IN THE SUPREME COURT OF MISSOURI

No. SC90463

BRINKER MISSOURI, INC., APPELLANT,

v.

DIRECTOR OF REVENUE, RESPONDENT.

ON PETITION FOR REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE NIMROD T. CHAPEL, JR., COMMISSIONER

BRIEF OF APPELLANT

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STATEMENT OF FACTS

The parties submitted this matter to the Missouri Administrative Hearing Commission (the "Commission") on cross-motions for summary decision as authorized by 1 CSR 15-3.440(3), with Statements of Undisputed Material Facts supported by affidavits and exhibits (Legal File ("L.F.")(see L.F. pp. 11-118 and pp. 119-320). From those documents, the Commission adopted its Findings of Fact (L.F. pp. 369-373). The Commission's decision under appeal (L.F. pp. 368-390) is attached as an appendix (App. A1-A23). The material facts are not in dispute.

Brinker

Appellant Brinker Missouri, Inc. (Brinker) is a corporation with headquarters in Dallas, Texas (L.F. p. 12, ¶ 1). Its business is owning and operating restaurants. From October 1, 2003, to December 31, 2004, Brinker operated 23 restaurants in Missouri under four distinct brands: Chili's Grill & Bar ("Chili's"), Romano's Macaroni Grill ("Romano's"), On the Border, and Maggiano's Little Italy (L.F. p. 12, ¶ 3; L.F. p. 126, ¶ 3). Each of the restaurants is a business that first produces and then sells food and drink products to the public (L.F. p. 126, ¶ 6), the sales of which are subject to the Missouri sales tax. One of Brinker's restaurants, Chili's restaurant no. 364 in Springfield, Missouri, also sold its meal and drink products to retail businesses that, in turn, resold to the public (L.F. p. 126, ¶7).

Brinker provides substantial revenue to the State of Missouri. During the 14 month tax period at issue, Brinker collected and remitted $5,076,825.78 in Missouri and

local sales tax on the sales by those restaurants (L.F. p. 14, ¶ 9). In addition, each restaurant, on average, employs 40 people (L.F. p. 15, ¶ 12).

Brinker purchased machinery, equipment and parts ("machinery and equipment") for the restaurants and used that machinery and equipment at the restaurants to transform food and drink ingredients into meals and drinks that they sold to the public (L.F. p. 15, ¶ 11). It paid Missouri use tax on the purchases (L.F. p. 15, ¶ 11).

The Production

Brinker used all of the machinery and equipment at issue in its Missouri restaurants to produce food and drink products. Generally, Brinker used the machinery and equipment to transform raw ingredients into food and drink products. Employees used the machinery and equipment to cut, cook, mix, or blend ingredients with other materials. Employees baked, fried or otherwise cooked raw foods. Other machinery and equipment were used to keep food and drink ingredients chilled or warm during the production process to prevent spoilage or to hold them until there was a need to assemble or mix them with the final product. Pumping, carbonating, mixing and producing soft drinks was accomplished by yet other machinery and equipment, as was the presentation of food and drinks to customers in an attractive, appealing way in individual servings.

One example of a product that Brinker produced with the machinery and equipment is fried chicken. To create fried chicken, Brinker started with raw frozen chicken parts, which Brinker thawed at a controlled temperature. Brinker then coated the raw chicken in a mixture of seasonings and breading and placed it in a fryer containing

hot cooking oil. The result of this process was fried chicken that Brinker's restaurants sold to customers for immediate consumption (L.F. p. 13, ¶ 6).

Another example of a product produced by Brinker with the machinery and equipment is "pico de gallo," a condiment served at Chili's and made from tomatoes, jalapeno peppers, cilantro, red onions and spices. After Chili's employees freshly prepared this condiment by washing, chopping and mixing the ingredients, the condiment was marinated in a walk-in refrigerator for at least two hours before being used. This process allowed the ingredients to interact to achieve the desired flavor (L.F. p. 14, ¶ 7).

The cost of the food and drink ingredients varied by food and drink item; typically the cost of the ingredients was less than one half of Brinker's selling price for the finished product (L.F. p. 13, ¶ 6; L.F. p. 15, ¶ 10). The amount of sales tax that Brinker collected and remitted on its sales of the products that it produced, therefore, was at least double the amount of tax remitted had Brinker's customers purchased their own ingredients and processed and prepared the food products themselves.

Each piece of machinery and equipment at issue benefited multiple production cycles; that is, each item was used over a long period of time, well over one month, in the production of Brinker's food and drink products. Brinker's accounting books and records reflect that Brinker capitalized each piece of machinery and equipment (L.F. p. 15, ¶ 11).

Brinker purchased some of the machinery and equipment to establish new restaurants (L.F. p. 15, ¶ 12) or to expand existing restaurants and the remainder to replace like machinery and equipment at existing restaurants (L.F. p. 16, ¶ 13). Brinker also purchased replacement parts for its machinery and equipment (L.F. p. 16, ¶ 14).

Brinker used all of the machinery, equipment, and parts to produce food and drink products for sale to Brinker's customers, some of which were resellers.

Dining Property Resale

Whether customers consumed the food or drink products in Brinker's restaurants or took the food and drink products elsewhere for consumption, they paid the same price for food and drink products (L.F. p. 127, ¶ 8). The price was the same because Brinker factored the cost of reusable items (like silverware and glassware) that the customers used in the restaurants ("Dining Property") into the cost of the food and drink products (L.F. p. 20, ¶ 23) just as it factored the cost of disposable items (like plastic tableware and Styrofoam containers) into the cost of the food and drink products (L.F. p. 351, ¶ 2). Brinker purchased the following Dining Property for customer use while in the restaurants:

a. benches, chairs, cushions, and bar stools for seating;
b. tables to hold plates of food and drinks;
c. salt and pepper shakers, menus, and other items placed on each table;
d. dishes, tableware, and glassware, including utensils, plates, bowls, platters, mugs, glasses, and beer schooners; and
e. booster seats, infant carrier seats, and high chairs.

(L.F. p. 19, ¶ 22).

Brinker's customers were permitted to use the Dining Property only while they were consuming food and drink products purchased at Brinker's restaurants (L.F. p. 20,

¶ 24. Brinker collected Missouri sales tax on the sale price of food and drink products where customers used the Dining Property (L.F. p. 20, ¶ 23).

To-go Property Resale

Brinker also factored into the prices charged to all of its customers the cost of property provided to-go customers (L.F. p. 351, ¶ 2). That property included disposable plates and plate covers, insulated and non-insulated bowls and bowl covers, insulated and non-insulated cups and lids, plastic utensils, single-serving condiments, and carry-out bags ("dine-out property") (L.F. p. 351, ¶ 2). The cost of the dine-out property provided to Brinker's customers was between 7 and 10.7 percent of the retail sales to go (L.F. p. 351, ¶ 2). To-go sales represent from 3 to 12 percent of all sales, depending on the restaurant (L.F. p. 351, ¶2).

