IN THE SUPREME COURT OF MISSOURI

No. SC91283

WEHRENBERG, INC., Appellant,

v.

DIRECTOR OF REVENUE, Respondent.

ON PETITION FOR REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE SREENIVASA RAO DANDAMUDI,
COMMISSIONER

APPELLANT'S REPLY BRIEF

COOK & RILEY, LLC

Daniel J. Cook, #39447
Scott R. Riley, #41898
1900 Locust St., Ste. 300
St. Louis, Missouri 63103
dcook@cookrileylaw.com
sriley@cookrileylaw.com
Telephone: (314) 241-3314
Facsimile: (314) 241-3314

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

Procedural

The Commission concluded as follows:

> [W]e conclude that the concession stand is an establishment; the concession stand, rather than the movie theater in general, is specifically the seller of the refreshment items. The concession stand receives all of its receipts from concession sales. Therefore, more than 80 percent of the total gross receipts of the establishment were from sales of food prepared by the establishment. The refreshment items do not qualify for the reduced sales tax rate.

Wehrenberg focused its Appellant's Brief on the decision issued by the Commission based on the rules of the standard of review (see *infra*). However, the Director only addresses this issue in a very cursory manner and, instead, focuses the bulk of her brief on the issue of whether the sales at issue meet the definition of "food" pursuant to §144.014 which was not the basis of the decision issued by the Commission.

Additionally, the Director states in her brief: "Wehrenberg spends the entirety of its argument, and its sole point relied on, on one issue – whether movie theater concessions stands are 'establishments' under §144.014, and, therefore, subject to the 80/20 rule." Respondent's Brief at page 19. As this Court will see from the record, the argument related to the definition of "food" was the primary focus of the Appellant's briefs at the AHC. In this Court, Appellant focused its

initial brief on the "two establishments" argument (the basis of the decision of the Commission) since the Standard of Review (as stated by both parties) is:

> 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.

However, because the Respondent has focused its brief almost entirely on the issue of the definition of "food" , Appellant's Reply brief addresses not only Respondent's argument relating to the "two establishments" issue (the actual basis of the AHC's decision), but also the issue of the definition of "food."

Introduction

The Director's argument is founded upon the assumption that the General Assembly incorporated the federal definition of "food" found in 7 U.S.C. § 2012(k)(1) [1] into §144.014.[2] Conveniently, the Director's brief fails to set out in

[1] This is the definitional section of the federal food stamp act (now SNAP). The section in question provides: "Food means: any food or food product for home consumption except alcoholic beverages, tobacco, and hot foods or hot food products ready for immediate consumption other than those authorized pursuant to clauses (3), (4), (5), (7), (8), and (9) of this subsection."

the body of its argument the very statute which is the subject of this case, §144.014. Perhaps the Director's failure to put the statute in plain sight stems from the fact that the language in §144.014 does not conform to the Director's argument. Hence, the Director proceeds to paraphrase select portions of the statute instead.

Section 144.014 provides:

> 1. Notwithstanding other provisions of law to the contrary, beginning October 1, 1997, the tax levied and imposed pursuant to sections 144.010 to 144.525 and sections 144.600 to 144.746 on all retail sales of food shall be at the rate of one percent. The revenue derived from the one percent rate pursuant to this section shall be deposited by the state treasurer in the school district trust fund and shall be distributed as provided in section 144.701.
>
> 2. For the purposes of this section, the term **"food" shall include only 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**, as that

---

[2] All statutory citations in this Brief are to the Revised Statutes of Missouri of 2000, as amended, unless otherwise noted.

> section now reads or as it may be amended hereafter, and shall include food dispensed by or through vending machines. For the purpose of this section, except for vending machine sales, the term "food" shall not include food or drink sold by any establishment where the gross receipts derived from the sale of food prepared by such 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, regardless of whether such prepared food is consumed on the premises of that establishment, including, but not limited to, sales of food by any restaurant, fast food restaurant, delicatessen, eating house, or cafe. (Emphasis added).

