IN THE SUPREME COURT OF MISSOURI

Appeal No. SC92853

ST. CHARLES COUNTY, MISSOURI,

Petitioner-Appellant,

v.

DIRECTOR OF REVENUE,

Respondent-Appellee.

On Appeal From The Administrative Hearing Commission

No. 10-1919 RS

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This Court has exclusive jurisdiction over this appeal pursuant to Article V, Section 3 of the Missouri Constitution and Section 621.189 RSMo. This appeal raises the question whether sales in and for the St. Charles County Family Arena, a place of amusement, entertainment or recreation owned and operated by Appellant St. Charles County, Missouri, are exempted from sales tax by Section 144.030.2(17) RSMo. (now Section 144.030.2(18)), and thus involves the construction of a revenue law of the State of Missouri.

STATEMENT OF FACTS

During the period March 2007 through February 2010 and in May 2010, Appellant St. Charles County, Missouri ("County") paid sales tax on sales in and for the St. Charles County Family Arena ("Arena"). Stip. 7-47; 628.[1] The County sought refunds of these sales taxes, claiming the exemption under Section 144.030.2(17) (now section 144.030.2(18)) for fees and charges in or for a place of amusement, entertainment or recreation, games or athletic events owned or operated by a political subdivision. *Id.* The total amount of refunds requested by the County, and the subject of this appeal, is $922,856.68.[2]

Respondent Director of Revenue ("Respondent") denied the refund requests. *Id.* The County appealed Respondent's decision to the Administrative Hearing Commission ("Commission") on October 8, 2010. A1.[3] After a hearing, the Commission affirmed Respondent's denial of the refund requests by its decision dated August 29, 2012, finding

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[1] "Stip. __" shall refer to the applicable page numbers in the Joint Stipulation & Exhibits.

[2] Respondent issued four (4) separate denials of the County's application for refunds:

Date of Denial	Amt. of Refund	for the Period	
August 30, 2010	$126,824.44	March—May 2007; May 2010	Stip. 7-11
September 15, 2010	$ 56,500.53	June 2007	Stip. 12-13
August 30, 2010	$ 1,962.70	July 2007	Stip. 14-15
September 15, 2010	$737,569.01	August 2007—February 2010	Stip. 16-47

[3] "A_" shall refer to the applicable page numbers in the Appendix.

that the Arena is not an exempt place of amusement under Section 144.030.2(17) on the basis that proceeds from the sales of admissions, concessions and merchandise in and for the Arena inure to private persons, firms or corporations, and that merchandise and concessions sales are not exempt items under Section 144.030.2(17). A1-A23.

This appeal follows.

* * *

The County is a charter county and political subdivision of the State of Missouri. Stip. 48. It has exclusive ownership and control over the Family Arena facilities and operations. Stip. 62-64; 119-125; 126-28; 141-72.[4] The Arena is operated by the Family

[4] The County has owned the Arena since May 2005. *See* certified copy of the Deed at Stip. 119-125. It first built the Arena in the 1990s with borrowed funds, and the Arena was owned at that time by the Family Arena Authority. The Authority conveyed the property to the County in May 2005 when the County refinanced the original bonds. *See* Stip. 119-25. The County has continuously and exclusively controlled, operated, managed, received income from and covered the losses of the Arena since establishing the Family Arena Department in November 2001. *See* Chapter 131 of the County Ordinances, at Stip. 141-42, which established the Arena as a department of County Government. Prior to November 2001, the Arena was operated and managed by a private entity. The County remains solely responsible for debt retirement payments of principal and interest. Stip. 90. While these background facts are not directly relevant to the issues

Arena Department, a division of County Government, which is headed by a director appointed by the County Executive and confirmed by the County Council. Stip. 126; 141-42; 51A.

The Arena is not funded by its operational income; rather, the County Council appropriates the Family Arena Department's budget prior to the fiscal year, which begins January 1. Stip. 87-90; 143-71. The Council takes into consideration expected revenues and expenditures for the Arena in creating the budget and making its appropriations. *Id.* Appropriations for the Arena are kept in the County Treasury, within the Family Arena Fund. *Id.* The Family Arena Department is prohibited from making any expenditure in excess of its appropriations, but the Council may at any time increase or decrease the Family Arena Department's appropriations or transfer appropriations from another department to the Family Arena Department. Stip. 89-90.

The County's Department of Finance oversees all Arena revenues and expenditures. Stip. 126-128. There is a great variety of expenses involved in operating a place of amusement, entertainment or recreation such as the Arena—e.g., employees, union labor, utilities, equipment vendors, supply vendors, and contracting with organizations and event promoters to bring their events to the venue. Stip. 143-71. All of

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in this appeal, the County nevertheless provides this information to the Court in order to provide context for the Arena's place within County Government.

the Arena's receipts are deposited into the Family Arena Fund in the County Treasury and used to cover all of these operational expenses. Stip. 126-28.

