M & M Management Corp.*, 897 S.W.2d 649 (Mo. App. W.D. 1995). The rule “is sometimes followed and sometimes held inapplicable, depending on the facts.” *Reorganized School Dist. No. R-8 of Lafayette County v. Robertson et. al*, 262 S.W.2d 847 (Mo. 1953); *State ex rel. Fawkes v. Bland*, 210 S.W.2d 31 (Mo. banc 1948). It is a “mere auxiliary rule of construction in aid of the fundamental objective of ascertaining the intention of the lawmakers,” and is “not to be permitted to defeat the plainly indicated purpose of the legislature.” *Bauer v. Rutter*, 256 S.W.2d 294 (St. L. Ct. App. 1953). It may be invoked “only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment.” *See Springfield City Water Co. v. City of Springfield*, 182 S.W.2d 613, 618 (Mo. 1944).

The “boat and outboard motor” exception in § 144.020.01(8) is not an appropriate subject for this rule of statutory construction. The “boat and outboard motor” exception does not evidence the type of strong contrast or create the type of association that establishes, or even suggests, that items omitted from that exception should receive “opposite and contrary treatment.” In fact, the language of § 144.020.1(8) suggests quite the opposite. The purpose of the “boat and outboard motor” exception is to ensure that

boats and outboard motors are taxed under the sales and use tax provisions specifically applicable to motor vehicles and trailers, rather than under § 144.020.1. Boats and outboard motors are treated differently from other property under § 144.020.1(1), (2) and (8), because receipts from sales or rentals of boats and outboard motor rentals are taxable under §§ 144.070 and 144.440. And, specifically with respect to boat or outboard motor leases, they are excluded from taxation under § 144.020.1(2) and (8) *whether or not* tax was paid when the boat or motor was purchased, while rental receipts for other property are excludable from § 144.020.1(2) and (8) *only* if tax was paid at the time of purchase. This explains how and why the Legislature treated boats and outboard motors differently from other property in § 144.020.1(8). It in no way suggests that the treatment of boats and outboard motors should be “opposite and contrary” to the treatment of other items rented or leased in a place of amusement. It is just this type of false dichotomy that explains why this rule of statutory construction is to be applied sparingly. It is because there are so many cases like the “boat and outboard motor” exception where the presence of one thing in a statute cannot fairly be read as intending the exclusion of all else. Yet, Appellant not only asks this Court to misapply this rule of statutory construction to inappropriate facts, she asks this Court to do so where the effect is to overrule controlling precedent.

The “boat and outboard motor” exception was extensively briefed by both parties in *Westwood*. Attached as App.A9 – A14 are the written arguments presented to this Court in that case. This Court was thus aware of the “boat and outboard motor” exception when it decided *Westwood*, but apparently did not agree with Appellant’s claim that this exception shows that everything else that is subject to § 144.020.1(8)’s exclusion is nevertheless

taxable at a place of amusement. Rather, this Court apparently recognized that, other than for boats and outboard motors, the taxability of which is governed by completely different sections of the sales tax code, § 144.020.1(8)'s exclusion applies only if tax was paid at the time of purchase. Hence, this Court necessarily concluded that the Legislature's addition of the "boat and outboard motor" exception to the statute did not indicate a legislative belief that all other property rented in a place of amusement is taxable twice—both at the time of purchase and on subsequent rental. The fact that this Court did not see fit to mention Appellant's rule of statutory construction in its decision in *Westwood*, or in the majority opinion in *Six Flags*, is telling that this Court did not see fit to apply the rule -- not that it was unaware of the rule.

2. This Court in *Westwood* Fully Considered the "Boat and Outboard Motor" Exception

Despite Appellant's attempt to dress up the "boat and outboard motor" exception as a new issue, this argument is shopworn and the worse for the wear. In *Westwood*, Appellant argued, no differently than she does here, that the "boat and outboard motor" exception proves that the Legislature must have believed rentals and leases in a place of amusement to be subject to tax as fees paid in a place of amusement. (App. A9 – A11); (Dir. Br. 14). Specifically, Appellant's brief in *Westwood* argued that:

[T]he General Assembly did not reasonably expect that any fee charged to use property within an amusement or recreational facility would constitute a lease or rental consideration falling under the provisions of subdivision (8). This is demonstrated

by the language contained in subdivision (8) concerning the rental or lease of boats.

...

By the use of this language the legislature anticipated that other charges to “rent” or “lease” property for amusement or recreational activities within a place of amusement or recreation would fall under the amusement tax. Moreover, this language reveals that the legislature intended that all fees for the use of property as part of an amusement or recreational activity would be subject to the amusement tax and that subdivision (8) would be restricted to transactions that constituted a true rental or lease obligation.

(App. A10 – A11).

