SC95181

IN THE SUPREME COURT OF MISSOURI

KRISPY KREME DOUGHNUT CORPORATION,

Appellant,

vs.

DIRECTOR OF REVENUE,

Respondent.

On Petition for Review From
The Administrative Hearing Commission,
The Honorable Karen A. Winn, Commissioner

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

For years, Krispy Kreme Doughnut Corporation – home of "HOT DOUGHNUTS NOW" – collected sales tax from its restaurant customers at the general tax rate of four percent. (LF 4, 9-10); *see* § 144.020, RSMo (2015 Supp.).[1/] Krispy Kreme then discovered the lower tax rate of one percent in § 144.014. It claimed before the Administrative Hearing Commission ("Commission") that its Missouri tax return preparer was "unaware that Missouri had a lower sales tax rate" that applied to sales of certain foods for which food stamps may be redeemed under the Federal Food Stamp Program. (LF 4).

After discovering the lower tax rate, Krispy Kreme sought refunds for sales taxes already collected from its retail customers. (LF 1-3). In this case, the refund claims are for sales of doughnuts sold more than a decade ago – between April 1, 2003 and December 31, 2005 ("the tax period"). During the tax period, Krispy Kreme owned and operated five different retail restaurants in Missouri, each with refund claims. (LF 3). Only four are still operating. (LF 3-4).

[1/] All references to the Revised Statutes of Missouri will be to the 2015 Supplement, unless otherwise indicated.

The parties initially submitted cross-motions for summary disposition. The Commission reviewed the evidence on cross-motions for summary disposition and denied the refund claims. Krispy Kreme then appealed, and this Court affirmed, in part, that decision and remanded for a further determination of facts. *See Krispy Kreme Doughnut Corp. v. Dir. of Revenue*, 358 S.W.3d 48 (Mo. 2011) ("*Krispy Kreme I*"). Krispy Kreme now appeals the Commission's decision to deny the refund claims a second time after an evidentiary hearing and a determination of facts.

A. The 2012 Internet Questionnaire.

Following the remand from this Court in the first appeal, Krispy Kreme sought to piece together an argument to salvage its refund claims. As such, it hired a marketing professor to conduct a "survey" in the fall of 2012 specifically for this litigation. (LF 5; Tr. 141). The 2012 survey was, in fact, an internet questionnaire and formed the basis for the refund claims on remand. (LF 5).

The professor who designed and conducted the internet questionnaire testified: "I have no experience in surveying doughnut customers." (Tr. 83). He could not determine the veracity or truthfulness of the answers received through the internet questionnaire. (Tr. 85). He also did not verify that the person answering the internet questionnaire actually bought the doughnuts in question, much less any doughnuts during the tax period. (Tr. 87). And he

never expressed his opinion with regard to the subject matter in dispute – the immediate or non-immediate consumption of doughnuts by customers, including during the tax period. (Tr. 31 – 74).

The 2012 internet questionnaire consisted of Krispy Kreme stores issuing receipts to all customers that included an invitation to go to a special website and complete a questionnaire for purchases during the period of September 25, 2012, to November 9, 2012. (LF 5). The internet questionnaire did not attempt to collect information going back to April 2003 through December 2005, the tax period at issue. (Tr. 68 – 69). And each receipt was identified with the store that issued it. (Tr. 74-82).

If the person responded to the questionnaire on the internet during the prescribed time and for the correct store, the person responding would be able to obtain a free dozen doughnuts. (LF 5; Tr. 34). The questionnaire response rates were as follows:

- Store 197 issued 17,282 receipts directing customers to the internet to respond to a questionnaire. Only 257 responses were usable, or 1.49%.
- Store 199 issued 22,248 receipts. Only 312 responses were usable, or 1.4%.
- Store 202 issued 17,115 receipts. Only 362 responses were usable, or 2.12%.

- Store 203 issued 15,139 receipts. Only 208 responses were usable, or 1.37%.

(LF 6; Tr. 82).

One part of the internet questionnaire solicited answers about: how soon after purchase a doughnut was consumed in increments of less than a minute, 1-5 minutes, 6-15 minutes, 16-30 minutes, 31-60 minutes, and more than 60 minutes; and, where the doughnut was eaten – in the store, on the go/car, at home, at work, at school, at some other place. There were also answers of don't remember, not consumed yet, and time not reported. (Tr. 41).