Even so, the Arena is not a self-sufficient, commercial enterprise, and in fact has difficulty even covering its operational expenses. *See, e.g.*, Stip. 143; 150; 158. The County transfers funds from its general revenue, called "Interfund Transfers," to cover the Arena's operational losses. Stip. 158. In 2006, for example, the County transferred $1,519,307 from the general revenue to the Family Arena Fund due to the fund balance being insufficient to cover all Arena expenditures. *Id.* In 2007, it transferred another $1,200,000 to cover the operational shortfall. *Id.*

* * *

Throughout the year, many different types of events are held at the Arena: graduations, church conferences, sporting events, concerts, etc. Stip. 175-85. The contracts the County enters into with organizations and event promoters to bring events to the Arena may take three (3) different forms: the Rental Agreement, the Co-Promotion Agreement, or the Purchase Agreement. Stip. 622; 909-11.[5] While the Arena endeavors

[5] Examples of Co-Promotion Agreements are included in the record for the following events: Lipizzaner Stallions Show (Stip. 236-254) and Kelly Clarkson Concert (Stip. 210-235). Stip. 635; 913-920. Examples of Rental Agreements are included in the record for the following events: Circus to Save Lives (Stip. 306-329); Missouri Valley Conference ("MVC") Basketball Tournament (Stip. 281-305); Lindenwood Graduation (Stip. 255-280); Driving Dynamics (Stip. 186-209). Stip. 634-35; 914-920. An example of a

to use the best contract that poses the lease amount of risk to the County, at times it must negotiate, and the choice is often the decision of the organization or event promoter (which could simply take its event elsewhere). *Id.* Particularly in light of its difficulty in even covering its operational expenses as discussed *supra*, the County must be flexible in order to bring events to the Arena.

All three (3) types of agreements are standard in the entertainment industry. Stip. 909. The Arena's agreements generally provide that the relationship of the parties is as independent contractors and that the agreement does not create a partnership, joint venture, agency or employment relationship. Stip. 231; 326; 634-35. They generally provide that the County shall have the right to determine whether refunds of admissions fees will be issued and that refund decisions are made at the sole discretion of the County "in keeping with the Arena's policy of retaining the public faith." Stip. 217; 313; 634-35. They generally provide that, for purposes of calculating nonresident entertainer compensation tax, the organization or event promoter's total compensation "shall include all amounts due to Licensee form (sic) all ticket sales or box office receipts (after satisfaction of all of Licensee's obligations pursuant to this Agreement) and any other amounts which shall be paid from Arena to Licensee as compensation for Licensee's 'Event.'" Stip. 220; 315; 634-345.

Purchase Agreement is included in the record for the Kenny Rogers Concert (Stip. 701-708). Stip. 635; 920.

Most importantly, pursuant to any agreement requiring payment for goods and services in and for the Arena, the County accounted for the receipt of payment for such goods and services, paid sales tax on them, paid the compensation due to the organization or event promoter under the agreement, and deposited the net revenues into the general revenue for the sole and exclusive benefit of the County. Stip. 126-28. The County has always considered the Arena's proceeds to be the total amounts received by the County in and for events at the arena less the costs to the County of putting on the event. Stip. 906. Indeed, after subtracting the direct costs from the revenue received, the proceeds are deposited into the County's general revenue for appropriation for County purposes. Stip. 907; 126-28. Those proceeds do not inure to anyone other than St. Charles County. *Id.*

Sales for Admissions

An event may or may not charge for admission. Stip. 617-19; A4. If it does, the Arena is generally responsible for determining what the charge should be. Stip. 617-19. The Arena provides ticketing service through its agent, Metropolitan Tickets, Inc. ("Metrotix"). Stip. 619-20; 710-714. It retains all admissions receipts until final settlement. Stip. 622-24; 909-11.

If an event does charge for admission, the Arena may or may not be entitled to retain a portion of admissions sales depending upon the terms of the agreement. For example, under a Rental Agreement, the Arena has no entitlement to admissions receipts. Stip. 622; 909-10. The Arena may provide ticketing service through Metrotix for a fee, but otherwise the organization or event promoter handles admission charges without the Arena's involvement. Stip. 619.

Under a Co-Promotion Agreement, the Arena may be entitled to a certain portion of admissions receipts (less agreed-upon expenses), or it may otherwise stand to gain or lose profits because the economic arrangement otherwise hinges on admissions sales. For example, the Arena received a forty percent (40%) share of admissions sales (less specified expenses) from the Lipizzaner Stallions Show. Stip. 252; A6-A7. For the Kelly Clarkson concert, the Arena agreed to charge a $10,000 base fee plus expenses, with no entitlement to any other revenue from admissions sales, but the promoter did not guarantee payment of the base fee, agreeing only to pay for certain specified expenses. Stip. 210-235; A7. The Arena remained responsible for all other expenses. *Id.* Because gross receipts were insufficient to cover all expenses, the Arena suffered a net loss of $24,747.40 on that event. *Id.*

Finally, the Arena's entitlement to admissions receipts similarly varies depending upon the terms of a Purchase Agreement. For example, the Arena agreed to a $57,000 flat fee, or "guarantee," to bring Kenny Rogers to the Arena, with an alternative right to a portion of admissions receipts (less specified expenses and taxes). Stip. 701; A8-A9. That agreement resulted in a net loss to the Arena of $26,180.09. A9.

Sales for Merchandise

Merchandise sales may be handled in a myriad of ways and are also subject to negotiation with an organization or event promoter. Stip. 624; A5. The Arena is responsible for all inventory, including losses. *Id.* It may agree to make merchandise sales for the organization or event promoter on consignment such that the organization is

entitled to all merchandise sales less the Arena's expenses for handling sales. *Id.* Or, the parties may agree that the Arena receives a specified percentage. *Id.*

For example, under the Circus to Save Lives Rental Agreement, the Arena sold merchandise under consignment, unless the organization decided to use Arena employees for such sales. Stip. 306-309; A5. Under the MVC Rental Agreement and the Kelly Clarkson Concert Co-Promotion Agreement, the Arena retained twenty percent (20%) and twenty-five percent (25%) of merchandise sales, respectively. Stip. 210-12; 282-85; A5; A8. It received a flat fee of $1,000 for merchandise sales under the Lippizaner Stallions Co-Promotion Agreement. Stip. 245; A7.

