

IN THE SUPREME COURT OF MISSOURI

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No. SC91471

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**KRISPY KREME DOUGHNUT CORPORATION,**  
*Appellant,*

v.

**DIRECTOR OF REVENUE,**  
*Respondent.*

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

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**BRIEF OF *AMICI CURIAE* RETAIL BAKERS OF AMERICA AND  
AMERICAN BAKERS ASSOCIATION  
IN SUPPORT OF APPELLANT**

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### Interest of Amicus Curiae

The Retail Bakers of America (“RBA”) is a not-for-profit trade association that seeks to improve the operation and profitability of retail bakeries. Founded in 1918, RBA creates industry standards through professional certification, industry research, and school programs, and works to foster the community of retail bakeries by providing a forum for exchange of industry and business information. RBA members bring consumers quality bakery foods from independent bakeries, supermarket bakery departments, and foodservice facilities.

The American Bakers Association (“ABA”) is the Washington D.C.-based voice of the wholesale baking industry and the retail outlets of its members. Since 1897, ABA has represented the interests of bakers before federal and state legislatures and agencies and international regulatory authorities. ABA advocates on behalf of more than 700 baking facilities and baking company suppliers. ABA members produce bread, rolls, crackers, bagels, sweet goods, tortillas and many other wholesome, nutritious, baked products for America’s families. The baking industry generates more than \$70 billion in economic activity annually and employs close to half a million highly-skilled people.

Amici and their members have an interest in this matter insofar as it involves the full and fair application of Missouri tax laws to their members’ retail bakeries in the state. Under Rule 84.05(f), Amici sought and obtained the consent of Appellant’s counsel, and the Missouri Director of Revenue’s counsel, to file this brief.

## **Background**

Appellant Krispy Kreme Doughnut Corporation (“Krispy Kreme” or “Appellant”) claims a reduced sales tax rate on sales of food and drinks under § 144.014, RSMo Supp. 2009, which provides for a lower tax rate of one percent on all retail sales of food. That section defines “food” as “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 . . . .” Section 144.014 then expressly excludes from this definition:

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 café.

Appellant, 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 foods. The Missouri Director of Revenue (the “Director”) denied the claim.

Krispy Kreme appealed the Director’s decision to the Administrative Hearing Commission (the “Commission”). The Commission rightly concluded that the types of food sold by Krispy Kreme stores are food of the type that may be purchased with food

stamps under the Federal Food Stamp Program, now called the Supplemental Nutrition Assistance Program (“SNAP”). “Food” is defined under that program, at 7 U.S.C. Section 2012(k), as “any food or food product for home consumption except alcoholic beverages, tobacco, and hot foods or hot food products ready for immediate consumption . . . .” The U.S. Department of Agriculture (“USDA”) implementing regulations define “eligible foods” as those foods “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. The Commission acknowledged that these definitions seem to contemplate the distinction between “food *generally* purchased for home consumption and food *generally* purchased for immediate consumption. The former, like doughnuts by the dozen, milk by the carton, and coffee beans by the bag, are eligible foods. The latter, like prepared hamburgers and French fries, are not.” *Krispy Kreme Doughnut Corp. v. Director of Revenue*, No. 06-1044 RS (Mo. AHC, Dec. 23, 2010) (emphasis in original), at 8.

Notwithstanding the fact that the foods at issue are qualifying foods pursuant to § 144.014, Appellant’s stores still will not be entitled to charge the lower tax rate if more than 80% of the stores’ gross receipts are derived from the sale of food prepared for immediate consumption. In other words, 20% or more of Appellant’s gross receipts must come from the sales of items other than food prepared by the establishment for immediate consumption (the “80/20 rule”).

Appellant demonstrated that more than 20% of its gross receipts came from sales of food other than that prepared for immediate consumption, on three grounds. First,

receipts from sales of food items not prepared by Appellant (bagged coffee, juice, milk, and bottled water), plus retail sales of doughnuts in quantities of a dozen or more, total more than 20% of its gross receipts. L.F. 366 (¶ 4). Second, the sales of doughnuts prepared at least one hour prior to sale – and therefore inherently not prepared for immediate consumption – combined with sales of food not prepared by Appellant, constituted between 31.25% and 56.3% of total retail sales. L.F. 366 (¶ 5); L.F. 35-6(¶8). Third, according to a customer survey conducted at each of Appellant’s Missouri stores, over 20% of total gross receipts at each 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. 26-7(¶8). Amici expect that these facts are reasonably typical of other similarly situated bakeries in Missouri, at which both food prepared for immediate consumption and food prepared for later consumption or not prepared by the bakery are sold.