The professor testified that "the main charge" that he worked under was that "we needed to get at the when and where were the doughnuts consumed." (Tr. 31). Yet, his testimony consisted only of explaining the process and results of the questionnaire. Krispy Kreme then sought to connect the 2012 internet questionnaire with the tax period by comparing it to prior marketing research and by calling its own interested employees to say that they believed customer demographics, marketing, pricing, competition, and customer motivation and purchasing habits had remained relatively constant. (LF 4, 8). Prior marketing research did not focus or inquire about the location and time of restaurant food consumption. (LF 4).

B. The Commission's Decision.

At the hearing, the Director objected to the admission of the 2012 internet questionnaire, and argued in the alternative that it should be given little weight. The Commission admitted the 2012 internet questionnaire, but concluded that:

- The questionnaire "is evidence of when and where the four stores' customers ate their doughnuts during the survey period" and not "*during the tax periods*." (LF 21) (emphasis in original).
- The witnesses trying to connect the questionnaire to the tax periods were "obviously interested in the results of this case." (LF 21).
- Prior marketing results "lack[ed] data on the key issue in this case, which is when customers eat their doughnuts." (LF 21). They "do not, intuitively, support the proposition that a large percentage of doughnuts are not purchased for immediate consumption." (LF 22).
- The prior marketing also "showed that there were some changes over time." (LF 22).

For these reasons, the Commission assigned "little weight" to the 2012 internet questionnaire. (LF 23). And as such, the Commission concluded that

Krispy Kreme did not establish, by a preponderance of the evidence, that it was entitled to the tax refund. (LF 23).

SUMMARY OF THE ARGUMENT

Once again, Krispy Kreme Doughnuts is before this Court trying to prove that the obvious is not the obvious – doughnuts purchased at a fast-food restaurant are prepared for immediate consumption. Who goes to a Krispy Kreme restaurant to stock up on doughnuts? No one. Even Krispy Kreme's own marketing research shows that people go to its restaurants because they have an immediate craving, for a special treat, or because they see the "HOT DOUGHNUTS NOW" sign and want a mouth-watering original glazed doughnut.

In this second appeal, the issue is much easier to resolve than in *Krispy Kreme I*. Here, the Commission concluded that Krispy Kreme failed to meet its burden to prove, under § 144.014, that 20% or more of its doughnuts were not prepared for immediate consumption. The Commission reached this conclusion after hearing the evidence and determining, as the "sole judge" of witness credibility and the weight to give evidence, that little weight should be given to the evidence presented. Why? Because Krispy Kreme attempted to prove the timing and location of doughnut consumption during the tax period – 2003 to 2005 – with an internet questionnaire conducted many years later – in 2012. In fact, the "evidence" should not have been admitted at all.

The 2012 internet questionnaire was conducted solely for this litigation and did no inquire about doughnut purchases and consumption during the

tax period. Instead, Krispy Kreme sought to connect the inadmissible internet responses to the tax period through witnesses such as a professor who admitted "I have no experience in surveying doughnut customers," and with additional witnesses who the Commission found were "obviously interested in the results of this case."

The selection of respondents for the 2012 internet questionnaire was haphazard and untrustworthy. Krispy Kreme had no way of knowing if the person responding to the questionnaire was the purchaser of the doughnuts or had actually consumed or knew anything about the consumption of the doughnuts, much less purchases or consumption during the tax period. The selection of the respondents was not random and there was no way to verify that the actual purchaser was the person answering the internet questionnaire. The internet questionnaire consisted of nothing more than 1,139 separate hearsay statements. And this out of 71,784 possible respondents who were issued receipts with the promise of a free dozen doughnuts.

Recognizing the weakness of its evidence and claims, Krispy Kreme argues that this Court should reverse its decision in *Krispy Kreme I*, because it is difficult to prove that doughnuts purchased at a fast-food restaurant are not prepared for immediate consumption. But there is a reason it is difficult to prove, and it is not because this Court's decision was "clearly erroneous

and manifestly wrong." It is because of the simple truth that doughnuts at Krispy Kreme's fast-food restaurants are prepared for immediate consumption. They are not prepared or purchased to put on a shelf, like a loaf of bread, to be consumed over a few days or a week. They are purchased (and prepared) to be consumed immediately.

