

IN THE SUPREME COURT OF MISSOURI

No. SC91471

KRISPY KREME DOUGHNUT CORPORATION,
Appellant,

v.

DIRECTOR OF REVENUE,
Respondent.

**ON PETITION FOR REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION,
THE HONORABLE KAREN A. WINN, COMMISSIONER
No. 06-1044 RS**

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INTRODUCTION

Section 144.014 of the Revised Statutes of Missouri provides that a reduced sales tax rate applies to retail sales of food that is of the type that may be purchased with federal food stamps. As a condition for making sales at the reduced rate, section 144.014.2 further requires that food establishments, including “restaurant[s], fast food restaurant[s], delicatessen[s], eating house[s], or cafe[s],” derive at least 20 percent of their total gross receipts from the sale of products other than “food prepared by such establishment for immediate consumption.” Appellant Krispy Kreme Doughnut Corporation (“Krispy Kreme”), having determined that its Missouri stores satisfied this requirement, filed a refund claim for the sales tax it erroneously remitted at the full tax rate on its sales of qualifying food. The Missouri Director of Revenue (the “Director”) denied the claim.

On appeal, the Administrative Hearing Commission (the “Commission”) agreed that Krispy Kreme’s sales at issue in its refund claim consisted of food stamp-eligible items. The Commission, however, disallowed Krispy Kreme’s refund claim based on the erroneous conclusion that Krispy Kreme’s stores failed to meet the statute’s 20 percent requirement. The Commission construed section 144.014’s term “food prepared by [an] establishment for immediate consumption” to mean ready-to-eat food. Based on this construction, the Commission held that neither Krispy Kreme’s sales of doughnuts prepared in advance of sale (and, therefore, of consumption), nor its sales of doughnuts in bulk, nor its sales of food products taken by customers to other locations before

consumption could be counted to satisfy the 20 percent requirement. In the Commission's view, because all these products could be consumed "without further preparation," they were "food prepared by [the] establishment for immediate consumption."

The Commission's contorted interpretation cannot be reconciled with the plain language of section 144.014. The Commission read out of the statute the temporal requirement that consumption of food must follow its preparation without delay, and it rendered section 144.014.2's reference to restaurants and fast food restaurants entirely superfluous, as all such establishments sell primarily, if not exclusively, food in a ready-to-eat state. The Commission's interpretation also contradicts the accepted meaning of the term "immediate consumption" as used by federal law, and as understood by the federal regulatory authorities and the food industry. Moreover, the Commission's ruling either misreads or ignores altogether the decisions by other highest state courts that construed analogous statutes, which expressly held that ready-to-eat food is *not* synonymous with food "prepared for immediate consumption," and that bulk purchases of food are presumed *not* to be intended for immediate consumption. Finally, to the extent section 144.014 is ambiguous, the Commission erred by construing the ambiguity in favor of the Director, instead of — as required by this Court's precedents — in favor of Krispy Kreme, the taxpayer. This Court should correct the Commission's erroneous construction and reverse its denial of Krispy Kreme's refund claim.

JURISDICTIONAL STATEMENT

This appeal involves the construction of section 144.014, a revenue law of the State of Missouri.¹ Specifically, the issue in this appeal is whether Krispy Kreme's sales of certain food items qualify for the reduced food tax rate specified in section 144.014. Accordingly, this Court has exclusive jurisdiction over this appeal pursuant to Article V, § 3 of the Missouri Constitution because the appeal involves the construction of a revenue law of this State. *MFA Petroleum Co. v. Dir. of Revenue*, 279 S.W.3d 177, 178 (Mo. banc 2009).

¹ Unless noted otherwise, all Missouri statutory citations are to the Revised Statutes of Missouri, R.S. Mo. 2010.

STATEMENT OF FACTS

I. KRISPY KREME'S OPERATIONS AND SALES

A. Krispy Kreme's Products and Sales.

Krispy Kreme is a leading retailer and wholesaler of high-quality doughnuts and beverages. Krispy Kreme stores sell and distribute a variety of premium doughnuts together with complementary products, and also offer a broad array of coffees and other beverages. The stores sell their products both directly to customers, such as individuals visiting the stores, and to a variety of retailers, such as convenience and grocery stores.

During the tax period at issue in this appeal — April 1, 2003 to December 31, 2005 — Krispy Kreme owned and operated five stores in Missouri. L.F. 365 (¶ 1). These stores were located in Branson, Kansas City, Independence, and Springfield, which had two stores. *Id.*² Krispy Kreme's Missouri stores were engaged in the production and sale, both retail and wholesale, of premium doughnuts. *Id.* (¶ 2). The stores also sold other food items, such as bagged coffee beans and ground coffee, liquid coffee and coffee drinks, hot chocolate, milk, bottled water, bottled juices, and other soft

² Because almost all sales at the Kansas City store, which served as a commissary and which subsequently closed, L.F. 365 (¶ 1), were wholesale sales, and not sales for retail, its sales are not part of the tax refund claim at issue in this appeal. L.F. 024 (¶ 3); L.F. 026 (¶ 5); L.F. 366 (¶ 8). Subsequent references to Krispy Kreme's Missouri stores therefore do not include the Kansas City commissary. Krispy Kreme's franchisee in Missouri is not a party to this case.

drinks. *Id.* Several of these products — bags of ground coffee and coffee beans, bottled water and juice, bottles and cartons of milk, and bottled soft drinks — were not prepared by Krispy Kreme stores. L.F. 028 (¶ 10); L.F. 039 (¶ 7); L.F. 366 (¶ 4). Krispy Kreme served some of the coffee drinks and hot chocolate hot, and served some drinks chilled. L.F. 365 (¶ 2). Doughnuts were sometimes sold warm, while the remaining doughnuts and other food products were sold at room temperature. *Id.*

Krispy Kreme’s Missouri stores prepared three different types of doughnuts: cake doughnuts, “processed” doughnuts, and glazed doughnuts. L.F. 034 (¶ 5). Cake doughnuts are made with cake batter, while processed and glazed doughnuts are made with dough. *Id.* (Dough contains yeast, while cake batter does not. L.F. 034-35 (¶ 5).) A processed doughnut contains either a filling (such as cream, custard, or jelly) or a topping or coating (such as icing). L.F. 035 (¶ 5). A glazed doughnut has a sugar glaze and contains no other topping, coating, or filling. *Id.*

All cake and processed doughnuts are made in advance of the shift during which they are sold. *Id.* (¶ 6). Glazed doughnuts are made two times during the day: early in the morning and after 5:30 in the afternoon. *Id.* All of the glazed doughnuts are sold during the day when they were prepared; any unsold glazed doughnuts are converted into processed doughnuts to be sold during the next shift. *Id.*

B. Krispy Kreme’s Analysis of Its Missouri Sales.

Krispy Kreme’s Missouri stores kept separate accounts of wholesale and retail sales. L.F. 024 (¶ 4). Over 30 percent of Krispy Kreme sales at its Missouri stores were

wholesale sales of doughnuts to retailers who then resold those doughnuts. L.F. 024 (¶ 3); L.F. 365 (¶ 3).³ The remaining sales made by Krispy Kreme's Missouri stores were retail sales.

As to these retail sales, Krispy Kreme's Missouri stores accounted separately for sales of each product and for whether customers consumed their purchases on or off the store premises. L.F. 024 (¶ 4). In addition, Krispy Kreme tracked its retail sales by the quantity of doughnuts sold to each customer. L.F. 024-25 (¶ 4). As a result, Krispy Kreme was able to determine retail gross receipts for each of its Missouri stores by type of item sold, the quantity of doughnuts sold, and whether the sale was for dine-in or dine-out. *Id.*

Krispy Kreme analyzed the doughnut sales at its Missouri locations to determine the time of sale relative to the time the production was complete and the doughnuts were ready for sale. L.F. 027 (¶ 9); L.F. 366 (¶ 5). The sales of doughnuts prepared at least one hour prior to sale, and so necessarily prior to consumption, combined with sales of drinks not prepared by Krispy Kreme (bottled water and juice, and cartons of milk), constituted between 31.25 and 56.3 percent of total retail sales. L.F. 035-36 (¶ 8). Thus, over 20 percent of Krispy Kreme retail sales were of doughnuts that were prepared more than one hour before they were sold and consumed, together with products not prepared by Krispy Kreme. L.F. 027 (¶ 9); L.F. 035 (¶ 8); L.F. 366 (¶ 5).

³ These wholesale transactions did not form a part of Krispy Kreme's tax refund claim and are not at issue in this appeal. L.F. 025 (¶ 5); L.F. 365 (¶ 3).