Despite Appellant’s presentation of the evidence described above, the Commission erroneously accepted the Director’s equation of food “prepared for immediate consumption” with food that is “ready to eat,” and therefore determined that Appellant failed to satisfy the 80/20 rule because more than 80% of Appellant’s gross receipts were for food that is ready to eat. If this mistaken interpretation is upheld, virtually no bakeries in the state of Missouri would be eligible to levy the lower tax rate on their qualifying food. Such a result is inconsistent with the statutory language, legislative intent, and overarching body of food regulatory law, for the reasons set forth below.

**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  
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Section 144.014, RSMo;

21 U.S.C. § 343(q)(5)(A);

21 C.F.R. § 101.9(j);

76 Fed. Reg. 19192 (Apr. 6, 2011);

*Medicine Shoppe International v. Director of Revenue*, 156 S.W.3d 333, 338 (Mo. banc 2005);

*Murray v. Missouri Highway and Transp. Comm’n*, 37 S.W.3d 228, 233 (Mo. banc 2001);

*Walsworth Pub. Co., Inc. v. Dir. of Revenue*, 935 S.W.2d 39, 40 (Mo. banc 1996);

*Canteen Corporation v. Department of Revenue*, 525 N.E. 2d 73 (Ill. 1988).

## 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”**

**I. The Commission’s Interpretation of Food Prepared for “Immediate Consumption” Ignores the Meaning of that Term as it is Commonly Used in the Context of Relevant Law.**

As a general rule, tax statutes are to be strictly construed in favor of the taxpayer and against the taxing authority. *Medicine Shoppe International v. Director of Revenue*, 156 S.W.3d 333, 338 (Mo. banc 2005). Thus, any ambiguity in the language of Missouri’s tax statute should be settled in favor of Appellant. In the December 23, 2010 Decision, the Commission expressed its opinion that “both [definitions of immediate consumption – Appellant and Appellee’s] are plausible . . .” The Commission failed, however, to give Appellant – the taxpayer – the benefit of this basic rule of construction. Even if the two definitions were equally plausible, the ambiguity should have been resolved in Appellant’s favor. The Commission’s failure to do so puts not only Appellant, but also the baking industry as a whole, at a distinct tax disadvantage by depriving these facilities of the benefit of this basic rule of construction.

Not only does the Commission’s interpretation of the term “prepared for immediate consumption” fail to adhere to general rules of construction relating to tax statutes, it also fails to take into account the accepted meaning of that term as it is used in the body of law and regulations applicable to food. The Federal Food, Drug, and Cosmetic Act (“FDCA”) and the implementing regulations of the U.S. Food and Drug Administration (“FDA”) use part of the relevant term – “for immediate consumption” – and define it a particular way that (1) includes temporal and spatial elements, and (2) rejects “ready-to-eat” as a proxy for the term. The FDA definition and approach, discussed in detail below, has become the accepted definition of “for immediate consumption” in the food industry.

Here, where the statutory phrase “prepared for immediate consumption” is not defined in section 144.014 and there is no express legislative history clarifying the issue, the FDA’s definition of “for immediate consumption,” accepted by the food industry, should govern, for in the absence of a specific legislative or judicial definition of a statutory term, it is appropriate to look to business and industry practice as to the meaning of a term. *Walsworth Pub. Co., Inc. v. Dir. of Revenue*, 935 S.W.2d 39, 40 (Mo. banc 1996).