ARGUMENT

Standard of Review

The Commission's decision will 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." *Saint Charles Cnty. v. Dir. of Revenue*, 407 S.W.3d 576, 577 (Mo. 2013) (citing § 621.193). Additionally, "[i]n reviewing the AHC's decision, the Court may not determine the weight of the evidence or substitute its discretion for that of the administrative body." *Preston v. Dir. of Revenue*, 202 S.W.3d 608, 609 (Mo. 2006); *see also Brinker Missouri, Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 435 (Mo. 2010).

Here, the Commission expressly found that Krispy Kreme's evidence on remand was entitled to little weight and, therefore, concluded that it had failed to prove it was entitled to a refund. Ignoring the standards of review and *stare decisis*, Krispy Kreme argues that the Commission's decision regarding the weight of the evidence is not entitled to any deference, or alternatively that the standards established by this Court in *Krispy Kreme I* should be reversed. These arguments fail.

I. The Commission is the Sole Judge of Credibility and the Weight to Give Evidence, and Correctly Concluded that Krispy Kreme Failed to Meet its Burden in This Case – Responding to Appellant's Point I.

Courts routinely affirm decisions in which the Commission has concluded that the taxpayer failed to meet its burden. *See, e.g., Overland Steel, Inc. v. Dir. of Revenue*, 647 S.W.2d 535, 538 (Mo. 1983) (noting the lack of evidence to meet the requisite burden of proof despite testimony from the taxpayer); *Dillon v. Dir. of Revenue*, 777 S.W.2d 326, 328 (Mo. App. W.D. 1989) (finding a failure to sustain the burden for an exemption). Krispy Kreme, however, argues that "[n]o Missouri court appears to have addressed directly the standard that applies when the Commission concludes that a party did not meet its burden of proof" and so suggests an "against-the-weight-of-the-evidence" standard. Appellant's Brief, p. 27. This is neither true nor the appropriate standard.

A. The Commission is the Sole Judge of Credibility and the Weight to Give Evidence.

The Commission expressly concluded that the evidence in this case was entitled to "little weight." In fact, as set forth below, the supposed evidence was likely not even admissible. Yet, Krispy Kreme ignores case law and suggests that this Court "need not defer to the Commission's evaluation" of

the evidence, but "can consider it anew here." Appellant's Brief, p. 28. But even the cases cited by Krispy Kreme do not support its new standard. *See* Appellant's Brief, p. 26-27 (citing *Dale v. S & S Builders, LLC*, 188 P.3d 554, 559 (Wyo. 2008) (adopting "arbitrary and capricious"), *Hall v. Dillon Cos., Inc.*, 189 P.3d 508, 512 (Kan. 2008) (adopting "arbitrary disregard of undisputed evidence" or "bias, passion, or prejudice")).

Instead, decisions about credibility and the weight to give evidence are uniquely within the province of the Commission. A legion of decisions from this Court, and many other courts, have concluded that "[i]n reviewing the AHC's decision, the Court may not determine the weight of the evidence or substitute its discretion for that of the administrative body." *Preston v. Dir. of Revenue*, 202 S.W.3d 608, 609 (Mo. 2006); *Edwards v. Mo. State Bd. of Chiropractic Examiners*, 85 S.W.3d 10, 20 (Mo. App. W.D. 2002) (citing *Greene Cnty. v. Hermel, Inc.*, 511 S.W.2d 762, 768 (Mo. Div. 2 1974)). "The fact-finding function rests with the AHC, and even if the evidence would support either of two findings, the court is bound by the AHC's factual determination." *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 640 (Mo. App. W.D. 2000).

In short, the Commission "'is the sole judge of the credibility of witnesses and the weight and value to give to the evidence.'" *Missouri Real Estate Appraisers Comm'n v. Funk*, 306 S.W.3d 101, 105 (Mo. App. W.D.

2010) (emphasis added) (quoting *Clayton v. Langco Tool & Plastics, Inc.*, 221 S.W.3d 490, 493 (Mo. App. S.D. 2007) and *Blackwell v. Puritan–Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. E.D. 1995)).

As the "sole judge" of credibility and the weight to give evidence, and without any evidence to support a claim, the only question in this case is whether the Commission's decision to give little weight to Krispy Kreme's supposed evidence was "arbitrary, capricious, or unreasonable, and whether the commission abused its discretion." *Psychcare Mgmt., Inc. v. Dept. of Soc. Servs. Div. of Med. Servs.*, 980 S.W.2d 311, 312 (Mo. 1998). The Commission's decision was appropriate, and should be affirmed.