Brinker collected Missouri sales tax on the sale price of food and drink products that included the cost of the to-go items just as it collected Missouri sales tax on the sale price of food and drink products where customers used Dining Property of Brinker.

The Claim for Refund and the Decision

On October 18, 2006, Brinker submitted to the Director an application claiming a refund of use tax it paid on its purchase of the below property in the amount of $54,034.86 for the periods from October 1, 2003, through December 31, 2004 (L.F. p. 7; L.F. p. 373, ¶ 23). On December 21, 2007, the Director denied $48,966.83 of the claim and refunded $5,068.03 (L.F. p. 6; L.F. p. 373, ¶ 24). On January 18, 2008, Brinker filed its appeal of the denied portion of the claim with this Commission (L.F. p. 1; L.F. p. 373,

¶ 25). On appeal, Brinker reduced its claim to $44,138.93. The amended claim consists of:

a. Section 144.030.2(4)[1] replacement machinery $10,181.08

b. Section 144.030.2(4) replacement equipment 1,310.54

c. Section 144.030.2(4) replacement parts 297.59

d. Section 144.030.2(5) new/expanded plant machinery 21,599.19

e. Section 144.030.2(5) new/expanded plant equipment 1,909.56

f. Resale of reusable property 8,840.97

(L.F. p. 373; ¶ 26).

On October 14, 2009, the Commission denied Brinker's refund claim (L.F. pp. 368-390). The Commission concluded that the identity of the taxpayer, rather than the processes that it employed, was critical to determining whether it may invoke the production exemptions of section 144.030.2(4) and (5), and because Brinker primarily sold its products to consumers rather than to retailers, it was precluded from using those exemptions (L.F. pp. 379-384). Further, the Commission concluded that section 144.011.1(10) (providing certain express exclusions to the sales and use tax) impliedly taxed sales that otherwise are expressly excluded from sales and use tax as sales for resale (L.F. pp. 384-390). This appeal followed.

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[1] Unless otherwise indicated, all statutory references are to the 2000 Revised Statutes of Missouri.

STANDARD OF REVIEW

The decision of the Commission shall be reversed if: (1) it is not authorized by law; (2) it is not supported by competent and substantial evidence upon the whole record; (3) mandatory procedural safeguards are violated; or (4) it is clearly contrary to the reasonable expectations of the General Assembly. Section 621.193, RSMo. 2000; *Whitehead v. Director of Revenue*, 962 S.W.2d 884, 885 (Mo. banc 1998). The first and fourth standards are at issue in this case. This Court's interpretation of Missouri's revenue laws is *de novo*. *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000).

POINTS RELIED ON

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING THE MANUFACTURING, PRODUCING OR PROCESSING EXEMPTION PART OF THE SUBJECT REFUND CLAIM BECAUSE UNDER SECTION 621.193 THE DECISION IS NOT AUTHORIZED BY LAW AND CREATES A RESULT CLEARLY CONTRARY TO THE REASONABLE EXPECTATIONS OF THE GENERAL ASSEMBLY IN THAT: (1) THE COMMISSION MISINTERPRETED AND MISAPPLIED SECTIONS 144.010.1(14) AND 144.030.2(4) AND (5) BY CONCLUDING THAT THOSE WHO DIRECTLY SELL THEIR PRODUCTS TO CONSUMERS CANNOT BE MANUFACTURERS, PRODUCERS, OR PROCESSORS; AND (2) THE RESULT OF SUCH MISINTERPRETATION IS CONTRARY TO THE REASONABLE EXPECTATIONS OF THE GENERAL ASSEMBLY IN THAT THE RESULT CLEARLY DEFEATS THE PURPOSE OF THE EXEMPTIONS TO PRODUCE PRODUCTS HAVING A HIGHER TAXABLE VALUE AND ENCOURAGING THE EMPLOYMENT OF MISSOURIANS.

Branson Properties USA v. Director of Revenue, 110 S.W.3d 824 (Mo. banc 2003);

Hudson Foods, Inc. v. Director of Revenue, 924 S.W.2d 277 (Mo. banc 1996);

Al-Tom Investment v. Director of Revenue, 774 S.W.2d 131 (Mo. banc 1989);

Bridge Data Co. v. Director of Revenue, 794 S.W.2d 204 (Mo. banc 1990);

Section 144.010.1(14), RSMo.;

Section 144.030.2(4) and (5), RSMo.;

Section 144.615 (3), RSMo.

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING THE RESALE EXCLUSION PART OF THE SUBJECT REFUND CLAIM BECAUSE UNDER SECTION 621.193 THE DECISION IS NOT AUTHORIZED BY LAW AND CREATES A RESULT CLEARLY CONTRARY TO THE REASONABLE EXPECTATIONS OF THE GENERAL ASSEMBLY IN THAT: (1) THE COMMISSION MISINTERPRETED AND MISAPPLIED SECTIONS 144.011, 144.610 AND 144.605(7), (10) AND (13) BY CONCLUDING THAT PROPERTY THAT WAS PURCHASED FOR RESALE WAS NEVERTHELESS TAXABLE; AND (2) THE RESULT OF SUCH MISINTERPRETATION IS CONTRARY TO THE REASONABLE EXPECTATIONS OF THE GENERAL ASSEMBLY IN THAT THE MISINTERPRETATION RESULTS IN MULTIPLE TAXATION.

Sipco, Inc. v. Director of Revenue, 875 S.W.2d 539 (Mo. banc 1994);

King v. National Supermarkets, Inc., 653 S.W.2d 220 (Mo. banc 1983);

Smith Beverage Co. of Columbia v. Reiss, 568 S.W.2d 61 (Mo. banc 1978);

Moore Leasing, Inc. v. Director of Revenue, 869 S.W.2d 760 (Mo. banc 1994);

Section 144.605(7), RSMo.;

Section 144.605(10) and (13), RSMo.;

Section 144.610, RSMo.;

Section 144.615(6), RSMo.

