

SC95388

IN THE SUPREME COURT OF MISSOURI

GATE GOURMET, INC.,

Appellant,

vs.

DIRECTOR OF REVENUE,

Respondent.

On Petition for Review From
The Administrative Hearing Commission,
The Honorable Sreenivasa Rao Dandamudi, Commissioner

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT
DIRECTOR OF REVENUE

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STATEMENT OF FACTS

Appellant Gate Gourmet, Inc. (“Gate Gourmet”) is a global provider of catering and provisioning services for airlines and railroads. (Legal File “LF” 129). It owns and operates a large industrial facility in St. Louis County, Missouri near the Lambert-St. Louis International Airport. (LF 129; Tr. 36-38). The St. Louis facility earns a total of approximately \$5,800,000 a year from its airline catering business. (Tr. 93).

A. Meals Are Prepared Solely for Airlines.

Gate Gourmet’s facility in St. Louis contains a hot kitchen furnished with stoves, ovens and other cooking equipment. (Tr. 68, 78). The facility also contains blast chillers and other food preparation equipment, a warehouse, beverage department, storage areas, an equipment processing room, a pantry area where the catered meals are prepared for delivery to the airlines, a loading dock, and office space. (Tr. 38, 59-60, 67-68; Pet’r’s Ex. 14).

Gate Gourmet entered into written catering and provisioning agreements with its airline customers under which it agreed to provide meal and beverage catering services for commercial flights. (Tr. 36; Pet’r’s Ex. 3; Pet’r’s Ex. 4). All of the food Gate Gourmet sells is pursuant to a catering agreement. (Tr. 36; Pet’r’s Ex. 3; Pet’r’s Ex. 4). And every catered meal sold

by Gate Gourmet to its airline customers is either consumed in-flight by one of the airline's passengers or is later discarded after the flight. (Tr. 73).

Some of the food products Gate Gourmet incorporates into its airline meals are labeled "For Institutional Use Only." (Pet'r's Ex. 14, p. 6). Gate Gourmet employs a cook to prepare the airline meals and then uses blast chillers to quickly bring the cooked meal's temperature down. (Tr. 44, 52-53, 66, 67-68). The airline meals are then plated and refrigerated until delivery to the aircraft. (Tr. 39).

Airline meals are delivered to the aircraft approximately 30 minutes before takeoff. (Tr. 87-88). When the meals are sold to the airline customer, they are safe to eat. (Tr. 88). In flight, the meals are served on airline-owned dishes. (Tr. 42, 46). Because everything is fully cooked, all that the airline's flight attendants have to do is reheat the meals for about 20-25 minutes to bring them up to an appetizing temperature before serving to passengers. (Tr. 64, 87-89).

Gate Gourmet's airline meals do not contain any nutritional labels. (Tr. 71-72). It is not responsible for informing the airline customer of the ingredients or nutritional facts of its airline meals. (Tr. 72). At all stages of preparation, Gate Gourmet employs a Hazardous Analysis Critical Control

Points food safety protocol program which was adopted by the International Flight Services Association. (Tr. 59; Resp't's Ex. E).

Gate Gourmet only sells its catered meals to airlines. (Tr. 64). It does not sell catered meals to grocery stores. (Tr. 64). Its chefs design meals that are adapted to an in-flight environment. (Tr. 75-76; Pet'r's Ex. 5, p. 12). Once an in-flight meal is plated, the meal has only a 48-hour shelf-life. (Tr. 85).

B. Airline Meals are Not for Home Consumption.

For the audit period – January 1, 2008 through December 31, 2010 – Gate Gourmet collected a reduced tax rate of one percent, instead of the normal four percent, on its sales of pre-cooked meals to its commercial airline customers. (LF 129). The audit concluded that Gate Gourmet's sales of catered meals did not qualify for the reduced food tax and that “[s]ales of food made to airlines for consumption during flight do not qualify for the reduced food tax rate because they are not sales of food for home consumption.” (Tr. 27, 101-102; Pet'r's Ex. 1, pp. 14-15).

After a hearing and presentation of evidence, the Commission concluded that “Gate Gourmet was correctly taxed under § 144.020^{1/} instead of § 144.014 because, under *Wehrenberg, [Inc. v. Dir. of Revenue, 352 S.W.3d*

^{1/} All statutory references are to RSMo Supp. 2015 unless noted otherwise.

