SC92853

IN THE SUPREME COURT OF MISSOURI

ST. CHARLES COUNTY, MISSOURI,

Appellant,

vs.

DIRECTOR OF REVENUE,

Respondent.

From the Administrative Hearing Commission
The Honorable Sreenivasa Rao Dandamudi, Commissioner

BRIEF OF RESPONDENT DIRECTOR OF REVENUE

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STATEMENT OF FACTS

St. Charles County, a charter county and political subdivision of the State of Missouri, is the sole owner and operator of the St. Charles County Family Arena ("Arena"). Joint Stipulation ("JS") 125[1/]. The Arena hosts numerous events throughout the year that range from events held in the Arena's parking lot to shows like "Disney on Ice." JS 175-185. The Arena staff reviews industry information to determine the artists and events to perform in the Arena. JS 618-619. The Arena staff then selects and prices artists and events in order to ensure the costs of the events are covered. JS 618-619.

When an event requires customers to purchase tickets, the Arena requires that it act as the ticket seller. Legal File ("LF") LF 336. The Arena sells tickets through their third party ticketing agent, Metrotix. LF 336. Tickets are sold at the Arena's box office, over the internet, over the phone,

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[1/] The parties stipulated to the admissibility of 17 exhibits, which were consecutively paginated as: Ex. 1 (pp. 7-11); Ex. 2 (pp. 12-13); Ex. 3 (pp. 14-15); Ex. 4 (pp. 16-47); Ex. 5 (pp. 48-118); Ex. 6 (pp. 119-125); Ex. 7 (pp. 126-140); Ex. 8 (pp. 141-142); Ex. 9 (pp. 143-171); Ex. 10 (pp. 172-329); Ex. 11 (pp. 330-338); Ex. 12 (pp. 339-614); Ex. 13 (pp. 615-633); Ex. 14 (pp. 634-739); Ex. 15 (pp. 740-903); Ex. 16 (pp. 904-923); and Ex. 17 (p. 924).

and at area locations. JS 655. The ticket price includes sales tax, and the words "Tax Included" are printed on the tickets. JS 741-744. Ticket prices also include a "facility fee." JS 620-621. A facility fee is a charge included in the ticket price which the Arena keeps and applies directly toward the upkeep of the facility. JS 620-621. The facility fee is approximately $2 to $3 a ticket. JS 620-621.

The Arena works with promoters to enter into contracts or agreements with performers, and to put on events at the Arena. JS 622-624. These agreements provide that the compensation for the performers or promoters (Licensees) "shall include all amounts due to Licensee form (sic) all ticket sales or box office receipts."[2/] JS 220, 315, 634-35. Three different types of agreements are used to secure performers and events for the Arena. JS 622-624. Those agreements are rental agreements, co-promotion agreements, and purchase agreements. JS 622-624.

A. Rental Agreements.

As an example of a rental agreement, the County produced an agreement between the Arena and an organization named "Circus to Save a Life" ("the Circus"). JS 649. The Circus agreed to pay the Arena a $24,000

[2/] Section § 143.183 requires an entertainer to pay to the State of Missouri a tax on the total compensation an entertainer receives for an event.

license fee. JS 649. The license fee was to include reimbursement for ticket takers, ushers, security, changeover and set-up crew, sound technicians, electricians, video/scoreboard operators, medical personnel, and ticket sellers in the box office for the night of the event. JS 651. Any additional workers were subject to any applicable union requirements and would be paid by the Circus the greater of the cost to the Arena or the prevailing rate of wages plus a 10% supervision fee. JS 651-652. Ticket prices for the event included "all fees and taxes." JS 650.

Concession and parking revenues for the event were retained by the Arena. JS 652. With regards to merchandise sales, the agreement provided that the sales would be split 60% to the event promoter and 40% to the Arena, though the parties separately agreed that 100% of merchandise sales went to the Circus. JS 649, 652. The Circus was required to "advertise, publicize and promote the Event in a manner customary for such an event" and was solely responsible for all advertising costs. JS 653.

The Arena considered all receipts from the ticket sales to be the property of the Arena until the preliminary box office settlement. JS 667. The Arena retained the right to apply any and all amounts received against amounts the Circus owed to the Arena. JS 667. After all the expenses had been paid, any net profits were to be paid to the Circus. LF 338.

B. Co-Promotion Agreements.

As an example of a co-promotion agreement, the County provided a copy of the agreement with AEG Live Productions, LLC ("AEG"). JS 635, 674. This co-promotion agreement was for Kelly Clarkson to perform at the Arena. JS 635. In the agreement, the Arena and AEG agreed to a base fee paid to the Arena of $10,000. JS 674. AEG agreed to pay the Arena this fee plus "all other sums to be paid pursuant to subsequent provisions of this Agreement including without limitation personnel, services, equipment and materials expenses." JS 675. These expenses paid by AEG also included ticket takers, ushers, security, changeover and set-up crew, sound technician, electrician, video/scoreboard operator, medical personnel, and ticket sellers at the box office. JS 676. The Arena received the concessions and parking revenue. JS 677.