B. The Commission's Decision as to Credibility and the Weight to Give Evidence was Not Arbitrary, Capricious, Unreasonable, or an Abuse of Discretion.

The decision by the Commission to give little weight to the evidence was certainly reasonable in this case. After all, the critical evidence relied upon by Krispy Kreme purported to prove consumption rates and locations for doughnuts purchased during the tax period – 2003 to 2005 – with an internet questionnaire that was administered many years after the fact – in 2012.

The 2012 internet questionnaire was, in fact, conducted solely for litigation purposes. In reaching its conclusion as to the weight to give the

2012 internet questionnaire, the Commission specifically noted the following problems:

- The questionnaire "is evidence of when and where the four stores' customers ate their doughnuts during the survey period" and not "*during the tax periods*." (LF 21) (emphasis in original).
- The witnesses trying to connect the questionnaire to the tax periods were "obviously interested in the results of this case." (LF 21).
- Prior marketing results "lack[ed] data on the key issue in this case, which is when customers eat their doughnuts." (LF 21). They "do not, intuitively, support the proposition that a large percentage of doughnuts are not purchased for immediate consumption." (LF 22).
- The prior marketing also "showed that there were some changes over time." (LF 22).

These are not unreasonable or arbitrary concerns or explanations.

What is more, although the survey respondents were awarded a free dozen doughnuts for participating, the 2012 internet questionnaire produced only the following response rates:

- Store 197 issued 17,282 receipts directing customers to the internet to respond to a questionnaire. Only 257 responses were usable, or 1.49%.
- Store 199 issued 22,248 receipts. Only 312 responses were usable, or 1.4%.
- Store 202 issued 17,115 receipts. Only 362 responses were usable, or 2.12%.
- Store 203 issued 15,139 receipts. Only 208 responses were usable, or 1.37%.

Thus, there were 71,784 receipts and only 1,139 usable responses.

In addition, the selection of the respondents for the 2012 internet questionnaire was haphazard and untrustworthy. Krispy Kreme had no way of knowing if the person responding to the questionnaire was the purchaser of the doughnuts or had actually consumed or knew anything about the consumption of the doughnuts, much less purchases or consumption during the tax period. The selection of the respondents was not random and there was no way to verify that the actual purchaser was the person answering the internet questionnaire. In truth, the questionnaire consisted of 1,139 separate hearsay statements, which presented separately, would be inadmissible. Combining all 1,139 statements into one report did not make the statements competent evidence.

The Commission recognized the significant limitations of the 2012 internet questionnaire and properly gave it little weight. Krispy Kreme, however, argues that this "Court need not defer to the Commission's conclusions" because the "survey evidence does not depend on witness credibility." Appellant's Brief, p. 35. That is not true, of course, because the Commission is the sole judge of the weight to give evidence, and courts must defer to those determinations.

Moreover, the internet questionnaire was not merely unreliable on its own, it was also based on witnesses that were not credible. The witnesses were supposedly advanced, in Krispy Kreme's own words, to testify that "consumer behavior has not changed in any meaningful manner since the Tax Periods." Appellant's Brief, p. 35. Thus, according to Krispy Kreme, the results of the 2012 internet questionnaire "were tied to the Tax Period [in 2003 to 2005] by two people." Appellant's Brief, p. 40. The Commission questioned the witnesses' credibility – calling them "obviously interested in the results" – and for good reason.

As a demonstration of the unreliability of the witnesses, the store manager's testimony is instructive. The store manager was called because he supposedly understood the customers' "consumption habits" and the demographics of the customers. (Tr. 179-80). And so he testified, for example, that the Springfield store had "a lot of people" buy doughnuts on the way to

work. Yet, when cross examined on the internet questionnaire results that going to work was only 11% of the total purchases, he stated that one out of ten individuals buying doughnuts on the way to work was "significant." (Tr. 192 – 193).

The same witness also testified that 75% of the Branson store business was from tourists. Again, when cross examined on survey results that the most tourist business could be was 16%, he testified "First of all, the 75 percent number is a number I pulled out of the air." (Tr. 194). He went on to explain that "It's a large percentage. I couldn't tell you exactly what it is. I have no way of knowing that without surveying my customers to find out where they're coming from exactly." (Tr. 193 – 194). The other witness supposedly tying the internet survey to the tax period at issue was similarly unreliable and interested in the outcome.