366 (Mo. 2011)] the plain language of § 144.014.2 requires that to be taxed under that statute, the food must be ‘for home consumption.’” (LF 137). The pre-cooked meals Gate Gourmet sold to its commercial airline customers, the Commission concluded, “were intended to be eaten by the airlines’ passengers, pilots, and crew while on board the customers’ aircraft.” (LF 129). Thus, the Commission upheld the sales tax assessments in this case, along with statutory interest, in the amount of \$296,357.29. (LF 130).

SUMMARY OF THE ARGUMENT

Are food stamps used to purchase in-flight meals on an airplane? No, of course not. The Federal Food Stamp Program was designed to provide basic or staple foods for needy families and children, not to provide airline meals that can only be obtained during a flight. 7 U.S.C. § 2011 (declaring the “policy of Congress” as “raising levels of nutrition among low-income households”). Indeed, in accordance with 7 U.S.C. § 2012(k)(1), which defines the “food” covered by the Federal Food Stamp Program, the food must be “for home consumption.”

Missouri sales tax law in § 144.014 incorporates the federal definition of “food” under the Federal Food Stamp Program. The law provides that a reduced sales tax rate of one percent is available for retail sales of food, but only for “those products and types of food for which food stamps may be redeemed pursuant to the provisions of the Federal Food Stamp Program as contained in 7 U.S.C. Section 2012.” § 144.014.2.

In accordance with the plain language of § 144.014, and the incorporated federal definition of “food,” in-flight meals are not food for which food stamps may be redeemed because they are not “for home consumption.” Gate Gourmet, in fact, designs, prepares, packages, and sells its meals for in-flight airline passengers only. And all of the meals are either consumed in-

flight or are disposed of after the flight. Thus, sales of its meals only are not entitled to the reduced sales tax rate in § 144.014. Gate Gourmet's refund claim in this case fails for this reason, as well as other reasons consistent with the Administrative Hearing Commission's decision. Therefore, the Commission's decision should be affirmed.

ARGUMENT

Standard of Review

A decision of the Administrative Hearing Commission must be affirmed if: “(1) it is authorized by law; (2) it is supported by competent and substantial evidence on the whole record; (3) mandatory procedural safeguards are not violated; and (4) it is not clearly contrary to the reasonable expectations of the General Assembly.” *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 435-36 (Mo. 2010); § 621.193, RSMo 2000.

When the Commission has interpreted the law or the application of facts to law, the review is *de novo*. *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 152 (Mo. 2003); *Zip Mail Servs., Inc. v. Dir. of Revenue*, 16 S.W.3d 588, 590 (Mo. 2000). In addition, the Commission’s factual determinations “are upheld if supported by ‘substantial evidence upon the whole record.’” *Concord Publ’g House, Inc. v. Dir. of Revenue*, 916 S.W.2d 186, 189 (Mo. 1996) (quoting *L & R Egg Co., Inc. v. Dir. of Revenue*, 796 S.W.2d 624, 625 (Mo. 1990)).

Finally, this Court can affirm on any basis supported by the record. *See Missouri Bd. of Nursing Home Adm’rs v. Stephens*, 106 S.W.3d 524, 528 (Mo. App. W.D. 2003). Here, the Commission’s decision is supported by the record and the law, and should, therefore, be affirmed.

I. The Commission Should be Affirmed Because the Meals in This Case are Designed, Prepared, Packaged, and Sold Only for In-Flight Consumption by Airplane Passengers, and are Not Food “For Which Food Stamps May be Redeemed” Under § 144.014, Because the Meals are Not “For Home Consumption.”

The issue before the Court is one of simple statutory interpretation – whether commercial sales of in-flight airplane meals are entitled to a reduced tax rate under § 144.014. Under Missouri law, only food “for which food stamps may be redeemed” qualifies for the reduced one percent tax rate. § 144.014.2. And food for which food stamps may be redeemed is limited to food “for home consumption.” 7 U.S.C. § 2012(k).