In addition, Krispy Kreme analyzed its sales data by quantity of doughnuts sold. L.F. 026 (¶ 7); L.F. 039 (¶ 7). This analysis established that a combination of products not prepared by Krispy Kreme and of doughnuts sold in boxes of a dozen or more amounted to over 20 percent of total retail gross receipts for each of its Missouri stores. L.F. 039 (¶ 7); L.F. 366 (¶ 4).

Finally, Krispy Kreme conducted a customer survey at each of its Missouri stores to determine where its customers consume their purchases. L.F. 026 (¶ 8); L.F. 366 (¶ 6). This survey demonstrated that over 20 percent of total retail gross receipts at each Missouri store derived from sales of food or drink for off-premises consumption, with customers taking their purchases to another location before consuming them. L.F. 026-27 (¶ 8); L.F. 029-32; L.F. 366 (¶ 6).⁴

⁴ For purposes of its survey, Krispy Kreme treated as off-premises consumption only those instances where customers first traveled to another location, such as a home, office, church, or park, and only then consumed their purchases. L.F. 026-27 (¶ 8). By contrast, where customers consumed their purchases while traveling away from the store either by car or on foot, Krispy Kreme did not consider such purchases to be “off-premises” for the purposes of this study, because customers consumed the food right away after purchase. L.F. 027 (¶ 8).

II. THE APPLICABLE MISSOURI STATUTORY SCHEME⁵

The general state sales tax imposed by the Missouri law is four percent (4.0%). Section 144.020.1(1). Section 144.014.1 provides, however, that a lower rate of one percent (1.0%) shall apply to “all retail sales of food” covered by section 144.014. Section 144.014.1.⁶ For the purposes of section 144.014, qualified food includes “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 section now reads or as it may be amended hereafter.” Section 144.014.2.⁷ Section 144.014 applies to purchases that are of the types of food products that may be redeemed

⁵ The complete text of the Missouri state statute at issue in this appeal, section 144.014, is included in the Appendix at A16.

⁶ The Missouri Constitution imposes an additional sales tax of 0.225 percent on all products sold within the state. This tax is composed of the conservation sales tax of 0.125 percent, *see* Mo. Const. Art. IV, § 43(a), and the water conservation and state parks sales tax of 0.1 percent, *see* Mo. Const. Art. IV, § 47(a). Thus, the cumulative state sales tax applicable to food sales qualified under section 144.014 is 1.225 percent, while the cumulative general state sales tax is 4.225 percent. *See* 12 CSR 10-110.990(1), *included at* L.F. 041 and A17.

⁷ The Federal Food Stamp Program has been renamed the Supplemental Nutrition Assistance Program (“SNAP”). *See* 7 U.S.C. §§ 2012(l), 2013(a).

with food stamps but are not, in fact, redeemed with foods stamps. In the later case, such purchases are exempt from Missouri sales tax. Section 144.037.

The federal statute governing the federal food stamp program defines “food” as “any food or food product for home consumption except alcoholic beverages, tobacco, and hot foods or hot food products ready for immediate consumption.” 7 U.S.C. § 2012(k)(1). The federal regulations implementing the program further specify that “eligible foods” under the terms of the program are “[a]ny food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption.” 7 C.F.R. § 271.2. Accordingly, as the Director’s regulations implementing section 144.014 explain, “[f]ood items refrigerated or at room temperature qualify for the reduced rate, even if the purchaser elects to heat the item on the business’ premises.” 12 CSR 10-110.990(2)(A), *included at* L.F. 041 and A17. The Director’s regulations further observe that “[b]akery items, even if still warm from baking, are qualified foods.” *Id.*

Section 144.014, however, limits which establishments that are selling qualified food can charge the lower sales tax rate at all. Specifically, the section provides:

For purposes of this section, ... 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.

Section 144.014.2.

Thus, section 144.014 sets forth a so-called “80/20” rule for determining when an establishment selling food that qualifies for the reduced tax rate must nevertheless collect and remit tax at the higher general sales tax rate. Under this rule, the reduced sales tax rate does not apply if more than 80 percent of an establishment’s total gross receipts are derived from the sale of food that is “prepared by such establishment for immediate consumption.” Conversely, if an establishment derives at least 20 percent of its total gross receipts from the sale of items *other than* “food prepared by such establishment for immediate consumption,” then the establishment may charge the reduced rate of section 144.014 for *all* of its sales of qualified food.

III. KRISPY KREME’S TAX REFUND CLAIM

Krispy Kreme collects and remits Missouri sales tax on its taxable retail sales, filing its Missouri sales tax returns on a monthly basis. L.F. 038 (¶ 5). At the time of the preparation of the tax returns for the periods at issue (April 1, 2003 – December 31, 2005), Krispy Kreme was unaware that Missouri provided a lower sales tax rate for foods qualified under section 144.014. L.F. 025 (¶ 5). As a result, Krispy Kreme remitted sales

tax on all retail sales at its Missouri stores at the general rate of four percent prescribed by section 144.020.1(1), instead of the reduced rate of one percent set forth in section 144.014. *Id.*⁸

Upon discovering this omission in early 2006, Krispy Kreme analyzed the sales at its Missouri stores and determined that some of them qualified for the reduced tax rate of section 144.014 and that its Missouri establishments satisfied that section's 80/20 rule. L.F. 025-28 (¶¶ 5-10); L.F. 034-36 (¶¶ 4-9); L.F. 039 (¶¶ 6-7); *see also supra* at 4-5. On May 11, 2006, Krispy Kreme filed a refund claim with the Director, seeking a refund of the Missouri sales tax it remitted on sales of food qualified for the reduced tax rate — specifically, doughnuts, non-hot beverages, juices, milk, and bagged coffee beans and ground coffee. L.F. 025 (¶ 5); L.F. 038 (¶ 5); L.F. 043-47; L.F. 366 (¶ 8). Krispy Kreme explained that it erroneously applied the general sales tax rate at its Missouri locations, but that it “is a bakery and sells at retail food items which qualify for the reduced tax rate” of section 144.014. L.F. 046. Accordingly, Krispy Kreme requested a refund in the

⁸ By contrast, grocery stores and Wal-Mart stores in the St. Louis area sell Krispy Kreme doughnuts at the lower food tax rate prescribed by section 144.014. L.F. 037-38 (¶ 3). Additionally, a well-known bakery chain store, with at least some locations in St. Louis, sells, for both in-store and take-out consumption, items similar to those sold by Krispy Kreme — specifically, “bakery goods, sandwiches, soups, salads, hot beverages, cold beverages, and other items” — and charges the lower food sales tax rate on store-baked items. L.F. 038 (¶ 3).

amount of \$324,237.33, which represents the three-percent differential between the general sales tax rate and the reduced sales tax rate on the sales of qualified food.

L.F. 039 (¶ 6); L.F. 043; 046-47; L.F. 366 (¶ 9). Krispy Kreme did not seek refund of sales tax on the sale of any food, such as liquid coffee or hot chocolate, that was served in a hot state, and therefore was not qualified food under section 144.014. L.F. 025 (¶ 5); L.F. 366 (¶ 8).

The Director denied Krispy Kreme's refund claim on May 16, 2006. L.F. 002-3. As the reason for the denial, the Director stated only that, in her opinion, the "refund request does not qualify under section 144.190 RSMo" — the general Missouri revenue provision that authorizes refunds of tax overpayments. L.F. 003.

Krispy Kreme timely appealed the denial to the Administrative Hearing Commission (the "Commission") on July 12, 2006. L.F. 001. Subsequent to the filing of its appeal with the Commission, Krispy Kreme amended its refund claim to exclude any sales tax on "dine-in" sales — sales of qualifying food consumed by customers on the store premises. L.F. 025 (¶ 5); L.F. 039 (¶ 6); L.F. 366-67 (¶ 9). The total of the sales tax differential for these dine-in sales was \$46,245.13. L.F. 039 (¶ 6); L.F. 366-67 (¶ 9). After subtracting this amount, Krispy Kreme's refund claim equals \$277,992.20. L.F. 039 (¶ 6); L.F. 048-54; L.F. 366-67 (¶ 9). This amount does not include any sales tax remitted by Krispy Kreme on the sale of any food served in a hot state or any food sold for on-premises consumption. L.F. 025 (¶ 5); L.F. 366-67 (¶¶ 8-9).

IV. THE PROCEEDINGS BEFORE THE COMMISSION

After initiating the proceedings before the Commission, Krispy Kreme moved for summary decision on April 17, 2009. L.F. 007-10; L.F. 364.⁹ The Director opposed the motion and instead filed her own motion for summary decision on May 26, 2009.