As for merchandise revenue, 75% of merchandise revenue went to AEG and 25% went to the Arena. JS 674. Merchandise revenue was defined by the agreement as: "[g]ross revenue derived from the sale of programs, novelties, and souvenirs relating to the Event or the personalities appearing therein sold at the Family Arena during the Event, less taxes and credit card fees. JS 677. AEG also agreed to "advertise, publicize and promote the event in a manner customary for such an event." JS 678.

As in rental agreements, in co-promotion agreements the Arena acted as the ticket seller through its ticketing agent. JS 680. The price of each ticket included a facility fee of $3.00. JS 680. AEG was required to pay all reasonable expenses incurred with ticket admission sales to the event. JS 681. AEG was required to have commercial general liability insurance for the mutual benefit of AEG and the Arena. JS 681. The parties agreed that under § 143.183, the Missouri Compensation Tax owed by Kelly Clarkson was "an amount equal to two percent (2%) of the total compensation paid to Event Promoter." JS 683.

AEG and the Arena agreed that they were working as independent contractors and the agreement did "not create a partnership, joint venture, agency or employment relationship" between them. JS 695. After all the expenses had been paid and the Arena received its costs, any net profits were to be paid to AEG, the third-party promoter. LF 339.

C. Purchase Agreements.

As an example of purchase agreements, the County provided a copy of the agreement between the Arena and William Morris Endeavor. JS 635. This agreement brought Kenny Rogers to the Arena. JS 701-708. Kenny Rogers was to be compensated a guaranteed $57,000 as opposed to a percentage of the box office receipts. JS 701.

Under the purchase agreement with the promoter, the Arena had the responsibility to sell tickets to the performance. JS 705. The Arena was also required to purchase advertising spots from parties associated with the promoter. JS 702. The agreement further required that earned percentage overages and/or bonuses were paid to the promoter immediately following the engagement. JS 703. Earned percentage overages were amounts remaining after all expenses had been paid, including Kenny Rogers' compensation. JS 703. With regards to the merchandise sold, 90% of merchandise revenues for CD's and DVD's, and 80% of other merchandise revenues were paid to Kenny Rogers. JS 704.

D. Other Agreements.

In addition to the examples of three different types of agreements common for the Arena, the County produced still other agreements. For example, the County entered into an Agreement with White Stallion Productions, Inc., ("White Stallion") which promotes the Lipizzaner Stallions. JS 236. White Stallion and the Arena agreed that White Stallion would receive 60% of the gross receipts and the Arena would receive 40% of the gross receipts. JS 252. White Stallion also received all the merchandise revenue in exchange for a flat fee of $1,000 paid to the Arena. JS 253. The agreement with White Stallion required that the Arena manage the ticket sales for the event through the Arena's ticketing agent. JS 243. The Arena

also ensured that White Stallion received its percentage of gross receipts before other expenses were paid. JS 253.

Lindenwood University rented the Arena for $8,240 for its graduation events. JS 255. Though the Arena received payment, no sales tax was charged on this event because Lindenwood University was not subject to sales tax. Tickets were not sold to this event. JS 620.

The Missouri Valley Conference ("Missouri Valley") contracted with the Arena to host its women's basketball tournament. JS 281-305. Missouri Valley paid the Arena a license fee of $4,500 a day, for a grand total of $18,000. JS 282, 283. The license fee included the expenses for ticket takers, ushers, security, changeover and set-up crews, sound technician, electrician, video/scoreboard operator, medical personnel, and ticket sellers and box office service during the event. JS 284.

Missouri Valley and the Arena agreed that Missouri Valley would receive 80% of the merchandise revenue and the Arena would receive the remaining 20%. JS 282, 285. Merchandise revenue, as in the other agreement forms, was defined as "gross revenue derived from the sale of programs, novelties, and souvenirs relating to the Event or the personalities appearing therein sold at the Family Arena during the Event, less taxes and credit card fees." JS 285.

Missouri Valley was required to advertise the event in a manner customary for the event. JS 286. The agreement required the Arena to sell tickets to the event through its ticketing agent. JS 288. And the Arena had the right to apply any admission receipts against any expenses Missouri Valley was required to pay before any proceeds could be paid to Missouri Valley. JS 300. The parties agreed, as noted in the other agreements, that they were independent contractors and that the agreement did not create a partnership, joint venture, or employment relationship. JS 303. After all the expenses had been paid and the Arena received its costs, any net profits were to be paid to Missouri Valley. JS 300.