Here, Gate Gourmet sells fully cooked and prepared airline meals which are specifically designed, prepared, packaged, delivered and sold to its airline customers for the airline’s commercial use only; namely, to serve to in-flight passengers. None of the airplane meals are for home consumption. Indeed, the Commission specifically found that the “meals Gate Gourmet sold to its commercial airline customers were intended to be eaten by the airlines’ passengers, pilots, and crew while on board the customers’ aircraft.” (LF 129).

A. The Plain Language of § 144.014 Narrowly Limits the “Retail Sales of Food” Subject to the Reduced One Percent Tax Rate.

The “primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute.” *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. 2010) (citing *State ex rel. White Family P’ship v. Roldan*, 271 S.W.3d 569, 572 (Mo. 2008)). To this end, courts consider the words used in their plain and ordinary meaning. *Metro Auto Auction v. Dir. of Revenue*, 707 S.W.2d 397, 401 (Mo. 1986).

Where a statute’s language is clear and unambiguous, there is no room for construction. *Id.* In determining whether the language is clear and unambiguous, the standard is whether the statute’s terms are “plain and clear to a person of ordinary intelligence.” *Alheim v. F.W. Mullendore*, 714 S.W.2d 173, 176 (Mo. App. W.D. 1986). “In the absence of statutory definitions, the plain and ordinary meaning of a term may be derived from a dictionary ... and by considering the context of the entire statute in which it appears.” *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. 2007) (citing *Am. Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. 1999), and *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. 1995)). In this case, the plain language is clear.

**1. “Food” is narrowly defined to include only food
“for home consumption.”**

Section 144.014 subjects certain “retail sales of food” to a reduced tax “rate of one percent” instead of the regular four percent imposed by § 144.020. In order to qualify for the reduced rate, however, the “food” must be “food for which food stamps may be redeemed pursuant to the provisions of the Federal Food Stamp Program as contained in 7 U.S.C. Section 2012.” § 144.014.2. Thus, § 144.014 defines “food” subject to the reduced tax rate by reference to a specific federal statute.

It is not new, of course, for Missouri law to reference and incorporate federal law. *See, e.g.,* § 208.010, *cited in Gee v. Dep’t of Soc. Servs., Family Support Div.*, 207 S.W.3d 715 (Mo. App. W.D. 2006). And as such, we must turn to the statutory definition provided in federal law to determine the plain and ordinary meaning of the provisions in § 144.014. *See id.* at 719 (holding that a state agency cannot exceed the federal definition incorporated into Missouri law).

The referenced federal statute, 7 U.S.C. § 2012, contains definitions to be used in the Federal Food Stamp Program, including a definition of “food.” As provided in 7 U.S.C. § 2012(k), “food’ means”:

[A]ny food or food product *for home consumption* except alcoholic beverages, tobacco, and hot foods or hot food products ready for immediate consumption

Id. (emphasis added). Thus, to qualify for the reduced tax rate under Missouri law, the food must, at a minimum, be “for home consumption.”

Gate Gourmet argues throughout its brief that the meals it sells “in bulk to commercial airlines” are “TV-Dinner-Style Frozen Meals” “similar to frozen dinners sold to the public in grocery stores.” Appellant’s Brief, p. 2, 7; *see also id.* at 3, 5, 10, 13. Not only are the meals *not* like a frozen TV dinner and not “the type of food generally purchased for home consumption,” but Gate Gourmet’s argument and interpretation of the definition of “food” in § 144.014.2, as discussed below, has been expressly rejected by this Court in *Wehrenberg v. Dir. of Revenue*, 352 S.W.3d at 367.

The meals Gate Gourmet sells are *always* sold for commercial use because they are designed, prepared, packaged and sold under a written catering agreement with the airline customer for the airline to be able to provide its in-flight meal service.^{2/} Most important, the meals themselves are

^{2/} Gate Gourmet does not allege that the airlines’ purchases of food at issue are purchases for resale. The food is provided with the airlines’ service

actually designed, prepared, packaged, and sold for commercial use, not for home consumption. Because the airlines purchase the meals to provide commercial in-flight meal service to its passengers, and especially because those meals themselves are designed, prepared, packaged and sold for that specific commercial use, they do not qualify as “food” under the definition of “food” provided in § 144.014.2. Therefore, Gate Gourmet’s sales of its meals are subject to the regular four percent sales tax rate for the retail sale of tangible personal property provided under § 144.020.1(1).