For these many reasons, the Commission did not act arbitrarily, capriciously, or unreasonably in giving little weight to the evidence presented by Krispy Kreme to establish consumption in the 2003-05 tax period.

C. The Internet Questionnaire and Other "Evidence" Was Not Admissible to Prove Consumption in the 2003-05 Tax Period.

Even though the Commission gave little weight to Krispy Kreme's supposed "evidence," it was likely not admissible to begin with. After all, the 2012 internet questionnaire – the central piece of Krispy Kreme's claim – was merely a collection of cumulative hearsay statements that are unreliable and inadmissible. The professor who set up the 2012 internet questionnaire testified that "the main charge that I worked under which is that we needed to get at the when and where were the doughnuts consumed." (Tr. 31). His testimony, however, consisted only of explaining the process and results of the questionnaire. Several courts have considered similar issues.

In *Graves v. Atchison-Holt Elec. Coop.*, 886 S.W.2d 1 (Mo. App. W.D. 1994), for example, survivors of an electrocuted farmer and an injured farmer sued the power company for wrongful death and injury. The power company attempted to use a survey of direct telephone calls to 350 local farmers, selected at random from a larger group of farmers, to rebut the claim that the power company had failed to warn of the existence and danger of an overhead electric line when operating farm equipment. The power company apparently asserted that if nearly everyone in the area knew about the hazard of overhead electric lines and the potential for death or serious bodily injury,

then the victims knew about the danger and had shown contributory negligence resulting in death and injury.

In considering admission of the alleged survey at trial, the court found that "[t]he survey was admitted into evidence through the testimony of Christopher Pflaum, a consulting economist and president of Spectrum Economics, Inc., with a PhD in finance, statistical training, and management expertise. While his testimony indicates that the survey was scientifically designed and statistically reliable, this alone is not sufficient for its admission." *Graves*, 886 S.W.2d at 7 - 8.

The court reviewed the role of an expert witness and information summarized by the expert witness:

> Missouri courts have held that as long as the information which an expert witness obtains from other sources serves "only as background for his opinion and [is] not offered as independent substantive evidence ..., he should not be precluded from testifying." *Stallings v. Washington University*, 794 S.W.2d 264, 271 (Mo. App. 1990). This is based upon the principle that allowing an expert to rely upon published or reported data is a matter of necessity, and to rule otherwise would set impossible

> standards with regard to proof. *Id.* However, an expert who consults and merely summarizes the content of a hearsay source without applying his own expertise is merely a hearsay witness. *State ex rel. Missouri Highway & Transportation Comm'n v. Modern Tractor & Supply Co.*, 839 S.W.2d 642, 655 (Mo. App. 1992).

Graves, 886 S.W.2d at 7 (internal citations omitted). The *Graves* court determined that "survey results are admissible for the limited purpose of providing a foundation for expert opinion, and the survey must also be relevant to the issues in the case." *Graves*, 886 S.W.2d at 8. The court went on to find that the survey was inadmissible hearsay:

> Pflaum's testimony consisted of a recitation of how the survey was designed and conducted, what questions were asked, and how those surveyed responded to the questions. Pflaum did not offer any expert opinion based on the survey results. He was merely testifying about the survey itself and its results, and was providing no expert opinion of his own. In other words, the survey did not serve as a background for Pflaum's expert opinion, but

> was being offered as independent substantive evidence . . . . Thus, the survey was inadmissible.

Graves, 886 S.W.2d at 8.

Here, the 2012 internet questionnaire is even more problematic. The professor conducting the questionnaire expressed no specific opinion regarding the "immediate" consumption of doughnuts, much less consumption during the tax period at issue. His testimony consisted only of explaining the process of the questionnaire, the results of the questionnaire, and that in his view it was statistically reliable. Thus, his testimony provided less support than that of the expert in *Graves*.

The professor in this case was not testifying as to his expert opinion on consumer consumption of doughnuts. In fact, he had no experience in the doughnut industry or in consumer research of doughnut customers prior to conducting the 2012 internet questionnaire. (*See* Tr. 83 (stating "I have no experience in surveying doughnut customers"). He also could not determine the veracity or truthfulness of the answers to the questionnaire. (Tr. 85-86, 101). There were, after all, no interviews involving any person. (LF 19-20; Tr. 84). The questionnaire was merely written questions over the internet to a potential unknown audience of 71,784 persons with only 1,139 usable responses.

