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 REPLY BRIEF

OFFICE OF THE ST. CHARLES
COUNTY COUNSELOR

Toby J. Dible, Mo. 62727
Associate County Counselor
100 North Third Street, Suite 216
St. Charles, Missouri 63301
Tel: 636-949-7540
Fax: 636-949-7541
tdible@sccmo.org

ATTORNEY FOR APPELLANT
ST. CHARLES COUNTY, MISSOURI

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

Cases

Statutes

Regulations and Other Authorities

REPLY ARGUMENT

I. Introduction

Appellant St. Charles County, Missouri ("County") is entitled to a refund of sales taxes paid on sales in and for the St. Charles County Family Arena ("Arena") under Section 144.030.2(17) RSMo. (now section 144.030.2(18)) which exempts from sales tax fees and charges in or for a place of amusement, entertainment or recreation, games or athletic events owned or operated by a political subdivision.[1]

II. The Commission Rejected Respondent's Invitation to Add Language to the Exemption and Find That "All The Proceeds" Must Mean "Gross Receipts," and This Court Should, Too.

The crux of Respondent's Brief argues that the Court must find the term "all the proceeds" actually means "gross receipts."[2] But Respondent already raised this argument, and the Commission squarely rejected it.

---

[1] As it did in its principle brief, 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. *See* Appellant's Brief, p. 12 at fn. 6.

[2] *See* Resp. Brief, *e.g.*, at p. 19 ("B. The Terms 'All the Proceeds' Cannot Mean Net Proceeds, But Must Mean Gross Receipts"), at p. 21 ("most apt definition of 'proceeds' is…in this context, 'gross receipts.'"), and at p. 24 ("narrow construction of the exemption…would render the terms 'all the proceeds' to be equivalent with 'gross receipts'").

Curiously, Respondent acknowledges that courts should not add words to a statute under the auspice of statutory construction. Resp. Brief, p. 22. Yet that is exactly what it would have this Court do by finding the term "all the proceeds" actually means "gross receipts." Indeed, the General Assembly certainly knows how to use the term "gross receipts." It is a specifically defined technical term in Chapter 144. Yet the General Assembly chose not to use it in section 144.030.2(17). That choice is presumed intentional. *See* Appellant's Brief, p. 16 at fn. 7. The exemption for sales of handicraft items in section §133.030.2(24) further highlights this—that section uses the term "gross proceeds." This means that the General Assembly meant something different by using the term "all the proceeds" in section 144.030.2(17). In contrast to section 144.030.2(24), the exemption language at issue here does not use the term "gross receipts" or "gross proceeds" at all.

Respondent cites *Bolivar Road News, Inc. v. Dir. of Revenue*, 13 S.W.3d 297 (Mo. banc 2000), for the proposition that this Court has used the terms "proceeds" and "gross receipts" interchangeably. Resp. Brief, p. 25. But *Bolivar* is distinguishable. The issue in *Bolivar* was whether the adult book store, by virtue of operating coin-operated video booths, was a "place of amusement, entertainment or recreation," subject to tax under section 144.020.1(2). *Bolivar* did not even mention, must less construe, the exemption at issue here. Indeed, here there is no dispute that the Arena is a "place of amusement." *See* Appellant's Brief, pp. 15-16. The question is whether or not it is entitled to the exemption in section 144.030.2(17), which turns on the definition of the term "all the

proceeds" and whether "all the proceeds" benefit the County and do not inure to any private entities. *Id.*

In *Bolivar*, the Court was presumably far less concerned with any distinction between the terms "proceeds" versus "receipts" versus "gross sales"—the issue on appeal was whether the arcade was a taxable place of amusement in the first instance. In fact, in all likelihood the Court utilized the term "receipts" because, as Respondent's Brief points out, "Bolivar's bookkeeping noted the video booth receipts as 'Arcade Receipts.'" Resp. Brief, p. 25.

Bolivar simply does not support the contention and Respondent cannot otherwise demonstrate that the exemption language "all the proceeds" means "gross receipts." On the contrary, the plain language of and legislative intent behind the exemption demonstrate that "all the proceeds derived therefrom" means the Arena's proceeds after payment of its operational expenses, including the expense of bringing entertainment and athletic events to the Arena. *See* Appellant's Brief, pp. 16-19.