ARGUMENT

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING THE MANUFACTURING, PRODUCING OR PROCESSING EXEMPTION PART OF THE SUBJECT REFUND CLAIM BECAUSE UNDER SECTION 621.193 THE DECISION IS NOT AUTHORIZED BY LAW AND CREATES A RESULT CLEARLY CONTRARY TO THE REASONABLE EXPECTATIONS OF THE GENERAL ASSEMBLY IN THAT: (1) THE COMMISSION MISINTERPRETED AND MISAPPLIED SECTIONS 144.010.1(14) AND 144.030.2(4) AND (5) BY CONCLUDING THAT THOSE WHO DIRECTLY SELL THEIR PRODUCTS TO CONSUMERS CANNOT BE MANUFACTURERS, PRODUCERS, OR PROCESSORS; AND (2) THE RESULT OF SUCH MISINTERPRETATION IS CONTRARY TO THE REASONABLE EXPECTATIONS OF THE GENERAL ASSEMBLY IN THAT THE RESULT CLEARLY DEFEATS THE PURPOSE OF THE EXEMPTIONS TO PRODUCE PRODUCTS HAVING A HIGHER TAXABLE VALUE AND ENCOURAGING THE EMPLOYMENT OF MISSOURIANS.

Introduction

The issue before this Court under Point I is: Did Brinker's production of food and drink products entitle it to exemption from use tax under the production exemptions, sections 144.615(3) and 144.030.2(4) and (5)? The undisputed facts establish that the equipment Brinker used to produce food products meets every element of the exemptions in section 144.030.2(4) and (5), as incorporated by section 144.615 of the use tax law. Furthermore, the undisputed facts reflect that the very purposes of the exemptions are

furthered in that Brinker used the equipment at issue in facilities that employ people, and Brinker used the equipment to produce taxable products having a higher taxable value than the product inputs.

Despite these facts, the Commission denied Brinker the exemptions because its production facilities are "restaurants." The Commission concluded that restaurants are ineligible for the exemptions because their operations are primarily "sales and service," rather than "production," and because they sell their products to the ultimate consumer rather than to retailers. The Commission in so concluding largely disregarded the statutes at issue and dismissed this Court's jurisprudence as "liberal." Commission Decision at 9, 11, 12.

A. The Equipment is Exempt Under the Production Exemptions

Sections 144.615(3) and 144.030.2[2] ("production exemptions") exempt from sales and use tax the purchase of:

> 4) Replacement machinery, equipment, and parts … used directly in manufacturing, mining, fabricating or producing a product which is intended to be sold ultimately for final use or consumption … ;
>
> (5) Machinery and equipment … purchased and used to establish new or to expand existing manufacturing, mining or fabricating plants in the state

[2] Subdivision (4) of section 144.030.2 was amended in 2004, after the tax periods at issue in this case. However, the portion of the statute changed by the 2004 amendment is not at issue in this case.

> if such machinery and equipment is used directly in manufacturing, mining or fabricating a product which is intended to be sold ultimately for final use or consumption;

Section 144.010.1(14) defines the critical phrase "product which is intended to be sold ultimately for final use or consumption" as "tangible personal property, or any service that is subject to state or local sales or use taxes, or any tax that is substantially equivalent thereto, in this state or any other state." As explained below, that definition appears slightly to expand this Court's construction of that phrase in *International Business Machines Corporation v. Director of Revenue*, 958 S.W.2d 554 (Mo. banc 1998), holding that for services to be manufactured products, they must be subject to Missouri sales tax.

This Court recently explained the requirements of sections 144.030.2(4) and (5) in *Branson Properties USA v. Director of Revenue*, 110 S.W.3d 824 (Mo. banc 2003). A "product" produced by the taxpayer may be either tangible or intangible. What is required is a "clear and identifiable transformation of an input into an output with a separate and distinct use, identity or value." *Id.* at 827. Where there is no "transformation," the taxpayer is not engaged in manufacturing. *Id.* Conversely, where a process produces something that is "'clearly different from what went into it'" the taxpayer is engaged in "manufacturing" within the meaning of sections 144.030.2(4) and (5). *Id., quoting Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204, 207 (Mo. banc 1990).

This Court has long recognized that the purpose of the production exemptions is to encourage the location and expansion of business in Missouri. Businesses bring jobs to this state and businesses increase the state's overall sales tax collections by producing taxable products that are more expensive than the sum of their ingredients. *Floyd Charcoal Company, Inc. v. Director of Revenue*, 599 S.W.2d 173, 177 (Mo. banc 1980); *Sipco, Inc. v. Director of Revenue*, 875 S.W.2d 539 (Mo. banc 1994); *West Lake Quarry & Material Co. v. Schaffner*, 451 S.W.2d 140, 142 (Mo. 1970). Furthering the objective of the Production Exemptions, the Missouri General Assembly has continued to expand them. In 1996, through H.B. 1237, the legislature removed the then design or product change requirement from section 144.030.2(4). In 1998, in S.B. 936, the legislature expressly exempted "parts" of "machinery and equipment" in both sections 144.030.2(4) and (5), and broadly defined the previously undefined phrase "product which is intended to be sold ultimately for final use or consumption" in what is now section 144.010.1(14). In 2008, through H.B. 1670, the legislature again amended section 144.030, but made no amendment to the production exemptions.

In stark contrast to the Commission, the Missouri General Assembly does not appear to view this Court's production exemption jurisprudence as "liberal" or "broad," for, if that were the case, it would be restricting, rather than expanding, the language of the production exemptions. "[W]here a court of last resort construes a statute, and that statute is afterwards re-enacted, or continued in force, without any change in its terms, it is presumed that the legislature adopted the construction given to it by the court."

Medicine Shoppe International, Inc. v. Director of Revenue, 156 S.W.3d 333, 338, n.2 (Mo. banc 2005).

Reading together section 144.010.1(14) and section 144.030.2(4) and (5), therefore, along with this Court's jurisprudence, to qualify for the production exemptions, the taxpayer must: (1) buy machinery, equipment, or parts thereof; (2) that are used directly in mining, manufacturing, fabricating, or producing; (3) tangible personal property or a taxable service; and (4) the machinery, equipment, or parts must be purchased to (i) replace like property or (ii) to establish a new, or expand an existing, production facility. Brinker meets each of these elements, and thus is entitled to the exemptions.

First, it is undisputed that Brinker bought "machinery, equipment and parts." All of the subject purchases benefitted multiple production cycles and were capitalized on the books and records. S*ee Lincoln Industrial, Inc., v. Director of Revenue*, 51 S.W.3d 462 (Mo. banc 2001) (concluding that equipment includes property benefitting multiple production cycles and is capitalized). *See* Commission Findings ¶¶ 10, 13, at 4 (L.F. 371).

Second, Brinker used the purchases to transform the product inputs into food products "with a separate and distinct use, identity or value." To reiterate pertinent facts, Brinker used all of the machinery and equipment at issue in its Missouri restaurants to produce food and drink products. Generally, Brinker used the machinery and equipment to transform raw ingredients into food and drink products. Employees used the machinery and equipment to cut, cook, mix, or blend ingredients with other materials.