Sales for Concessions, Etc.

The Arena made all sales and retained all receipts from the sales of food, beverages, concessions, parking and other items and services (hereinafter referred to collectively as "concessions") at all times relevant to this appeal. Stip. 621; A5-A9.

POINTS RELIED ON

I. The Administrative Hearing Commission erred in finding that the Family Arena is not an exempt place of amusement under Section 144.030.2(17) RSMo., which is reviewable under Section 621.189 RSMo., because the County benefits from all proceeds derived from the Arena, and they do not inure to private persons, firms or corporations, in that all of the proceeds from such sales are used to pay the County's expenses in operating the Arena or otherwise inure solely to the benefit of the County.

Section 144.030.2(17) RSMo.

City of Jefferson Dept. of Parks and Recreation v. Dir. of Revenue, 1992 WL 390471, No. 92-00042RV (Mo.Admin.Hrg.Com. Dec. 23, 1992).

Godwin v. Dir. of Revenue, 1991 WL 128051, No. 90-000864RS (Mo.Admin.Hrg.Com. April 10, 1991).

Wetterau, Inc. v. Dir. of Revenue, 843 S.W.2d 365, 367 (Mo. banc 1992).

Wright-Jones v. Johnson, 256 S.W.3d 177, 181 (Mo. App. E.D. 2008).

II. The Administrative Hearing Commission erred in finding that merchandise and concessions sales in the Family Arena are not exempt items under Section 144.030.2(17) RSMo., which is reviewable under Section 621.189 RSMo., because merchandise and concessions clearly fall within Section 144.030.2(17), in that they are "fees" or "other charges" paid in or for a place of amusement.

Section 144.030.2(17) RSMo.

City of Springfield v. Dir. of Revenue, 659 S.W.2d 782, 784 (Mo. banc 1983).

Zoological Park Subdistrict v. Dir. of Revenue, 1991 WL 154843, No. 90-000490RS (Mo.Admin.Hrg.Com. June 10, 1991).

ARGUMENT

I. Introduction

It is undisputed in this appeal that sales of admissions, tangible personal property ("merchandise"), concessions, and other fees paid to or in the Arena are subject to sales tax pursuant to Section 144.020.1 RSMo., unless such sales are otherwise exempted by law. Section 144.030.2(17) RSMo. exempts from sales tax:[6]

> [a]ll 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…

[6] This provision was transferred from paragraph (17) to paragraph (18) of Section 144.030.2 RSMo. by S.B. 480 (2012), which became effective subsequent to Appellant's filing of its Petition for Review of Respondent's Decision in the Administrative Hearing Commission. A1. The substantive text of the exemption remains unchanged. The County will refer to the exemption herein as Section 144.030.2(17) since that was the version of the statute in effect at all times relevant to this case.

The Commission erred in finding that sales in and for the Arena are not exempt from sales tax. The exemption was meant to apply to a political subdivision owning or operating a place of amusement, entertainment, recreation, games or athletic events—a venue such as the Arena. In order to make it feasible to bring entertainment to the St. Charles County community, the Arena must use receipts generated from the events to offset its costs, including but not limited to paying employees, purchasing supplies, etc. It would be impractical and result in unreasonable, oppressive and absurd results to interpret the statute in such a way as to deprive the County of the exemption for using receipts derived from events at the Arena to pay for its operational expenses incurred in presenting them. The Commission erred in finding that the Arena is not an exempt place of amusement. Contrary to its findings, all the proceeds derived therefrom *do* benefit the County, and they do *not* inure to private entities. Furthermore, the Commission erred in finding that the exemption does not apply to sales of merchandise and concessions because it relied upon a false premise and misinterpreted applicable law in doing so.

II. Standard of Review

This Court reviews the Commission's interpretations of the state's revenue laws *de novo*. *Street v. Dir. of Revenue*, 361 S.W.3d 355, 357 (Mo. banc 2012). It should reverse the Commission's decision if it is not authorized by law, if it is not supported by substantial and competent evidence in the record, or if it is clearly contrary to the reasonable expectations of the General Assembly. *Id.;* Section 621.193 RSMo. The evidence and reasonable inferences therefrom are viewed in the light most favorable to the decision. *Kanakuk-Kanakomo Kamps, Inc. v. Dir. of Revenue*, 8 S.W.3d 94, 95 (Mo.

banc 1999). Administrative agency decisions based on the agency's interpretation of law are matters for the independent judgment of the reviewing court, and correction where erroneous. *Daily Record Co. v. James*, 629 S.W.2d 348, 351 (Mo. banc. 1982).

III. Statutory Construction

Taxing statutes are strictly construed against the state, *May Dept. Stores Co. v. Dir. of Revenue*, 791 S.W.2d 388, 389 (Mo. banc 1990), and tax exemptions are strictly construed against the claimant. *Director of Revenue v. Armco, Inc.*, 787 S.W.2d 722, 724 (Mo. banc 1990). The exemption claimant bears the burden to prove its entitlement to the exemption. *Wetterau, Inc. v. Dir. of Revenue*, 843 S.W.2d 365, 367 (Mo. banc 1992). However, to effectuate the legislative intent, the Court must apply the reasonable, natural and practical interpretation of the statute in light of modern conditions. *Id.* The statute must not be interpreted in such a way as to produce unreasonable, oppressive or absurd results. *Wright-Jones v. Johnson*, 256 S.W.3d 177, 181 (Mo. App. E.D. 2008).