This is not to say that some summary evidence may be admissible if the underlying evidence supporting the summary is admissible. In *Albers v. Hemphill Contracting Co., Inc.*, 740 S.W.2d 660 (Mo. App. E.D. 1987), for example, the trustees of two employee benefit trusts sued for amounts owing under the terms of collective bargaining agreements. The trustees engaged accountants to audit records. The defendant objected to the audit report, which included a summary of business records. The court upheld the trial court admission of the summary and testimony:

> The audit report to which defendant objects is a summary of information . . . extracted from defendant's own business records. A summary of voluminous records may properly be admitted into evidence if the summary's proponent establishes that the records upon which the summary is based are themselves admissible in evidence and available to the opposing party for inspection. *Killian Construction Company v. Tri-City Construction Company*, 693 S.W.2d 819, 834 (Mo. App. 1985); *State of Missouri ex rel State Highway Commission v. Cone*, 338 S.W.2d 22, 26 (Mo. 1960). Because defendant's business records were obviously readily available to

> defendant for inspection, and because these records would themselves have been admissible in evidence as records "made in the regular course of business" within the meaning of § 490.680, RSMo 1978, we conclude that the audit reports, which digest certain information contained in these records, were admissible as summaries.

Albers, 740 S.W.2d at 662. Here, Krispy Kreme did not have competent evidence underlying the results of its internet questionnaire.

Moreover, scientifically designed and statistically reliable surveys may be admitted as evidence. In *Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40 (Mo. App. E.D. 1984), for example, the court of appeals recognized the admissibility of scientifically designed and statistically reliable surveys where the purpose of the rule against hearsay evidence is adequately safeguarded and the trustworthiness of the survey is otherwise established.

A survey was taken of Liberty employees who were continuously employed throughout the nine months before and the nine months after Liberty's conversion to a different computer system. The purpose of the survey was to determine whether Liberty employees spent more or less time on computer problems after the conversion. "Neither the interviewers nor the

interviewees knew the purpose of the poll and had no interest in the outcome." *Id.* at 55. The expert in *Liberty* testified in detail how the survey was reliably conducted:

> Starting with a list of the 875 persons employed by Liberty in March 1977, 606 were selected by use of a "random number table" . . . . From this number were culled 282 employees who met the demographic and experience . . . . A professional interviewing firm then attempted to reach these persons by telephone and . . . . Appointments were made with 149 for subsequent in-depth telephone interviews. . . . Throughout the entire survey process, care was taken that its results be as unbiased as possible. . . . The results of the interviews were then tabulated and analyzed under Mr. Wynne's supervision, allowing him to arrive at the conclusion . . . .

Id. at 53.

After considering how detailed and controlled the survey was conducted, the court of appeals stated that "[w]e are persuaded, however, by common sense and reason that it is proper to allow into evidence surveys

which meet fundamental requirements of necessity and trustworthiness for the purpose of providing the foundation for an expert opinion such as that elicited here." *Id.* at 55. The 2012 internet questionnaire Krispy Kreme employed, in contrast, does not reach the level of statistical or scientific methodology and trustworthiness employed in *Liberty*.[2/]

Moreover, § 536.070(11) does not save the 2012 internet questionnaire in this case. This section addresses admissibility, leaving the weight to be given evidence to the Commission. It provides that in any contested case:

> The results of statistical examinations or studies, or of audits, compilations of figures, or surveys, involving interviews with many persons, or examination of many records, or of long or complicated accounts, or of a large number of figures, or involving the ascertainment of many related facts, shall be admissible as evidence of such results, if it shall appear that such examination, study, audit, compilation of figures, or survey was made by or under the supervision of a witness, who is present at

[2/] The court of appeals subsequently limited the future application of *Liberty* in *Nickels v. Nickels,* 817 S.W.2d 632 (Mo. App. S.D. 1991).

> the hearing, who testifies to the accuracy of such results, and who is subject to cross-examination, and if it shall further appear by evidence adduced that the witness making or under whose supervision such examination, study, audit, compilation of figures, or survey was made was basically qualified to make it. All the circumstances relating to the making of such an examination, study, audit, compilation of figures or survey, including the nature and extent of the qualifications of the maker, may be shown to affect the weight of such evidence but such showing shall not affect its admissibility[.]