For all agreements, after an event was concluded, the Arena and the event promoter settled the expenses and receipts. JS 622. The Arena provided preliminary and final settlement statements showing the amount of ticket sales and itemizing the expenses owed for the event production. JS 622. The settlement statements resembled financial income statements. JS 746, 748, 750, 752, 754, 756, 924. The total revenue earned by the event was itemized and specific categories were subtracted to determine the net revenue. *Id.* Those included the facility fee, parking fees, sales tax, and ticket fees if applicable. *Id.* Once the net revenue was determined, the direct and indirect expenses were itemized. *Id.* These included, but were not limited to,

the Arena rental fee, license fee, cleanup fee, crowd management, union labor for stagehands, telephones, police, towels, catering, etc. *Id.*

The Circus event revenue totaled $107,531.00. JS 746. After subtracting the facility fee, sales tax, consignment revenue, comp. ticket fees, and credit card fees, the total net revenue was $56,363.64. *Id.* The Kelly Clarkson concert had total revenue of $63,973.00. JS 748. Net revenue was $55,077.28 after subtracting facility fees, parking fees and sales tax. *Id.* Missouri Valley Conference Women's Basketball had total revenue of $12,935.00 with net revenue of $9,391.56. JS 750. The Lipizzaner Stallions' event revenue totaled $71,543.50. JS 754. Net revenue was $59,972.79. *Id.* The Kenny Rogers show totaled revenue of $110,785.00 with net revenue of $89,554.98. JS 924.

Having collected taxes for several years on all fees, charges, and sales for events (with the exception of Lindenwood University), the County sought a refund under § 144.030.2(17)[3/], in the amount of $922,856.68, plus interest. LF 342. The Director denied the claims and the Administrative Hearing Commission agreed, holding that the County "does not receive all the proceeds derived from the Arena as is required to qualify for the exemption."

[3/] All statutory references to § 144.030 are to RSMo Supp. 2011. All other statutory references are to RSMo Supp. 2012.

LF 353. The Commission further held that "the sales of merchandise, food, and beverages would not be exempt under § 144.030.2(17) because they are not items of the type exempted." LF 355.

SUMMARY OF THE ARGUMENT

Did the General Assembly intend that a for-profit concert, featuring paid performances by Kenny Rogers or Kelly Clarkson, be entirely tax free if held at a municipality-owned arena – to avoid paying taxes on fees for admission as well as sales of food and merchandise? No, of course not. Yet, that is exactly what St. Charles County is attempting to accomplish in this case with its refund claims of more than a million dollars. The Administrative Hearing Commission rejected the claims and should be affirmed.

In § 144.030.2(17), the General Assembly provided an exemption for places of "amusement, entertainment or recreation, games or athletic events" if they are "owned or operated by a municipality or other political subdivision." *Id.* This exemption, however, carries two very significant limitations: "all the proceeds" from "[a]ll amounts paid or charged for admission or participation or other fees paid by or other charges to individuals" must "benefit the municipality" and cannot "inure to any private person, firm, or corporation." *Id.*

On top of the limitations in the language of the exemption itself, the law requires that any exemption from taxes be narrowly construed, and the party seeking the exemption must show "that it fits the statutory language exactly." *Cook Tractor Co. vs. Dir. of Revenue*, 187 S.W.3d 870, 872 (Mo. banc

2006). The plain language of the statute here, as well as the statutory structure and surrounding provisions, supports a very narrow exemption.

The dictionary, for example, defines "proceeds" as "total revenue." In addition, the General Assembly twice used the term "all," requiring that in order for the exemption to apply "all the proceeds" for "all amounts" must benefit the municipality and not "inure to any private person, firm, or corporation." § 144.030.2(17). Although it may seem simplistic or merely a truism, it is an unavoidable conclusion that "all" really should mean "all," especially if the legislature includes it twice in the same provision.

Combining the terms "all the proceeds," and applying them to "all amounts" certainly does not suggest "net proceeds," as the County argues. The General Assembly has no problem using the terms "net proceeds," and it did not do so here. Moreover, an interpretation that would render these terms as "net proceeds" would effectively eliminate the limitations in § 144.030.2(17). A municipality would merely need to treat everything as costs or expenses (even payments or profits to third parties) to render all transactions at a municipality's place of amusement tax free. This is not what the General Assembly intended, especially considering the examples provided in the statute – museums, fairs, zoos and planetariums.

Additionally, the sales of concessions, food, and merchandise should not be tax free since they are not "fees" or "charges," and at least some of the

proceeds benefit or inure to the benefit of third parties. Finally, even if a refund were appropriate, it is the individual taxpayers that should benefit, not the County. Accordingly, this Court should affirm the Commission and hold that the exemption in § 144.030.2(17) does not apply in this case.

ARGUMENT

Standard of Review

A decision of the Administrative Hearing Commission must be affirmed if: "(1) it is authorized by law; (2) it is supported by competent and substantial evidence on the whole record; (3) mandatory procedural safeguards are not violated; and (4) it is not clearly contrary to the reasonable expectations of the General Assembly." *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 435-36 (Mo. banc 2010); § 621.193.