Employees baked, fried or otherwise cooked raw foods.[3] Other machinery and equipment were used to keep food and drink ingredients chilled or warm during the production process to prevent spoilage or to hold them until there was a need to assemble or mix them with the final product. Pumping, carbonating, mixing and producing soft drinks was accomplished by yet other machinery and equipment,[4] as was the presentation of food and drinks to customers in an attractive, appealing way in individual servings. That is manufacturing or producing. *See*, *Hudson Foods, Inc. v. Director of Revenue*, 924 S.W.2d 277 (Mo. banc 1996) (concluding that "freezing and crusting [turkey carcasses] works a transformation that results in a product with a different use and identity" and constituted "processing" under § 144.030.2(12)); *Branson Properties USA*, *supra*. *See* Commission Findings ¶¶ 5-7 at 3 (L.F. p. 370), and Carroll Affidavit ¶¶ 7-12 (L.F. pp. 37-39).

Third, under section 144.020.1(6), Brinker's sales are clearly taxable, whether they are the sales of tangible personal property or a service, and the undisputed facts show that Brinker collects and remits substantial Missouri and local sales tax on such

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[3] Brinker's cooking of ingredients is no different from the cooking that takes place in the rotisserie ovens used at grocery stores and granted the production exemptions by the Director. *See* Hilger Affidavit ¶¶ 3-8 (L.F. pp. 98-101) and footnote 5 hereof.

[4] Neither the Commission nor the Director could seriously deny that such blending of ingredients at the Coca-Cola bottling plant is exempt production. Precisely the same processes occur here, only on a smaller scale, and should be treated no differently.

sales; during the subject refund claim period, Brinker remitted over $5M in Missouri and local sales tax. *See* Commission Findings ¶ 14 at 4 (L.F. p. 371); Carroll Affidavit ¶ 10.

Fourth, Brinker either purchased the property to: (1) establish new or expand existing business facilities; or (2) to replace its property at existing business facilities. *See* Commission Findings ¶¶ 11-12 (L.F. p. 371).

Under the law and the undisputed facts, therefore, the production exemptions apply to Brinker, notwithstanding the Commission's failure to accept the application of the law to the facts.

B. The Commission Failed to Follow the Law in Denying the Production Exemptions

Focusing upon the entity, rather than the process, the Commission reframed the issue before it and decided that a restaurant cannot qualify for the exemptions:

> The issue in this case is not whether the processes by which Brinker's restaurants prepare food can fit within the definition of manufacturing, but whether that definition is applicable to the entity in which the processes are taking place, that is, a restaurant, the operations of which are geared toward retail sales and service and not toward production.

Commission Decision at 12 (L.F. p. 379).

The Commission wholly discounted Brinker's production of products by use of the equipment at issue by rationalizing that Brinker's production was needed only for immediate retail sale. Commission Decision at 17 (L.F. p. 384). Such an analysis is not

supported by the statutes, nor by this Court's decisions.[5] To reach its end in that regard, the Commission relied primarily upon two authorities: (1) a twenty-seven year old Commission decision, and (2) a thirty-five year old Missouri Court of Appeals opinion that addressed a license tax issue. *See Wendy's of Mid-Missouri, Inc. v. Director of Revenue*, No. RS-79-0222 (Mo. Admin. Hearing Comm'n, July 22, 1982); *Kansas City v. Manor Baking Co.*, 377 S.W.2d 545 (K.C. Ct. App. 1964).

First, looking at the statutes at issue, Brinker notes that the Commission's decision included no analysis of section 144.010.1(14). There, it is abundantly clear that "product which is intended to be sold ultimately for final use or consumption" means "tangible personal property, or any service that is subject to state or local sales or use taxes … in this state[.]" Nowhere does the definition require that a product must be sold to other than the ultimate consumer so as to qualify for the exemption. The Commission, however, found otherwise:

> Further, both subdivisions expressly limit the exemptions to "manufacturing . . . a product which is intended to be sold ultimately for final use or consumption." (Emphasis added.) "Ultimate" means "last in a

[5] The legal conclusion in this regard is not the only error on this point. The undisputed facts show that some of Appellant's sales are to retailers rather than the ultimate consumers. *See* Commission Findings ¶ 4, at 2 (L.F. p. 369). Even under the Commission's construction of the law, therefore, one of Brinker's facilities was entitled to the exemptions.

> progression or series : FINAL . . . arrived at as the last result." [MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 1356 (11th ed. 2004)]. The product that the legislature contemplated being produced by "manufacturing" was not one being produced for immediate retail sale as in a restaurant, but one produced for a later retail sale. Subdivisions (4) and (5) are couched in words unmistakably associated with entities whose purpose is production rather than retail sales and service. (L.F. p. 383)

The Commission's decision that Brinker's restaurants were not primarily engaged in production is incorrect. As explained above, section 144.020.1(6) clearly subjects Brinker's products to tax as "meals and drinks," and the undisputed facts show that Brinker in fact collects and remits Missouri and local sales tax on its sales. It therefore produces "product[s] which [are] intended to be sold ultimately for final use or consumption" as section 144.010.1(14) defines the phrase. There is no requirement for some down-line sale at retail as distinguished from immediate sale, despite the Commission's preferred definition of "ultimate."

The Commission also found that Brinker cannot qualify for the production exemptions because restaurants are "geared toward sales and service and not toward production." (L.F. p. 379). That is a mistaken conclusion. Again, section 144.010.1(14)'s definition of product establishes that, even if Brinker's operations were deemed "service" operations, they qualify for the production exemptions so long as the product output is either tangible personal property or a taxable service and they are otherwise manufacturing or producing. Whether the sales of meals and drinks are the

sale of property (which clearly appears to be the case) or of a service, the sales are taxable under section 144.020.1(6). As such, Brinker's output is "product[s] which [are] intended to be sold ultimately for final use or consumption" as section 144.010.1(14) defines the phrase.

Contrary to the Commission's construction, the words of the production exemptions do not limit the exemptions to any particular type of taxpayer, or particularly to a taxpayer conducting "industrial" operations. Indeed, the legislature used the passive voice to describe the actor in the exemptions, and did not use the word "industrial." Instead, these exemptions apply to purchases of any machinery and equipment that anyone uses directly in manufacturing, fabricating or producing a product intended to be sold ultimately for final use or consumption. Here, no one disputes that Brinker purchased and used the equipment, nor that Brinker used it to produce new and different products.