2. Dictionary definitions confirm the plain and ordinary meaning of “for home consumption.”

In addition to the plain and ordinary meaning of “home consumption,” the dictionary likewise confirms the same conclusion. The dictionary provides the following relevant definitions for each of these terms:

Home – 1a: the house and grounds with their appurtenances habitually occupied by a family: one’s principal place of residence **b:** a private dwelling . . . to or at one’s principal place of residence

of transporting passengers, which is a non-taxable service. *See* Missouri Code of State Regulations, 12 CSR 10-103.500.

Consumption – 1a: the act or action of consuming or destroying . . . **2:** the utilization of economic goods in the satisfaction of wants or in the process of production resulting in immediate destruction (as in the eating of foods)

Webster’s Third New International Dictionary 490, 1082 (1993).

Quite literally, “home consumption” for food means to eat or drink at a person’s principal place of residence. This is not the purpose for which in-flight airline meals are purchased. Instead, the point of a meal on an airplane is to provide a service to in-flight customers. And that is exactly what the Commission found – “meals Gate Gourmet sold to its commercial airline customers were intended to be eaten by the airlines’ passengers, pilots, and crew while on board the customer’s aircraft.” (LF 129).

By referencing only the definitional section of the Federal Food Stamp Program in 7 U.S.C. § 2012, the Missouri legislature intended to adopt this very concept in § 144.014. In accordance with the plain language of the statute, in-flight airplane meals are not entitled to the reduced one percent tax rate in § 144.014.

B. The Statutory Structure and Purpose of § 144.014

Also Support Denial of the Reduced Tax Rate.

Beyond merely the plain language of § 144.014, the statutory structure and purpose all support the conclusion that the reduced tax rate does not apply to in-flight airline meals.

The legislature intended that the reduced tax rate be limited. First, it is only applied to the types of food that are covered by the Federal Food Stamp Program as contained in 7 U.S.C. § 2012. The very nature of the Federal Food Stamp Program is that it is for basic or staple foods – not for food as part of airplane flight. *See* 7 U.S.C. § 2011 (declaring the policy of Congress for the food stamp program). The federal definition of food, for example, also excludes “hot foods or hot food products ready for immediate consumption.” 7 U.S.C. § 2012(k)(1). That same emphasis is incorporated into Missouri’s sales tax law.

Second, even all of the food for which food stamps may be redeemed are not subject to the reduced tax rate in § 144.014. The reduced tax rate does not apply to food “sold by any establishment where the gross receipts derived from the sale of food prepared by such establishment for immediate consumption . . . constitutes more than eighty percent of the total gross receipts of the establishment.” § 144.014.2. Thus, the legislature’s intent is

clear – narrowly limit the retail food sales subject to a reduced tax rate in order to benefit needy families and children in their purchase of basic or staple foods.

Consistent with the plain language of the statute, as well as the legislature’s purpose and the associated statutory structure, this Court should affirm the Commission’s decision denying Gate Gourmet a refund for sales taxes on in-flight airline meals.

C. All of Gate Gourmet’s Meals are Designed, Prepared, Packaged, and Sold for In-flight Consumption, Not for Home Consumption.

Section 144.014.2 lays out a two-part test for determining which food products are “food” qualifying for the reduced tax rate. Part one of the test determines whether certain food products qualify for the reduced rate, while part two—also known as “the 80/20 test”—determines whether certain stores or other establishments are eligible to charge its customers the reduced rate. The Commission correctly concluded that the meals in this case fail to satisfy part one of the test, because the “food” does not qualify for the reduced rate.

1. The meals are *designed* for in-flight consumption.

Gate Gourmet's meals are unique in that they are specifically designed and made according to the demands and needs of an airline. In providing its catering service for its airline customers, Gate Gourmet prepares and sells meals, rolls, and prepackaged salads. (Tr. 45-46, 57; Pet'r's Ex. 3; Pet'r's Ex. 4; Pet'r's Ex. 14, p. 25). Gate Gourmet prepares and sells about 320 airline meals a day for its customers. (Tr. 66).