No Complete Incorporation of the Federal Definition of Food into §144.014

The fundamental flaw in the Director's case is her assumption that the federal definition of "food" applies in Missouri. The General Assembly did not specifically adopt or incorporate the federal definition of "food" as set forth in 7 U.S.C. §2012 into Missouri sales tax law. Rather, §144.014.2 sets forth a Missouri sales tax law-specific definition of "food" based upon the products and types of food for which federal food stamps may be redeemed. The Director's logic, or lack thereof, appears to be that because §144.014 references the Federal Food Stamp Act in defining "food" that the General Assembly therefore must have

adopted the federal definition of "food" in its entirety. The statutory language used by the Missouri General Assembly simply does not support the Director's contention.

The Missouri General Assembly easily could have incorporated the federal definition of "food" into §144.014. An example of this type of "full incorporation" can be found in the statute immediately preceding §144.014, §144.013.[3] Section 144.013 of the Missouri Sales Tax law reads as follows:

> Notwithstanding any other provision of this chapter, the tax imposed on mobile telecommunications services pursuant to section 144.020 shall be imposed in accordance with the federal Mobile

[3] See also §143.091 wherein the General Assembly incorporates by reference into the Missouri income tax code federal definitions of terms. Section 143.091 provides: "Any term used in sections 143.011 to 143.996 [The Missouri Income Tax Code] shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required by the provisions of sections 143.011 to 143.996. Any reference in sections 143.011 to 143.996 to the laws of the United States shall mean the provisions of the Internal Revenue Code of 1986, and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes, as the same may be or become effective, at any time or from time to time, for the taxable year." (Emphasis added).

> Telecommunications Sourcing Act, 4 U.S.C. Sections 116 through 124, as amended. **All terms used in this section shall have the same meaning attributed to them by the federal Mobile Telecommunications Sourcing Act, 4 U.S.C. 124, as amended**. (Emphasis added).

If the General Assembly had intended to fully incorporate the federal definition of "food" from 7 U.S.C § 2012 for purposes of §144.014, then it could have used language similar to or identical to the language in §144.013, the statute right next to it in the Sales Tax Act. Such a **hypothetical** statutory section might have read as follows: "The term 'food' as used in this section shall have the same meaning attributed to it by the Federal Food Stamp Act, 7 U.S.C. § 2012, as amended." However, the General Assembly did not use such language. Section 144.013 clearly demonstrates that the General Assembly knows how to incorporate the federal definition of terms into the Missouri Sales Tax Law. The fact that the General Assembly did not use such language in §144.014 necessarily requires this Court to find the General Assembly meant to accomplish something different.

Moreover, because the statute being interpreted is a tax imposition statute, any doubts about the General Assembly's intent should be resolved in favor of Wehrenberg and against the Director. *Goldberg v. Administrative Hearing Comm'n*, 609 S.W.2d 140, 144 (Mo. banc 1980); *Delta Air Lines, Inc. v. Director*

of Revenue, 908 S.W.2d 353, 356 (Mo. banc 1995) *Staley v. Director of Revenue***,** 623 S.W.2d 246, 250 **(**Mo. banc 1981); *Brown Group, Inc. v. Administrative Hearing Comm'n*, 649 S.W.2d 874, 881 (Mo. banc 1983)("We hold fast to the basic precept that tax statutes are to be construed in favor of the taxpayer and against the taxing authority"). The Administrative Hearing Commission failed to employ this most basic rule of statutory interpretation for tax statutes. In fact, the Administrative Hearing Commission seems to have gone out of its way to construe ambiguities in section 144.014 in favor of the Respondent in contravention of the rule of strict interpretation against the taxing authority.

Definition of "Products" and "Types" of Food—No Home Consumption

The language actually employed in §144.014 simply does not support the foundation of Respondent's argument that the General Assembly intended a wholesale adoption of the federal definition of "food." Instead, the General Assembly created a Missouri sales tax-specific definition of "food" that made all "products and types of food for which federal food stamps may be redeemed" taxable at the low rate. Since the definition of food set forth in §144.014 is demonstrably separate and distinct from the definition of "food" found in 7 U.S.C. §2012, the language of §144.014 must be examined pursuant to the rules of statutory construction. *See* §1.090, RSMo.; *See Lincoln Industrial, Inc. v. Director of Revenue*, 51 S.W.3d 462 (Mo. banc 2001)("Courts are instructed by the legislature to take words in a statute in their plain and ordinary sense. The plain meaning of words, as found in the dictionary, will be used unless the

legislature provides a different definition.")(Citations omitted); *Asbury v. Lombardi*, 846 S.W.2d 196, 201 (Mo banc 1993)("Under traditional rules of [statutory] construction, undefined words are given their plain and ordinary meaning as found in the dictionary in order to ascertain the intent of lawmakers").