III. Respondent Improperly Equates "Strict Construction" To "Narrow Construction."

Respondent does not cite any authority for the proposition that "strict construction" means "narrow construction." *See* fn. 1; *see also* Resp. Brief, p. 21 ("the language of the statute is to be strictly or narrowly construed"), and at p. 29 ("…much less the narrow construction that must be afforded the terms"). The taxing statutes are to be *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*, 787 S.W.2d 722, 724 (Mo. banc 1990). But the polestar is always the legislature's intent. *Id.* To give effect to that intent, one must not necessarily construe the exemption *narrowly*, but rather consider the words used in the statute in their plain and ordinary meaning. *May Dept. Stores*, 791 S.W.2d at 389.

Respondent argues for a narrow interpretation of the exemption such that it would apply so long as proceeds are used only to pay County employees and no other private person, firm or corporation. Resp. Brief, p. 26. But this, too, is an argument expressly rejected by the Commission. Respondent itself points out that "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.'" *Id.* Isn't that exactly what the County has done? Indeed it is. The agreements between the County and the acts and event promoters generally provide that the relationship of the parties is as independent contractors. *See* Appellant's Brief, p. 6 *citing* Stip. 231, 326, 634-35. All other work done in and for the Arena is generally done by full-time County employees, part-time hourly employees such as ticket-takers and set-up crews called in to work a particular event, or volunteer groups.[3]

[3] *See* Stip. 126-127; 143-171. In particular, the County budgets for 2007, 2008, and 2009 demonstrate the County appropriates between $340,000.00 and $548,301.000 for hourly employees. Stip. 147, 153, 162. The County also contracts with concession volunteer groups (charitable organizations such as Greyhound Rescue or Make-A-Wish) which provide volunteers so that their organization can receive funds from operating concession

Respondent further argues that the foregoing must be what the General Assembly "contemplated by the exemption based on the examples given in § 144.030.2(17) – 'museums, fairs, zoos and planetariums'…", where independent contracting is, according to Respondent, not commonly necessary. Resp. Brief, p. 26. But those are indeed merely examples. Respondent wholly ignores that the exemption exempts from sales taxes "*any* place of amusement, *entertainment* or recreation, games or *athletic events*." Section 144.030.2(17) (emphasis added).

Respondent's interpretation would mean, for example, that individual players on athletic teams brought to the Arena would have to be employed by the County. Surely that is not the result the General Assembly intended. On the contrary, the legislative intent behind section 144.030.2(17) is better understood to exempt from sales tax amounts paid in or for municipally-owned and operated recreational facilities, just like the Arena, allowing for payment to independent contractors for certain services. *See, e.g.*, *Godwin v. Dir. of Revenue*, 1991 WL 128051, *4, No. 90-000864RS (Mo.Admin.Hrg.Com. April 10, 1991)("The purpose of this exemption is to spare transactions at certain public facilities from the sales tax. … The exemption depends, therefore, on whether the transaction takes place at a government facility or at a private enterprise.").

---

stands, medical personnel to handle illness or injury during events, interpreters for the deaf, etc. *Id.*

Respondent further argues for "narrow construction" relying on section 144.030.2(38) stating, "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)?" Resp. Brief, pp. 27-28. But section 144.030.2(38) is clearly a wholly different exemption, most importantly because it applies to events held in facilities owned or operated not only by a municipality or other political subdivision (as in section 144.030.2(17)), but also by any other *governmental authority or commission, a quasi-governmental agency, a state university or college or by the state.* Section 144.030.2(38) is further distinguishable because it exempts from sales tax only *tickets* (as opposed to all amounts paid in or for the venue) for *collegiate athletic championship* events only, and where the venue is a neutral site and the event could otherwise be taken out-of-state.

IV. Respondent Wholly Ignores the Private Benefit Doctrine Discussed Extensively in Appellant's Brief Because It Is Clear That the Conduct of the Arena's Business Does Not Present the Harm That the Limiting Language of the Exemption Was Intended to Avoid.