Gate Gourmet argues that its meals are just like frozen TV dinners. But unlike a mass-produced frozen dinner which is purchased at a grocery store and eaten at home or at work, the meals Gate Gourmet sells are specially designed to be consumed efficiently by the airline in providing on-board meal service for its passengers. In addition, they are specially designed to be eaten and taste good in a much different environment: 35,000 feet above sea-level in the cabin of an aircraft. In its culinary department, Gate Gourmet's chefs work with the airlines to design menus for in-flight meals that the airline serves to its passengers. (Tr. 51-52, 63, 78).

Gate Gourmet chefs design the menus for airline meals which are later sold to customers and consumed by passengers in-flight. As Gate Gourmet's Saint Louis Operations Manager Danny Ash testified:

A: We have teams of chefs that work with our airline customers, that do menu design. They create different menus for cycle rotations that – so in North America, the business flyer will not get the same meal, if he’s an avid flyer and the menus change. Some of them change monthly; some of them change bimonthly. But they actually work with the – the culinary department actually works with the airlines and helps them come up with menu design ideas.

Q: Okay. So what you’re saying is, these chefs are designing the menu?

A: That’s correct.

(Tr. 51-52).

The evidence established that Gate Gourmet designs meals adapted to an in-flight environment. (Tr. 75-76; Pet’r’s Ex. 5, p. 12). In designing menus and airline meals for in-flight consumption for its airline customers, Gate Gourmet’s chefs use innovative production technologies in designing meal components, such as “cuisine sous-vides”, Hot Filling and MAP (Modified

Atmosphere Packing). (Tr. 75-76; Pet'r's Ex. 5, p. 12). Gate Gourmet's meals are unique in that they are always specifically designed and made for commercial use according to the demands and needs of an airline. The meals are not designed for home consumption.

2. The meals are *prepared* for in-flight consumption.

In addition to not being designed for home consumption, Gate Gourmet meals are not prepared for home consumption. Gate Gourmet only sells its meals to airlines. (Tr. 64). All of the catered meals it sells, therefore, are specially prepared for airlines to use in providing their in-flight meal service.

Gate Gourmet employs a cook who prepares airline meal components in the hot kitchen near the airport. (Tr. 44, 52-53, 66). Gate Gourmet then uses its blast chiller to quickly bring the cooked meal's temperature down from cooking temperature to a chilled temperature. (Tr. 44, 67-68). When the meals are sold to the airline customer and Gate Gourmet delivers them, they are fully cooked and in a refrigerated state (not frozen). (Tr. 64-67, 88 (testifying that the meals are delivered to the airlines at "[b]etween 41 and 45" degrees). At all stages of preparing and delivering its meals that it sells to airlines, Gate Gourmet employs a Hazardous Analysis Critical Control Points

(HACCP) food safety protocol program which was adopted by the International Flight Services Association. (Tr. 59; Resp't's Ex. E).

Gate Gourmet has stated in its Brief that it sells "TV-Dinner-Style Frozen meals" that are not "ready for immediate consumption at the point of sale; they require additional preparation in order to be edible or safe to eat." Appellant's Brief, p. 3. But this is not accurate and conflicts with the evidence in the record. Gate Gourmet's Saint Louis Operations Manager testified that at the point of sale when the airline receives the meals, they are fully cooked and in a refrigerated state. (Tr. 64-67, 88). The meals are in a *refrigerated* state, not frozen. (Tr. 67). Also, the manager testified that the meals at the point of sale are in fact fully cooked and safe to eat at that point:

Q: Is it fully cooked?

A: It is cooked.

Q: Okay. Is it safe to eat?

A: I guess, I would imagine.

(Tr. 88).

This testimony is consistent with required food safety protocols which Gate Gourmet follows in preparing and delivering the food to the airlines. (Tr. 59; Resp't's Ex. E).

3. The meals are *packaged* for in-flight consumption.

In addition to being designed and prepared for in-flight consumption, Gate Gourmet meals are packaged and delivered for in-flight consumption, not home consumption. Again, because Gate Gourmet's only customers are airlines, and all of its meals are made and prepared according to catering agreements for those airlines, all of the meals it sells are specially packaged and delivered for the airline's consumption for commercial use in serving the meals in-flight to passengers.