In this regard, *Concord Publishing House, Inc.*, 916 S.W.2d 186 (Mo. banc 1996), is instructive. There, two corporations worked together to produce newspapers. Even though the equipment at issue was clearly used to produce the newspapers, the Director sought to deny the exemptions because the user of the equipment was not the same taxpayer that bought the equipment. This Court rejected the Director's contention:

> The § 144.030.2(5) exemption "does not refer to the *identity* of the user, but only to a use for the designated purpose." [citation omitted] We likewise apply this reasoning to § 144.030.2(4). As long as the equipment was

> purchased for and subsequently used in an exempt manner, we are not concerned which company purchased it. (emphasis original)

Id. at 196.

As a matter of fact, this Court has never denied the production exemptions to a taxpayer because that taxpayer sold its own products at retail. Indeed, this Court has allowed the production exemptions for taxpayers who retailed their own products. In *Concord Publishing House, supra*, this Court allowed the exemption to a newspaper that retailed its product—newspapers. Likewise, in *Southwestern Bell Telephone Co. v. Director of Revenue*, 182 S.W.3d 226 (Mo. banc 2005), this Court allowed the production exemptions to the telephone company, an entity clearly retailing its product—taxable services.

Another of this Court's decisions is instructive on this point. In *Al-Tom Investment v. Director of Revenue*, 774 S.W.2d 131 (Mo. banc 1989), the issue involved construction of section 144.030.2(2), commonly referred to as "the component part or ingredient exemption." It is another type of production exemption for:

> [m]aterials, manufactured goods, machinery and parts which when used in "manufacturing, processing, compounding, mining, producing or fabricating become a component part or ingredient of the new personal property resulting from such manufacturing, processing, compounding, mining, producing or fabricating and which new personal property is intended to be sold ultimately for final use or consumption."

The component part exemption contains many of the same terms found in the production exemptions. For instance, the "component part or ingredient" exemption applies to "manufacturing, processing, compounding, mining, producing or fabricating." And it applies where such operations result in "new personal property intended to be sold ultimately for final use or consumption." This is analogous to the requirements of section 144.030.2(4) and (5) that the taxpayer engage in manufacturing, mining, fabricating or producing to create a "product intended to be sold ultimately for final use or consumption." In *Al-Tom* this Court ruled that the "component part or ingredient" production exemption applied to cooking oil used for frying chicken in a Kentucky Fried Chicken restaurant. Clearly, the Kentucky Fried Chicken restaurant was a retailer and was not a factory. Nevertheless, it was deemed to qualify for the component part production exemption.

The Commission's notion that a "product" cannot be a service is also faulty. *See Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204, 206 (Mo. banc 1990) (information processing service results in a product). While this Court later limited *Bridge Data* in *International Business Machines Corporation v. Director of Revenue,* 958 S.W.2d 554 (Mo. banc 1998), by explaining that the term "product" within the meaning of section 144.030.2(5) includes only taxable services, the law remains that a product most certainly can be a service.

In summary, under section 144.010.1(14) and the decisions of this Court, a taxpayer is not disqualified from invoking the production exemptions if it retails its own products or if its product is or includes any services.

In deciding against Brinker, the Commission relied on *Kansas City v. Manor Baking Co., supra and Wendy's of Mid-Missouri, Inc.* In *Manor Baking*, the issue before the court of appeals was construction of Kansas City's license tax ordinances for the purpose of determining whether "[the Manor Baking Company] was a 'manufacturer' … or whether it was a 'merchant baker[.]'" *Manor Baking, supra*, 377 S.W.2d 545. The court concluded that Manor was a merchant because it conducted "predominantly [a] mercantile endeavor, processing ingredients only by necessity from the character of its product." *Id*. at 548. The court repeatedly recognized that Manor engaged in "processing" "ingredients" to make "products," but concluded that it was more a merchant than a manufacturer for licensure purposes.

Manor Baking is inapposite for many reasons. First, *Manor Baking* did not address Missouri's production exemptions under the sales and use tax law or any law even remotely similar. There, the court was required to decide whether Manor was a merchant or a manufacturer, and it concluded that, while Manor produced the products that it sold, it was **predominantly** a merchant. Here, this Court need not address whether Brinker is a producer or a retailer. Nothing in the production exemptions, or in the definition of "product intended to be sold ultimately for final use or consumption," makes that determination relevant. Stated differently, nothing in either statute disqualifies an otherwise eligible taxpayer simply because the taxpayer sells at retail the products that it produces.

Furthermore, the Commission's use of *Manor Baking* would lead to an absurd result if applied here. Were the Commission's decision followed, for example, the Busch

brewery would be entitled to invoke the production exemptions while the local brew pub, using all of the same brewing equipment for the same type of production, would be denied the exemptions simply because it sold its own products at retail. The decision is wholly inconsistent with the very purposes of the production exemptions, which are to create jobs and encourage the production of products having a higher taxable value. This Court must already have so recognized; this Court has never read a retailer disqualification into the exemptions.

Wendy's of Mid-Missouri, Inc., v. Director of Revenue, No. RS-79-0222 (Mo. Admin. Hearing Comm'n, 1982) is also distinguishable. As a close reading of that case reflects, this Court long ago rejected *Wendy's* reasoning. In *Wendy's*, the Commission construed what is now section 144.030.2(5) and, in quoting that section, emphasized the word "plant." The Commission refused the expansion exemption for machinery and equipment used in a restaurant based on the "nature of the *entity* involved." (emphasis original). The Commission acknowledged that the Director's regulation 12 CSR 10-3.296 defined "manufacturing" to include "the process or operation of making foods" but nevertheless found against the taxpayer by concluding that "section [144.030.2(5)] … requires that Petitioner's establishment constitute a 'manufacturing *plant*[.]'" (emphasis original). The Commission explained that "[c]ommon sense dictates that Petitioner's process of preparing food does not rise to the industrial level of a 'plant,' *regardless of whether or not such a process is, in fact, manufacturing*." (emphasis added). In short, the Commission denied the exemption because, in the Commission's view, the Wendy's

restaurant was not an "industrial plant" even were the restaurant deemed to be a manufacturer.

Here, the Commission's reliance on *Wendy's* disregards the fact that the replacement exemption in section 144.030.2(4) does not even use the word "plant," so the lynchpin of the *Wendy's* decision never had any bearing on construction of that exemption. Furthermore, sections 144.030.2(4) and (5) do not limit the exemptions to taxpayers engaged in particular businesses operating "industrial plants." Rather, these exemptions apply to any machinery and equipment purchased and used directly in manufacturing, fabricating or producing a product intended to be sold for final use or consumption, and this Court has so held.

