

Summary of SC95181, *Krispy Kreme Doughnut Corporation v. Director of Revenue*

Appeal from the administrative hearing commission, Commissioner Karen A. Winn
Argued and submitted March 1, 2016; opinion issued May 3, 2016

Attorneys: Krispy Kreme was represented by Edward F. Downey and Carole L. Iles of Bryan Cave LLP in Jefferson City, (573) 556-6622. The director was represented by Deputy Solicitor General Jeremiah J. Morgan of the attorney general's office in Jefferson City, (573) 751-3321; and Roger Freudenberg of the department of revenue in Jefferson City.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A company appeals the administrative hearing commission's decision that it does not qualify for a refund of sales taxes for its retail sales of certain foods. In a unanimous decision written by Judge Zel M. Fischer, the Supreme Court of Missouri affirms the commission's decision. Giving effect to the plain language and intent of the statute, all of the company's donuts are akin to food sold as restaurants and count toward the 80-percent threshold as "food prepared ... for immediate consumption."

Facts: This is the second time this case has come before this Court. In the relevant tax periods of April 2003 through December 2005, Krispy Kreme collected and remitted sales tax from its retail sales based on a 4-percent rate imposed by section 144.020, RSMo. In 2006, Krispy Kreme took notice of section 144.014, RSMo, which imposes only a 1-percent sales tax rate "on all retail sales of food," further defining "food" as that for which food stamps may be redeemed under federal law, excluding food when food prepared for immediate consumption constitutes more than 80 percent of the establishment's gross receipts, regardless of whether the food actually is consumed on the establishment's premises. Krispy Kreme sought a refund for tax it had remitted on its retail sales of donuts, non-hot beverages, milk, coffee beans and ground coffee, arguing the applicable tax rate was 1 percent rather than 4 percent. It did not seek a refund for tax remitted on its retail sales of hot beverages. The director denied the refund, and Krispy Kreme sought review in the administrative hearing commission, which ruled that, although Krispy Kreme's products qualified as "food" under the federal food stamp program, the company failed to show that not more than 80 percent of its gross receipts were derived from the sale of food prepared for immediate consumption. On subsequent review, this Court (in *Krispy Kreme I*) reversed the commission's decision and remanded (sent back) the case, holding that "food prepared ... for immediate consumption on or off the premises" means all food that is eaten at the place of preparation and purchase, or while traveling to, or immediately upon arrival at another location without any further preparation."

Following remand, Krispy Kreme conducted an online survey between September and November 2012 asking its customers where they eat donuts they purchase from Krispy Kreme stores and when they eat the donuts after arriving at the place of consumption. Based on the results, Krispy Kreme concluded that, if "immediate consumption" meant consumed within one hour, then enough of its donuts were not consumed immediately to surpass the 80-percent threshold. At the remand hearing, the director did not offer any evidence but objected to

admission into evidence of the 2012 survey results. The commission ruled the survey was admissible but found it did not establish, by a preponderance of the evidence, that it reflected Krispy Kreme's customers' habits during the relevant tax periods and found that Krispy Kreme's witnesses and other evidence failed to address when customers eat the donuts. The commission denied Krispy Kreme's refund request. Krispy Kreme appeals.

AFFIRMED.

Court en banc holds: Krispy Kreme failed to meet its burden of proof that it is entitled to a sales tax refund – rather, giving effect to the plain language and intent of section 144.014.2, all of Krispy Kreme's donuts are “food prepared ... for immediate consumption.” Because the director of revenue contested Krispy Kreme's evidence, this Court defers to the commission's determinations about the persuasiveness of that evidence. To meet its burden of proof on remand, Krispy Kreme attempted to demonstrate when and where its customers ate the donuts they purchased. But this Court does not believe the legislature intended that retailers interrogate their customers as to when they plan to eat food, which would be impractical and absurd. The terms of section 144.014.2 should be viewed in the light of reality and not be stripped of common sense or construed to establish arbitrary loopholes. As originally enacted, section 144.014's definition of “food” referred only to the federal food stamp program's definition, which is “any food or food product for home consumption except ... hot foods or hot food products ready for immediate consumption.” At first glance, this definition appears to distinguish, for tax purposes, food purchased from grocery stores and similar establishments from food purchased at restaurants and similar establishments, making only the former taxable at section 144.014's lower rate. This created a tax anomaly – food purchased from restaurants still could be taxable at section 144.014's lower rate, depending on whether the food ordered was hot or cold and whether it was ordered to go, for home delivery or for dining in the restaurant. Two years later, the legislature added language excluding from section 144.014's definition of “food” “food or drink sold by any establishment where the gross receipts derived from the sale of food prepared by such an establishment for immediate consumption on or off the premises of the establishment constitutes more than eighty percent of the total gross receipts of that establishment” The purpose of this addition, as reflected in the plain language chosen, is to ensure that food sold by restaurants no longer is taxable at section 144.014's lower rate. With this purpose in mind, food that is akin to food primarily sold by restaurants is intended to count toward the 80-percent threshold, which means food prepared by an establishment that not only is capable of immediate consumption but also regularly is consumed immediately. It is in this limited sense that customers' actual consumption matters. If a food meets this criteria, its classification does not change based on an individual's actual consumption of that food. Given the circumstances, Krispy Kreme does not dispute – and its own statistical evidence confirms – that it prepares its donuts and that its donuts regularly are consumed immediately by its customers. Therefore, the donuts are akin to food sold by restaurants and count toward the 80-percent threshold as “food prepared ... for immediate consumption.” This is true even for donuts not actually consumed immediately. All donuts are prepared for immediate consumption. A donut is no less a “food prepared ... for immediate consumption” simply because a customer chooses to eat it later.