The taxpayer’s brief in *Westwood* retorted, as Respondent does again, that the purpose of the “boat and outdoor motor” exception is to clarify that boats and outboard motors are nontaxable because their rental or lease is *never* taxable under § 144.020 -- in or out of a place of amusement; whereas other items rented or leased in a place of amusement are excluded from tax *only* if tax was paid when the lessor purchased the items (App. A13 – A14). It is thus quite apparent that this supposedly new issue was already raised and considered by this Court when it decided that the golf cart rental fees in *Westwood* were not taxable. The essence of Appellant’s argument is therefore that this

Court should overrule controlling Court precedent on the assumption that this Court in *Westwood* failed to read or consider the arguments of the parties in this regard.

3. The Legislature Has Not Overruled *Westwood*

Westwood was decided in 1999, *Six Flags* in 2003. As indicated above, both *Westwood* and *Six Flags* are entirely consistent with the purpose of § 144.020.1(8)'s exclusion: to prevent double taxation. Moreover, the Legislature has therefore had ample opportunity to overrule this Court's decisions in those cases and would have done so if it viewed the cases as wrongly decided. In fact, six full legislative sessions have come and gone since the *Westwood* decision. Yet, the Legislature has demonstrated no inclination to amend the statutory provisions at issue in *Westwood* and *Six Flags* to overrule those cases. In fact, in 2001, by H.B. 933, the legislature amended the boat and outboard motor part of § 144.020(8) but did not see fit to undo *Westwood*. When the Legislature fails to act in the face of the Court's or Commission's decision it "must be presumed to have accepted the judicial or administrative construction" of the statute. *State ex rel. Howard Electric Cooperative v. Riney*, 490 S.W.2d 1, 9 (Mo. 1973); *see also William A. Straub, Inc., v. City of St. Louis*, 506 S.W.2d 377, 380 (Mo. 1974); *Jacoby v. Missouri Valley Drainage Dist. of Holt County*, 163 S.W.2d 930, 939 (Mo. 1942); *cf. Medicine Shoppe International, Inc. v. Director of Revenue*, 156 S.W.3d 333, 334 (Mo. banc 2005). Accordingly, Appellant is simply wrong in her assertion that *Westwood* and *Six Flags* are contrary to legislative intent.

C. Section 144.518 Does Not Alter the Result Under §144.020.1 (8)

Appellant next retreads her claim that § 144.518, like the “boat and outboard motor” exception, demonstrates that the Legislature’s intent in enacting § 144.020.1(8) is different than what this Court has twice found that intent to be. *See Westwood*, 6 S.W.3d at 889; *Six Flags*, 102 S.W.3d at 530. Appellant thinks that the exemption in § 144.518 shows that the Legislature believed that, without that exemption, both receipts from the sale of coin-operated amusement devices and receipts from the use of the devices would be subject to tax. Appellant’s argument is misplaced.

Section 144.518 does not address the taxation of proceeds from the rental of amusement machines. What it does address is an exemption from sales tax on the purchase of certain machines used in a “commercial, coin operated amusement and vending business” if tax is paid on the gross receipts derived from the use of such machines. While § 144.518 and § 144.020.1(8) are related to some degree, § 144.518 is much broader than § 144.020.1(8). Section 144.518 makes no mention of the leases and rentals at issue in § 144.020.1(8), nor would such mention make any sense, since the use of a vending machine to purchase a soft drink is simply not a lease or rental of the vending machine. Although the video games at issue in *Six Flags* were coin-operated and were rented, they are not representative of all or even most coin-operated amusement and vending machines. That the temporary use of a video game is treated as a lease does not mean that the purchase of a soda is also a lease of a vending machine. While both § 144.518 and § 144.020.1(8) may apply to amusement machines of a type that are rented at a place of amusement, § 144.518 also covers vending machines and amusement machines that are not rented, as well

as vending and amusement machines where the fee covers not only the use of the machine, but also the right to win a prize or purchase vending machine products.

The issue raised by Appellant here was fully briefed by both Appellant and Respondent in *Six Flags* (App. A15 – A19), yet this Court did not consider the issue to be worth mentioning in its decision. This Court apparently correctly recognized that § 144.518 deals with different property than § 144.020.1(8) and neither the existence of § 144.518 nor its relation to § 144.020.1(8) addresses the treatment of the rental fees paid in a place of amusement that were at issue in *Westwood* and *Six Flags*. In fact, the two sections operate quite harmoniously even in those cases where they overlap. Under § 144.020.1(8), if amusement machines are rented at a place of amusement, a taxpayer does not have to collect tax on the rental receipts if it paid tax on the purchase of the machines; while, under § 144.518, no tax is due on the purchase of the amusement machines if the taxpayer collects tax on rental receipts.

A closer look reveals that § 144.518 evidences exactly the opposite of what Appellant asserts. In providing an exemption only if the taxpayer collects tax on rental receipts for amusement machines, § 144.518 clearly contemplates the possibility that tax might not have to be collected on rental receipts -- for example where the lessor paid tax on the purchase of the amusement machines rented by customers, as was the case in *Six Flags*. A more apt observation, however, may be that § 144.518 simply has nothing to do with places of amusement -- that it applies to vending machines and amusement machines, wherever used, and whether or not the use is a rental -- and therefore has no relevance to the case at hand.