The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent, and to consider the words used in the statute their plain and ordinary meaning. *May Dept. Stores*, 791 S.W.2d at 389. The polestar is always the legislature's intent. *Armco*, 787 S.W.2d at 724. To ascertain the legislative intent, the statute should be read *in pari material* with related sections, and the taxing statutes should be construed in context with each other. *Street*, 361 S.W.3d at 358. It is presumed that the legislature intended every word, clause, sentence and provision to have operative effect; conversely, it is not presumed that the

legislature intended to insert idle verbiage or superfluous language. *State v. Smith*, 591 S.W.2d 263, 266 (Mo. App. W.D. 1979).

IV. The Administrative Hearing Commission erred in finding that the Family Arena is not an exempt place of amusement under Section 144.030.2(17) RSMo., which is reviewable under Section 621.189 RSMo., because the County benefits from all proceeds derived from the Arena, and they do not inure to private persons, firms or corporations, in that all of the proceeds from such sales are used to pay the County's expenses in operating the Arena or otherwise inure solely to the benefit of the County.

A. Introduction

The Commission properly noted that "the language of Section 144.030.2(17) requires a close and careful reading with due consideration to the statutory context in which it appears." A13. However, its decision that the Arena does not qualify for the exemption hinges primarily on its incomplete definition of critical terms and failure to consider the statutory context of the exemption, ultimately leading to the erroneous finding that proceeds from sales in and for the Arena inure to private entities. A13-A21.

In order to qualify for the exemption, the Arena must be a place of amusement, entertainment or recreation, games or athletic events, and it must be owned or operated by the County. The Commission concedes that the Arena meets both of these requirements. A3. It nevertheless found that the Arena does not qualify for the exemption because it does not meet the final requirement—that "all the proceeds derived

therefrom benefit [the County] and do not inure to any private person, firm, or corporation." Section 144.030.2(17). This finding was in error.

B. "All proceeds derived from" means the Arena's revenues after paying its expenses.

The first critical determination is the meaning of the phrase "all the proceeds derived therefrom." The Commission was correct to squarely reject Respondent's administrative interpretation that "all the proceeds" is equivalent to "gross receipts," as there is no basis upon which to make such a finding.[7] A15-A18. However, the Commission incorrectly ignored the abundance of authority which demonstrates that "all the proceeds," particularly in light of the dictionary definitions, statutory context and legislative intent of Section 144.030.2(17), accounts for the Arena's payment of its expenses.

In the absence of a statutory definition, words will be given their plain and ordinary meaning as derived from the dictionary. *State v. Oliver*, 293 S.W.3d 437, 446 (Mo. banc 2009). The Commission purported to give the term "all the proceeds" its plain and ordinary meaning, but it used an incomplete definition of the term. *See* A12-A17 (at

[7] The term "gross receipts" is defined in Section 144.010.1 and declared to apply to Sections 144.010 to 144.525. If the legislature had intended the term "gross receipts" to apply to the Section 144.030.2(17) exemption, it would have used that defined term. *See State v. Smith*, 591 S.W.2d at 266 (the legislature is presumed to have intended the language it did, and did not, use).

A17, the Commission states the definition of "proceeds" is "the amount of money produced by a sale or performance, etc.").

Merriam-Webster provides two (2) definitions for the term "proceeds"—first, "the total amount brought in", and second, "the net amount received (as for a check or from an insurance settlement) after deduction of any discount or charges." *Merriam-Webster Collegiate Dictionary*, 990 (11th ed. 2003). Merriam-Webster Online further defines proceeds as "the amount of money left when expenses are subtracted from the total amount received" and provides the following synonyms: "earnings, gain, lucre, net, payoff, proceeds, return."[8] Similarly, the *Oxford English Dictionary*, 1406 (Vol. VIII 1970) defines "proceeds" as "that which proceeds, is derived, or results from something; that which is obtained or gained by any transaction; produce, outcome, profit."

In sum, the Commission's reliance on an incomplete dictionary definition resulted in a conclusion directly contrary to the plain and ordinary meaning of "proceeds" as provided by its dictionary definition. The Arena's "proceeds" are those derived after payment of its operational expenses, which include the expense of bringing entertainment acts, amusement events, athletic teams, etc. to the venue—the only one of its kind in St. Charles County—as an amenity to the public. And, *all* those proceeds inure solely to the benefit of the County. Stip. 126-128.

[8] Available at www.merriam-webster.com/thesaurus/proceeds (last accessed February 16, 2013).

It also bears pointing out that the legislature did not use the term "all the proceeds" in isolation, choosing to further state "derived therefrom." Section 144.030.2(17). One must presume this was intentional. *See State v. Smith*, 591 S.W.2d at 266. It must be meaningful that, instead of stating simply that the exemption applies to a "place of amusement …where all the proceeds benefit the municipality or political subdivision," it chose to state "where all the proceeds *derived therefrom* benefit the municipality or political subdivision." Section 144.030.2(17). The Oxford English Dictionary Online states that to "derive something from" is to "obtain something from (a specified source)."[9] This further supports the conclusion that the legislature intended the term "proceeds" to be the place of amusement's "proceeds" as "derived from" its gross receipts, *less* expenses.