In the twenty-seven years since the Commission's decision in *Wendy's*, this Court has decided numerous cases involving the exemptions at issue, all of which reflect that this Court does not read an "industrial plant" requirement into the exemptions. The Court's analysis in these cases has focused on the requirements set forth in sections 144.030.2(4) and (5) and the functions performed by the taxpayer using the machinery and equipment at issue—not on the nature of the taxpayer's enterprise. In *Concord Publishing House, supra.*, 916 S.W.2d at 195, this Court recognized that the purpose of the exemptions was not to "fill the Missouri landscape with towering industrial plants … but rather to increase the number of products on which sales tax could be assessed." Accordingly, these provisions have been found to apply in a number of contexts where the taxpayer was not conducting a production operation in a factory. For example, these exemptions have been found to apply to the production of telephone services, newspaper

publishing, data processing for mutual funds, and water purification, among other activities. *See Concord Publishing House, Inc., supra.*; *DST Systems, Inc. v. Director of Revenue,* 43 S.W.3d 799 (Mo. banc 2001); *Jackson Excavating Co. v. Administrative Hearing Comm'n,* 646 S.W.2d 48, 51 (Mo. 1983); *Southwestern Bell Telephone Co. v. Director of Revenue, supra.*; *and International Business Machines Corporation, supra*.

Finally, in relying on *Wendy's,* the Commission not only ignored the words of the production exemptions and this Court's decisions, but also ignored more recent of its own decisions. For instance, in 1987, the Commission found that the production exemptions applied to a concrete mixer. *See Capitol Con Crete, Inc., v. Director of Revenue,* No. RS-85-0259 (Mo. Admin. Hrg. Comm'n, July 17, 1987) (Commission ruled the purchase of concrete mixing trucks were exempt under section 144.030.2(5): "[t]he whole truck constitutes a manufacturing plant" within the meaning of the exemption). There, the concrete company sold the concrete at retail and a cement mixer is not a factory, although the Commission did describe it as an "industrial plant." And in 1993, in *Souffle, Inc. d/b/a Café Allegro v. Director of Revenue,* No. 92-001068RV (Mo. Admin. Hearing Comm'n, June 7, 1993), the Commission found that the component part or ingredient production exemption applied to a restaurant's smoking of meat; the Commission noted that this Court's decision in *Al-Tom* implicitly recognized that frying chicken was "manufacturing, processing, compounding, producing or fabricating").[6]

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[6] The Commission in this case also ignored very important undisputed facts. The Director grants the production exemptions for equipment used to bake bagels at retail

In sum, the decisions of this Court are consistent with the statutory definition of manufactured product ("product which is intended to be sold ultimately for final use or consumption") as including any property or service that is subject to tax. Therefore, Brinker is not disqualified from use of the production exemptions merely because it retails the products that it produces. Moreover, all of the decisions of this Court, and the more recent decisions of the Commission, have focused on the processes employed in producing new products rather than the characterization of the location where such production occurs. Therefore, Brinker is not disqualified from claiming the production exemptions merely because its production facilities are labeled "restaurants." Because

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stores, for rotisserie ovens used to bake chickens at retail stores, for equipment used to bake bread products at a retailer grocer's centralized baking facility, for equipment used to make fully-cooked ready-to-eat hot dogs and sausages, and for equipment used to make dairy products like cheese and ice cream at a retailer's dairy processing center. Hilger Affidavit ¶¶ 3-8 (L.F. pp. 98-101). The Commission wholly dismissed this undisputed evidence, and even failed to include these facts in its findings: "we make no findings about such practices [of the Director] because they did not involve restaurants." Commission Decision at 15 (L.F. p. 382). Brinker respectfully submits that the record does not support the Commission's apparent factual conclusion that no such retailers were restaurants. Furthermore, the undisputed facts reveal that not even the Director supports the Commission's position that producers who retail their products to the ultimate consumer are disqualified from claiming the production exemptions.

Brinker uses the equipment at issue to transform product inputs into products with a new use, value and identity, and because its purchases of such equipment were for the purpose of either replacing like equipment, establishing new facilities, or expanding existing facilities, its purchases of such equipment are exempt under section 144.030.2(4) and (5). Last, Brinker's claim to the production exemptions is entirely consistent with the purposes of the exemptions in that Brinker employs people at each of its Missouri facilities and, at each such facility, produces products having a much higher taxable value than the sum of the product inputs.

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING THE RESALE EXCLUSION PART OF THE SUBJECT REFUND CLAIM BECAUSE UNDER SECTION 621.193 THE DECISION IS NOT AUTHORIZED BY LAW AND CREATES A RESULT CLEARLY CONTRARY TO THE REASONABLE EXPECTATIONS OF THE GENERAL ASSEMBLY IN THAT: (1) THE COMMISSION MISINTERPRETED AND MISAPPLIED SECTIONS 144.011, 144.610 AND 144.605(7), (10) AND (13) BY CONCLUDING THAT PROPERTY THAT WAS PURCHASED FOR RESALE WAS NEVERTHELESS TAXABLE; AND (2) THE RESULT OF SUCH MISINTERPRETATION IS CONTRARY TO THE REASONABLE EXPECTATIONS OF THE GENERAL ASSEMBLY IN THAT THE MISINTERPRETATION RESULTS IN MULTIPLE TAXATION.

A. The Resale Exclusion and Its Purpose

Missouri's law governing use tax excludes all property purchased for resale, which includes the transfer of the right to use property if that transfer is for consideration. The purpose of the resale exclusion is to prevent multiple taxation of the same property.

Missouri's use tax is a complement to the sales tax. The sales tax law imposes its tax upon "sales at retail." Section 144.020 and 144.021. Unlike the sales tax law, the use tax law does not impose its tax upon "sales at retail." Rather, section 144.610 imposes the use tax on the storage, use or consumption of tangible personal property in Missouri.

Section 144.605 defines the terms of the use tax imposition statute, and those definitions are merely an extension of the tax imposition statute itself. Section 144.605(10) defines "storage;" that definition expressly excludes "property for sale[.]"

Section 144.605(13) defines "use;" that definition expressly excludes the "sale of property in the regular course of business[.]" While chapter 144 does not define "consumption," that term means "the utilization of economic goods in the satisfaction of wants or in the process of production resulting chiefly in their destruction, deterioration or transformation." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 249 (10th ed. 1997).[7] It is obvious that property that a taxpayer resells is not consumed by the taxpayer. Thus, the use tax law, through the definition of terms in the use tax imposition statute, does not impose a tax on tangible personal property that is held in Missouri for the purpose of resale.[8]

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[7] This Court gives undefined terms their plain meaning, which it determines from the dictionary. Section 1.090; *Lincoln Indus., Inc. v. Director of Revenue*, 51 S.W.3d 462, 465 (Mo. banc 2001).