II. THE COMMISSION DID NOT ERR IN DECIDING THAT *TROPICANA LANES* DOES NOT APPLY TO THE FACTS IN THIS CASE

Appellant claims that *stare decisis* required the Commission to apply *Tropicana Lanes* to this case. Distilling Appellant’s *Tropicana Lanes* argument to its essence, Appellant seems to be arguing that this Court unwittingly overruled *Westwood* and *Six Flags* when it decided *Tropicana Lanes*. In fact, however, the opposite is true -- this Court in *Tropicana Lanes* specifically declined Appellant’s request that the Court overrule “*Westwood* and its progeny.” *Tropicana Lanes*, 111 S.W.3d at 410.

A. Stare Decisis Requires This Court to Follow *Westwood* and *Six Flags*, not *Tropicana Lanes*

Appellant’s reliance on *Tropicana Lanes* is misplaced. As explained by the Court in *Tropicana Lanes*, its decision was compelled by the earlier decision of the Court in *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596 (Mo. banc 1977), holding that fees for bowling in a commercial bowling establishment are taxable. Because the facts of *Tropicana Lanes* were so similar to those in *Blue Springs Bowl*, the Court viewed *Blue Springs Bowl* as controlling. “[U]nder the doctrine of *stare decisis*, a decision of this Court should not be lightly overruled, particularly where the opinion has remained unchanged for many years and is not clearly erroneous and manifestly wrong.” *Tropicana Lanes*, 111 S.W.3d at 411. *Tropicana Lanes* was not, as Appellant claims, a retreat from *Westwood* and its progeny. In fact, the rationale underlying this Court’s decision in *Blue Springs Bowl*, when applied to the present case, dictates exactly the opposite conclusion to the one reached by Appellant. Just as *stare decisis* compelled this Court in *Tropicana*

Lanes to follow its prior decision involving fees paid in a bowling facility, *stare decisis* in the present case requires the Court to follow its prior decision in *Six Flags*, involving rental fees paid in an amusement park.

Moreover, there is another reason why the bowling shoe fees at issue in *Tropicana Lanes* should be treated differently than the Inner Tube Fees at issue here. Customers of a bowling alley do not pay for admission to the bowling alley. Instead, they pay a fee to bowl and an additional fee for specialized shoes, which they are required to use “in order to participate in the activity of bowling.” *Id.* In contrast to the bowling shoes for which a separate charge had to be paid in *Tropicana Lanes*, the fee to enter Respondent’s Park entitles customers not only to admission, but to use all park facilities and *includes* the use of an inner tube *without charge* at all activities where an inner tube is needed (L.F. 247). Appellant, in yet another leap of illogic, claims that Respondent’s customers are “forced to pay the inner-tube fees” (App. Br. 27) because the inner tubes are “directly related to its customers’ participation in the amusement activities provided in the water park.” (App. Br. 27). The record, however, is extremely clear that inner tubes are available for free at every ride except the wave pool and that no inner tube is needed at the wave pool (L.F. 242). Thus, just as the required use of bowling shoes indicated that the shoe charge at issue in *Tropicana Lanes* was part of the charge for the amusement activity, the availability of inner tubes without charge indicates the opposite here -- that the Inner Tube Fee is not a disguised charge for the amusement activity. Thus, contrary to Appellant’s assertion, the Inner Tube Fees received by Respondent are not the type of fees that this Court determined in

Tropicana Lanes were “intended to be subject to the amusement tax under section 144.020.1(2).” *Id.*

B. Application of *Westwood* and *Six Flags* to This Case Would Not, As Appellant Claims, Result In Confusion and Inconsistent Treatment

Appellant claims to have difficulty with what she perceives as the inconsistency of *Tropicana Lanes* with *Westwood* and *Six Flags*. Appellant cites *Columbia Athletic Club v. Director of Revenue*, 961 S.W.2d 806 (Mo. banc 1998) and asks: “What would prevent a bowling establishment from seeking a refund of taxes paid on the receipts from video and pinball machines ... while at the same time paying taxes on fees it charged to use bowling shoes?” (App. Br. 61-62). The answer is: Nothing. Fees for bowling shoes are taxable because the shoes are required to participate “in the activity of bowling.” The use of video and pinball machines is not required for bowling and such fees paid in a bowling alley are therefore no different than video game fees paid at an amusement park. Because video games are controlled by the *Six Flags* case, rental fees for the video games are not taxable if the lesser paid tax at the time of purchase, whether the games are situated at an amusement park or in a bowling alley. Appellant’s discussion of *Columbia Athletic Club* is therefore completely misplaced.