When the Commission has interpreted the law or the application of facts to law, the review is *de novo. State Bd. of Registration for the Healing Arts v. McDonagh,* 123 S.W.3d 146, 152 (Mo. banc 2003); *Zip Mail Servs., Inc. v. Dir. of Revenue,* 16 S.W.3d 588, 590 (Mo. banc 2000). In addition, the Commission's factual determinations "are upheld if supported by 'substantial evidence upon the whole record.' " *Concord Publ'g House, Inc. v. Dir. of Revenue,* 916 S.W.2d 186, 189 (Mo. banc 1996) (quoting *L & R Egg Co. v. Dir. of Revenue,* 796 S.W.2d 624, 625 (Mo. banc 1990)). Finally, this Court can affirm on any basis supported by the record. *See Missouri Bd. of Nursing Home Administrators v. Stephens*, 106 S.W.3d 524, 528 (Mo. App. W.D. 2003). Here, the Commission's decision is supported by the record and the law, and should, therefore, be affirmed.

Statutory Framework

Missouri law imposes sales and use taxes "upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail." § 144.020.1. This includes counties and political subdivisions of the state. § 144.010.1(7). The amount subject to tax is based on the "gross receipts," with the tax collected by the seller. § 144.021. There are different types of business activities subject to sales and use taxes, including "[a] tax equivalent to four percent of the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events." § 144.020.1(2). Thus, gross receipts for admission, seating accommodations, or fees paid to, or in any place of amusement are subject to a four percent sales tax.

In addition to providing a sales tax on different business activities, Missouri law also exempts specific business activities from sales and use taxes. Most of the exemptions are provided for in § 144.030. Included among the exemptions is the following:

> All amounts paid or charged for admission or participation or other fees paid by or other charges to individuals in or for any place of amusement, entertainment or recreation, games or athletic events, including museums, fairs, zoos and

> planetariums, owned or operated by a municipality or other political subdivision where all the proceeds derived therefrom benefit the municipality or other political subdivision and do not inure to any private person, firm, or corporation;

§ 144.030.2(17). A more specific exemption is also provided for admission to collegiate athletic championship events:

> Sales of tickets to any collegiate athletic championship event that is held in a facility owned or operated by a governmental authority or commission, a quasi-governmental agency, a state university or college or by the state or any political subdivision thereof, including a municipality, and that is played on a neutral site and may reasonably be played at a site located outside the state of Missouri. For purposes of this subdivision, "neutral site" means any site that is not located on the campus of a conference member institution participating in the event;

§ 144.030.2(38). The County makes no claim under this exemption.

In this case, the County claims that all charges, fees, and sales at its Arena are exempt under § 144.030.2(17). But they are not, just as the Commission held.

I. The Commission Correctly Held That the Exemption in § 144.030.2(17) Does Not Apply in This Case Because "All the Proceeds" Must "Benefit the Municipality" and Cannot "Inure to Any Private Person, Firm, or Corporation" – Responding to Appellant's Point I.

The statutory provision at issue in this case – § 144.030.2(17) – is not just any revenue law; instead, it is a sales and use tax exemption subject to strict construction:

> Tax exemptions are strictly construed against the taxpayer. An exemption is allowed only upon clear and unequivocal proof, and doubts are resolved against the party claiming it. Exemptions are interpreted to give effect to the General Assembly's intent, using the plain and ordinary meaning of the words.

Branson Properties USA, L.P. v. Dir. of Revenue, 110 S.W.3d 824, 825 (Mo. banc 2003); *Dir. of Revenue v. Armco, Inc.,* 787 S.W.2d 722, 724 (Mo. banc 1990). In other words, "it is the burden of the taxpayer claiming the

exemption to show that it fits the statutory language exactly." *Cook Tractor Co. v. Dir. of Revenue*, 187 S.W.3d 870, 872 (Mo. banc 2006); *see* § 621.050.2. The County cannot satisfy the burden to show that it fits the statutory language at all, much less exactly.

A. The Plain Language of the Statute Supports a Very Narrow Exemption.

The "primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010) (citing *State ex rel. White Family P'ship v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008)). To this end, courts consider the words used in their plain and ordinary meaning. *Metro Auto Auction v. Dir. of Revenue,* 707 S.W.2d 397, 401 (Mo. banc 1986).

Where a statute's language is clear and unambiguous, there is no room for construction. *Id.* In determining whether the language is clear and unambiguous, the standard is whether the statute's terms are "plain and clear to a person of ordinary intelligence." *Alheim v. F.W. Mullendore,* 714 S.W.2d 173, 176 (Mo. App. W.D. 1986). "In the absence of statutory definitions, the plain and ordinary meaning of a term may be derived from a dictionary . . . and by considering the context of the entire statute in which it appears." *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. banc 2007) (citing *Am. Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496,

498 (Mo. banc 1999), and *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. banc 1995)). In this case, the plain language is clear based on the plain and ordinary meaning of the terms and the context of the entire statute.

In order to satisfy the exemption in § 144.030.2(17), St. Charles County must establish not only that (1) "all the proceeds derived" from "[a]ll amounts paid or charged for admission or participation or other fees paid by or other charges to individuals" "benefit the municipality," but also that the proceeds (2) "do not inure to any private person, firm, or corporation." This double limitation, particularly when narrowly construed, produces a very narrow exemption.