Even though the Commission purported to resolve the meaning of the term "proceeds" based on its dictionary definition, it also gave consideration to the term's technical meaning in light of applicable law. Indeed, both Respondent and the Commission acknowledge that statutory construction (both state and federal law on tax-exempt organizations generally) inform the meaning of the term "proceeds" as used in Section 144.030.2(17). The Commission states "[t]he most common statutory formulation combines 'inures' with the concept of 'net earnings' as follows: 'no part of the net earnings of which inures to the benefit of any private shareholder or individual'"

[9] Available at http://oxforddictionaries.com/definition/english/derive?q=derive (last accessed February 16, 2013).

citing to 26 U.S.C. § 501(c)(3). A14. Furthermore, Respondent stated, at Stip. 335, that the Department of Revenue is guided by the Missouri Code of Regulations 12 CSR 10-110.955 Sales and Purchases – Exempt Organizations' definition of "net proceeds" in defining the term "proceeds" in Section 144.030.2(17). That regulation defines "net proceeds" as "the proceeds remaining from direct sales after deducting direct costs."

C. Assuming *arguendo* that the term "proceeds derived therefrom" does not account for the Arena's payment of its expenses, it nevertheless cannot be said that the County does not benefit from "all the proceeds" and that they inure to any private benefit.

The next question becomes, then, whether the Arena meets the requirement that "all the proceeds derived therefrom benefit [the County] and do not inure to any private person, firm, or corporation." Section 144.030.2(17). Based upon the facts and the doctrine of "inurement" as it relates to tax-exempt organizations, it most certainly does.

The concept of "inurement" appears throughout the Missouri statutes in the context of tax-exempt organizations. A14 at fn. 16. Its origin is in the federal exemption for charitable and other organizations, 26 U.S.C. § 501(c)(3), which provides that "no part of the *net* earnings of which inures to the benefit of any private shareholder or individual." (emphasis added).[10]

[10] The prohibition against private inurement first appeared in the Revenue Act of 1909 and remains virtually unchanged today. *See* Paul Arnsberger, et al., *A History of the Tax-Exempt Sector, Statistics of Income Bulletin*, 105, 107 (Winter 2008) (available at

The Commission acknowledges that the word "inure" has "technical meaning from its frequent use in laws concerning tax-exempt organizations," but it then refuses to apply the commonly-accepted legal doctrines associated with those laws—namely, the private inurement doctrine and the private benefit doctrine. A14-A15.

The private inurement doctrine prohibits inurement to insiders or other individuals with a direct interest in the organization. *American Campaign Academy v. C.I.R.*, 92 T.C. 1053, 1067-69 (1989). There is no evidence in the record that any benefit inures to "insiders" in the Arena, and therefore the County does not contest the Commission's finding that the private inurement doctrine is inapplicable in that context here.

The Commission erred, however, in failing to apply the private benefit doctrine when construing the statute. The private benefit doctrine is broader than the private inurement doctrine, extending the prohibition against private inurement beyond "insiders" to include third parties as well. *Id.* It originates from the "operational test" set forth in C.F.R. § 1.501(c)(3)-1(d)(1)(ii)(as amended in 1990), which states that an organization is not exempt under 501(c)(3) "if more than an insubstantial part of its activities is not in furtherance of an exempt purpose." The Internal Revenue Service, in turn, propounded its official approach to the private benefit doctrine in G.C.M. 39598 (Jan. 23, 1987), stating at p. 14 that an organization is not exempt "if it serves a private

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http://www.irs.gov/pub/irs-soi/tehistory.pdf (last accessed February 18, 2013)). *See also Chesed Shel Emeth Society v. Unemployment Compensation Comm'n*, 203 S.W.2d 454, (Mo. 1947)(state statute borrowed inurement language from federal exemption).

interest more than incidentally."[11] The IRS Memo introduced an "incidental benefit balancing test," stating:

> A private benefit is considered incidental only if it is incidental in both a qualitative and a quantitative sense. In order to be incidental in a qualitative sense, the benefit must be a necessary concomitant of the activity which benefits the public at large, i.e., the activity can be accomplished only by benefiting certain private individuals… To be incidental in a quantitative sense, the private benefit must not be substantial after considering the overall public benefit conferred by the activity.

Id. at pp. 15-16.

This framework is greatly informative to the inurement provision of Section 144.030.2(17) and the case at bar. The legislative intent behind limiting the exemption to places of amusement where all the proceeds derived therefrom benefit the political subdivision and do not inure to any private entity was to prevent private persons from taking advantage of the exemption by leasing a public facility and all rights to the proceeds. *Godwin v. Dir. of Revenue*, 1991 WL 128051, *4, No. 90-000864RS (Mo.Admin.Hrg.Com. April 10, 1991); *see also*, Dan Jordan & Kevin Thompson, *Sales*

[11] Available at http://www.legalbitstream.com/scripts/isyswebext.dll?op=get&uri=/isysquery/irl6fcd/9/doc (last accessed February 17, 2013).

and Use Tax Issues at the Administrative Hearing Commission (Part II), 51 J. Mo. B. 217, 221 (1995).