**A. Federal Food Law Defines Food “For Immediate Consumption” to Mean Food Consumed Shortly After it is Served or Sold and On or Upon Leaving the Premises.**

First, FDA regulations and the agency’s consistent regulatory approach interpret the phrase “for immediate consumption” as including temporal and spatial elements. FDA regulations regarding nutrition labeling generally exempt foods “served for immediate human consumption.” 21 C.F.R. 101.9(j)(2). Food “served for immediate human consumption” includes food served in “bakeries, delicatessens, and retail confectionery stores where there are facilities for immediate consumption on the premises” and other places “where foods are generally consumed immediately where purchased or while the consumer is walking away.” 21 C.F.R. 101.9(j)(2)(ii). The agency explains further in its preamble to that final rule that the exemption for food “served for immediate human consumption” would apply to places that sell food that is consumed while walking away (e.g., a mall cookie counter), or an establishment that delivers food which is consumed immediately. *Id.* Similarly, FDA explains in the preamble to its recently proposed rule on nutrition labeling for restaurant menus that “for immediate consumption” means “to be consumed either on the premises where the food is purchased or while walking away.” 76 Fed. Reg. 19192, 19203 (April 6, 2011).

FDA’s use of the term “for immediate consumption” therefore deals in large part with *when* and *where* the food is consumed, relative to the time and place it was prepared or purchased. A food is “served for immediate consumption” if it is meant to be consumed then and there on the premises at which it was prepared or sold, or very soon

after it is taken from that establishment. FDA’s interpretation of a spatial and temporal element within the phrase is a commonly accepted interpretation of those words within the food industry and by food regulators. And, indeed, the food industry, including the baking industry, relies upon this interpretation of the term in determining how to comply with FDA’s nutrition labeling requirements.

Even the Illinois case upon which the Commission itself relied in its December 27, 2010 Decision followed the generally accepted FDA approach to the term “for immediate consumption.” In that case, the Supreme Court of Illinois stated that food prepared for consumption, but not for immediate consumption, is food “which is to be eaten only after a delay or at a later time.” *Canteen Corp. v. Department of Revenue*, 525 N.E.2d 73, 77-78 (Ill 1988). It is therefore clear that food “prepared for immediate consumption” is food intended to be eaten promptly and without delay.

While FDA’s approach places emphasis on the time and place of intended consumption, it does not require any case-by-case inquiry into consumers’ actual consumption practices. Rather, FDA’s reliance on timing and proximity serves to characterize generally those types of foods that, by their nature, tend to be consumed right after they are served or sold, at the place where they were prepared or soon after leaving that location. Notably, FDA’s regulations refer to foods that are “*generally* consumed immediately where purchased or while the consumer is walking away.” 21 C.F.R. 101.9(j)(2)(ii) (emphasis added).

The Commission acknowledged in its December 27, 2010 Decision that the Federal law and regulations governing the SNAP program embrace the concept of a distinction between food “*generally* purchased for home consumption and food *generally* purchased for immediate consumption.” *Krispy Kreme*, No. 06-1044 RS at 8 (emphasis in original). Thus, the relevant inquiry relates to the nature of the food itself, rather than what a particular consumer intends to do with it. Accordingly, the Commission rightly noted that doughnuts by the dozen “are the type of food or food product” that is “for home consumption” rather than “for immediate consumption.” *Id.* It is difficult to understand how the Commission then ultimately concluded, at the end of its opinion, that retailers would need to quiz or survey their customers as to when they plan to eat the food they buy if it were to adopt Appellant’s argument for a temporal definition of “for immediate consumption.”

That the FDA regulations address food “served for immediate human consumption,” while the Missouri tax statute refers to food “prepared for immediate consumption” does not alter the analysis of the term’s essential definition. Whether “served” or “prepared” for immediate consumption, in the context of food law, this category refers to a specific type of food that is generally consumed immediately after preparation or sale. Because foods must be prepared before they can be served, foods that are not served for immediate consumption necessarily were not prepared for immediate consumption. Thus, food not meeting FDA’s definition of food “served for immediate human consumption” will also not be food “prepared for immediate consumption” under Missouri tax law.