B. The Terms "All the Proceeds" Cannot Mean Net Proceeds, But Must Mean Gross Receipts.

The statutes and the regulations are silent as to the definition of the terms "all the proceeds," which requires the Court to look to the phrase's ordinary meaning in order to determine the legislative intent with regards to the exemption. *Wolff Shoe Co. v. Dir. of Revenue,* 762 S.W.2d 29, 31 (Mo. banc 1988). While studiously avoiding the use of the terms "net proceeds," the County argues that "all the proceeds" means revenues after paying all expenses, including "compensation due to the organization or event promoter." Appellant's Brief, pp. 7, 16-19. The County even acknowledges that performers and event promoters "will not come unless there is some

return to them." Appellant's Brief, p. 25 (emphasis added). In other words, the County argues that "all the proceeds" is really "net proceeds" or "net profits."

The dictionary defines "all" in relevant part as:

> **all** . . . **1 :** the whole number, quantity, or amount **:** TOTALITY – often used with a following relative clause <~ that I have> and with *of* and a pronoun and in recent usage with *of* and a noun <~ of us> <~ of the books> . . . .

Webster's Third New International Dictionary 54 (1993) (emphasis in original). The dictionary further defines "proceeds" as:

> **proceeds** . . . **1 a :** what is produced by or derived from something (as a sale, investment, levy business) by way of total revenue **:** the total amount brought in **:** YIELD, RETURNS <the ~ from the sale of the paintings were considerable> <estimated that the ~ from such taxes would be enormous> **b :** the net profit made on something <took the ~ from the sale of his business and invested in stocks> **2 :** the net sum received (as for a check, a negotiable note, an

> insurance policy) after deduction of any discount or charges.

Webster's Third New International Dictionary 1807 (1993). The first, and most apt definition of "proceeds" is "total revenue," or in this context, "gross receipts." The County, however, argues that because one of the subsequent definitions of "proceeds" includes a possible meaning of net profit that thereby the terms "all the proceeds" must mean net proceeds. This argument ignores the fact that this is an exemption, as well as the statutory context.

As an exemption, the language of the statute is to be strictly or narrowly construed. As such, the definition that produces a narrow construction of the exemption should apply. In addition, the fact that the General Assembly used the term "all" to qualify the term "proceeds" suggests the intent of the legislature was to adopt the "total revenue" version of the definition. Accordingly, the ordinary meaning of the terms "all the proceeds" should be "the whole number, quantity, or amount" of "total revenue," and not "net proceeds."

The General Assembly certainly knows how to use the terms "net proceeds." *See, e.g.,* §§ 148.065 (referring to "net proceeds"); 148.660 (same); 151.250 (same); 164.201 (same). Yet, it did not use "net proceeds" in § 144.030; not even once. The General Assembly also did not use just the term "proceeds." Instead, it used the terms "all the proceeds" to apply to "[a]ll

amounts paid or charged." § 144.030.2(17). Thus, twice the General Assembly used the term "all" to describe the amounts or proceeds at issue. Moreover, the Missouri Code of State Regulations 12 CSR 10-110.955(2)(G), defines the term "net proceeds" as "the proceeds remaining from direct sales after deducting direct costs." Thus, the regulation takes into account that there is a distinct difference between "all the proceeds" and "net proceeds." There is simply no reference to expenses or costs anywhere in the provision, much less partial or net amounts or proceeds.

It is fundamental that "[c]ourts cannot add words to a statute under the auspice of statutory construction." *Sw. Bell Yellow Pages, Inc. v. Dir. of Revenue,* 94 S.W.3d 388, 390 (Mo. banc 2002) *quoted in State v. Vaughn*, 366 S.W.3d 513, 518 (Mo. banc 2012). By arguing that the terms "all the proceeds" for "all amounts paid or charged" constitutes net proceeds, the County is doing more than simply ignoring the plain language of the statute; the County is actually adding words to the statute, which is expressly forbidden.

Furthermore, inserting net proceeds into the statute as the County suggests would produce an absurd result, which courts assiduously avoid. *See Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund*, 138 S.W.3d 714, 716 (Mo. banc 2004) ("[W]e will not construe the statute so as to work unreasonable, oppressive, or absurd results."). For example, if the

County's interpretation applied then anything could be treated as a cost or expense and every transaction would be tax free. A municipality would merely need to adjust their contracts to treat all money that does not go to the municipality as a cost or expense and thereby render any activity, charge, or fee in a place of amusement as tax free, effectively rendering the clear limitations in § 144.030.2(17) completely meaningless. That is exactly what the County purports to do in this case – treating the payments to performers such as Kenny Rogers as costs benefiting the municipality and not proceeds that inure to any private person, firm, or corporation.[4/] And if the result was

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[4/] Interestingly, although the County believes that the proceeds from ticket, concession and merchandise sales are exempt from sales tax, the County believes that the City of St. Charles should receive their local sales tax on those sales. In an article discussing this issue, the County stated that it would continue to receive their local sales taxes on the sales. The article stated:

> While the state stands to lose tax money if the arena's exemption is allowed, another major beneficiary of sales tax at the facility – the city of St. Charles – will not.

dependent on whether an actual profit was made, then the parties would not even know whether the fees or charges were subject to tax until after the event was concluded and a determination was made as to whether there were profits – an intolerable situation for the collection of taxes.