It is noteworthy that Respondent's Brief fails to even mention, much less refute, the authority proffered in Appellant's Brief related to the private benefit doctrine and the harm that the limiting language of section 144.030.2(17) was actually intended to avoid. *See* Appellant's Brief, pp. 19-27.

Indeed, the term "inure" is best understood to mean that the organization is not exempt "if more than an insubstantial part of its activities is not in furtherance of an

exempt purpose," C.F.R. § 1.501(c)(3)-1(d)(1)(ii)(as amended in 1990), or "if it serves a private interest more than incidentally." G.C.M. 39598 (Jan. 23, 1987), p. 14. An incidental private benefit is, in turn, one that is "a necessary concomitant of the activity which benefits the public at large" and is insubstantial "after considering the overall public benefit conferred by the activity." *Id.* at 15-16. The Commission has recognized, furthermore, that the intent of the limiting language in section 144.030.2(17) is to prevent private persons from taking advantage of the exemption by leasing a public facility and all rights to the proceeds. *Godwin*, 1991 WL 128051 at *4.

The Arena's business simply does not present the type of harm that the limiting "inurement" language of section 144.030.2(17) was intended to avoid. Indeed, the Arena is a place of amusement wholly owned and operated by the County. *See* Appellant's Brief, p. 3. The County does not contract with a management company to oversee the Arena or maximize and share its profits; rather, the County itself solicits acts 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. *Id.* at pp. 3-5.[4] The economic realities of the entertainment market compel the County to

[4] Respondent points out the net revenues generated by some of the example events provided in the record. Resp. Brief, p. 9. But it assiduously fails to point out the net *profits/losses* once the operational expenses are accounted for, which demonstrate the complete picture. *See* Stip. 746 (net loss of $11,098.36), 748 (net loss of $24,747.40), 750 (net loss of $39,636.96), 754 (net profit of $13,386.32), and 924 (net loss of $26,180.09).

negotiate competitively to bring acts 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.[5] And, the Arena most certainly benefits from all proceeds derived therefrom.

Respondent argues that the County's reading of the exemption would produce an absurd result in that a municipality could simply write its contracts with third parties to treat any money that does not ultimately go to the municipality as a cost or expense

---

[5] Respondent also provides an incomplete and misleading quotation from some sample Family Arena agreements in the record. At p. 2, Respondent's Brief states, "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.'" In fact, this is but a fragment of a sentence in the provision of the agreements that deals with nonresident entertainer compensation tax. The *full* quotation is:

> Licensee's total compensation *for purposes of calculating the amount to be withheld by Arena under this paragraph* 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, 634-35 (emphasis added). Most importantly, the nonresident entertainer compensation tax has nothing to do with this appeal.

which benefits the County as opposed to a proceed that inures to a private person, firm or corporation. Resp. Brief, p. 23.[6] The County submits that the opposite is in fact true: the 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 public place of amusement like the Arena. *Wetterau, Inc. v. Dir. of Revenue*, 843 S.W.2d 365, 367 (Mo. banc 1992).

[6] Respondent's Brief, p. 23 at fn. 4, cites to a newspaper article for the proposition that the County "believes" the City of St. Charles should receive local sales taxes even though the County "believes" it is entitled to the exemption from the State, and Respondent further cites the article for the proposition that "the County stated that it would continue to receive their local sales taxes on the sales." As a preliminary matter, the article is not in the record in this case and Respondent's reference to it is therefore wholly improper and should not be considered by the Court. *See State v. Strong*, 142 S.W.3d 702, 728-29 (Mo. banc 2004)(sustaining the State's motion to strike references to a newspaper article that was outside the record on appeal) *citing State v. Burrington*, 371 S.W.2d 319, 320-21 (Mo. 1963); *see also Stallman v. Robinson*, 260 S.W.2d 743, 284 (Mo. 1953)(a newspaper article is not admissible as evidence of the facts stated therein). Furthermore, Respondent attributes statements to the County which were *not* made by the County. In fact, the statements referenced in Respondent's Brief were factual statements averred by the reporter, not attributed to any County official or spokesperson.

V. For All the Reasons Articulated in Appellant's Brief, Merchandise and Concessions Sales Clearly Fall Within Section 144.030.2(17) in That They Are "Fees" or "Other Charges" Paid In or For a Place of Amusement.