**B. Federal Food Law Distinguishes Between Food for Immediate Consumption and Food That is “Ready-to-Eat”**

Federal law also rejects a definition of “for immediate consumption” that equates the term with “ready-to-eat.” Indeed, the FDCA and FDA regulations consistently contemplate foods that are ready to eat but are not for immediate consumption. The FDCA expressly exempts from nutrition labeling: (1) food “served in restaurants or other establishments in which food is served for immediate human consumption,” and (2) food “which is processed and prepared primarily in a retail establishment, which is ready for human consumption . . . and which is offered for sale to consumers but not for immediate human consumption in such establishment.” 21 U.S.C. § 343(q)(5)(A)(i), (ii). Similarly, section 101.9(j)(3) of FDA’s nutrition labeling regulations exempts prepared food that is, among other things, “ready for human consumption” but is “not for immediate human consumption.” The law and regulations therefore recognize that food may be “ready-to-eat” even though it is not intended “for immediate consumption.” Moreover, FDA’s regulations specifically note that bakery foods may fall into this category. 21 C.F.R. 101.9(j)(3)(v).

FDA’s proposed menu labeling rules mirror this approach. There, FDA distinguishes between “restaurant food” and “restaurant-type food” by indicating that restaurant food is, in relevant part, food served in restaurants or other establishments in which food is “served for immediate human consumption, *i.e.*, to be consumed either on the premises where the food is purchased or while walking away,” while restaurant-type food is “ready for human consumption” and “offered for sale to consumers but not for

immediate consumption.” 76 Fed. Reg. at 19203. Thus, FDA plainly recognizes a category of food that is ready to eat, but is not for immediate consumption. The Director’s assertion that food “prepared for immediate consumption” means food that is ready-to-eat and needs no further preparation is simply inconsistent with the way that term is used in food regulation. The Commission should not have adopted the Director’s position.

Significantly, FDA lists bakeries as an example in both sections of its nutrition labeling exemption rule: as establishments serving food for immediate human consumption, and establishments selling food that is ready for human consumption but not for immediate consumption. 21 C.F.R. 101.9(j)(2)&(3). FDA thus acknowledges that bakeries sell *both* types of food, and that some bakery items may be ready to eat but are not intended for immediate consumption. Items such as a dozen or more doughnuts as well as loaves of sliced bread, cakes, and pies fall squarely within this category. Such ready-to-eat products are clearly intended to be taken home or to another location and eaten later or over the course of time. They are plainly not prepared for consumers to eat immediately.

FDA’s regulatory landscape does not contemplate “immediate” consumption by a group of people. Rather, in its nutrition labeling regulations and elsewhere, FDA focuses on individual serving sizes, or the “amount of food customarily consumed per eating occasion,” per individual adult. 21 C.F.R. 101.9(b)(1), 101.12. This approach is also reflected in the *Canteen* case cited by the Commission, where the court stated 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.E.2d at 77-78. Emphasis added. The clear implication is that food sold in bulk is not sold for immediate consumption. By the same token, larger quantities of food like doughnuts sold by the dozen or in bulk cannot logically be considered to be purchased “for immediate consumption.” Because preparation of food occurs prior to its sale or purchase, the preparation of food sold in bulk is not “food prepared for immediate consumption.”

Clearly then, relevant food law and regulations, as well as the precedent cited by the Commission, mandate a conclusion that foods that are prepared for, or sold for, “immediate consumption” are not simply ready-to-eat foods. FDA’s approach – an approach long relied upon by the food industry in general and the baking industry in particular – views foods “for immediate consumption” as foods intended to be consumed by an individual very soon after preparation or purchase, at or near the location where they were prepared or purchased. Foods “for immediate consumption” are distinct from foods that are “ready for human consumption.” Applying these definitions to the instant case, doughnuts sold in quantities of a dozen or more, doughnuts prepared more than an hour before sale, and doughnuts taken away from the store to be consumed elsewhere later simply cannot qualify as food “prepared for immediate consumption.” The Commission’s conclusion otherwise was in error.

**C. The Commission’s Interpretation of Food “Prepared for Immediate Consumption” Effectively Reads an Entire Section Out of the Statutory Language, and Would Unfairly Disadvantage Bakeries and Similarly Situated Facilities.**

The Commission’s interpretation of the Missouri tax law would effectively nullify the “80/20 rule” portion of the tax statute, thereby violating basic rules of statutory construction and putting bakeries and similar facilities with gross receipts at levels close to the 80/20 ratio at an unfair tax disadvantage vis-à-vis grocery stores, convenience stores, and other similar retail stores.