In contrast, a narrow construction of the exemption in § 144.030.2(17), would render the terms "all the proceeds" to be equivalent with "gross receipts." This makes sense given that Missouri bases its sales tax on the seller's gross receipts. § 144.021. In fact, Missouri law specifically taxes gross receipts (without saying the words gross receipts) for "the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment, or recreation, games, and athletic events." § 144.020.1(2). If Missouri law taxes gross receipts for places of amusement, entertainment, or recreation, games, and athletic events, why would it not also use the same gross receipts as the basis for the exemption? Furthermore, "gross receipts" fits perfectly within the terms "all the proceeds" as "gross receipts" is defined as:

Mark Schlinkmann, *St. Charles County, State Spar Over Sales Tax at Arena,* http://www.stltoday.com/news/local/stcharles/article_84d5515e-5415-56ec-a0fa-36a905a80619.html?mode=story (last visited April 16, 2013).

> [T]he total amount of the sale price of the sales at retail including any services other than charges incident to the extension of credit that are a part of such sales made by the businesses herein referred to, capable of being valued in money, whether received in money or otherwise . . . .

§ 144.010.1(3).

This Court has also used the terms "proceeds" and "gross receipts" interchangeably. In *Bolivar Road News, Inc. v. Dir. of Revenue,* 13 S.W.3d 297 (Mo. banc 2000), for example, Bolivar was an adult book store that included coin-operated video booths in the back of the store. Customers could preview videos Bolivar sold by entering a booth and inserting tokens in the coin box to engage the video on the screen. *Id.* at 299-300. Bolivar's bookkeeping noted the video booth receipts as "Arcade Receipts." *Id.* "The arcade receipts amounted to forty-six percent of Bolivar's total gross sales for the thirty-six month audit period." *Id.* "Bolivar's bookkeeping records denominated proceeds from the video booths as 'Arcade Receipts.'" *Id.* at 302. This Court used the words "proceeds" and "gross sales" and "receipts" interchangeably throughout the entire opinion.

The Commission adopted neither "gross receipts" nor "net proceeds" as the analog for the statutory terms "all the proceeds." Instead, the

Commission held that "all the proceeds" must mean essentially gross receipts minus the amounts used to "pay an independent contractor an amount equivalent to the fair market value of services rendered." LF 350-351. While this interpretation has some appeal because it expands the exemption, there does not appear to be any statutory or caselaw support for the interpretation.

Moreover, the Commission's approach is a slippery slope as an independent contractor is still a "private person, firm, or corporation" for which none of the proceeds can inure to the benefit. An employee of the County, however, would not be a private person, firm, or corporation. Thus, the exemption would certainly apply if proceeds were used to pay employees of the County – a benefit to the municipality that does not inure to any private person, firm, or corporation.

This appears to be what is contemplated by the exemption based on the examples given in § 144.030.2(17) – "museums, fairs, zoos and planetariums" – all of which can be staffed and managed by employees of the County and paid from "all the proceeds derived" from "amounts paid or charged for admission or participation or other fees paid by or other charges." *Id.* Indeed, museums, fairs, zoos and planetariums are fixed and relatively stable for purposes of providing employment while arenas are more susceptible to fluctuations and the need for contractors or private parties. There is quite a

difference between a zoo that is open daily and an arena that holds special events like the Kelly Clarkson concert.

C. The Statutory Structure and Surrounding Provisions Support a Narrow Exemption.

Not only does the plain language of the statute support the Director's interpretation, but so do the statutory structure and surrounding provisions. The most compelling example of this is an additional, and more specific, exemption in § 144.030.2(38). In subdivision (38), the General Assembly provided an additional exemption for:

> Sales of tickets to any collegiate athletic championship event that is held in a facility owned or operated by a governmental authority . . . including a municipality . . . .

§ 144.030.2(38).

Like the exemption in § 144.030.2(17), this exemption covers admission at a place of amusement or athletic event. Yet, in this exemption the General Assembly provides no limitation regarding the proceeds benefiting the municipality or not inuring to any private person, firm or corporation. Thus, if the provisions of § 144.030.2(17) really did mean net proceeds as the County argues, then why would the legislature include the exemption in § 144.030.2(38) since a collegiate athletic event would already be exempt

under § 144.030.2(17)? The provision would be superfluous, an interpretation that the law does not favor. *See Hyde Park Hous. P'ship v. Dir. of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993).

Furthermore, the entire sales and use tax structure is set up on the foundation of gross receipts. In § 144.021, the General Assembly provided that a seller is required "to report to the director of revenue their 'gross receipts' . . . and remit tax at four percent on their gross receipts." Because gross receipts is the foundation for the sales and use tax structure, the tax rates listed in § 144.020 do not even reference gross receipts while describing the gross receipts subject to tax: "the purchase price paid or charged"; "the consideration paid or charged"; "the amount paid"; "the basic rate paid or charged"; "the amount of sales or charges"; and "the amount paid or charged." Each of these different expressions in the very same provision of the statute – § 144.020 – all apply to gross receipts. Thus, it is consistent with the statutory structure and surrounding provisions that the term "all the proceeds" from "all amounts paid or charged" contemplates gross receipts.