L.F. 065-70; L.F. 364. On February 4, 2010, the Commission denied both motions on the ground that a genuine issue of material fact existed as to whether the food sold by Krispy Kreme was eligible food under the federal food stamp program and, therefore, whether it was qualified food under section 144.014.1. L.F. 202-04; L.F. 364-65.

On June 17, 2010, Krispy Kreme filed a renewed motion for summary decision. L.F. 205-10; L.F. 365. The Director again opposed the motion and filed a cross-motion for summary decision. L.F. 294-302; L.F. 365.¹⁰

⁹ Because the summary decision procedure was previously known as “summary determination,” L.F. 364 n.1 (citing 1 CSR 15-3.446(5)), Krispy Kreme’s motion was entitled “Motion for Summary Determination,” L.F. 007. The summary decision procedure is virtually identical to summary judgment under this Court’s Rule 74.04.

¹⁰ With its renewed motion, Krispy Kreme presented additional evidence demonstrating that foods sold by Krispy Kreme were eligible food under the federal food stamp program and were in fact purchased by Missouri residents under this program. This evidence consisted of deposition testimony by Rachel Traver, Assistant Deputy Director for the Family Support Division of the Missouri Department of Social Services, and Charlene Adams, a Missouri food stamp recipient. L.F. 211-12; L.F. 223-26;

L.F. 271 (¶ 5). The testimony of Ms. Traver, who manages the food stamp program in Missouri, contained as exhibits various publications of the Missouri Department of Social Services addressing the operation of the federal food stamp program in Missouri, as well as the regulation promulgated by the United States Department of Agriculture (USDA), 7 C.F.R. § 272.2, defining foods eligible under the federal program. *See* Deposition of Rachel Traver (May 28, 2010) at 22:18-25:16 & exhibits A-C; *see also* L.F. 211-12. Those publications of the state agency charged with administering the program clearly demonstrated that there was no requirement that the foods be actually consumed “in home.” Ms. Traver, the person the Department of Social Services designated to testify as to the operation of the food stamp program, confirmed that there was no “in home” consumption requirement, Traver Deposition at 22:10-17, 26:18-29:12 and further testified that doughnuts, milk, water, juice, and coffee beans or ground coffee are the types of products that are eligible for purchase with food stamps, *id.* at 12:7-23; 13:25-16:7; 30:12-31:22; 40:15-41:8. The affidavit of Ms. Adams contained, as attachments, sales receipts demonstrating that she had purchased “cartons of milk, bottled water, bottled juice, ground and whole bean coffee, cans of soft drinks, fountain soft drinks, and doughnuts with [her] SNAP/food stamp benefits.” L.F. 223; *see also* L.F. 225-26. This evidence supplemented the communications from the USDA previously introduced by Krispy Kreme to demonstrate that its food products were the types of products eligible for purchase under the federal food stamp program. *See* L.F. 147-49; L.F. 197.

On December 30, 2010, the Commission issued its decision, rejecting Krispy Kreme’s refund claim. L.F. 378. In analyzing Krispy Kreme’s claim, the Commission considered separately each part of section 144.014’s two-fold requirement: (1) whether the products for which Krispy Kreme sought a tax refund were qualified food under section 144.014, and (2) whether Krispy Kreme’s Missouri stores satisfied section 144.014’s 80/20 rule. L.F. 368-78.

In construing the first requirement, the Commission looked at the definition of food eligible for the federal food stamp program contained in the federal statute governing the SNAP. L.F. 370. The Commission observed that the federal statute — 7 U.S.C. § 2012(k) — defined eligible food as “any food or food product for home consumption,” excepting only “alcoholic beverages, tobacco, and hot foods or hot food products ready for immediate consumption.” L.F. 368 (quoting 7 U.S.C. § 2012(k)). Based on the federal statute’s use of “two terms in contrast” — “for home consumption” and “for immediate consumption” — the Commission concluded 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.” L.F. 371 (quoting 7 U.S.C. § 2012(k)). As the Commission observed, foods such as “donuts by the dozen, milk by the carton, and coffee beans by the bag, are eligible foods” because they are “*generally* purchased for home consumption.” L.F. 371. By contrast, foods such as “prepared hamburgers and french fries, are not,” because they are “*generally* purchased for immediate consumption.” *Id.*

The Commission also observed that the Director conceded that “the products sold by [Krispy Kreme] that are at issue in this case — bagged coffee and coffee beans, boxes of doughnuts, cartons of milk, and bottles of water and juice — may qualify as ‘food’ for purposes of § 144.014 if sold by a grocery store” or by a similar seller. L.F. 371 (internal quotation marks and citation omitted). Given that, for the purposes of section 144.014 “the type of vendor does not matter,” the Commission concluded that “the foods sold by [Krispy Kreme] that are at issue here are the type of food or food product contemplated by § 144.014.” *Id.*¹¹

Turning to section 144.014’s second requirement, however, the Commission rejected Krispy Kreme’s argument that the food sales by its Missouri stores satisfied section 144.014.2’s 80/20 rule. The Commission disagreed that the statutory term “food prepared by [an] establishment for immediate consumption” refers to food that is prepared by the establishment to be consumed immediately after preparation. The Commission adopted instead the Director’s interpretation, construing the term “food prepared ... for immediate consumption” to mean “prepared food that a purchaser can consume without further preparation.” L.F. 373; L.F. 378. While acknowledging that, as

¹¹ The Commission erroneously excluded the deposition testimony of Ms. Traver and the affidavit of Ms. Adams, on the basis that they were not relevant. L.F. 369. Nevertheless, the Commission concluded that the foods sold by Krispy Kreme were eligible under the federal food stamp program, thus apparently rendering the Commission’s erroneous ruling moot.

a tax imposition statute, section 144.014 must be construed in favor of the taxpayer, L.F. 375-76, and stating that both Krispy Kreme's and the Director's proposed constructions were "plausible," the Commission nevertheless asserted that the Director's interpretation "yield[ed] the more reasonable result" because otherwise retailers would need to quiz their customers as to when they plan to consume the purchased food, L.F. 378. On the basis of this statutory construction, the Commission rejected Krispy Kreme's argument that it satisfied the 80/20 rule because over 20 percent of its retail sales were of doughnuts that were prepared more than one hour before sale, in combination with products not prepared at all by Krispy Kreme. L.F. 375; L.F. 378.

The Commission similarly rejected Krispy Kreme's independent argument that doughnuts sold in quantities of a dozen or more were not "food prepared ... for immediate consumption." While acknowledging that other states have adopted a rule under which a purchase of six doughnuts (or other baked products) is assumed to be a bulk purchase and not one for immediate consumption, the Commission departed from this consensus on the grounds that, in some instances, even large quantities of doughnuts could be consumed "immediately" if taken to "a large family, office, or Sunday school class." L.F. 376.

Finally, the Commission disagreed with Krispy Kreme's third independent argument that over 20 percent of food sold by its Missouri stores was not prepared for immediate consumption because customers transported their purchases away from the store to another location, such as a home, church, office, or park, before consuming it.

The Commission viewed this argument as contrary to the statute's requirement that whether "food [is] prepared by [an] establishment for immediate consumption" should be considered "regardless of whether such prepared food is consumed on the premises of that establishment." L.F. 376 (internal quotation marks omitted).

Krispy Kreme timely filed a petition for review of the Commission's decision with this Court on January 21, 2011.

STANDARD OF REVIEW

This Court reviews the Commission's interpretation of revenue laws *de novo*. *Mo. State USBC Ass'n v. Dir. of Revenue*, 250 S.W.3d 362, 363 (Mo. banc 2008). The Commission's factual determinations will be upheld if supported by the law and by substantial evidence upon the whole record. *Id.* A tax imposition statute is construed against the taxing authority and in favor of the taxpayer. *Am. Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999). Because the Commission found against Krispy Kreme under a procedure identical to summary judgment, this Court reviews the record in the light most favorable to Krispy Kreme, the party against whom the decision was entered. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

POINT RELIED ON

**THE COMMISSION ERRED IN REJECTING KRISPY KREME'S
REFUND CLAIM BECAUSE UNDER SECTION 621.193 ITS DECISION WAS
NOT AUTHORIZED BY LAW, IN THAT THE PLAIN LANGUAGE OF
SECTION 144.014, ITS PURPOSE, AND THIS COURT'S RULES OF
STATUTORY INTERPRETATION FORECLOSE THE COMMISSION'S
REVISION OF SECTION 144.014'S TERM "FOOD PREPARED ... FOR
IMMEDIATE CONSUMPTION" TO MEAN "FOOD THAT REQUIRES NO
FURTHER PREPARATION."**

Section 144.014, RSMo;

12 CSR 10-110.990(3)(E);

21 U.S.C. § 343(q)(5)(A);

21 C.F.R. § 101.9(j);

Am. Healthcare Mgmt., Inc. v. Dir. of Revenue, 984 S.W.2d 496 (Mo. banc 1999);

Norwin G. Heimos Greenhouse, Inc. v. Dir. of Revenue, 724 S.W.2d 505 (Mo.
banc 1987);

State of Nevada v. McKesson Corp., 896 P.2d 1145 (Nev. 1995);

Canteen Corp. v. Dep't of Revenue, 525 N.E. 2d 73 (Ill. 1988);

Webster's Third New International Dictionary (1993).