Respondent fails to appreciate the breadth of the exemption on this point. Section 144.030.2(17) exempts "*all amounts paid or charged for admission or participation or other fees paid by or other charges to individuals in or for any placement of amusement…"* (emphasis added).

First, Respondent argues that sales of tangible personal property ("merchandise") and food and beverages ("concessions") are not "fees" or "other charges" paid in or for a place of amusement based upon the dictionary definitions of those terms. Resp. Brief at pp. 29-31. But even the dictionary definitions proffered by Respondent do not support such a claim. The cited definitions for the term "charge," for example, include: "expenditure," "money paid out," "the price demanded for a *thing* or service," and "something that is debited." *Id., citing Webster's Third New International Dictionary* 377 (1993) (emphasis added). It is difficult to see how sales for merchandise and/or concessions do not meet these various definitions.

Next Respondent states, as the Commission did, that the Commission is not obligated to follow the reasoning of prior decisions which clearly weigh in favor of the County here. Resp. Brief, pp. 31-33. Respondent ignores the County's citation to *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), which states that 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. Here, the Commission's findings were arbitrary and unreasonable in light of *Zoological Park Subdistrict v. Dir. of Revenue*, 1991 WL 154843, No. 90-000490RS (Mo.Admin.Hrg.Com. June 10, 1991) (exempting merchandise and concessions sales) and *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) (exempting concessions sales).

Furthermore, there is simply no merit to Respondent's statement that Appellant's Brief mischaracterized this Court's opinion in *City of Springfield v. Dir. of Revenue*, 659 S.W.2d 782 (Mo. banc 1983). *See* Resp. Brief, p. 32 ("This is not at all what the Court stated…"). To be clear, *City of Springfield* states:

> … it is completely obvious that the tax is properly ordained by the application of §§ 144.010.1(2), (5), (8)(a) and (9), which define "business", "person", "sale at retail" and "seller" subject to the sales tax in such terms as to include the City in this instance. Section 144.020.1(2) brings the items of sales and the recreational activities within the purview of the taxing statute.

Id. at 784.

Finally, Respondent argues that merchandise and concessions sales are not exempt "fees" or "other charges" because "all the proceeds [therefrom] do not benefit the County in this case, but inure, in part, to private persons, firms or corporations." Resp. Brief, pp. 33-34. This argument fails as set forth comprehensively in the County's principle brief.

See, e.g., Appellant's Brief at pp. 27-29 (all proceeds derived from the Arena do benefit the County and do not "inure", as that term is understood in this context, to the benefit of private persons, firms or corporations; furthermore, such a finding is directly contradictory to *Godwin*, where the Commission found that a mere "money handling arrangement" pursuant to which the City paid 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).

In sum, merchandise and concessions sales are clearly "fees" or "other charges" under section 144.030.2(17), and the Commission erred in finding otherwise.

VI. Respondent Cites No Authority for the Proposition That the County Is Not A Proper Refund Claimant Nor for the Proposition That the Proper Remedy Is the Uniform Disposition of Unclaimed Property Act, §§ 447.500 *et seq.* RSMo.

Respondent cites *Norwin G. Heimos Greenhouse, Inc. v. Dir. of Revenue*, 724 S.W.2d 505 (Mo. banc 1987) for the proposition that the refund the County seeks in this case "belongs to unnamed customers of the Arena who paid the tax over the years in question." Resp. Brief, p. 35.[7] But *Norwin* does not say that at all. In fact, *Norwin* says

[7] Respondent also cites to *City of Springfield*, *supra* to state that its argument is true "even when the entity collecting the sales tax is a political subdivision." Resp. Brief, p. 35. But *City of Springfield* simply held that the imposition of sales tax pursuant to section 144.020.1(2) on "recreational sales" at a municipally-owned golf course did not violate the prohibition in Mo. Const. Art. III, § 39(10) against "a use or sales tax upon the

that *both* the seller and the purchaser can claim refunds. Indeed, the seller is the claimant in the usual case, as "[t]he primary tax burden [of the sales tax] is placed upon the seller." Section 144.021 RSMo.