III. THE COMMISSION DID NOT ERR IN DECIDING THAT § 144.020.1(8) APPLIED TO THIS CASE BECAUSE IT IS A MORE SPECIFIC STATUTE THAN § 144.020.1(2)

Appellant pleads once again for this Court to abandon its rationale in *Westwood* and *Six Flags* -- that § 144.020.1(8) is more specific than, and therefore controlling over, §

144.020.1(2). Appellant argues that this rationale for *Westwood* and *Six Flags* has been undermined by this Court's supposedly contrary holdings in *J.B. Vending Company, Inc. v. Director of Revenue*, 54 S.W.3d 183 (Mo. banc 2001), *Blue Springs Bowl* and *Tropicana Lanes*. Oddly, Appellant argues this even though the Court restated its reliance on this rationale in *Six Flags*, which was decided after *J.B. Vending* and *Blue Springs Bowl*.

A. The Specific-vs.-General Rationale Articulated By This Court in *Westwood* and *Six Flags* Applies With Equal Force to The Present Case

Appellant herself noted in *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346 (Mo. banc 2001), that “[w]hen the same subject matter is addressed in general terms in one statute and in specific terms in another, the more specific controls over the more general.” *Greenbriar III*, 47 S.W.3d at 352; *see also Bauer, supra; State ex rel. Missouri State Life Ins. Co. v. Gehner*, 8 S.W.2d 1068 (Mo. banc 1928). This rationale was relied on by this Court in *Westwood* and *Six Flags*, which involved facts very similar to those of the present case. This was the crux of the issue in *Westwood* and the parties argued extensively over which of §§ 144.020.1(8) and 144.020.1(2) is more specific. The Court held for the taxpayer, reasoning that:

Fees paid to a country club are considered fees paid to a ‘place of amusement, entertainment or recreation.’ *Old Warson Country Club v. Director of Revenue*, 933 S.W.2d 400, 403 (Mo. banc 1996). We, however, find that section 144.020.1(8) is a more specific statute than section 144.020.1(2) in that it expressly deals with the lease or rental of personal property

upon which sales tax has already been paid. Since we apply a more specific statute over a more general statute when both address the same issue, we apply section 144.020.1(8) to the controversy. *Greenbriar Hills*, 935 S.W.2d at 38.

Westwood, 6 S.W.3d at 889.

The *Westwood* Court determined that the express exclusion from taxation in § 144.020.1(8) trumped § 144.020.1(2). This Court found § 144.020.1(8) to be controlling when there is overlap with § 144.020.1(2), because the former section is more specific than the latter. *Westwood*, 6 S.W.3d at 889. This rationale was restated by the Court in *Six Flags*, which echoed *Westwood*'s clarification "that when section 144.020.1(8) is at issue, that more specific statute will be applied over the more general section 144.020.1(2)." *Six Flags*, 102 S.W.3d at 530. This rationale should be similarly applied in the present case.

B. The *J.B. Vending* Decision is Inapplicable to the Present Case

Appellant argues that *J.B. Vending* implicitly overruled *Greenbriar I*⁴ and *Westwood* by undermining the specific-vs.-general rationale of those cases.⁵ Respondent notes at the

⁴ Appellant also claims that the Court's decision in *Greenbriar I* was compelled "by the parties' stipulations" and did not reflect the Court's reliance on "the notion that 'specific' tax statutes control over general ones." (App. Br. 49). But, Appellant's claim is belied by the opinion in *Greenbriar I* which states that "[r]esolution of the conflict [between § 144.020.1(6) and § 144.020.1(2)] is guided by deference to the more specific of the two

outset that this Court's decision in *Six Flags* belies this contention, since *Six Flags* relied on the specific-vs.-general rationale in reaching its decision long after *J.B. Vending* was decided.

Appellant quotes *J.B. Vending*'s statement that the specific-vs.-general rationale "applies only where the two [statutory] provisions are in such conflict that they cannot be harmonized." (App. Br. 49). However, there was such a conflict in *Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36 (Mo. banc 1996), *Westwood*, and *Six Flags*, and that is why this Court applied the more specific exclusions in § 144.020.1(6) and (8) over § 144.020.1(2). Indeed, *Six Flags* was decided after *J.B. Vending*, and for that

subdivisions. When the same subject matter is addressed in general terms in one statute and in specific terms in another, the more specific controls over the more general. *Terminal R.R. Assn. of St. Louis v. City of Brentwood*, 230 S.W.2d 768, 769 (Mo. 1950). In the present case, subdivision 6 of section 144.020.1, by implication specifically excluding from tax charges for food and drink sold in a place that does not regularly serve the public, is more specific than subdivision 2 with respect to the transaction the Director seeks to tax, that is, charges for food and drinks. Subdivision 6, then, controls over subdivision 2." *Greenbriar I*, 935 S.W.2d at 38.

⁵ It should be noted that unlike *Greenbriar I* and *Westwood*, *J.B. Vending* was completely unrelated to places of amusement. Moreover, *J.B. Vending* concerned only sales of food and drink. It had no relevance to the portion of the *Westwood* case dealing with golf cart rentals.

reason, found the specific-vs.-general rationale to be controlling in *Six Flags*, just as it was controlling in *Greenbriar* and *Westwood*. Contrary to Appellant's contention, this Court did not, in *Westwood* and *Six Flags*, fall "into the trap that had been left for it" by the *Greenbriar I* opinion (App. Br. 50). It properly applied the specific-vs.-general rationale to the facts in *Westwood* and *Six Flags* and should likewise follow that rationale in applying those precedents in the present case.