SUMMARY OF THE ARGUMENT

In violation of this Court's long-standing rules of statutory interpretation, the Commission's construction of section 144.014 departs from the plain language of the

statute, ignores the statute's purpose, and resolves any putative statutory ambiguity in favor of the taxing authority and against the taxpayer. The Commission, moreover, ignored the relevant federal law showing the food industry understanding, as well as the consensus view adopted by other states with respect to similar statutes. The Commission's erroneous decision must be reversed for three separate reasons:

First, the Commission misconstrued the term "food prepared ... for immediate consumption" to denote food sold in a "ready to eat" state. This construction is contrary to the plain language of section 144.014, because it reads out of the statute the temporal requirement that consumption of food follow its preparation without delay. This construction also renders a portion of section 144.014 entirely superfluous. Under the Commission's interpretation, several types of food establishments expressly listed in section 144.014 as potentially eligible for the reduced tax rate would never satisfy the 80/20 rule to qualify for the reduced rate. In addition, the Commission's interpretation runs counter to the accepted meaning of the term "immediate consumption" as used in federal law, which demonstrates the understanding of the term by the food industry. Moreover, to the extent the statutory term is ambiguous, the Commission violated settled rules of statutory interpretation by construing this term *against* the taxpayer, and in favor of the taxing authority.

Second, the Commission erroneously concluded that food purchased in bulk — namely, doughnuts in quantities of a dozen or more — is purchased for immediate consumption. Speculating about instances where a dozen of doughnuts might be

consumed shortly after the purchase, the Commission inexplicably ignored its earlier conclusion that doughnuts sold by the dozen are generally purchased for home — and not immediate — consumption. In doing so, the Commission disregarded the uniform conclusion of other states that, whether by regulation or judicial decision, treat bulk purchases of food as purchases for home consumption. Food consumed at home is necessarily consumed after a delay, and therefore is not consumed “immediately” after either purchase or preparation. Critically, the Commission’s decision departs from the considered judgment of the only other highest state court to have considered an analogous statute.

Third, the Commission erred by rejecting Krispy Kreme’s evidence that over 20 percent of its sales derived from products taken to other locations before consumption. The transportation of the products independently demonstrates a delay between purchase, and thus preparation, and consumption. The Commission sought to justify its decision by section 144.014’s reference that the 80/20 rule applies irrespective of whether the customer consumes the food on or off the premises. But Krispy Kreme has already accounted for this statutory command by excluding from its refund claim food purchases that the customer consumed while traveling away from the store (and thus consumed immediately after purchase, although off the premises). The fact that off-premises consumption counts for the purposes of the 80/20 rule does not alter the statute’s immediacy requirement, and purchases consumed only after they are transported to other locations do not fall within its scope.

ARGUMENT

THE COMMISSION ERRED IN REJECTING KRISPY KREME’S REFUND CLAIM BECAUSE UNDER SECTION 621.193 ITS DECISION WAS NOT AUTHORIZED BY LAW, IN THAT THE PLAIN LANGUAGE OF SECTION 144.014, ITS PURPOSE, AND THIS COURT’S RULES OF STATUTORY INTERPRETATION, FORECLOSE THE COMMISSION’S REVISION OF SECTION 144.014’S TERM “FOOD PREPARED ... FOR IMMEDIATE CONSUMPTION” TO MEAN “FOOD THAT REQUIRES NO FURTHER PREPARATION.”

I. THE COMMISSION ERRED BY INTERPRETING THE TERM “FOOD PREPARED ... FOR IMMEDIATE CONSUMPTION” TO MEAN FOOD THAT REQUIRES NO FURTHER PREPARATION.

In interpreting a statute, this Court seeks “to ascertain the intent of the legislature, as expressed in the words of the statute.” *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 909 (Mo. banc 2006) (citations omitted). Statutory language is given its plain and ordinary meaning, and each statutory provision must be read in context. *Utility Service Co., Inc. v. Dep’t of Labor and Indus. Relations*, 331 S.W.3d 654, 658 (Mo. banc 2011) (citations omitted). In construing the statute, this Court presumes that the legislature did not include superfluous language. *Norwin G. Heimos Greenhouse, Inc. v. Dir. of Revenue*, 724 S.W.2d 505, 508 (Mo. banc 1987). When the legislative intent cannot be determined from the plain meaning of the statutory language, this Court applies rules of statutory construction to resolve any ambiguity. *United Pharmacal Co.*, 208 S.W.3d at 910.

A. The Commission’s Interpretation Contradicts the Plain Language of Section 144.014.

The plain language of section 144.014, when read in context, forecloses the Commission’s interpretation. By its plain terms, section 144.014’s reference to “food prepared by [an] establishment for immediate consumption” means food that is prepared to be consumed without delay. Because this “statutory language is not defined expressly, it is given its plain and ordinary meaning, as typically found in the dictionary.” *Derousse v. State Farm Mut. Auto. Ins. Co.*, 298 S.W.3d 891, 895 (Mo. banc 2009). The dictionaries contemporaneous to section 144.014.2’s enactment define the word “immediate” as “occurring, acting, or accomplished without loss of time” or “made or done at once.” *Webster’s Third New International Dictionary* 1129 (1993); *see also Black’s Law Dictionary* 751 (7th ed. 1999) (defining “immediate” as “[o]ccurring without delay; instant”); *Merriam-Webster’s Collegiate Dictionary* 579 (10th ed. 1994) (defining “immediate” as “occurring, acting, or accomplished without loss or interval of time”). Because “words used in proximity to one another must be considered together,” *Albanna v. State Bd. of Registration for Healing Arts*, 293 S.W.3d 423, 431 (Mo. banc 2009), these definitions instruct that consumption of food described in section 144.014.2 must follow its preparation “at once,” “without loss of time,” or “without delay.”

This statutory construction fits comfortably within the context in which the phrase “food prepared by [an] establishment for immediate consumption” is used. Section 144.014.2 lists, as examples of establishments that can qualify under the 80/20 rule, “restaurant[s], fast food restaurant[s], delicatessen[s], eating house[s], or cafe[s].”

Section 144014.2. These are establishments that traditionally specialize in preparing food that is meant to be eaten immediately. Thus, restaurant dishes — such as a grilled steak, a pan-fried fish, or a oven-baked soufflé — are served and consumed at once after preparation. Similarly, a hamburger, a bowl of chili, or an order of French fries prepared by a fast food restaurant will be consumed without any delay after preparation. The type of food served by these establishments generally has a very short shelf life, and the very purpose of these establishments is to serve food that will be eaten by their patrons as soon as it is prepared. Given section 144.014’s express reference to these establishments, it is therefore reasonable to interpret the term “immediate” as referring to the interval of time (or, rather, lack therefore) between preparation and consumption.

The overall list of establishments subject to the 80/20 rule further supports this interpretation. Food establishments enumerated in section 144.014.2 may prepare both food intended to be consumed at once and food that could be consumed after some delay. Thus, a fast food restaurant may have some dine-in facilities but also offer food as a take-out, and some of that food will be consumed after some delay. Similarly, sandwiches or salads in a delicatessen or a cafe may be prepared either to be eaten at once, on the premises or while walking away, or to be eaten after some delay, at home or at the office. Depending on the proportion of each type of food such an establishment offers, it may either satisfy the 80/20 rule and take advantage of the reduced sales tax rate under section 144.014 or fail to meet that threshold and pay the higher general tax rate. A construction of the term “prepared by [an] establishment for immediate consumption” that

differentiates between food prepared for consumption at once and food prepared for consumption with some delay after the preparation provides a workable rule under which an establishment listed in section 144.014.2 can determine whether its sales satisfy the 80/20 rules.