Under § 144.014, facilities may apply the lower 1% tax rate to all retail sales of SNAP-eligible foods as long as at least 20% of their gross receipts come from sales of food other than food prepared for immediate consumption. All items sold at facilities not meeting this 80/20 rule are taxed at the full rate of 4.225% state rate. The purpose of the 80/20 rule seems to have been administrative ease; vendors who sell mostly only one class of food are relieved of the burden of tracking sales at two different sales tax rates.

In clear cases, the application of the 80/20 rule is simple. Grocery stores, convenience stores, gas stations, and department stores likely always qualify for the application of the lower tax rate for the foods they sell (either because they primarily sell foods that they do not prepare, or do not primarily sell food at all). On the other end of the spectrum, most dine-in and fast-food restaurants typically will not qualify, as they derive virtually all, or certainly well above 80%, of their gross receipts from food prepared by the establishments to be consumed right away after preparation. In creating

the 80/20 rule, however, the legislature clearly contemplated that some facilities selling both types of foods in approximately an 80-to-20% gross receipts ratio would qualify to sell at the low rate. The Commission's interpretation of food "for immediate consumption" as ready to eat food, however, would render the 80/20 rule in the statute meaningless, as virtually no dine-in facility or restaurant facility would qualify to sell at the low rate, even though the statute contemplates that "restaurants," "fast food restaurants," and other similar facilities could qualify if they met the 80/20 rule.

Bakeries and similar facilities seem to be the precise type of dual-function facilities contemplated by the 80/20 rule. Some items that they sell are prepared well in advance of sale, and thus consumption. Some items that they sell are plainly prepared to be consumed long after sale. Likewise, some items they sell are prepared to be consumed right away, such as a cappuccino or espresso. If bakery items such as loaves of sliced bread, doughnuts, and cakes or pies—items that are prepared long before sale or consumed long after sale—are considered prepared for immediate consumption, however, it is difficult to imagine what types of restaurant or dine-in facilities would meet the 80/20 rule intended to expressly apply to them. As noted above, restaurants and typical fast food establishments will sell almost all of their food in a ready to eat state. Thus, should all bakery goods, like almost all food sold at any restaurant, be deemed "prepared for immediate consumption" simply because they are sold in a ready to eat state, the 80/20 percent rule would apply to virtually no restaurant or dine-in facility. Such a result is clearly contrary to the statute intending to apply an 80/20 rule to any "restaurant, fast food restaurant, delicatessen, eating house or café." Such a result also

violates the basic rule of statutory construction that statutes should be construed so as to avoid unreasonable and absurd results, *Murray v. Missouri Highway and Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo. banc 2001), and that each word, clause, sentence, and section of a statute must be given meaning. *State el rel. Womack v. Rolf*, 173 S.W.3d 634, 638 (Mo. banc 2005); *United States v. Lexington Mill & E. Co.*, 232 US 399, 409 (1914) (“It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word.”). Rewriting the term “food prepared for immediate consumption” as simply “ready-to-eat food” would limit the common-sense meaning of that term in such a way as to negate an entire section of the statute. Such an approach cannot be what the legislature intended. Accordingly, the Commission’s December 23, 2010 Decision should be reversed.

### **Conclusion**

The Commission’s interpretation of “food prepared for immediate consumption,” as that term is used in Missouri’s tax statute, is incorrect and impracticable. It fails to take into account the well-established meaning of that term as it is used in the relevant area of law – the FDCA and FDA’s food regulations – and produces an absurd result that would effectively read the 80/20 rule out of the statute. Amici urge the court to adopt the more reasonable and practical definition of “food prepared for immediate consumption” that reflects the temporal and spatial considerations applied by FDA and intended by the clear words of the statute. Doing so would reveal that purchases such as a dozen doughnuts, or doughnuts that are eaten well after sale, or of doughnuts prepared well prior to sale are not reasonably doughnuts that were “prepared for immediate

consumption,” and would produce a result that would adequately reflect the meaning of the tax statute as applied to Appellant and to bakeries more broadly.

Respectfully submitted,

Dated June 6, 2011

By \_\_\_\_\_

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**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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**CERTIFICATE OF COMPLIANCE**

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 4,636 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.

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