Gate Gourmet uses online software with flight tracking in order to coordinate its catering service and determine how many meals to prepare and deliver to its customer. (Tr. 69-70; Pet'r's Ex. 3, p. 3). Gate Gourmet then delivers all of its catered meals by truck to the aircraft owned by its customer. (Tr. 40; Pet'r's Ex. 14, pp. 27-28). Gate Gourmet delivers its meals to the aircraft approximately 30 minutes before takeoff. (Tr. 87-88). The meals are in a refrigerated state but are fully cooked. (Tr. 88). When Gate Gourmet's meals are sold to its airline customers, they are plated on airline-owned dishes. (Tr. 42, 46).

Gate Gourmet's catered meals also do not contain any nutritional labels. (Tr. 71-72). Unlike food manufacturers that sell frozen dinners for

home consumption, Gate Gourmet is not responsible for informing the consumer (airline) of the ingredients or nutritional facts and content of the catered meals it prepares. (Tr. 72). When the meals are sold to its airline customers, they are labeled with a sticker that contains an item code and description of the meal. (Tr. 71; Pet'r's Ex. 14, pp. 16-20). The meals are also sold to airline customers in the airline-owned glide trays which are placed inside the airline-owned portable ovens. (Tr. 40-43, 65, 71; Pet'r's Ex. 14, p. 17-19). Therefore, the meals are always packaged and delivered for commercial use and not for home consumption.

4. The meals are *sold* for in-flight consumption.

Gate Gourmet argues throughout its brief that the meals it prepares for airline customers are the type of food generally purchased for home consumption, and therefore eligible for the reduced rate under § 144.014. In support of this argument, Gate Gourmet relies on the Commission's decision in *Krispy Kreme Doughnut Corp. v. Dir. of Revenue*, Case No. 06-1044 RS (Mo. Admin. Hear'g Comm., December 23, 2010). At issue in that hearing, which was subsequently remanded by this Court, was whether food products sold by Krispy Kreme at its retail stores qualified for the reduced sales tax rate under § 144.014.2. Interpreting the meaning of "home consumption" under part one of the statute's test, the Commission reasoned that:

the statute was intended to draw a line, however inexact, between food *generally* purchased for home consumption and food *generally* purchased for immediate consumption.

(Emphasis in original).

There are two fundamental problems with Gate Gourmet's reliance on the interpretation of § 144.014.2 found in the Commission's *Krispy Kreme* decision: First, the test has been expressly rejected by this Court. Secondly, even if the test was precedential, Gate Gourmet's meals still would not qualify as they are not food "generally purchased for home consumption." The meals are always purchased for commercial use. In addition, Gate Gourmet's meals are not even capable of being sold for home consumption. Its only customers are airlines. (Tr. 64). All of the food Gate Gourmet sells is pursuant to a catering agreement. (Tr. 36; Pet'r's Ex. 3; Pet'r's Ex. 4). And every catered meal sold by Gate Gourmet to its airline customers is either consumed in-flight by one of the airline's passengers or is later discarded after the flight. (Tr. 73). In short, Gate Gourmet only sells meals that are designed, prepared, packaged, and sold for commercial use by an airline, food that is *never* sold or purchased for home consumption.

The correct interpretation of § 144.014.2 is found in *Wehrenberg, Inc. v. Dir. of Revenue*, 352 S.W.3d 366 (Mo. 2011). In *Wehrenberg*, this Court held that the reference to 7 U.S.C. § 2012(k) clearly means the definition of qualifying “products and types of food” subject to the reduced rate under § 144.014 is linked with, and incorporates, the definition of “food” under the federal statute which is limited to “any food or food product for home consumption.” *Id.* at 367.

Wehrenberg argued that the popcorn, fountain drinks, and candy purchased at the concession stands in its movie theaters were products and types of food eligible for the reduced tax rate under the definition in § 144.014.2. But this Court held that because of the incorporation of the federal definition, “the ‘products and types of food’ subject to the one percent state sales tax are food items for home consumption.” *Id.* at 367. The Court also determined that “[t]here is no doubt that the food sold at the theater concession stand is for consumption at the theater and is not sold for home consumption.” *Id.* at 367.