By contrast, the statutory construction adopted by the Commission would render a portion of section 144.014 superfluous. Under the Commission’s interpretation, the term “food prepared ... for an immediate consumption” denotes food that “‘need[s] no further preparation.’” L.F. 378. If so, no “restaurant” or “fast food restaurant” — types of food “establishment[s]” expressly listed in section 144.014 — would ever qualify for the reduced tax rate under that section. The very purpose of such establishments is to serve ready-to-eat meals that require no further action on the part of the customer. No restaurant or fast food restaurant would sell food or drink in other than a ready-to-eat state. As this Court admonished, “[c]onstruction of statutes should avoid unreasonable or absurd results.” *Murray v. Mo. Highway and Transp. Comm’n*, 37 S.W.3d 228, 233 (Mo. banc 2001) (citation omitted). Under the Commission’s interpretation, restaurants and fast food restaurants — the establishments expressly enumerated in the statute as potentially eligible for the reduced tax rate — would *never* be able to take advantage of that rate, because they would be unable to satisfy section 144.014’s 80/20 rule.

The Commission did not even attempt to explain how, under its preferred construction, any restaurant or fast food restaurant could ever satisfy this rule. Instead, the Commission simply ignored this contradiction. This Court instructed, however, that

“[e]ach word, clause, sentence and section of a statute should be given meaning,” *State ex rel. Womack v. Rolf*, 173 S.W.3d 634, 638 (Mo. banc 2005) (citation omitted), and that courts must presume that the legislature did not include superfluous language in the statute, *Norwin G. Heimos Greenhouse*, 724 S.W.2d at 508; *see also Bartley v. Special Sch. Dist.*, 649 S.W.2d 864, 867 (Mo. banc 1983) (“it is presumed that the legislature does not enact meaningless provisions”). The Commission’s interpretation violates this cardinal rule of statutory construction because it effectively reads out of section 144.014 some of the types of food establishments that the legislature expressly envisioned as eligible to meet the 80/20 rule.

B. The Commission’s Construction Is Inconsistent with the Construction of Similar Terms in Federal Law and with Food Industry Understanding.

The Commission’s construction is also contrary to the way the term “immediate consumption” is interpreted in federal law on nutrition labeling and the federal regulations promulgated or proposed by the United States Food and Drug Administration (“FDA”). The meaning assigned to this term in federal law is important for two reasons. First, the FDA regulations reflect the accepted meaning of the term “immediate consumption,” as used in the food industry. In the absence of a specific legislative or judicial definition of a statutory term, business and industry practice is informative as to the term’s meaning. *Walsworth Pub. Co., Inc. v. Dir. of Revenue*, 935 S.W.2d 39, 40 (Mo. banc 1996). Second, a related provision of section 144.014 expressly looks to federal law that uses the term “immediate consumption.” Section 144.014 incorporates

7 U.S.C. § 2012 — the federal statutory provision governing the federal food stamp program — when defining what constitutes qualified food under section 144.014. Section 144.014; *see also supra* at 6. Section 2012 specifies that, for federal food stamp purposes, the term “food” shall not include “hot foods or hot food products ready for immediate consumption.” 7 U.S.C. § 2012(k). The federal law definition of “immediate consumption” therefore informs the scope of what constitutes qualified food under section 144.014. Because statutory provisions must be “construed together, and if reasonably possible, ... harmonized with each other,” *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 437 (Mo. banc 2010) (internal quotation marks and citation omitted); *see also Sullivan v. Strop*, 496 U.S. 478, 483 (1990), this Court should construe section 144.014 so as not to create divergent interpretations of what constitutes “immediate consumption” for the purposes of that provision.

The FDA regulations contradict the Commission’s construction of the term “food prepared ... for immediate consumption” as denoting food that is ready-to-eat. Thus, the FDA regulations regarding nutrition labeling exempt food that is “[r]eady for human consumption” and is “[o]ffered for sale to consumers *but not for immediate human consumption.*” 21 C.F.R. § 101.9(j)(3)(ii), (iii) (emphasis added).¹² In addition, the FDA

¹² Indeed, the federal nutrition labeling statute itself draws a distinction between ready-to-eat food and food offered for immediate consumption. The Nutrition Labeling and Education Act of 1990 (the “NLEA”), Pub. L. No. 101-535, 104 Stat. 2353, 2355 (1990), expressly exempts from its requirements two categories of food that it regards as

regulations specifically indicate that “independent delicatessens, bakeries, or retail confectionery stores where there are *no facilities for immediate human consumption*” may be offering for sale “*ready-to-eat* foods that are processed and prepared on-site.” *Id.* § 101.9(j)(3)(v) (emphasis added). Thus, the FDA regulations explicitly contemplate that some food can be ready for consumption, yet not offered for *immediate* consumption. Critically, in direct relevance to Krispy Kreme’s Missouri stores at issue in this appeal, the regulations indicate that stores such as bakeries may be offering “ready-to-eat” foods

distinct: (1) food “served in restaurants or other establishments in which food is *served for immediate human consumption*” and (2) food “which is *ready for human consumption* ... and which is offered for sale to consumers *but not for immediate human consumption*.” 21 U.S.C. § 343(q)(5)(A)(i), (ii) (emphasis added); *see also Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments*, 76 Fed. Reg. 19,192, 19,196 (proposed Apr. 6, 2011) (explaining the statutory distinction between the two categories). Furthermore, the NLEA explains that food “ready for human consumption” is of “the type” that may be — but does not need to be — offered “for immediate human consumption.” 21 U.S.C. § 343(q)(5)(A)(ii). Thus, the U.S. Congress that enacted the NLEA — and did so with the knowledge that the statute governing the federal food stamp program already used the term “immediate consumption,” *see* 7 U.S.C. § 2012(k) — viewed that term as different from ready-to-eat food.

yet not be offering them for immediate consumption. *Id.* Because preparation of food occurs prior to its sale, such food is then not “prepared for immediate consumption.”

The FDA’s proposed regulations regarding nutrition labeling of restaurant menus further exemplify the distinction between ready-to-eat food and food that is offered for immediate consumption. Following the statutory distinction in the NLEA, *see supra* at 27 n.12, the FDA distinguishes between “restaurant food,” which it defines as “food ... served for immediate human consumption,” and “restaurant-type food,” which is “food of the type described in the definition ‘restaurant food’ that is *ready for human consumption*, offered for sale to consumers *but not for immediate consumption.*” 76 Fed. Reg. at 19,203 (emphasis added). Thus, just as United States Congress did when it enacted the NLEA, the FDA recognizes that ready-to-eat food *could* be served for immediate consumption, but that the two terms are not synonymous. By adopting a different interpretation, the Commission departed from the shared understanding of the United States Congress, the federal regulatory authorities, and the food industry.

Instead, the FDA regulations support Krispy Kreme’s interpretation of the term “food prepared ... for immediate consumption.” Describing “establishments in which food is *served for immediate human consumption*,” the regulations explain that such establishments include “bakeries, delicatessens, and retail confectionery stores where there are *facilities for immediate consumption on the premises.*” 21 C.F.R. § 101.9(j)(2)(ii) (emphasis added). The reference to the presence of “facilities” enabling “immediate consumption” indicates that the term “served for immediate consumption”

contains a temporal element — these facilities enable customers to consume their purchases right away, on the premises of the store where they bought the food.

This interpretation is further supported by another example in the FDA regulations. The regulations explain that “establishments in which food is *served for immediate human consumption*” also include “food service vendors, such as lunch wagons, ice cream shops, mall cookie counters, vending machines, and sidewalk carts *where foods are generally consumed immediately where purchased or while the consumer is walking away.*” *Id.* (emphasis added). Thus, food “served for immediate consumption” can also consist of food that is eaten shortly after it was served, without delay, even if not eaten directly on the premises.¹³ Both examples given by the FDA are radically inconsistent with the Commission’s interpretation, which focused solely on whether the food was ready to be consumed.