[8] To erase all doubt that the General Assembly sought to spare property held for resale from the Missouri use tax, see section 144.615(6), which also exempts from the use tax all property held by retailers for resale. While the elements of the resale exclusion and resale exemption are the same, Brinker emphasizes the resale **exclusion** of the use tax law because that exclusion is part of the tax imposition statutes and, as such, is to be strictly construed against the Director and in favor of the taxpayer. *Moore Leasing, Inc. v. Director of Revenue*, 869 S.W.2d 760 (Mo. banc 1994).

The exclusion of purchases for resale in the use tax law is similar to the exclusion of sales for resale from the imposition of the sales tax in the sales tax law in its definition of "sale at retail," section 144.010.1(10). Both the sales and use tax exclusions from tax for resales are designed to "avoid multiple taxation of the same property as it passes through the chain of commerce[.]" *Sipco, Inc. v. Director of Revenue*, 875 S.W.2d 539, 541 (Mo. banc 1994). *See King v. National Supermarkets, Inc.*, 653 S.W.2d 220, 222 (Mo. banc 1983) ("Imposition of use tax on National's purchase of paper bags would amount to double taxation" because the cost of the bags was factored into the price of groceries upon which tax was paid).

The standard of statutory construction in this matter is clear:

> Taxing statutes, when ambiguous, are construed narrowly against the taxing authority, and in favor of the taxpayer. [citation omitted] Furthermore, the rule of strict construction against the taxing authority is "especially true of a tax upon a tax." [citation omitted]

Moore Leasing, Inc. v. Director of Revenue, 869 S.W.2d 760 (Mo. banc 1994).

Here, the Commission ignored the words of the use tax imposition statutes and this Court's precedent. The Commission's conclusion compels multiple taxation of the same property. First, the Commission's decision imposes tax upon Brinker's purchase of the Dining Property. Second, tax is imposed upon the bundled sale that includes the transfer of the right to use the same Dining property. There results the prohibited tax upon a tax.

The issue here is: Does Brinker qualify for the resale exclusion on its purchase of Dining Property such as silverware and glassware used temporarily and exclusively by

Brinker's customers when: (1) they purchase and consume food and beverage products at Brinker's restaurants; (2) they receive the Dining Property in consideration for their taxable purchases of the food and beverage products; and (3) the cost of that Dining Property is factored into the sales price of the food and beverage products?

Chapter 144 contains no definition of "resale." However, section 144.605(7) defines "sale," and this Court adopted that definition as the definition for "resale." In a multitude of cases, this Court has recognized the resale exclusion for a bundled sale where the cost of the resold property was included in the bundled sale. *See King*, 653 S.W.2d at 221 (paper bags resold by grocery store since cost of the bags included in the charge for groceries); *Sipco, supra*. at 875 S.W.2d 541 (dry ice resold by meat processor since the cost of the dry ice was factored into the charge for meat products); *Kansas City Royals Baseball Corp. v. Director of Revenue*, 32 S.W.3d 560, 562 (Mo. banc 2000) (promotional items resold at baseball game since the cost of the promotional items were included in the ticket price); *Aladdin's Castle, Inc. v. Director of Revenue*, 916 S.W.2d 196, 198 (Mo. banc. 1996) (arcade prizes resold since their cost was included in the price of tokens); and *Kansas City Power & Light Co. v. Director of Revenue*, 83 S.W.3d 548 (Mo. banc. 2002) (electricity provided in hotel rooms resold to guests since the cost of the electricity was factored into the room rental rate). *See also Weather Guard, Inc. v. Director of Revenue*, 746 S.W.2d 657 (Mo. App. 1988) (insulation blowing machines resold since their cost was included in the cost of insulation).

Each of the above cases followed the statutory definition of "sale" to require: (1) a transfer, barter or exchange; (2) of the title or ownership of tangible personal property **or**

the right to use, store, or consume the same; (3) for consideration paid. Here, there is no dispute that the Dining Property is tangible personal property and that Brinker transferred the right to use the Dining Property to its dine-in customers. The only question that remains is whether Brinker receives consideration in exchange for its transfer of the right to use the Dining Property.

Brinker does receive consideration in exchange for its transfer. This Court's decisions are clear. In *King*, this court clearly addressed the issue of consideration. There, evidence was presented that .35 percent of the cost of groceries reflected the cost of paper bags provided to customers. Because the cost of the bags was factored into the purchase price of the groceries, this Court concluded that "transfer of the bags from National to its customers is supported by consideration as required in section 144.605([7.])" *King*, 653 S.W.2d at 221. Later, in *Sipco*, this Court determined that the law required no exact calculation of the resold property's contribution to the sales price. *Sipco*, 875 S.W.2d at 542.

Here, the Commission acknowledged that Brinker required purchases of food and drink products as a condition for transferring the right to use the Dining Property (L.F. p. 372, ¶ 16). It also noted that Brinker factored the cost of the Dining Property into the price of such food and drink products (L.F. p. 372, ¶ 17). The Commission then added a new requirement: it concluded that Brinker did not resell the Dining Property because it did not require "additional consideration." Opinion at 22-3 (L.F. pp. 389-90). In effect, the Commission concluded that the consideration required for the temporary transfer of

the right to use property is different from the consideration required for property "permanently transferred."

The Commission creation is without support. Nothing in section 144.605(7) sets two different standards for determining consideration, one for property "permanently transferred" and another for property "temporarily transferred." As far as section 144.605(7) is concerned, consideration is consideration, and this Court's decisions, and other provisions of chapter 144, support that construction. In *Brambles Industries, Inc. v. Director of Revenue*, 981 S.W.2d 568 (Mo. banc 1998), this Court found that the resale exclusion under the sales tax law applied to the lease, or "temporary transfer," by Brambles to Proctor & Gamble (P&G) of pallets for its use in shipping its products to its customers.[9] P&G charged its customers the same price whether or not it used leased pallets to ship its products to them; thus there was no "additional consideration" for products shipped on leased pallets. This Court concluded that the definition of "gross receipts" in the sales tax law, section 144.010(3), compelled the same resale treatment for leased property as for property permanently transferred. While there is no similar definition of "gross receipts" under the use tax law, the commerce clause requires this court to construe section 144.605(7) so that the resale exclusion applies equally to property purchased from out-of-state as for the same property purchased in-state. *See*

[9] The Commission mistakenly listed the *Brambles* case as an example of a permanent transfer of property. Opinion at 22 (L.F. p. 389).

Associated Industries of Missouri v. Director of Revenue, 918 S.W.2d 780 (Mo. banc 1996).

In summary, there is no basis whatsoever for the Commission's conclusion that Brinker did not receive consideration for its transfer of the right to use the Dining Property given that it required a purchase of food and drink products and built the cost of the Dining Property into the price it charged for such products. Because Brinker meets all three elements for resale, it qualifies for the resale exclusion on the Dining Property.