In *Norwin*, the greenhouse company sought a refund of sales taxes it had paid on the purchase of certain utilities. This Court, apparently acknowledging that a refund request from the *purchaser* as opposed to the *seller* was not the usual case, stated that the threshold question was whether the greenhouse company, as purchaser, had standing to

---

use, purchase or acquisition of property paid for out of the funds of any county or other political subdivision." *cf.* The Honorable Judge Welliver's dissent, stating:

> It is not apparent to me why recreational facilities provided by tax funds and for the benefit of the general public should be treated in the same manner as privately owned country clubs operated for the benefit of its members. The private nature of the recreational facilities in *St. Louis Country Club* [*v. Administrative Hearing Comm'n* , 657 S.W.2d 614 (Mo. banc 1983), relied upon by the majority] renders that case wholly inapposite from the instance (sic) one … the services and activities sought to be taxed herein are supported by public funds.
>
> … As a result of this decision, the state can take a cut of the moneys that political subdivisions generate to recover the costs of providing recreational activities and facilities.

City of Springfield, 659 S.W.2d at 785-86.

request a refund. *Norwin*, 724 S.W.2d at 506. In answering that question the *Norwin* Court first looked to section 144.190, which provides the exclusive remedy for recovery of erroneously-collected sales tax. *Id.* It states that such erroneously-collected "sum[s] shall be credited on any taxes then due from the *person* under sections 144.010 to 144.510, and the balance…shall be refunded to the person…" *Id.* "Person," in turn, is defined as "*any* individual, firm, copartnership, [or] corporation." *Id.* at 507, *citing* § 144.010.1(5) (1986)(emphasis added).[8] As such, the Court held that *both* a purchaser and seller have standing to request a refund:

> The statute, by its terms, does not restrict the right to make a request for refund to sellers *alone.*
>
> ***
>
> …the legislature evidently intended to allow *anyone* burdened, either legally or otherwise, by the Director's collection of sales taxes to request a refund.

Id. at 507 (emphasis added).

Furthermore, Respondent fails to cite any authority for the proposition that the proper remedy in this case would be to treat the refund as unclaimed property under the Uniform Disposition of Unclaimed Property Act, §§ 447.500 *et seq.* ("the Act"). Indeed,

[8] The definition of "person" has since been moved to subsection (7) of section 144.010.1 RSMo. and provides that a "person" is "any individual, firm, copartnership, joint venture, association, [or] corporation…"

Respondent itself states that such a proposition has been merely "suggested" by this Court. Resp. Brief, p. 35, *citing Buchholz Mortuaries, Inc. v. Dir. of Revenue*, 113 S.W.3d 192 (Mo. banc 2003) and *State ex rel. American Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483 (Mo. banc 2003).

In fact, no suggestion was made at all in the principal opinion in *Buchholz*. Rather, the Honorable Judge Wolff opined in his concurring opinion that he believed "the money to be refunded belongs to Buchholz's customers." *Buchholz*, 113 S.W.3d at 195. And *Buchholz* involved neither a political subdivision as the seller nor the construction of section 144.030.2(17). The *Clark* case doesn't support such a proposition either. *Clark* was a class action breach of contract case before this Court on a writ prohibition. Again, the Honorable Judge Wolff, in his concurring opinion, merely mentioned the Act in explaining why he believed the state itself had an interest in the litigation. *Clark*, 106 S.W.3d at 495 ("This pot of gold at the end of the rainbow should, in my view, escheat to the state as 'unclaimed property.'").

CONCLUSION

WHEREFORE, for all of the reasons set forth herein and in Appellant's Brief, 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,

OFFICE OF THE ST. CHARLES
COUNTY COUNSELOR

/s/ Toby J. Dible

Toby J. Dible, Mo. 62727
Associate County Counselor
100 North Third Street, Suite 216
St. Charles, Missouri 63301
Tel: 636-949-7540
Fax: 636-949-7541
tdible@sccmo.org

ATTORNEY FOR APPELLANT
ST. CHARLES COUNTY, MISSOURI

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 3,474 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 2nd day of May, 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:

James R. Layton, Solicitor General
Jeremiah J. Morgan, Deputy Solicitor General
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102

Thomas A. Houdek
Department of Revenue
301 W. High St., Rm 670
Jefferson City, MO 65105

/s/ Toby J. Dible