C. The Commission’s Construction Is Based on a Profound Misreading of How Section 144.014 Operates.

The Commission’s erroneous construction was based on a profound misreading of section 144.014. The Commission believed that Krispy Kreme’s interpretation would lead to arbitrary results “under which a donut sold at 8:00 a.m. is taxed at 4.225%, but

¹³ This view remains the federal agency’s position. Thus, the FDA’s proposed regulations on nutrition labeling for restaurant menus reiterate that “food served for immediate human consumption” is food that is served “to be consumed either on the premises where the food is purchased or while walking away.” 76 Fed. Reg. at 19,203.

one from the same batch sold at 1:00 p.m. is taxed at 1.225%.” L.F. 375. The Commission misunderstood how section 144.014’s 80/20 rule operates. The 80/20 rule focuses on whether a particular *vendor* qualifies to make any sales at the reduced tax rate of section 144.014. The rule looks at “the *total* gross receipts of [a specific] establishment,” and then considers whether that establishment’s sales of “food prepared by such establishment for immediate consumption” constitutes more than 80 percent of those total gross receipts. Section 144.014.2 (emphasis added). If the vendor’s establishment satisfies this rule, then it can sell *all* food that qualifies under section 144.014 (*i.e.*, food stamp-eligible food) at the reduced sales tax rate. There is no danger whatsoever of the “arbitrary loopholes” that the Commission feared. L.F. 375 (internal quotation marks omitted).¹⁴

Krispy Kreme’s refund claim includes only items that may be purchased with food stamps, and which therefore qualify under section 144.014 for the reduced tax rate. *See supra* at 9-10. The Commission agreed that Krispy Kreme’s doughnuts, coffee beans, milk, water, and juice are foods that qualify for the reduced tax rate. L.F. 371.

Therefore, if Krispy Kreme’s stores satisfy the 80/20 rule — that is, that at least 20 percent of their total sales are not sales of “food prepared by [an] establishment for

¹⁴ To be eligible for the reduced tax rate, any food must of course satisfy section 144.014’s threshold requirement that the food be of the type that qualifies for purchase with food stamps under the terms of the federal food stamp program. Section 144.014.2; *see also supra* at 6.

immediate consumption” under section 144.014.2 — Krispy Kreme could sell all of its eligible foods at the reduced tax rate.¹⁵

Nor, contrary to the Commission’s supposition, would the statutory construction proposed by Krispy Kreme require that “retailers quiz or survey their customers as to when they plan to eat the food they buy.” L.F. 378; *see also* L.F. 375. Two of the independent factual bases that support Krispy Kreme’s refund claim are not based on customer interviews, but rather on Krispy Kreme’s sales records. L.F. 024-25 (¶ 4); L.F. 035-36 (¶¶ 6-9); *supra* at 4-5. These records established that the total sales of doughnuts prepared at least one hour prior to sale, and thus prior to consumption (when

¹⁵ The Commission sought support in the observation made the Illinois Supreme Court in *Canteen Corporation v. Department of Revenue*, 525 N.E. 2d 73 (Ill. 1988), that a legislature is unlikely to intend that identical food items sold at different times of the day be taxed at different rates. L.F. 375 (discussing 525 N.E.2d at 77-78). But *Canteen* is inapposite in this respect. There, the Illinois state statute provided that the reduced food sales tax rate shall not apply to *any* specific “food which has been prepared for immediate consumption.” 525 N.E.2d at 76 (quoting Ill. Rev. Stat. 1981, ch. 120, par. 441). Section 144.014, by contrast, does not provide that a general sales tax rate automatically applies to any food “prepared ... for immediate consumption.” Rather, as long as an establishment meets the 80/20 rule of section 144.014, *all* food items qualified under that section (whether or not they had been “prepared for immediate consumption”) can be sold at the uniform reduced tax rate. *See supra* at 8.

combined with drinks and coffee beans or ground coffee prepared elsewhere) constituted between 31.35 and 56.3 percent of the total retail sales. L.F. 035-36 (¶ 8); *supra* at 4. A doughnut prepared at least an hour before it is sold and consumed is prepared in advance of consumption; it is not consumed at once after preparation or without delay. This analysis — which neither the Director nor the Commission challenged — constitutes a firm basis on which Krispy Kreme satisfies the 80/20 rule of section 144.014.¹⁶ As discussed below, Krispy Kreme also established through its sales records that food sold in bulk (when combined with drinks and coffee beans or ground coffee prepared elsewhere) satisfied the 80/20 rule of section 144.014. *See infra* at 40-45.

¹⁶ The customer survey conducted by Krispy Kreme, which established that over 20 percent of its sales derived from products that its customers consumed in other locations, L.F. 026-27 (¶ 8); L.F. 029-32; L.F. 366 (¶ 6); *supra* at 5, is a separate empirical proof that over 20 percent of Krispy Kreme’s sales of food were not consumed immediately after that food’s preparation. *Cf.* 21 C.F.R. § 101.9(j)(2)(ii) (indicating that “food ... served for immediate human consumption” is food that is served either at establishment with on-premises “facilities for immediate consumption” or by vendors “where foods are generally consumed immediately where purchased or while the consumer is walking away”). The customer survey constitutes an independent basis on which this Court may reverse the Commission’s decision and uphold Krispy Kreme’s refund claim, *see infra* at 45-46, but the Court need not reach that issue.

The Commission placed a heavy reliance on the Supreme Court of Illinois’ opinion in *Canteen Corporation v. Department of Revenue*, 525 N.E. 2d 73 (Ill. 1988). L.F. 374-75. The Commission misread that decision. *Canteen* provides no support for the Commission’s strained statutory construction, which interprets foods “prepared ... for immediate consumption” to mean ready-to-eat food. On the contrary, the *Canteen* court observed that “food ‘prepared for immediate consumption’ [is] food made ready to be eaten *without substantial delay*.” *Canteen Corp.*, 525 N.E.2d at 77 (emphasis added). As the Illinois Supreme Court emphasized, “[t]he only” other “possible subclass” of food “would be food which *has reached its final state of preparation but which is to be eaten only after a delay or at a later time*.” *Id.* (emphasis added). Thus, the *Canteen* court expressly stated that not all ready-to-eat food is food “prepared for immediate consumption.” Rather, because “[a]ll food sold at retail has been either prepared for consumption or not,” the determinative factor is whether this prepared food is being consumed “without substantial delay” or only “at a later time.” *Id.*

In line with this approach, *Canteen* held that a variety of ready-to-eat food items sold through vending machines — such as candy, chips, pastries, milk, juice, and canned beverages — were nevertheless *not* items “prepared for immediate consumption” because “[f]or those items, there is a substantial delay between the final stage of preparation and the time of consumption.” 525 N.E.2d at 78. The *Canteen* court reached this conclusion even though it had acknowledged that all such items “are ready to eat before they are

even placed in the vending machines, much less sold.” *Id.*¹⁷ Thus, whether or not a food item is ready for consumption does not indicate whether that item has been “prepared for immediate consumption.” Rather, the focus must be on the period of time (if any) that has elapsed “between the time the food has been made ready to be eaten and the time it is actually consumed.” *Id.* Under this interpretation, there can be no doubt that over 20 percent of Krispy Kreme stores’ retail sales were not of “food prepared ... for immediate consumption” because they were either not of products prepared by the store or of doughnuts prepared at least one hour prior to the time when they were actually sold and, subsequently, consumed. *See* L.F. 027 (§ 9); L.F. 035 (§ 8); L.F. 366 (§ 5); *supra* at 32-33.

Krispy Kreme’s construction comports with the plain and ordinary meaning of the word “prepared,” as used in section 144.014. As the *Canteen* court observed,

“[t]he plain and common meaning of the term ‘prepare’ is to make ready. In the context of food for human consumption, food preparation would include the steps or acts necessary to make the food *ready to eat*.”

¹⁷ Notably, the *Canteen* court held so even though the taxpayer had the burden of proof, because the case involved a tax exemption. 525 N.E.2d at 78. Here, by contrast, section 144.014 is a tax-imposition statute that must be construed in favor of the taxpayer. *Am. Healthcare Mgmt.*, 984 S.W.2d at 498.

Canteen, 525 N.E.2d at 77 (emphasis added). *See also Webster's Third New International Dictionary* 1790 (1993) (defining “prepare” as “to make ready beforehand for some purpose: put into condition for a particular use, application, or disposition”); *Merriam-Webster's Collegiate Dictionary* 920 (10th ed. 1994) (defining “prepare” as “to make ready beforehand for some purpose, use, or activity”).¹⁸ By contrast, the Commission’s interpretation, which equates “food prepared ... for immediate consumption” with “ready-to-eat” food, *see* L.F. 378, introduces an impermissible redundancy into the statute. *State v. Reed*, 181 S.W.3d 567, 572 (Mo. banc 2006) (because “this Court is required to give meaning to every word of the legislative enactment,” interpretations that “appear[] to be meaningless and redundant” should be avoided).

¹⁸ Indeed, this is how the Missouri legislature defined this term in other contexts, expressly contrasting food “prepared for human consumption” with “raw food.” *See* section 192.081.1(6) (defining “[p]repared food” as “any food prepared, designed, or intended for human consumption”); section 196.165 (indicating that “food” can be “either raw or prepared for human consumption”). The legislature is presumed to have been aware of this definition when it enacted section 144.014.2. *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 426 (Mo. banc 1988).