Just as there is no doubt that Wehrenberg’s food was sold for consumption at its theaters, there is no doubt that Gate Gourmet meals are sold to be consumed by airlines in the commercial use of serving them to passengers in-flight. During the audit period, Gate Gourmet entered into

written catering and provisioning agreements with its airline customers under which it agreed to provide meal and beverage catering services to airlines. (Tr. 36; Pet'r's Ex. 3; Pet'r's Ex. 4). Gate Gourmet's only sells its catered meals to airlines and has no other customers. (Tr. 64). Its airline customers consume the meals when reheating them in-flight to serve to their passengers. (Tr. 64, 87-89).

Gate Gourmet argues that the facts of *Wehrenberg* are limited to food sold at a movie theater concession stand for immediate consumption and asks this Court to therefore disregard the holding in the case. There is no mention of such a limitation in the Court's opinion. Additionally, Gate Gourmet fails to note the rest of the Court's holding which is directly on point in this case. Just as Gate Gourmet attempts to argue here, *Wehrenberg* also tried to argue that "for home consumption" part of the federal definition referenced in § 144.014.2 does not require that the food be intended for home consumption, but that the food qualifies as long as it is "of the type of food generally purchased for home consumption." The Court in *Wehrenberg* expressly rejected this argument:

Wehrenberg argues that the relevant inquiry is not whether the items are intended for home consumption, but whether items such as popcorn or

nachos are “types of food” for which food stamps may be redeemed. Wehrenberg’s argument is premised on the assertion that section 144.014 does not incorporate the definition of “food” utilized by the Federal Food Stamp program. This argument fails . . . [and] would render the reference in section 144.014 to the Federal Food Stamp Act superfluous.

Wehrenberg, at 367.

This Court’s holding in *Wehrenberg* indicates that to qualify for the reduced tax rate under § 144.014, the food at issue must, at a minimum, be intended “for home consumption” as defined in the federal statute. It is clear that the Court determined that “food” is narrowly defined to include only food that is “for home consumption.” By referencing only the definitional section of the Federal Food Stamp Program in 7 U.S.C. § 2012, the Missouri legislature intended to adopt this very concept in § 144.014. And every word, sentence or clause in a statute is presumed to have effect. *See State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 519 (Mo. 2009).

Under the plain language of 7 U.S.C. § 2012, and using a dictionary definition, to qualify for the reduced tax rate in § 144.014 food must be for “home consumption.” This is not the intended purpose for which Gate

Gourmet meals are designed, prepared, packaged, or sold. Instead, its meals are sold for commercial use – under written catering agreements whereby the airlines purchase the meals to provide in-flight meal service for its passengers.

II. The Director’s Assessments Are Not Unconstitutional Under the “Uniformity Clause.”

Finally, Gate Gourmet argues that the Director’s assessments in this case violate the “Uniformity Clause” of the Missouri Constitution. The Uniformity Clause, however, requires that taxes “shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax.” Mo. Const., Art. X, § 3. There is no violation of the Missouri Constitution in this case.

The uniformity provision of the Missouri Constitution does not prohibit all distinctions among taxpayers; it prohibits only distinctions between those in the same class or subclass. *McKinley Iron, Inc. v. Dir. of Revenue*, 888 S.W.2d 705, 708 (Mo. 1994) (“The state ... is not prohibited from treating one class of taxpayer differently from others”). In order for the Director to comply with this provision, “[i]t is only necessary that there be a reasonable basis for the ... differentiation and that all persons similarly situated ... be treated alike.” *Bopp v. Spainhower*, 519 S.W.2d 281, 289 (Mo. 1975).

Gate Gourmet argues that for all intents and purposes, Gate Gourmet's TV-Dinner-Style-Meals are identical to TV dinners sold by other sellers to which the reduced tax rate applies and therefore merely because the TV-Dinner-Style-Meals are eaten on airplanes, the Department has violated the Uniformity Clause. Not so. As the evidence shows, Gate Gourmet's meals are not substantially the same as TV dinners sold at a grocery store because Gate Gourmet meals are always designed, prepared, packaged, and sold for the airline's commercial use. The meals are not for home consumption and therefore the Department's position is reasonable and consistent with § 144.014 and this Court's holding in *Wehrenberg*.

CONCLUSION

For the foregoing reasons, the Administrative Hearing Commission's decision should be affirmed.

Respectfully submitted,

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CERTIFICATION OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the Brief of Respondent was served electronically via Missouri CaseNet e-filing system on the 5th day of April, 2016, to:

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I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 5,791 words.

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