Webster's Dictionary defines "product" as "a thing produced by labor." WEBSTER'S COLLEGE DICTIONARY (1991). Webster's Dictionary defines "type" as "a thing or person regarded as a member of a class or category; kind; sort (usually followed by 'of')." *Id*. What is missing from these definitions is what Respondent so desperately wants this court to read into the statute—some sort of geographic limitation. The phrase "products and types of food" simply does not impose any sort of geographic restriction upon where the food must be consumed.

"Home consumption" is neither a food product nor a type of food! Therefore, "home consumption" is simply not a relevant inquiry when determining whether an item constitutes "food" for purposes of §144.014.

What Products and Types of Food are Eligible for the Food Tax Rate?

The products and types of food which are eligible for purchase with federal food stamps are defined generally in 7 CFR §271.2 as: "Any food or food product for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption." Even assuming arguendo that there is some geographic limitation implied by the phrase "for immediate consumption," this phrase only modifies "hot food products." Therefore, any food products, other than "hot food products for immediate

consumption," are not restricted in any way by where the purchaser consumes his or her purchase. Hot food products sold by Petitioner for immediate consumption (e.g. hamburgers, french fries, pizza etc.) were simply not included in Petitioner's refund claim.

While more in the nature of a negative definition, the federal food stamp act defines the **types** of food and **products** which do **not** qualify. The nonqualifying products and types of food are:

- Alcoholic beverages;
- Tobacco[4]; and
- Hot foods and hot food products for immediate consumption.

Based on the federal definition of nonqualifying "products" and "types of food," all of Petitioner's sales of foods at its Missouri theatres should qualify for the low rate of tax except for alcoholic beverages, "hot foods" and "hot food products for immediate consumption."

Hot food items such as hamburgers, french fries and pizza (among others) were not included in Appellant's refund claim because they are "hot foods" or "hot food products intended for immediate consumption." Therefore, these products were excluded from the claim because under Missouri's definition of "food" these

[4] Tobacco, while not a "type of food," is a product which cannot be purchased with federal food stamps.

products did not qualify; these foods did not qualify because they were products and types of food that could not be purchased with federal food stamps.

On page thirteen of the Respondent's Brief, she all but admits that the foods sold by Appellant's theatres are the products and types of food for which federal food stamps may be redeemed:

> To be sure, popcorn, drinks and candy can all be purchased at the local supermarket, and if purchased at the local supermarket may in fact be for home consumption. But, the purchase of these items at a supermarket versus the purchase of these items at a movie theatre is drastically different. (internal quotations omitted).

Thus, Respondent takes issue with the place where Appellant's food is consumed rather than with the products and types of food which Appellant sells.[5]

Appellant's Popcorn is not Hot Food or a Hot Food Product

The popcorn served by Appellant is not intended to be served hot. The transcript reflects the testimony of Appellant's Director of Concessions who testified as follows at page 113 of the transcript:

[5] Respondent does question whether select foods sold by Appellant are hot foods. She takes issue with popcorn, pretzels and nachos. See § I(A)(4) of Respondent's Brief.

[Question from Mr. Cook] Is it Wehrenberg's intention to serve hot popcorn?

[Answer] No it is not.

The Director's brief makes sure to point out that the poppers reach a temperature of nearly five hundred degrees and the popping process requires the water trapped inside the corn to boil which ultimately turns to steam and causes the corn to "pop." This is pure misdirection on the Director's part.

These facts would be relevant if the test for whether food qualifies for the low tax rate was if the food was ever cooked or heated. Using the Director's logic, one could not buy a bag of potato chips at the grocery store at the low tax rate because the potato chips were at one time deep fried in hot oil.