D. The Commission Further Erred by Failing to Follow this Court’s Settled Canons of Statutory Construction When Resolving Any Perceived Ambiguity in Section 144.014.

Even if the phrase “prepared by [an] established for immediate consumption” is ambiguous, settled canons of statutory interpretation militate against the interpretation adopted by the Commission. *First*, because section 144.014 is a tax-imposition statute, it must be construed against the taxing authority and in favor of the taxpayer. *See, e.g., Am. Healthcare Mgmt.*, 984 S.W.2d at 498; *Moore’s Leasing, Inc. v. Dir. of Revenue*, 869 S.W.2d 760, 761 (Mo. banc 1994). The Commission perceived a statutory ambiguity based on a competing dictionary definition of the word “immediate.” L.F. 377-78. As already demonstrated, however, the Commission’s chosen definition cannot be the preferred one in the context of section 144.014. The Commission’s definition ignores entirely the proximate term “preparation” and renders a part of the statute — the provision that specifically enumerates some of the types of food establishments subject to section 144.014 — entirely superfluous. *See supra* at 22-25. But even if, as the Commission opined, Krispy Kreme’s and the Director’s proposed interpretations were “both ... plausible,” L.F. 378, the tie should have gone to Krispy Kreme as the taxpayer, and not, as the Commission erroneously held, to the taxing authority. *Am. Healthcare Mgmt.*, 984 S.W.2d at 498.

Second, the Commission’s statutory construction contradicts the legislative intent. Under this Court’s precedents, any “perceived ambiguity in [the statutory provision] should be resolved by interpreting the statute in manner consistent with the legislative

purpose.” *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 566 (Mo. banc 2010). As already explained, in enacting section 144.014.2, the legislature intended that a variety of establishments — namely, “restaurant[s], fast food restaurant[s], delicatessen[s], eating house[s], or cafe[s]” — be potentially able to take advantage of the reduced sales tax rate. *See supra* at 24-25. The Commission’s construction, however, entirely eliminates that possibility for at least some of these establishments, such as restaurants and fast food restaurants.

The more reasonable inference is that, in enacting section 144.014’s 80/20 rule, the legislature intended to relieve certain vendors that predominantly (but not exclusively) sell ineligible food products from the burden of tracking food sales at two different tax rates where benefit to consumers is low. Thus, the 80/20 rule permits a dine-in or a fast-food restaurant to charge a uniform rate, even though such establishment may have a small amount of sales of food that is not prepared for consumption without delay. Conversely, supermarkets, grocery stores, or convenience stores will likely always satisfy the 80/20 rule because they sell a significant amount of non-food items or of food (whether ready-to-eat or otherwise) that is prepared elsewhere.

Bakeries and similar facilities, which prepare and sell food for consumption both right away and at a later time, are positioned between these two straightforward applications of the 80/20 rule. A bakery, such as Krispy Kreme, is radically different from a dine-in or a fast-food restaurant. Unlike those food establishments, a significant portion of a bakery’s output is destined for wholesale, rather than retail purposes. Indeed,

in Krispy Kreme’s case, over 30 percent of sales at its Missouri stores were wholesale sales of doughnuts to retailers who then resold those doughnuts. L.F. 024 (¶ 3); L.F. 365 (¶ 3); *see also supra* at 3-4. Depending on the proportion of food that these establishments prepare to be consumed right away, they may or may not satisfy the 80/20 rule. Under the Commission’s interpretation, however, *no* such establishment would be able to meet the 20 percent threshold, because the overwhelming majority of its sales would be of ready-to-eat food prepared by that establishment. Had the legislature indeed intended such a result, it would have drafted section 144.014 differently, indicating that an establishment deriving over 20 percent of its retail sales from ready-to-eat food is ineligible to charge the reduced tax rate.

Finally, the Commission should have further discounted the Director’s self-serving construction of section 144.014 because it conflicts with the Director’s own published interpretation of this statutory provision. In its regulations illustrating how section 144.014 operates, the Director expressly recognized that “cold salads and cold soft drinks” sold by a “[a] fast food restaurant” could count towards the 20-percent threshold of section 144.014. 12 CSR 10-110.990(3)(E), *included at* L.F. 041 and A17 (indicating that such a fast food restaurant could not satisfy the 80/20 rule if “[t]hese cold items represent [only] 10% of total gross receipts”). This example expressly illustrates that such food items — which are ready-to-eat but not necessarily prepared for consumption at once — do not constitute “items prepared for immediate consumption.” *Id.*; *see also* Mo. Dep’t of Revenue, *Missouri Sales Tax Reduction on Food* (2009),

<http://dor.mo.gov/tax/business/sales/foodtax.htm>, *included at* L.F. 42 and A18 (tax policy notice providing the same example). The Commission ignored this example in the Director’s own publications, yet it cannot be reconciled with the Director’s position in this litigation.

The Director may not change existing regulations without going through the formal notice-and-comment rulemaking procedure prescribed by section 536.021. § 536.021 (“No rule shall hereafter be proposed, adopted, amended or rescinded by any state agency unless such agency shall first file with the secretary of state a notice of proposed rulemaking and a subsequent final order of rulemaking, both of which shall be published in the Missouri Register ...”). As this Court has explained, “[f]ailure to follow rulemaking procedures renders void purported changes in statewide policy.” *NME Hosps. Inc. v. Dep’t of Soc. Serv.*, 850 S.W.2d 71, 74-75 (Mo. banc 1993). Nor may the Director apply any “change in ... interpretation” of existing regulations that affects “a particular class of person subject to such decision” retrospectively. § 32.053.

Indeed, Krispy Kreme introduced evidence — not addressed by the Commission — that the Director’s changed position is also contrary to the practice of other retail baking establishments that prepare and sell, for both in-store and take-out consumption, baked goods and other items similar to those sold by Krispy Kreme, and charge the lower food sales tax rate of section 144.014 on store-baked items. L.F. 038 (¶ 3). Because the Director’s newly minted interpretation of section 144.014 contradicts her own prior and current published interpretation, it was not entitled to any weight and must be rejected.

II. THE COMMISSION ERRED BY INTERPRETING THE TERM “FOOD PREPARED ... FOR IMMEDIATE CONSUMPTION” TO ENCOMPASS KRISPY KREME’S BULK SALES.

The Commission’s decision should also be reversed for an additional, independent reason. The Commission erred in concluding that doughnuts sold in large quantities — specifically, in boxes of a dozen or more — are foods that will be consumed immediately upon purchase. In reaching this decision, the Commission ignored, without any explanation, its earlier conclusion that doughnuts sold by the dozen are *not* generally purchased for immediate consumption. L.F. 371. This presumption reflects the common-sense notion that food purchased in bulk quantities is not intended to be consumed at once. The Commission’s erroneous conclusion is contrary to the uniform view adopted by other states, including the conclusion of the only other highest state court to interpret an analogous statutory provision.

Based on Krispy Kreme’s analysis of its sales data, a combination of products not prepared by Krispy Kreme along with doughnuts sold in quantities of a dozen or more amounted to over 20 percent of the total gross receipts for each of its Missouri stores. L.F. 039 (§ 7); L.F. 366 (§ 4). It is reasonable to assume that a person who purchases a dozen doughnuts does not intend to consume them immediately. Consequently, a vendor that sells doughnuts in quantities of a dozen or more knows that the customer buying these doughnuts will not be consuming them immediately. Rather, because customers are buying a bulk quantity of doughnuts, they will likely store them for some period of time before consumption.

Indeed, several states have adopted a presumption that doughnuts or other pastries sold in quantities of *six* or more are not intended to have been sold for immediate consumption. *See* Conn. Dep't of Revenue Servs., *Policy Statement 2002(2)* ¶ 400-646 (Feb. 22, 2002), *included at* A19; Mass. Dep't of Revenue, Reg. 830 CMR 64H.6.5(5)(e)3, *included at* A24; R.I. Div. of Taxation, Reg. SU09-59.A, *included at* A42; *see also* L.F. 026 (¶ 7) (indicating that Connecticut, Massachusetts, and Rhode Island have adopted a six-doughnut rule). Although these states enacted this rule by regulation, this presumption represents a consensus that it is unreasonable to expect that doughnuts or other pastries sold in a quantity of six or more would be consumed immediately. Moreover, Krispy Kreme's analysis uses a more conservative measurement than the six-doughnut presumption adopted by other states, since Krispy Kreme considered only boxes of doughnuts sold in a dozen or more to constitute bulk sales. L.F. 039 (¶ 7); L.F. 366 (¶ 4).