B. Section 144.010.1(10) Does Not Alter the Result

Section 144.010.1(10) provides:

> 1. For purposes of sections 144.010 to 144.525 and 144.600 to 144.748, and the taxes imposed thereby, the definition of "retail sale" or "sale at retail" shall not be construed to include any of the following:
>
> ***
>
> (10) The purchase by persons operating eating or food service establishments, or items of a nonreusable nature which are furnished to the customers of such establishments with or in conjunction with the retail sales of their food or beverage. Such items shall include, but not be limited to, wrapping or packaging materials and nonreusable paper, wood, plastic and aluminum articles such as containers, trays, napkins, dishes, silverware, cups, bags, boxes, straws, sticks and toothpicks[.]

Section 144.011.1(10) is silent as to the tax treatment of reuseable property resold by restaurants. Despite that, the Commission used that section to conclude that all

reusable items provided to customers by restaurants are subject to Missouri use tax, regardless of whether they are held for resale. It did so without identifying even one provision of the Missouri use tax law that uses the term "retail sale" or "sale at retail." The Commission divined a legislative intent to tax all reusable items provided by restaurants to their customers, and it did so without identifying any language of the use tax imposition statutes (where property held for resale is excluded from tax) that is even ambiguous. The Commission's construction effectively sets a standard where restaurants that resell reusable property are denied the use tax resale exclusion (i.e. subject to use tax) while other similar vendors are granted the resale exclusion. The Commission's decision in this regard is erroneous as a matter of law.

As indicated above, the use tax imposition statute, section 144.610, imposes the use tax on the "storage," "use," or "consumption" of tangible personal property in Missouri. Neither in section 144.610, nor in the definitions of "storage," "use," or "consumption," does one find the terms "retail sale" or "sale at retail." This is in contrast to the sales tax imposition statute, section 144.020, which imposes the sales tax on "retail sales." Property held for resale is simply not subject to the use tax because it is not included under the definitions of "storage," "use," or "consumption." Thus, section 144.011.1(10), on its face, does not define or in any way alter the use tax imposition statute, a statute that is to be strictly construed in favor of the taxpayer, particularly where a liberal construction will lead to multiple or double taxation of the same property. *Moore Leasing, Inc., supra.*

While the use tax imposition statute clearly does not tax Brinker's purchase of the Dining Property because it is held for resale, the Commission nevertheless concluded that the resale was taxable. It concluded that section 144.011.1(10), because it was silent as to the treatment of reusable property by restaurants, imposed the tax:

> By its enactment of § 144.011.1(10), the legislature recognized that reusable items are not being "sold" to the customers, but that restaurants are providing them as a means of conveying the food to the customers and as a service for their customers' temporary use to enable them to consume the restaurant's products.

Opinion at 20, L.F. p. 387. That conclusion is logically and legally flawed.

Section 144.011 has the clear purpose of identifying transactions that are not taxable. It is not a tax imposition statute; nowhere in section 144.011 is any sales or use tax actually imposed. Yet the Commission has construed it to impose a tax. And nowhere does section 144.011.1(10) indicate, or even imply, that nonreusable property is excluded from tax **because the General Assembly determined that it was resold**. Yet, the Commission read that emphasized conclusion into the statute. Having read that conclusion into the statute, the Commission then posits that reusable property cannot be resold by restaurants. The Commission's construction is simply not supported by the words of the statute.

Moreover, this Court has already rejected the approach taken by the Commission in this case. Section 144.011.1(9) likewise excludes from the definition of "retail sale" or "sale at retail" the transfer of "reusable containers" for which a deposit is required and

refunded upon return. Upon passage of that provision, the Director argued that it impliedly restricted the resale exemption for bottles under the use tax law. This Court rejected the Director's position in *Smith Beverage Co. of Columbia v. Reiss*, 568 S.W.2d 61, 67-8 (Mo. banc 1978):

> Appellant contends enactment of § 144.011 manifests a legislative intent to restrict the use tax exemption of § 144.615(6) [the resale exemption]. This contention is not well taken *for several reasons*. Section 144.011, clear and unambiguous in its terms, specifically states it is applicable only to the Sales Tax Law, i.e., §§ 144.010 to 144.510, RSMo 1969, as amended. If the legislature had intended to extend the ambit of § 144.011 to the Use Tax Law, it could have expressly so provided. Additionally, when § 144.011 was enacted, the Revenue Department by Rule 93 had declared its interpretation of § 144.615(6) as exempting Stage I transactions described here for the reason such sales were considered "sales for resale." *Section 144.011 makes no reference to or restricts in any way … § 144.615(6) …. And nothing appears from which it may reasonably be inferred the legislature intended to … restrict § 144.615(6) as it had been formerly construed. To the contrary, it may be fairly inferred no change or restriction of the Use Tax exemption statute was intended for if it were otherwise the legislature could readily have expressed that intention in the statute.* (emphasis added)

The Commission quoted from the decision, Opinion at 21 (L.F. p. 388), but did not address the above-emphasized language. The Commission focused only on the fact that section 144.011's exclusions now expressly apply to "sections 144.600 to 144.748," the use tax law. *See* section 144.011.1. What *Smith Beverage* establishes is that had the legislature intended to restrict the resale exclusion or resale exemption in the use tax law, it would have expressly done so. It still has not done so. Sections 144.605, 144.610, and 144.615 are not even mentioned in section 144.011.

Furthermore, the Commission's attempted construction of section 144.011.1 would lead to absurd results on multiple levels. With respect to section 144.011.1(10), the Commission's construction would render taxable, merely because they are reusable property, a restaurant's purchases of reusable property like glasses, plastic cups or mugs (normally inscribed with the restaurant's name) that are permanently transferred by restaurants to customers as part of their taxable food and drink purchases. And with respect to section 144.011.1(9), the Commission's construction would deny the resale exclusion for purchases of reusable bottles by bottlers simply because no deposit was required on the ultimate sale of the bottles and their contents. Similarly, such a construction would deny the resale exclusion for the purchase of nonreusable containers like aluminum cans by "bottlers" simply because the containers are nonreusable. That would be an odd result for a statute obviously designed to exclude various sales from Missouri sales and use tax.

This Court should resist the Director's and Commission's invitation to embark down the slippery slope of reading a tax imposition intent into tax exemption or tax

exclusion statutes. This is particularly true where, as here, such a construction would lead to multiple taxation of the same property.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the Commission and remand with instructions to grant the subject refund claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that a true and correct copy of the foregoing, as well as a labeled disk containing the same, were served by first class mail, postage prepaid, or hand-delivered this ___ day of February, 2010, to:

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I hereby further certify that the foregoing brief complies with Rule 55.03 and with the limitations contained in Rule 84.06(b), in that it contains 9,897 words.

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