The evidence in this case demonstrates it was Wehrenberg's intent to serve crispy popcorn, not hot popcorn.[6] The record reflects that the cornditioners in which the popcorn was stored prior to being served to Wehrenberg's customers were designed to dehumidify the popped corn and to maintain the proper level of crunchiness in the popped corn. Any heat that was generated by the cornditioners

[6] The Commissioner who presided over the hearing of this matter was the Honorable Joseph Bindbeutel. Mr. Bindbeutel was no longer serving on the Administrative Hearing Commission when this decision was authored by the Honorable Sreenivasa Rao Dandamudi. The author of the AHC's decision was not present during the testimony of the witnesses in this matter.

was incidental to the dehumidifying process.[7] Additionally, Wehrenberg did not hold itself out to the public as a purveyor of hot popcorn.[8] Thus, the popcorn sold by Wehrenberg meets the definition of "food" pursuant to §144.014, RSMo.

Tax Administration by Ambush

Turning to the store-within-a- store concept that the Director raised for the first time in its brief before the Administrative Hearing Commission, the Director's brief implies this behavior should be condoned by the courts. How is

---

[7] See TR at page 86 testimony of Brett Havlik. [Question by Mr. Cook]: What does a popcorn conditioner [cornditioner] do? [Answer]: "It is both a display unit and a conditioning unit. It holds the popcorn, allows air to flow through and around the popcorn drying it, drying the excess oil and humidity out of the corn to get maximum crunch and texture." [Question by Mr. Cook]: Why does Wehrenberg use these popcorn conditioners? [Answer] "To dry the popcorn. Popcorn comes out of the kettle still soaked in oil. It immediately starts also absorbing humidity that's in the air [which] needs to be dried. Otherwise it will be chewy, soft and won't be considered fresh by the end consumer."

[8] See TR at page 93 testimony of Brett Havlik. [Question by Mr. Cook]: Does it say hot popcorn anywhere on [the popcorn containers]? Answer: No it does not. [Question by Mr. Cook]: Did you have any signage in your Missouri theatres during the periods in controversy that advertised hot popcorn? [Answer]: No we did not.

the Director's action in this matter consistent with the legislative principals embodied in the Missouri Taxpayer Bill of Rights? Moreover, how is it consistent with any notion of fundamental fairness that the Director can be allowed to raise altogether new objections to a refund claim after the close of evidence in a case?

Strict Interpretation does not Result in Absurdity

According to the Director, the Administrative Hearing Commission's decision which is supported neither by the language of the statute nor the Director's present administration of the sales tax law was nonetheless required to avoid an absurd result. Apparently the absurdity which the Director would like to see avoided is to treat a candy bar or a soda in the same manner for sales tax purposes regardless of where it is purchased. Does it make sense that a convenience store in the same commercial development with one of Appellant's theatres could sell the exact same products and types of food for which Appellant seeks a refund at the low rate while Appellant would be forced to sell these products at the high rate? Given the language in §144.014 that focuses upon the products and types of food which qualify for the low rate of tax, a candy bar or soda should be taxed at the same sales tax rate in Appellant's theatre as it would be at the convenience store located across the parking lot from the theatre.

The Director has come to make this absurdity argument a regular part of her arguments to this court.[9] It appears that whenever the language in a statute read at face value would support an exemption or some other result where less tax is due, the Director views this as something the General Assembly could not possibly have had in mind and, therefore, an absurdity. In these situations, the Director consistently has sought for this Court to find the plain meaning of the words in the statute be jettisoned in favor of a more rational result—in her mind, a result where more tax is paid. The absurd result doctrine is an extreme remedy to be used sparingly, not an argument to be made every time the plain meaning of the words in a statute results in a lower tax bill.

---

[9] See e.g. the Respodent's Brief in *Brinker v. Director of Revenue*; 319 S.W.3d 433 (2010) at page 19: "Courts reject an interpretation, notwithstanding its possibility as an interpretation, it if produces an absurd or illogical result. This is just such a case."; *see also* the Director's Appellant's Brief in the recent *E & B Granite, Inc. v. Director of Revenue*, No. SC9100 (Mo. banc 2/8/2011) at page 29 wherein the Director argues: "[I]f the proposed interpretation or plain language produces an absurd or illogical result, the court will not adopt that interpretation or meaning. Here, the absurd result is identified by the AHC itself: 'The legislature has provided this exemption, resulting in a situation in which no tax is paid.'" (citations omitted).