C. Appellant's Argument That a Decision in Favor of Respondent Will Burden the Fiscal Budget Is Misguided

Appellant argues that *Westwood* and *Six Flags* should be overruled because giving taxpayers the option of paying tax on purchases of property or paying tax on the subsequent rental of the property will lead to lower tax collections (App. Br. 62). Despite the absence of support in the record, Appellant undertakes a speculative tax calculation purporting to demonstrate that the State of Missouri will collect less tax from taxpayers, and from Respondent in particular, if this Court decides this case in favor of Respondent. In making this argument, Appellant turns Missouri tax policy on its head. This Court has recognized that many provisions of Missouri's sales tax code, including the provision at issue in this case, are specifically designed to prevent double taxation. *Westwood*, 6 S.W.3d at 889; *Six Flags*, 102 S.W.3d at 530. Yet, here, the Director seeks to further double taxation by keeping the tax Respondent remitted on its purchase of the inner tubes and also keeping the tax Respondent remitted on the subsequent rentals. Clearly, the Missouri's General Assembly's goal is not to gouge taxpayers by collecting the most tax. Even the Director does not accept her arguments in this regard. The Director's Letter Rulings L.R. 10222

(February 13, 1998) (App. A20), concludes that the owner of airport and shopping mall baggage carts could **elect** to pay Missouri sales tax on the purchases of such carts and forego collecting Missouri sales tax on the “lease” of such carts, citing § 144.020.1(8). As that letter ruling demonstrates, the interplay between the resale exclusion and the rental exclusion in § 144.020.1(8) gives taxpayers the option of paying tax on their purchases of rental property or paying tax on the subsequent rentals.

IV. RESPONDENT’S INNER TUBE FEES ARE NOT DISGUISED ADMISSION FEES

Appellant argues that § 144.020.1(8)’s exclusion should be administered grudgingly because a taxpayer could abuse it by disguising admission fees as rentals. Specifically, Appellant argues that if Respondent prevails, Respondent could eliminate a fee for admission to a water park and replace it with a fee to rent inner tubes, or replace the fee to enter the Park with a fee to rent seats on rides. To the extent Appellant is suggesting that a disguised admission fee should be taxable, Respondent agrees. However, Appellant seems to be suggesting something more -- that the exclusion provided by § 144.020.1(8) should be disregarded because Appellant views it as susceptible to abuse -- even though Appellant does not suggest -- or have any basis to suggest -- that any such abuse was present in this case. Quite the contrary, the facts of this case do not permit even an inference that Respondent’s Paid Inner Tube fees are disguised admission fees.

Respondent charges an admission fee to enter the Park, but does not charge an additional fee to use the water park (L.F. 247). Inner tubes are available without charge at all activities where an inner tube is needed. (L.F. 247). For added convenience, or if

patrons want to use an inner tube in the wave pool (though an inner tube is not needed in the wave pool), patrons may rent an inner tube (L.F. 247). The Park's patrons are free to choose not to rent an inner tube and can participate in the same activities as those who do not rent an inner tube (*i.e.*, a Park patron can use a Free Inner Tube) (L.F. 248).

This is identical, in all relevant respects, to the golf cart rentals addressed in *Westwood*. Just as the golfers who rented a golf cart in *Westwood* enjoyed the added comfort and convenience of riding in the cart during their game, but were not required to rent the cart and paid the same fee to play golf whether they rented a cart or not, Park patrons who do not rent inner tubes can participate in the same activities at the same price as those who do. Because all Park patrons have access to the same rides at the same price, whether or not they rent an inner tube, it is evident that the Inner Tube Fees are not disguised admission charges.

In any event, Appellant's concern is unwarranted. The Commission already proved itself readily able to recognize a disguised amusement fee masquerading as a rental fee. The Commission had no trouble finding that § 144.020.1(8) did not apply to the taxpayer's charge for golf balls in *Tower Tee Golf, Inc. v. Director of Revenue*, No. 00-0686 RV (Mo. Admin. Hearing Comm'n, May 30, 2001). Because that charge was the only charge to use the driving range and patrons were required to rent golf balls in order to use the driving range, the Commission recognized that the charge for the golf balls was really an admission fee, not a rental fee. It is thus clear that a disguised admission fee can be easily distinguished from rental fees of the type at issue in *Westwood*, *Six Flags* and the present case.

Moreover, whether or not § 144.020.1(8) would permit a taxpayer to disguise an admission fee as an excludable rental, Appellant cannot simply disregard § 144.020.1(8) because she believes that her view of it as bad tax policy is superior to that of the Legislature and this Court.