In the *Godwin* case, Poplar Bluff's Park Board hired Godwin to manage and operate its municipal golf course. 1991 WL 128051 at *1. The employment contract provided that Godwin was an independent contractor and required him to conduct the business of the pro shop with his own employees. *Id.* Godwin collected certain revenues to be remitted to the City (e.g., green fees, membership fees, and golf cart fees), but he was entitled to retain a portion of those revenues. *Id.* at *2. He likewise retained all revenues from the driving range, pro shop sales, certain golf ball sales, golf club rentals and golf lessons. *Id.* Godwin filed a petition pursuant to Section 144.030.2(17) arguing that he was not liable for sales taxes on green fees. The Commission agreed with him, finding the green fees were exempt from sales tax despite the fact that Godwin shared in the revenues:

> The purpose of this exemption is to spare transactions at certain public facilities from the sales tax. The General Assembly restricted the facilities to those in which "all the proceeds derived therefrom benefit the municipality or other political subdivision and do not inure to any private person, firm or corporation" in order to prevent private persons taking advantage of the exemption by leasing a public facility and all rights to the proceeds. The exemption depends, therefore, on whether the transaction takes place *at a government facility* or at a private enterprise.

> The Director argues that that (sic) the exemption is inapplicable because not all the proceeds from the course benefit the City and some of the proceeds inure to Godwin's benefit…We disagree. We consider the City's money handling arrangement with Godwin no different, for purposes of this statute, than if Godwin handed over all amounts collected directly to the City and the City paid him his percentage in return. That the parties have instead structured their relations [as they did] does not create the mischief the limiting language was designed to avoid.

Id. at *4 (emphasis added); *see also City of Jefferson Dept. of Parks and Recreation v. Dir. of Revenue*, 1992 WL 390471, No. 92-00042RV (Mo.Admin.Hrg.Com. Dec. 23, 1992)(finding that Section 144.030.2(17) exempts from sales tax all fees and charges, including concessions, in the City-owned golf course, swimming pool and ice park).

It is difficult to see any distinction between *Godwin* and the instant case, and particularly in light of the legislative intent behind Section 144.030.2(17). Here, there is no dispute that the Arena is a place of amusement wholly owned and operated by the County. Stip. 62-64; 119-125; 126-28; 141-72. Moreover, this is not a situation where the County is in contract with a management company to oversee the Arena operation, to maximize and/or share in the Arena's profits. On the contrary, this is a situation where the County itself endeavors to solicit organizations and event promoters to come to the Arena to fulfill its purpose as a public amenity, and in the process attempt to simply cover its operational costs, which it is often unable to do. Stip. 143; 150; 158. It is a

situation where the County must negotiate the best agreement it can with the organization or event promoter to bring events to the Arena, to do what it can to keep the public place of amusement afloat. Surely the legislature intended that "proceeds derived therefrom" would enable the political subdivision to account for its expenses in operating a place of amusement like the Arena here.

While this Court is not generally obliged to concern itself with inconsistencies between current and prior decisions of an administrative agency, it *is* if the complained-of decision is arbitrary or unreasonable. *State ex rel. GTE North, Inc. v. Missouri Public Service Comm'n*, 835 S.W.2d 356, 371 (Mo. App. W.D. 1992)(citation omitted). Here, the Commission's decision finding that the Arena is not an exempt place of amusement on the basis that some of its proceeds inure to private entities is in contravention of its prior decisions in similar cases and in contravention of the legislative intent behind the exemption. As such, it is both arbitrary and unreasonable.

Interestingly, the Commission concedes that it would be an unreasonable, oppressive and absurd result to interpret the statute to mean that the Arena cannot use any proceeds to pay for services rendered to the Arena. A18. It acknowledges that the purpose of the exemption is to provide a benefit to a political subdivision and that it would be absurd to adopt an interpretation that would make it impossible for the County to qualify for the exemption if it paid an employee or independent contractor for services rendered. *Id.* Yet that is exactly what it has done.

The Commission states that "paying for services" is "not the true nature of the relationship" between the Arena and the entities with whom it contracts and that "St.

Charles County is not getting the benefit of all of the proceeds derived from the venue." A19. But of course it is. It is difficult to see how this case is any different than *Godwin*, for instance, where the benefit inuring to Godwin was, as the IRS might say, "a necessary concomitant of the activity which benefits the public at large"—the public golf course. G.C.M. 39598 at pp. 15-16. Here, it is incumbent upon the Arena itself to bring in sufficient events to be able to offer the public amenity that is the Arena, without which the events may not come to the St. Charles area at all. Of course, the organizations and event promoters will not come unless there is some return to them for doing so, and the County must strike the best bargain it can to get the event in the door. To be sure, economic realities of the entertainment market will compel the County to negotiate competitively to bring an act like Kelly Clarkson or Kenny Rogers to the Arena. But the benefit to outsiders under the Arena's circumstances is simply an incidental, "necessary concomitant" to the Arena's ability to operate for the public benefit. And, the Arena most certainly benefits from all proceeds derived therefrom.

A reasonable, natural and practical interpretation of the statute in light of modern conditions would recognize the fact that there must be incidental incentives to third parties in operating a place of amusement like the Arena. *Wetterau*, 843 S.W.2d at 367.[12]

[12] *See, e.g.*, in the section 501(c)(3) context, Rev. Rul. 97-21, I.R.B. 1997-1(in the physician recruitment context, reasonable incentives did not disqualify hospital from exemption when recruitment justified by community need, expanding services by the hospital, or providing new services to the community); *see also* Rev. Rul. 2004-51, I.R.B.