This section allows a witness to testify as to the accuracy of the results of reviewing competent evidence. The section does not allow for a witness to testify to the results of inadmissible hearsay. The issue is what the term "surveys" means in this section. Under Section 18 of Article V of the Missouri Constitution, evidence must be competent. Krispy Kreme maintains that by using the term "surveys," the section allows for inadmissible hearsay evidence to become competent evidence. That is not the intent of the section and not allowed under the Missouri Constitution.

Under § 536.070(11), the reference to surveys is that a witness may testify to the results of examinations of some other existing subject matter or of geographic locations. The subject matter, however, must be competent evidence. *See, e.g.*, *Savage v. State Tax Comm'n of Missouri*, 722 S.W.2d 72, 76–77 (Mo. 1986) (interpreting § 536.070(11); *Big River Tel. Co., LLC v. Southwestern Bell Tel., L.P.*, 440 S.W.3d 503 (Mo. App. W.D. 2014) (same).

The report from Krispy Kreme's 2012 internet questionnaire is merely a compilation of hearsay evidence. Section 536.070(11) is not an exception to the hearsay rule and the internet questionnaire should not have been admitted even though it was appropriately given little weight and still failed to support the refund claims in this case.

II. The Plain Language of § 144.014 – Which Provides for a Reduced 1% Tax Rate on Food Purchased with Food Stamps – Does Not Include Doughnuts Purchased at a Fast Food Restaurant and Prepared for Immediate Consumption – Responding to Appellant's Point II.

Recognizing that its refund claims must fail for lack of any evidence under this Court's prior decision, Krispy Kreme asks this Court to reverse its decision in *Krispy Kreme I*. But its arguments have already been rejected and present nothing new. The principle of *stare decisis*, therefore, should lead the Court not to a new analysis with all the same principles rehashed, but

instead this Court should simply decline to revisit the issues altogether. *See Hodges v. City of St. Louis*, 217 S.W.3d 278, 282 (Mo. 2007).

Once this Court has "laid down a principle of law applicable to a certain state of facts, it [must] adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same." Black's Law Dictionary 1406 (6th ed. 1990). This Court has held, under the principle of *stare decisis,* that a decision "should not be lightly overruled" unless it is "clearly erroneous and manifestly wrong." *Eighty Hundred Clayton Corp. v. Dir. of Revenue*, 111 S.W.3d 409, 411 n3 (Mo. 2003) (citing *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue,* 94 S.W.3d 388, 391 (Mo. 2002)). This Court's decision in *Krispy Kreme I* is not clearly erroneous and manifestly wrong.

A. The Lower Tax Rate in § 144.014 Should be Strictly Construed.

Before even considering the merits of Krispy Kreme's arguments, it is essential to establish the proper burden or construction for the interpretation of the statute at issue – § 144.014. Generally, tax imposition statutes are construed against the taxing authority and in favor of the taxpayer. *Am. Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. 1999). Yet, the circumstances and setting of this statute and Krispy Kreme's arguments are distinctly different.

In an effort to obtain a refund of taxes already collected from customers, Krispy Kreme seeks to qualify for a lower tax rate. In doing so, Krispy Kreme is trying to expand § 144.014 in order to remit the lower one percent tax rate rather than the general four percent tax rate that would otherwise be applicable to its retail sales of doughnuts and other food items. Thus, the lower tax rate of § 144.014, in effect, is an exception or exclusion to the general tax provisions of § 144.020, and as such should be strictly construed and certainly not expanded. *See Southwestern Bell Tel. Co. v. Dir. of Revenue,* 182 S.W.3d 226, 228 (Mo. 2005) (holding that tax exemptions are "strictly construed against the taxpayer, and any doubt is resolved in favor of application of the tax"); *see also Branson Props. USA, L.P. v. Dir. of Revenue,* 110 S.W.3d 824, 825 (Mo. 2003) (noting that the taxpayer carries the burden of showing they are entitled to an exemption under the statutes).

B. Doughnuts Prepared by Krispy Kreme for Retail Sale are "Prepared . . . for Immediate Consumption."

Regardless of how § 144.014 is construed, this case comes down to the plain meaning of four words in the statute – "prepared . . . for immediate consumption" – all in the context of a fast food doughnut restaurant. *Id.* (emphasis added). This language in § 144.014.2 is clear, not ambiguous, and therefore does not require resort to rules of statutory construction. *See Abrams v. Ohio Pacific Express*, 819 S.W.2d 338, 340 (Mo. 1991) (holding that

where the language of a statute is unambiguous, courts give effect to the language as written and will not resort to rules of statutory construction).