V. THE COMMISSION DID NOT ERR IN DECIDING THAT CUSTOMERS' USE OF INNER TUBES FOR A FEE IS A RENTAL OR LEASE WITHIN THE MEANING OF § 144.020.1(8)

Appellant claims that Respondent's rental of inner tubes to customers is not a "rental" or "lease" of tangible personal property, as those words are used in § 144.020.1(8). Rather, Appellant argues that Respondent's customers are merely granted a license to use the inner tubes.

A. The Use of Respondent's Inner Tubes Is a Rental Within the Dictionary Definition of That Term

Section 144.020.1(8) applies to a "rental" or "lease." Respondent agrees with Appellant that this Court should give these words their plain, ordinary meaning as found in the dictionary. *See Moon Shadow, Inc. v. Director of Revenue*, 945 S.W.2d 436, 437 (Mo. banc 1997). Appellant cites the definition of "rent" as "[t]o obtain occupancy or use of [another's property] in return for regular payments." The American Heritage Dictionary at 1047 (2d College ed. 1985). Appellant argues that Respondent's Inner Tube Fees are not "regular" payments because they are not "periodic." (App. Br. 36). However, "regular" does not mean the same thing as "periodic." The definition of "regular" is "normal, standard." Merriam Webster's Collegiate Dictionary 985 (10th ed. 1997). The use of

Respondent's Paid Inner Tubes in return for a normal, standard payment is therefore a rental of the inner tubes. Moreover, Appellant's argument that a rental payment must be "periodic" was already rejected by this Court in *Westwood*. The dictionary definition cited by Appellant thus establishes that Respondent's charge for the inner tubes is a rental charge. The definition of the term "rent" in Merriam Webster's Dictionary is equally consistent with Respondent's rental of inner tubes to its customers. The Merriam Webster's Dictionary provides that "rent" means "to grant the possession and enjoyment of in exchange for rent; to take and hold under an agreement to pay rent." *Id.* at 991. Respondent grants possession and use of its inner tubes in exchange for payment. It is thus clear that Respondent "rents" the inner tubes to customers.

B. Respondent Rents and Leases Paid Inner Tubes Under Applicable Caselaw, Regulations and Letter Rulings

Appellant complains that previous decisions by this Court have defined the terms "lease" and "rental" too broadly and that "under this scheme," any fee or charge to use personal property in a place of amusement would be exempt from tax if tax was paid when the personal property was purchased (App. Br. 41). This, claims Appellant, would give § 144.020.1(8) unintended breadth. This argument is unfounded. This Court has properly interpreted § 144.020.1(8) as applying to video games and golf carts rented in a place of amusement, and should similarly apply § 144.020.1(8) to the inner tubes at issue in this case. Specifically, in *Westwood* and *Six Flags* this Court held that where a patron of a place of amusement is given the exclusive right to use or operate an item of tangible

personal property for a specified term, it is a rental within the meaning of § 144.020.1(8).⁶ That this holding applies similarly to the inner tubes at issue in this case is established by this Court’s decision in *Moon Shadow*, which applied § 144.020.1(8) to inner tubes very similar to those at issue in the present case.

In *Moon Shadow*, the taxpayer purchased inner tubes and paid sales tax at the time of purchase, then rented the tubes to customers to float down a river. *Moon Shadow*, 945 S.W.2d at 436. Appellant assessed sales tax on the tube rentals and the taxpayer petitioned the Commission for a hearing. *Id.* The Commission rejected the assessments, relying on § 144.020.1(8) and the fact that the taxpayer had paid tax at the time it purchased the inner tubes. On appeal, this Court referred to the transaction as a “rental” no less than three times (*e.g.*, “Moon Shadow did not resell the tubes, but rented them to customers for floating the river.”). *Id.* at 436.

⁶ Despite Appellant’s contention to the contrary (App. Br. 37), the *Westwood* Court clearly held that the fees charged by the taxpayer for the golf carts were rental fees. *See Six Flags*, 102 S.W.3d at 529-530 (“The taxation of receipts from the video game machines is prohibited by this Court’s holding in the similar circumstance of the rental to customers of golf carts. *Westwood*, 6 S.W.3d at 888-889. In *Westwood*, this Court determined that a country club owed no sales tax on fees it charged for golf cart usage because the golf carts were being rented to customers and the country club previously paid sales tax on its purchases and leases of the carts. *Id.* at 888. Section 144.020.1(8) governs such a transaction. *Id.* at 889.”).

Moreover, contrary to Appellant's assertion, the fact that Respondent's customers cannot take the Paid Inner Tubes outside the water park has no bearing on whether customers "rent" the inner tubes. Just as the *Westwood* golfers could use the rented golf carts only within the confines of the golf course and subject to the country club's rules, Respondent's customers must use Paid Inner Tubes only within the confines of the water park and subject to the Park's rules. That this is nevertheless a rental is supported by Appellant's own regulation, 12 C.S.R. 10-3.228, entitled "Lessors-Renters Include," which states:

PURPOSE: This rule indicates that a person may be a lessor or renter even though the location of the leased or rented article remains unchanged and interprets and implies §§ 144.010 and 144.020, RSMo.