The Commission, however, disregarded this presumption based solely on an unsupported speculation that it is conceivable for a large quantity of doughnuts to be consumed at once, provided it is delivered to a large number of people. L.F. 376. But statutory interpretation cannot be based on mere conjecture. Statutes should be interpreted in a reasonable manner, and courts must presume a logical result, as opposed to an unreasonable one. *David Ranken, Jr. Tech. Inst. v. Boykins*, 816 S.W.2d 189, 192 (Mo. banc 1991). Here, the uniform judgment of all other state regulatory authorities demonstrates the reasonableness of a presumption that bulk quantities of pastries, such as

doughnuts, are not purchased for immediate consumption, and thus were not prepared for immediate consumption.

Indeed, the Supreme Court of Nevada — the only highest state court to have considered whether bulk purchases of food are intended for “immediate consumption” — reached the same conclusion. The Nevada court held so when it considered purified water sold to customers through coin-operated machines in quantities of at least one gallon. *See State of Nevada v. McKesson Corp.*, 896 P.2d 1145 (Nev. 1995). The question before the court was whether such sales constituted sales of “[p]repared food intended for immediate consumption” within the meaning of the state statute, which specified that such food would not benefit from a general sales tax exemption for food. *McKesson*, 896 P.2d at 1146 (quoting Nev. Rev. Stat. § 372.284). The *McKesson* court explained that, although its precedent mandated that vending machines “generally provide items for immediate consumption,” this type of a sale was different because the customer “will, in most every case, pour the water into a smaller container such as a glass before actually consuming it.” *Id.* at 1147. Therefore, the Nevada Supreme Court concluded that the product at issue was “not amenable to immediate consumption.” *Id.* (“Purchases of water in quantities of at least one gallon seem clearly to be for home, rather than contemporaneous consumption.”). Similarly in this case, sales of doughnuts in quantities of a dozen or more are not sales intended for contemporaneous consumption. Just as in *McKesson*, a customer purchasing a box with a dozen or more doughnuts will then consume them one by one, over the course of some time.

The Commission held otherwise based solely on its unsupported speculation that “[i]t is entirely possible for one large family, office, or Sunday school class to consume a dozen or more donuts ‘immediately.’” L.F. 376. But just because it is *conceivable* for a dozen doughnuts to be consumed immediately, that is not a reasonable basis on which to interpret section 144.014. It was entirely possible for the purified water sold in quantities of a gallon or more in *McKesson* to be consumed immediately by “one large family, office, or Sunday school class,” yet the Nevada Supreme Court — although acknowledging that it may happen in an isolated case, 896 P.2d at 1147 — did not view this as a reasonable assumption. Indeed, the *Canteen* decision, on which the Commission placed heavy reliance, explicitly adopted a contrary approach, concluding that “it [is] reasonable to create a presumption that purchases of food from establishments which sell food items *primarily in individual-sized servings* will be eaten without substantial delay.” *Canteen Corp.*, 525 N.W.2d at 78 (emphasis added).¹⁹

¹⁹ The Commission’s attempt to draw support from an unpublished decision by the Connecticut Superior Court, *see* L.F. 376-77, is equally unavailing. The Connecticut trial court opined, without any evidentiary support, that a box of a dozen doughnuts is typically purchased for immediate consumption with co-workers. L.F. 377 (discussing *Jones v. Crystal*, 1996 WL 106765, at * 4 (Conn. Sup. Ct. Feb. 27, 1996)). This unsupported assertion was entirely *dicta* and, moreover, was contrary to the considered judgment of the Connecticut taxing authority. A regulation promulgated by the Connecticut Department of Revenue Services, which the *Jones* court followed, adopted

The FDA nutrition labeling regulations, which are illustrative of the food industry practice and understanding, *see supra* at 25-26, similarly do not view consumption by a group of people as “immediate” consumption. *See* 21 C.F.R. § 101.9(b)(1) (defining “serving” or “serving size” as “an amount of food customarily consumed per eating occasion” by an adult).

The Commission’s conclusion that doughnuts sold in boxes of a dozen or more are sold for “immediate” consumption is also not a reasonable inference from the legislative intent. Under the Commission’s interpretation, no bakery or another establishment that sells food items both in individual-sized servings and in bulk quantities, such as boxes of doughnuts, loaves of sliced bread, or six-packs of english muffins, can ever satisfy section 144.014’s 80/20 rule. Yet, it is not reasonable to suppose that, in enacting this section, the legislature intended to exclude all food establishments that sell items in bulk. Certainly, nothing in the text of section 144.014 evidences such intent.

Thus, the Commission erred by concluding that section 144.014’s reference to “food prepared ... for immediate consumption” encompasses bulk sales, such as sales of doughnuts in quantities of a dozen or more. Because Krispy Kreme’s bulk sales of doughnuts, combined with products prepared elsewhere, amounted for over 20 percent of its total gross receipts, Krispy Kreme met section 144.014’s 80/20 test. This evidence

the “six-item” rule, specifying that doughnuts (as well as other baked goods) sold in quantities of six or more “are considered to be bulk sales.” *Jones*, 1996 WL 106765, at *6 (internal quotation marks and citation omitted).

constitutes an independent basis for reversing the Commission’s erroneous determination.

III. THE COMMISSION ERRED BY CONCLUDING THAT FOOD CONSUMED IN OTHER LOCATIONS, AFTER A DELAY, CONSTITUTED “FOOD PREPARED ... FOR IMMEDIATE CONSUMPTION.”

Finally, the Commission erred by dismissing Krispy Kreme’s evidence that over 20 percent of its sales derived from products that its Missouri customers consumed in other locations, and not on the premises or while walking away from the store. L.F. 366 (¶ 6). These purchases, which necessarily occurred after preparation, were not purchases of food prepared for immediate consumption, since the purchaser first traveled to another location — whether office, home, school, or a park — before consuming this food. L.F. 026-27 (¶ 8); L.F. 029-32. As already explained, the FDA and the food industry consider only food that is served at an establishment with on-premises “facilities for immediate consumption” or by vendors “where foods are generally consumed immediately where purchased or while the consumer is walking away” to be “food ... served for immediate human consumption.” 21 C.F.R. § 101.9(j)(2)(ii); *supra* at 28-29.²⁰

²⁰ Indeed, the Director’s own regulations view on-premises consumption as relevant to determining whether consumption occurs “immediate[ly]” after preparation. Thus, the regulations explain that an ice cream vendor selling ice cream during a football game would not meet the 80/20 rule, even though the gross receipts from the sales of ice cream prepared by such vendor were less than 80 percent of his total gross receipts (which

The Commission based its decision on section 144.014's reference to the fact that food can be considered "prepared by [an] establishment for immediate consumption" "regardless of whether such prepared food is consumed on the premises of that establishment." L.F. 376 (quoting section 144.014.2). But this statutory reference merely ensures that food establishments such as street vendors and mobile food carts, which offer no on-premises seating facilities, do not escape the application of the 80/20 rule. Krispy Kreme's statutory construction complies with this statutory intent, because it excludes food purchases that the customer consumed while traveling away from a Krispy Kreme store either by car or on foot. L.F. 026-27 (§ 8); *see supra* at 5 n.4.

would normally satisfy this rule), because all of the ice cream he sells "is consumed on the premises." 12 CSR 10-110.990(3)(H), *included at* L.F. 041 and A17. Logically, if food items that are "consumed on the premises" are "food prepared ... for immediate consumption," it follows that food taken to other locations and consumed off the premises is not "food prepared ... for immediate consumption." As already explained, *see supra* at 39, the Director may not amend her existing regulations outside of formal rulemaking procedures, *see* § 536.021, nor may the Director apply any change in interpretation of existing regulations retrospectively, *see* § 32.053.

CONCLUSION

For the above-mentioned reasons, this Court should reverse the Commission's erroneous conclusion that Krispy Kreme's stores do not satisfy section 144.014's 80/20 rule.

Respectfully submitted,

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RULE 84.06(C) CERTIFICATION

I hereby further certify that the foregoing brief with accompanying appendix complies with Rule 55.03 and with the limitations contained in Rule 84.06(b), in that it contains 12,707 words.

I hereby further certify that the labeled disk, simultaneously filed with the hard copies of the briefs, has been scanned for viruses and is virus-free.

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2011, true copies of the foregoing document and accompanying appendices were mailed by US Postal Service and sent by e-mail to the following:

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