II. The Commission Correctly Held That the Sale of Food and Merchandise is Not Exempt Under § 144.030.2(17) as "Fees" or "Charges" – Responding to Appellant's Point II.

In addition to "amounts paid or charged for admission or participation," the exemption in § 144.030.2(17) also applies to "other fees paid by or other

charges to individuals in or for any place of amusement." The County takes an expansive view of these terms and argues that "[m]erchandise and concessions sales are 'fees' or 'other charges' contemplated by the statutory scheme." Appellant's Brief, p. 29 (emphasis added). Not so. Neither the plain language nor the statutory structure, much less the narrow construction that must be afforded the terms, supports such an argument.

A. The Plain Language and Context of the Statute Do Not Support the Sale of Food or Merchandise as "Fees" or "Charges."

Once again, the statute does not describe or define "fees" or "charges," requiring the Court to turn to the dictionary and the context of the entire statute to determine the plain and ordinary meaning of the terms. *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. banc 2007).

The term "fee" is defined in relevant part as:

> **fee** . . . **3 a :** a fixed charge for admission (as to a museum) **b :** a charge fixed by law or by an institution (as a university) for certain privileges or services <a license ~> <a toll road ~> <a college-admission ~> <research ~s> <laboratory ~s> <tuition ~s> **4 a :** a charge fixed by law for the services of a public officer <a sheriff's ~> **b :** compensation often

> in the form of a fixed charge for professional service or for special and requested exercise of talent or of skill (as by an artist) <a doctor's ~> <a lawyer's retainer ~> . . . .

Webster's Third New International Dictionary 833 (1993). None of the definitions of fee suggest the sale of food or merchandise. The term simply does not have that connotation.

The relevant definition of "charges" is similar:

> **charge** . . . **5 a :** expenditure or incurred expense <living at the ~ of his brother>: as (1) **:** payment of costs **:** money paid out (2) **:** a pecuniary liability (as rents or taxes) against property, a person, or an organization <~s upon the estate> <smoking has become . . . a fixed ~ on the expenditures of every family – Morris Fishbein> - often used in pl. **b :** the price demanded for a thing or service <a 10-cent admission ~> - often used in pl. <reverse the ~s for a telephone call> **c :** a debit to an account <a ~ to expense account> : an entry in an account of what is due from one party to another <a ~ to a customer's

account> **:** something that is debited <the purchase was a ~> . . . .

Webster's Third New International Dictionary 377 (1993). Once again, the most apt definitions do not involve the sale of food or merchandise. And the statutory context confirms this very same conclusion.

Throughout the statute, the General Assembly uses language appropriate to the circumstances contemplated. Thus, when referring to admission or participation in a place of amusement the General Assembly uses "fees" or "charges." *See* § 144.030.2(17); § 144.030.2(21) (exempting "admission charges and entry fees to the Missouri state fair or any fair conducted by a county") (emphasis added). Even the County in its brief cannot help but call these "sales for concessions" or "sales of food," and not charges or fees. Appellant's Brief, p. 9. In contrast, when referring to products, materials, manufactured goods, and the like, the General Assembly uses terms such as "sales," "sold," and "purchased." *See, e.g.,* § 144.030.2(1)-(5) . Thus, in this context, the terms "fees" and "charges" do not refer to the sale of food or merchandise.

The County disputes this argument, and the Commission's consistent conclusion, on the basis of previous Commission decisions (which were

rejected by the Commission in this case)[5/] and this Court's decision three decades ago in *City of Springfield v. Dir. of Revenue*, 659 S.W.2d 782 (Mo. banc 1983). The County claims that this "Court stated it was 'completely obvious' that recreation sales (including concessions) are within the purview of Section 144.020.1(2)." Appellant's Brief, p. 31. This is not at all what the Court stated in *City of Springfield*. The Court actually stated that "it is completely obvious that the tax is properly ordained by the application of §§ 144.010.1(2), (5), (8)(a) and (9)." *City of Springfield*, 659 S.W.2d at 784. It

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[5/] The Commission acknowledged that its decision in this case departs from its analysis of this exemption in cases more than 20 years ago, but notes that it is not obligated to follow the reasoning of these prior decisions. *See* LF 353, Decision, p. 21 n. 30 (citing *Luther (Buddy) Godwin d/b/a Buddy's Golf Shop v. Dir. of Revenue*, 1991 WL 128051, Case No. 90-000864 RS (Apr. 10, 1991); *Zoological Park Subdistrict of the Metropolitan Zoological Park Museum Dist. v. Dir. of Revenue*, 1991 WL 154843, Case No. 90-000490 RS (June 10, 1991); *City of Jefferson Dep't of Parks and Recreation v. Dir. of Revenue*, 1992 WL 390471, Case No. 92-000424 RV (Dec. 23, 1992). And the Commission was right to do so, as a private party benefited from fees in *Godwin*, and the Commission expansively misread the exemption in *Zoological Park* and *City of Jefferson*.

was further "stipulated that no tax was assessed on matters exempted by § 144.030.2(17)." *Id.* at 783-84. And the end result, of course, was that the Court found that sales tax was appropriate on concessions, which only makes sense since such sales would have qualified as "sales at retail" of "tangible personal property." § 144.020.1(1).