(1) Lessors and renters include those persons whose tangible personal property remains on their own premises, but which is operated by the lessee or is under the direct control of the lessee for a specified period of time.

Pursuant to this regulation, the golf carts at issue in *Westwood*, the video game machines at issue in *Six Flags* and the inner tubes at issue here are

nevertheless leased, even though their use is restricted to a fixed or limited location.⁷

Finally, Appellant's own letter rulings demonstrate that the rental of an inner tube is a rental or a lease within the meaning of § 144.020.1(8). In L.R. 10222 (February 13, 1998)(App. A20), Appellant concluded that the owner of airport and shopping mall baggage carts could elect to pay Missouri sales tax on the purchases of such carts and forego collecting Missouri sales tax on the "lease" of such carts, citing § 144.020.1(8). Despite the fact that these carts were used on average for five or ten minutes and remained within the airports and shopping malls throughout the rental period, Appellant ruled that these transactions constituted leases within the meaning of § 144.020.1(8). In short, Appellant's claim that Respondent's charges for inner tubes were not "amounts paid or charged for rental or lease of tangible personal property" (App. Br. 45) is belied not only by applicable caselaw and regulation, but by Appellant's own letter ruling.

⁷ See also *Lost Valley Lake Resort Club, Inc. v. Director of Revenue*, No. 94-000393RV, (Mo. Admin. Hearing Comm'n, March 30, 1995), which held that § 144.020.1(8) applies to "rentals" of tents, bikes, boats and other equipment by a resort which was a "place of amusement, entertainment or recreation."

C. The History of § 144.020.1(8) Cited By Appellant Is Inapplicable to This Case and Was Well Known to This Court When It Decided *Westwood* and *Six Flags*

Although this Court was well aware of the historical background of § 144.020.1(8) when it decided *Westwood* and *Six Flags*, Respondent offers a lengthy discussion of “the history behind the passage of [§ 144.020.1(8)]” (App. Br. 31) to support her apparent contention that those cases were wrongly decided. This history, however, has nothing whatsoever to do with the facts of the case at hand. Appellant starts with a discussion of this Court’s decisions in *Federhofer, Inc. v. Morris*, 364 S.W.2d 524 (Mo. 1963) and *International Bus. Machines Corp. v. David*, 408 S.W.2d 833 (Mo. banc 1966), which Appellant claims “offer guidance in determining the types of transactions the Legislature intended to tax by passing [§ 144.020.1(8)].” (App. Br. 34). While Respondent does not disagree with this assertion, it is puzzled by the contention that it is relevant to the case at hand. *Federhofer* predated the Legislature’s imposition of sales tax on leases. This Court found that the vehicle leases at issue in that case were not sales, but rentals, the receipts from which were exempt from sales tax. In *International Bus. Machines*, this Court held that rentals of business machines manufactured by the lessor outside Missouri were subject to Missouri sales tax under § 144.020.1(8). Respondent does not dispute that rentals or

leases of vehicles and business machines, like rentals of golf carts, video games and inner tubes, are rentals of the type addressed by § 144.020.1(8).⁸

⁸ Appellant also cites non-tax cases -- *Katz v. Slade*, 460 S.W.2d 608 (Mo. 1970) and *Esmar v. Zurich Ins. Co.*, 485 S.W.2d 417 (Mo. 1972) -- to support her claim that Respondent's customers received a mere license to use the Paid Inner Tubes. *Katz* involved a golfer's action for damages from a golf cart accident on a public golf course. Although repeatedly referring to the golf carts as rented, the Court said the golf cart rental should be treated as akin to a license in deciding plaintiff's strict liability tort claim, which could be maintained only if the golf course were found to be a "mass lessor" that widely promoted and advertised its products for rental. The Court said that "the 'renter' [of the cart] is more like the patron who buys a ticket to ride on a merry-go-round than he who leases a Hertz Drive-Ur-Self automobile for a weekend or a week of travel on the public highways." *Katz*, 460 S.W.2d at 613. *Esmar* involved a building owner's claim for damages under insurance policies covering the building. This Court found that the right to park a vehicle in an unassigned space created a licensor-licensee relationship, not a lessor-lessee relationship. However, the Court noted that this right would be a lease if a designated parking space had been assigned. The *Esmar* Court explained that the distinction between a lessor-lessee and a licensor-licensee relationship "has been settled in Missouri where it has been held the distinctive feature of a lease of real or personal property is that it conveys an interest in the property for a fixed or definite period of time." *Esmar*, 485 S.W.2d at 420. These cases are inapposite.

VI. THE COMMISSION DID NOT ERR IN HOLDING THAT THERE IS NO STATUTORY REQUIREMENT THAT A REFUND BE RETURNED TO RESPONDENT'S CUSTOMERS

Appellant argues that any refund to Respondent in this case would be a windfall unless Respondent returns the refunded money to its customers (App. Br. 63-6). This argument is not supported by the facts in this case. As discussed in the Statement of Facts, and in footnotes 1 and 3, above, there is no support in the record for the contention that Respondent collected the tax at issue from its patrons. Moreover, even if Respondent had collected the tax at issue from its patrons, Respondent would be entitled to the refund under applicable caselaw.