As Judge Posner pointed out in *United Cancer Council v. C.I.R.*, 165 F.3d 1173 (7th Cir. 1999), the purpose of the inurement provision is really to ensure that the organization is operating for its exempt as opposed to private purposes. It is *not* meant "to empower the IRS to monitor the terms of arm's length contracts made by charitable organizations with the firms that supply them with essential inputs, whether premises, paper, computers, legal advice, or fundraising services." *Id.* at 1176. The County respectfully submits that the Arena's contractual agreements with organizations and event promoters fall into the same category.

In sum, the underlying principle of Section 144.030.2(17)'s inurement provision, not unlike Section 501(c)(3), is to ensure that the tax-exempt organization should be free of private inurement—that is, nonprofit. *See* fn. 10, *supra*. The Arena most certainly is that, doing what it can to merely stay afloat. The Commission erred in finding that the private benefit doctrine has no applicability to Missouri sales tax law "because of the significant differences in purpose between the respective types of activities to which 26 U.S.C. § 501(c)(3) and § 144.030.2(17) are designed to apply." A15 at fn. 22. In keeping with the "incidental balancing test" and the Commission's own finding in *Godwin*, to find that the Arena does not meet the requirements for exemption under Section 144.030.2(17) is to apply an impractical interpretation of the statute in a way that ignores modern

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2004-22 (exempt university's formation of an LLC with company specializing in interactive video training programs is not a substantial part of the university's activities and therefor does not destroy university's exemption).

conditions and results in unreasonable, oppressive and absurd results. *Wright-Jones*, 256 S.W.3d at 181.

D. Conclusion

In sum, the Commission erred in finding that the Arena is not an exempt place of amusement under Section 144.030.2(17). The plain and ordinary meaning of the term "proceeds" accounts for the Arena's payment of expenses out of gross revenues—and all of the proceeds, after the Arena pays its expenses, inure solely to the benefit of the County. Assuming *arguendo* that the term "proceeds" does not account for the Arena's payment of expenses out of gross revenues, it nevertheless cannot be said that the County does not benefit from "all the proceeds" in and for the Arena or that they inure to any private benefit. Point one should be granted.

V. The Administrative Hearing Commission erred in finding that merchandise and concessions sales in the Family Arena are not exempt items under Section 144.030.2(17) RSMo., which is reviewable under Section 621.189 RSMo., because merchandise and concessions clearly fall within Section 144.030.2(17), in that they are "fees" or "other charges" paid in or for a place of amusement.

A. Introduction

The Commission also erroneously found that sales from tangible personal property ("merchandise") and food and beverages ("concessions") in the Arena are not exempt under Section 144.030.2(17). A21-A23. It offers three (3) reasons for this finding: (1) merchandise and concessions sales are not exempt because the Arena is not an exempt

place of amusement; (2) merchandise sales are subject to revenue sharing agreements; and (3) neither merchandise nor concessions sales are exempt items under Section 144.030.2(17). For the following reasons, each of these findings is in error.

B. The Arena is an exempt place of amusement under Section 144.030.2(17).

The Commission first finds that the Arena's merchandise and concessions sales do not qualify for the exemption in Section 144.030.2(17) because the Arena is not an exempt place of amusement. A21. As discussed comprehensively *supra*, the Arena is an exempt place of amusement. Therefore, this finding was in error.

C. Any so-called "revenue sharing arrangement" does not remove merchandise sales from the purview of Section 144.030.2(17).

Next, the Commission finds that merchandise sales are not exempt because they are "subject to the same type of revenue sharing arrangements as the admission charges." A21.[13] However, the Commission did not provide any further explanation for this finding. To the extent the Commission implies that proceeds from the sale of merchandise inure to private persons, firms or corporations, such a finding lacks merit for the same reasons discussed comprehensively *supra*. That is, the County benefits from all proceeds derived from the Arena, including merchandise sales, and they do not inure to private persons, firms or corporations. Furthermore, such a finding is directly

[13] The decision is silent regarding concessions sales on this point, stating only that merchandise sales are subject to revenue sharing arrangements. Indeed, the Arena retains all receipts from concessions sales. Stip. 621; A5-A9.

contradictory to the Commission's finding in *Godwin*, where the Commission found that a "money handling arrangement" wherein the City would pay Godwin his percentage of amounts collected "does not create the mischief the limiting language [of Section 144.030.2(17)] was designed to avoid." 1991 WL 128051 at *4. Therefore, this finding was in error.

D. Merchandise and concessions sales are "fees" or "other charges" contemplated by the statutory scheme.

Finally, the Commission finds that "neither the sales of merchandise nor the sales of food and beverages are items exempted from tax under § 144.030.2(17)." A21. But this finding is based solely on the Commission's false premise that "if tangible personal property and food and beverages are not taxed as fees under § 144.020.1(2), we cannot exempt them from tax as fees under § 144.030.2(17)." A23. This premise is flawed for two distinct reasons.

1. The Commission's attempt to exclude sales of merchandise and concessions from the scope of "fees" within the meaning of Section 144.020.1(2) is directly contrary to Missouri Supreme Court precedent.

In its initial decisions interpreting Section 144.030.2(17), the Commission says it held that merchandise and concessions were exempted because it "believed them to also be taxable as fees paid in a place of amusement under § 144.020.1(2)." A22 at fn. 32, citing to the *Godwin*, *City of Jefferson*, and *Zoological Park Subdistrict v. Dir. of Revenue*, 1991 WL 154843, No. 90-000490RS (Mo.Admin.Hrg.Com. June 10, 1991).