B. If the Sale of Food and Merchandise Constitutes "Fees" or "Charges," Then Those Fees and Charges are Part of "All the Proceeds" and Also Not Exempt.

Alternatively, if the sale of merchandise and food constitutes "fees" or "charges," then the proceeds would constitute part of "all the proceeds" subject to the requirement that all the proceeds must benefit the municipality and not inure to any private person, firm, or corporation. And because all the proceeds do not benefit the County in this case, but inure, in part, to private persons, firms, or corporations, then the exemption would still not apply.

The language of the exemption provides that "[a]ll amounts paid or charged for admission or participation or other fees paid by or other charges to individuals . . . where all the proceeds derived therefrom benefit the municipality . . . and do not inure to any private person, firm, or corporation." The phrase "derived therefrom" is in reference to the first line of the exemption and would include "other fees paid by or other charges to." Thus, if

sales of food and merchandise are truly to be considered "fees" or "charges" then they must also be included in "all the proceeds."

When assessing all the proceeds, there is a temptation to try to divide up the various fees and charges and consider them separately for purposes of the exemption. This is exactly what the County attempts to do, but is unsupported by the statute. Such an interpretation would ignore the terms "all the proceeds derived therefore." The statutory language does not exclude any of the fees or charges for purposes of determining the tax exemption, nor does the statute indicated that charges or fees should be considered separately for purposes of the tax exemption (*i.e.* consider merchandise sales separately from admission charges). To do otherwise, would invite all manner of mischief. A place of amusement could splice and dice their charges, fees, and purchases as separate proceeds so that they are not swept up as part of "all the proceeds derived therefrom" and thereby undermine the exemption.

The Commission applied the statutory language as required and correctly held that the County's sales of food and merchandise at the Arena were not exempt from taxes.

III. The County May Not Benefit From Sales Tax Refunded Because the Sales Tax is Unclaimed Property.

Finally, even if the County were correct that all amounts paid or charged were tax exempt in this case, the claimed remedy is flawed. The

County is requesting a refund of all the sales tax it collected from the patrons of the Arena. However, this is not the proper remedy in this case. The money the County is seeking belongs to unnamed customers of the Arena who paid the tax over the years in question. *See Norwin G. Heimos Greenhouse, Inc. v. Dir. of Revenue*, 724 S.W.2d 505, 507 (Mo. banc 1987) ("[a]lthough the legal burden of the sales tax is not on the purchaser, the economic burden is"). This is the case even when the entity collecting the sales tax is a political subdivision. *See, e.g., City of Springfield v. Dir. of Revenue*, 659 S.W.2d 782 (Mo. banc 1983). The economic benefit of any refund should likewise accrue to the patrons of the Arena who are the true taxpayers here. *See* § 144.190.

The remedy in this case, if any, should be to treat the refund as unclaimed property in accordance with §§ 447.500 *et seq.*, known as the Uniform Disposition of Unclaimed Property Act. This method of treating refund claims has been suggested before by the Missouri Supreme Court, and is especially appropriate in this case. *See Buchholz Mortuaries Inc. v. Dir. of Revenue*, 113 S.W.3d 192, 196 (Mo. banc 2003); *State ex rel Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 495 (Mo. banc 2003).

Section 447.535, provides that all intangible personal property, including money, that is held or owing for a period of more than seven years, unclaimed by the owner, is presumed abandoned and due to be turned over to the State as unclaimed property. The owner of the property is defined in

§ 447.503(8) as a person with a legal or equitable interest in the property. There should be no dispute that the patrons of the Arena have a legal or equitable interest in the refund money, since they paid the tax initially and could claim the money from the Arena if it is refunded. *See* § 144.190. Thus, after the statutory period of seven years, the unclaimed refund money should be remitted to the State in accordance with the law.

The property the County seeks belongs to the patrons of the Arena during the periods in question, not the county government who merely collected the funds. The County cannot convert these funds for its own use without depriving the rightful owners of the property. Thus, the County's proposed remedy of a refund of moneys paid by patrons to go to the general revenue of the County is inappropriate. Holding the refund money as unclaimed property allows the proper owners, the taxpayers who paid the sales tax to the Arena, to come forward and be reimbursed. This is the correct remedy, if any. *See* § 144.190.1.

CONCLUSION

For the foregoing reasons, the Administrative Hearing Commission should be affirmed.

Respectfully submitted,

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CERTIFICATION OF SERVICE AND COMPLIANCE

I hereby certify that on the 17th day of April, 2013, the foregoing brief was filed electronically via Missouri CaseNet and served electronically to:

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I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 8,181 words.

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