Appellant's argument that Respondent is not the taxpayer is difficult to understand. The sales tax statute clearly imposes on Respondent, not its customers, the duty to pay sales tax. Section 144.021 states that:

The purpose and intent of sections 144.010 to 144.510 is to impose a tax upon the privilege of engaging in the business, in this state, of selling tangible personal property and those services listed in section 144.020. The primary tax burden is placed upon the seller making the taxable sales of property or

It should also be noted that *Katz* and *Esmar* were decided long before *Westwood* and *Six Flags*, where the Court found that the personal property at issue in each case was "rented" at taxpayer's place of amusement within the meaning of § 144.020.1(8).

service and is levied at the rate provided for in section 144.020.

See also § 144.080. Thus, while Missouri sales tax statutes contemplate that the seller will usually first collect the tax from its customers, the sales tax is considered to have been paid by Respondent (*see* § 144.080; § 144.060) and Respondent is liable for the tax whether or not the tax is collected from its customers. Section 144.080. A seller's right to collect sales tax from customers does not turn the customers into the taxpayers. Missouri law imposes on Respondent the responsibility to report and pay the sales tax and it is therefore Respondent on which the tax is imposed. And § 144.190 grants the right of refund to the person legally obligated to remit the tax.

Moreover, even if Respondent had collected tax from its customers, this Court has ruled on several occasions, and in similar circumstances, that taxpayers in that position are entitled to a refund of overpaid sales taxes that they remitted to the State. *See Shelter Mutual Insurance Co. v. Director of Revenue*, 107 S.W.3d 919 (Mo. banc 2003); *Buchholz Mortuaries, Inc. v. Director of Revenue*, 113 S.W.3d 192 (Mo. banc 2003); *Galamet, Inc. v. Director of Revenue*, 915 S.W.2d 331 (Mo. banc 1996). Appellant's reliance on the dissenting opinions of this Court in *Shelter Mutual* and *Buchholz* demonstrates that the law, *i.e.*, the majority opinion in those cases, is that the person legally obligated to remit the tax is entitled to the refund.⁹

⁹ Like this Court, the Missouri Attorney General also recognizes that a taxpayer may keep a refund of sales tax. *See* Missouri Attorney General Opinion Letter No. 98-2000

The Legislature has had ample opportunity to legislatively overrule those cases, but has declined to do so.

The fact that the legislature has not seen fit by amendment to express disapproval of a contemporaneous or judicial interpretation of a particular statute, has been referred to as bolstering such construction of the statute, or as persuasive evidence of the adoption of the judicial construction.

Howard Electric Cooperative, supra, quoting 50 Am. Jur. Statutes § 326, pp. 318-319; *see also Jacoby*, 163 S.W.2d at 939; *cf. Medicine Shoppe*, 156 S.W.3d at 334.

Not only has the Legislature implicitly approved this Court's decisions in *Shelter Mutual*, *Buchholz* and *Galamet*, it has done so explicitly by declining to enact various legislative proposals that would have overruled *Shelter Mutual*, *Buchholz* and *Galamet*.¹⁰ For example, Senate Bill 1150 would have revised § 144.190 to prohibit retailers from obtaining a sales tax refund without crediting the original purchaser unless it was proved that the tax "was paid by such person claiming the refund or credit and was not collected from purchasers." However, this bill was not enacted, demonstrating the Legislature's

(overpayment of tax either shall be credited to "the person legally obligated to remit the tax" or "the balance shall be refunded to the person legally obligated to remit the tax").

¹⁰ *See, e.g.*, H.B. 796, 92nd Gen. Assem., 2nd Reg. Sess. (Mo. 2004); H.B. 1306, 92nd Gen. Assem., 2nd Reg. Sess. (Mo. 2004); S.B. 1150, 92nd Gen. Assem., 2nd Reg. Sess. (Mo. 2004).

determination that *Shelter Mutual*, *Buchholz* and *Galamet* should remain the law. Accordingly, there is no basis in the record, and no basis in law, for Appellant's position that Respondent is not entitled to the refunds at issue in this case.

CONCLUSION

For all of the foregoing reasons, Respondent's receipts for rental of Paid Inner Tubes qualify for the express exclusion from sales tax under § 144.020.1(8). Accordingly, this Court should affirm in all respects the decision of the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that one true and accurate copy of the foregoing, as well as a labeled disk containing the same, were hand-delivered this 10th day of June, 2005, to Evan Buchheim, Missouri Attorney General's Office, Supreme Court Building, Jefferson City, Missouri and that the foregoing brief complies with Rule 55.03 and complies with the limitations in Rule 84.06(b) in that it contains 10,532 words and that the attached floppy disk of this brief has been scanned for viruses and is virus-free.