The example used in Respondent's brief to illustrate the supposed absurdity of Appellant's position is a department store that also operates a restaurant. According to Respondent it would be absurd to let the department store sell food[10]at the low rate because of all of the sales rung up in its other departments because this would be unfair to other restaurants. This hardly reaches the level of absurdity that would require this court to abandon the plain meaning of the words in the statute.[11] See Doughtery, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AMERICAN UNIVERSITY LAW REV. 127, 140 n. 56 (1994) *citing Sturgess v. Crowninshield*, 17 US 122, 202-203 (1819) wherein Chief Justice Marshall states: "But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that

---

[10] Conveniently Respondent leaves out the word "qualifying" in that hot foods for immediate consumption would not be at the low rate for such a restaurant.

[11] *see* MDOR private letter ruling CL 2328 (10/17/2000) part of Respondent's Ex. D. In this letter ruling the Director concludes certain items sold by a deli located inside a grocery store qualify for the low rate. In reaching this decision the Director took into account the grocery items sold in the remaining aisles and departments of the grocer in determining whether the grocer met the 80/20 test. Using these sales of groceries in the calculus, the Director concluded the grocer met the 80/20 test and must charge the low rate of tax on certain deli items.

instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." This same note in the Dougherty article also cites to Justice Kennedy's concurring opinion in *Public Citizen v. US Dep't of Justice*, 491 US 440, 470-71 (1989)(Kennedy concurring)(" This exception remains a legitimate tool of the Judiciary, however, only as long as the Court acts with self-discipline by limiting the exception to situations where the result of applying the plain language would be, in a genuine sense, absurd, i.e., where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone.")(citations omitted).

The situation at hand does not rise to a level of absurdity so as to necessitate the abandoning of the plain meaning of the words used by the General Assembly. Thus, the normal rules for construing tax imposition statutes should be applied and the statute should be construed strictly in favor of Wehrenberg and against the Director.

Summary

The plain meaning of the words in §144.014 should be respected. The statute is phrased in terms of the "products and types of food for which federal food stamps may be redeemed." Neither "products" nor "types of food" suggests that the General Assembly intended to require that foods be purchased for "home consumption" in order to qualify for the food tax rate imposed by §144.014.

Each theatre operated by Wehrenberg is an establishment for purposes of §144.014.2. The concession stands within the theatres are operated by the same Wehrenberg employees that may take or sell tickets on a different night of the week. The definition of establishment as used by the AHC is: "a place of business . . . with its furnishings and staff." The theatres and the concession stands do not constitute separate establishments, but rather a single establishment under one roof with a single owner and a group of employees that all work for the same employer.

Because §144.014 is a tax imposition statute, it must be strictly construed against the Director and in favor of Wehrenberg. Using this rule of interpretation, any ambiguity regarding the General Assembly's incorporation of the federal definition of "food" must be resolved in Wehrenberg's favor. Likewise, any ambiguity regarding whether the concession stands could be separate establishments from the theatres in which they are housed should also be resolved in Wehrenberg's favor.

The decision of the Administrative Hearing Commission should be reversed and this case should be remanded to the AHC with instructions that Wehrenberg should be granted a refund of sales taxes consistent with the amended returns it filed with the Director.

COOK & RILEY, LLC

Daniel J. Cook, #39447
Scott R. Riley, #41898
1900 Locust St., Ste. 300
St. Louis, Missouri 63103
dcook@cookrileylaw.com
sriley@cookrileylaw.com
Telephone: (314) 241-3314
Facsimile: (314) 241-3314

Attorneys for Appellant

RULE 84.06(c) CERTIFICATION

The undersigned counsel certifies that this brief includes the information required by Rule 55.03, complies with the limitations provided for in Rule 84.06(b) and contains 4,277 words.

_____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing brief, and one CD containing the foregoing brief were mailed, first class, postage prepaid, this 30th day of June, 2011, to:

Mr. Jeremiah J. Morgan
Deputy Solicitor General
P.O. Box 899
Jefferson City, Missouri 65102

_____