Since then, it says, this Court has explained that each subsection in Section 144.020.1 taxes different items, and "if tangible personal property and food and beverages are not taxed as fees under § 144.020.1(2)," they cannot be exempted under Section 144.030.2(17). *Id.* (emphasis added). [14]

[14] The Commission cited the following cases (A22 at fn. 33) for its stated proposition, but they contain no such clear statement of law. In *Greenbriar Hills Country Club v. Dir. of Revenue*, 935 S.W.2d 36, 38 (Mo. banc 1996)(finding no liability for sales tax on meals and drinks because the club does not regularly sell to public), the Court held that both subsections (2) and (6) of Section 144.020.1 encompassed meals and drinks served in a private club, but because subsection (6) was more specific than subsection (2), it controlled. In *Westwood Country Club v. Dir. of Revenue*, 6 S.W.3d 885 (Mo. banc 1999), the Court acknowledged its finding *Greenbriar* but found Westwood was nevertheless liable for sales tax on meals and drinks because they were not "sales at retail" under subsection (9), and found further that, with respect to golf cart fees, subsection (8) is more particular than subsection (2) and thus controls. In *J.B. Vending Co., Inc. v. Dir. of Revenue*, 54 S.W.3d 183 (Mo. banc 2001), the Court considered only subsection (6) in its determination that a cafeteria operator regularly served meals and drinks to the "public". And in *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 179 S.W.3d 266 (Mo. banc 2005)(finding no liability for sales tax on inner tube rentals because Six Flags paid sales tax on their purchase before such rentals ever took place), the Court held that subsection (8) controlled because it is more specific than subsection

But unless and until this Court rules otherwise, there is no question but that merchandise and concessions sales are "fees" as contemplated by Section 144.020.1(2). In *City of Springfield v. Dir. of Revenue*, 659 S.W.2d 782, 784 (Mo. banc 1983), this Court stated it was "completely obvious" that recreational sales (including concessions) are within the purview of Section 144.020.1(2). This is consistent with the Commission's findings in *Zoological Park* (exempting merchandise and concessions sales) and *City of Jefferson* (exempting concessions sales).

The line of more recent cases cited by the Commission (at A22, fn. 33) merely demonstrate how the Court will reconcile situations where a certain transaction appears to fall under more than one subsection of Section 144.020.1; they do not support any contention that merchandise or concessions sales are no longer within the scope of Section 144.020.1(2). That being the case, the Commission's attempt to exclude such fees from the scope of the exemption in Section 144.030.2(17) fails as resting on a false premise.

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(2). The Commission concedes that this Court "has ***not*** yet" applied the analysis from the foregoing cases with respect to merchandise (subsection (1) of Section 144.020.1). A22 at fn. 33. (emphasis added).

2. Even if sales of merchandise and concessions are not "fees," Section 144.030.2(17) still exempts "other charges" otherwise taxable under other subsections of Section 144.020.1, which would include such sales.

The Commission has attempted to limit the scope of the exemption defined in Section 144.030.2(17) to the scope of taxation defined in Section 144.020.1(2), but there is no authority to support that limitation, and it is contrary to the plain language used in the exemption statute. Section 144.030.2(17) applies to "admission *or participation* or other fees paid by or *other charges* to individuals in or for any place of amusement…", while Section 144.020.1(2) imposes tax only on "the amount paid for admission and seating accommodations, or fees paid to, or in an place of amusement…." The scope of this exemption is plainly broader than the scope of this tax.

The Commission attempts to ignore this distinction by claiming that this Court "has considered 'fees' and 'charges' to mean the same thing in this context." A22 at fn. 31. The context of the present case, however, relates solely to the construction of the statutory exemption from sales tax found in Section 144.030.2(17). The cases the Commission cites (*Greenbriar Hill Country Club*, *supra*, and *L & R Distributing, Inc. v. Dept. of Revenue*, 529 S.W.2d 375 (Mo. 1975)), did not involve the interpretation of any exemption statute, much less the specific exemption statute at issue here. These cases do not have application in the present context. The use of "other charges" in Section 144.030.2(17) alone, since those words must be given meaning under normal rules of statutory construction, establish the broader scope of the exemption.

The Commission's flawed reasoning reveals that its decision to depart from its past decisions construing Section 144.030.2(17) is both arbitrary and unreasonable in this appeal. These past decisions exempted the sales of tangible personal property and sales of food and beverages at the venues defined in this statute. This Court must recognize the continued existence of those exemptions in accordance with the plain intent of the legislature.

D. Conclusion

In sum, the Commission erred in finding that merchandise and concessions sales in the Arena are not exempt items under Section 144.030.2(17) because such sales are "fees" or "other charges" paid in or for a place of amusement, and its arguments to the contrary are based upon false premises and misinterpretations of the law. Point two should be granted.

CONCLUSION

WHEREFORE, for all of the reasons set forth herein, Appellant St. Charles County, Missouri respectfully requests the Court find the sales in and for the St. Charles County Family Arena are exempt from sales tax pursuant to Section 144.030.2(17), reverse the decision of the Administrative Hearing Commission, and remand the case for entry of a decision in favor of Appellant.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Missouri Supreme Court Rule 55.03, complies with Missouri Supreme Court Rule 84.06, and it contains 7,747 words, excluding the parts of the brief exempted, and has been prepared in proportionately spaced typeface using Microsoft Word 2010 in 13 pt. Times New Roman font.

/s/ Toby J. Dible

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of February, 2013, a true and correct copy of the foregoing was delivered through the Court's electronic filing system, according to the information available on the system at the time of filing, to the following:

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