Krispy Kreme concedes that the great majority of its retail sales of doughnuts are not only prepared for immediate consumption, but are actually immediately consumed. Thus, Krispy Kreme does not argue, for example, that doughnuts eaten by customers in its restaurants are not prepared for immediate consumption. Krispy Kreme also does not argue that most doughnuts purchased at its drive-throughs are not prepared for immediate consumption. And of course, Krispy Kreme's most well recognized trademark – "HOT DOUGHNUTS NOW" – finds no place in its argument that these doughnuts are not prepared for immediate consumption.

As with any statutory provision, "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. 2010) (citing *State ex rel. White Family Partnership v. Roldan*, 271 S.W.3d 569, 572 (Mo. 2008)). "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. 2007) (citing *Am. Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. 1999) and *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. 1995)).

Here, the language at issue in § 144.014 – "prepared . . . for immediate consumption" – makes clear the legislative intent. The critical term "prepared," is defined by the dictionary as:

> **prepare 1a:** to make ready beforehand for some purpose **:** put into condition for a particular use, application, or disposition **b:** to make ready for eating . . . .

Webster's Third New International Dictionary 1790 (1993). The terms "immediate" and "consumption," are defined, in turn, as follows:

> **immediate 1a:** acting or being without the intervention of another object, cause, or agency . . . **3a:** occurring, acting, or accomplished without loss of time **:** made or done at once **:** near to or related to the present . . . .
>
> **consumption 1a:** the act or action of consuming or destroying **b:** the wasting, using up, or wearing away of something **2:** the utilization of economic goods in the satisfaction of wants or in the process of production resulting in immediate destruction (as in the eating of foods) . . . .

Id. at 1129, 490. At its fast food doughnut restaurants, Krispy Kreme does just as described in the dictionary definitions of "prepared," it makes doughnuts ready beforehand for immediate consumption. If the terms

"immediate consumption" were not connected to the term "prepared" then the terms might have a different meaning. But by attaching the terms "immediate consumption" to the term "prepared" the meaning of the statute is quite clear. Krispy Kreme prepares all of its doughnuts for retail sale the same way, and the employees just pull the number based on the customer's order. This is in contrast to doughnuts sold at wholesale (which are not at issue in this case) that are specifically prepared for wholesale and packaged accordingly.

The plain language provides that doughnuts are prepared for immediate consumption even if they are consumed "off the premises of the establishment." The statute makes this point more than once, providing also that food may be prepared for immediate consumption "regardless of whether such prepared food is consumed on the premises of the establishment." Yet, Krispy Kreme would argue for a standard that effectively turns this into an exception for "made-to-order" food for immediate consumption. Appellant's Brief, p. 39. The statute does not limit the exception in that way. And in fact, the statute specifically includes food sold at "any restaurant, fast food restaurant, delicatessen, eating house, or cafe," all of which sell food that is not necessarily "made-to-order" but is often made in advance and sold when ordered. Even McDonalds, the ultimate example in fast food, does not necessarily make all of its food to order. Just because a food item is made in

advance of order does not mean that it is not prepared for immediate consumption.

Moreover, the very purpose of the statute undermines Krispy Kreme's arguments. Krispy Kreme argues that "the purpose of section 144.014 is to allow consumers a discount in the sales tax rate when they buy food." Appellant's Brief, p. 19. That is hardly the whole story. Section 144.014 is intended to permit a reduced tax rate for the "types of food for which food stamps may be redeemed." § 144.014.2. One hardly thinks of a fast food doughnut restaurant as a place that food stamps may be redeemed. *See* usda.gov/documents/FOOD_STAMP_PROGRAM.pdf (noting that the food stamp program is designed to help the most vulnerable populations avoid hunger and "make healthy food choices"). And although doughnuts may be purchased at a grocery store with food stamps, it is not appropriate to try and stretch the interpretation of this statute beyond the plain language in order to accommodate a lower tax for the benefit of a fast food doughnut restaurant.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing brief of respondent was served electronically via Missouri CaseNet e-filing system on the 3rd day of February, 2016, 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 7,248 words.

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