SC95388

IN THE SUPREME COURT OF MISSOURI

GATE GOURMET, INC.,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

On Petition for Review from the Administrative Hearing Commission

Hon. Sreenivasa Rao Dandamudi, Commissioner

APPELLANT'S REPLY BRIEF

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INTRODUCTION

For the first time, this Court is called upon to determine the meaning of the term "home consumption" as it is used, not in common parlance, but in the context of Missouri's sales tax laws. The meaning is very broad. It includes all food except that sold for immediate consumption.

Gate Gourmet's TV-Dinner-Style Frozen Meals are not sold for immediate consumption. They are sold for further preparation and consumption at a later time off Gate Gourmet's premises. Thus, they are sold for "home consumption" and qualify for the one percent tax rate.

The Director's arguments are based on a misleading statement of facts, a literal and overly narrow definition of "home consumption," and erroneous interpretations of Missouri law and this Court's precedent.

ARGUMENT

I. THE DIRECTOR RELIES ON IRRELEVANT AND UNSUPPORTED FACTS

The Director's statement of the facts is fraught with errors, misleading and incomplete excerpts from the hearing transcript, and inappropriate legal conclusions.

A. Non-Taxable Catering Services Are Irrelevant

Citing an incomplete excerpt from the AHC hearing transcript, Tr. 93:11, the Director suggests the non-taxable catering side of Gate Gourmet's business (delivering and serving hot meals directly to customers) is at issue in this case. Resp. Br. 1. It is not.

This case concerns only Gate Gourmet's sales of its TV-Dinner-Style Frozen Meals. *See* Entire Record.

B. Gate Gourmet's TV-Dinner-Style Frozen Meals Are Similar To Grocer-Sold TV Dinners

Attempting to differentiate Gate Gourmet's TV-Dinner-Style Frozen Meals from similar meals that are sold in grocery stores and that qualify for the one percent rate, the Director urges the Court to focus on Gate Gourmet's legally irrelevant pre-sale and post-sale activities. The Commission, however, explicitly found that "[t]he pre-cooked and frozen meals Gate Gourmet sold to its commercial airline customers are similar to frozen dinners sold to the public in grocery stores in that they are fully cooked, then frozen, then distributed for sale. For both Gate Gourmet's meals and frozen meals sold in grocery stores, the customer thaws and heats the meal before eating it." A2; L.F. 129, ¶ 5. These factual findings are supported by substantial evidence upon the whole record and must be upheld. *Concord Publ'g House, Inc. v. Director of Revenue*, 916 S.W.2d 186, 189 (Mo. banc 1996).

1. Pre-Sale Manufacture And Design Facts Are Irrelevant

The Director correctly states that the St. Louis Facility features stoves, ovens, cooking equipment, blast chillers, storage areas, and other operations typically found in a food processing plant, and that Gate Gourmet employs chefs and other experts who design the different varieties of meals. Resp. Br. 1. Surely, however, other TV-Dinner manufacturers like Lean Cuisine have similar facilities, employees, and processes for

manufacturing frozen TV Dinners. The Lean Cuisine website, for example, describes its "team of chefs," "nutritionist," "big kitchen," "recipes," "best ingredients," and freezing process. *See* https://www.leancuisine.com/about/freshlymade (visited April 22, 2016). Whatever their pre-sale activities are, in the cases of both Gate Gourmet and Lean Cuisine, the resulting food is not sold for immediate consumption. The frozen meals in both cases are sold for further preparation and consumption elsewhere. Thus, the TV-Dinner-Style Frozen Meals are sold for home consumption, regardless of who sells them, how they are manufactured, who buys them, or wherever else they are eaten.

2. At Time Of Sale, The TV-Dinner-Style Frozen Meals Are Neither Safe Nor Ready To Eat

The Director asserts that the TV-Dinner-Style Frozen Meals are safe to eat at the point of sale, relying entirely on one line of testimony lifted from a longer statement by the St. Louis Facility's operations manager, Danny Ash. Resp. Br. 2. The Director's statement conflicts with the Commission's factual findings. A2; L.F. 129, ¶ 5. Furthermore, the entire record – including a closer look at the operations manager's testimony – reveals something entirely different. Mr. Ash testified that Gate Gourmet's meals must be cooked after purchase in an oven for 20-25 minutes before they are safe to eat, that he would not recommend eating the food without such additional preparation (even if the proteins were thawed out), and that the meals should not in fact be eaten immediately without such preparation or thawing. Tr. 47, 50, 62-63. Neither Gate Gourmet's nor Lean Cuisine's meals are sold for immediate consumption. Like Mr. Ash,

we would not eat a TV-Dinner-Style Frozen Meal at the point of sale, but would take it somewhere to heat it up properly before eating or serving it.

3. Post-Sale Facts Are Irrelevant

The Director emphasizes the irrelevant post-sale facts that Gate Gourmet's meals are served on airline-owned dishes, that "all the airline's flight attendants have to do is reheat the meals for about 20-25 minutes to bring them up to an appetizing temperature before serving to passengers," and that once an in-flight meal is plated, it only has a 48-hour shelf life. Resp. Br. 2-3. These facts are not only irrelevant to this Court's inquiry – do the meals satisfy the statute's qualifying food test? – but they also do not contradict the Commission's factual finding that the TV-Dinner-Style Frozen Meals are similar to frozen meals sold to the public in grocery stores. Before a Lean Cuisine frozen dinner purchased from Dierbergs is safe to eat, all someone needs to do is heat it up. She might even transfer it to her own dishes to make the food appear more appetizing. We suspect that few people would be willing to take the risk of eating any cooked TV dinner after letting it sit out for more than 48 hours.

In any event, what the customer does with the meal after purchase has no legal importance here. A frozen meal purchased from Dierbergs will be subject to the one percent tax rate regardless of the location where the purchaser ultimately heats it up and eats it – at home, at work or school, even on a long airplane flight – and regardless of whether she serves it to someone else or just throws it out and never eats it at all.

II. THE DIRECTOR'S PRIMARY RESIDENCE ARGUMENT HAS NO BASIS IN THE LAW

The issue in this case is whether Gate Gourmet's sales of TV-Dinner-Style Frozen Meals qualify for the one percent sales tax rate under § 144.014. Resolution of this issue turns on whether the meals are sold for "home consumption" – in which case they qualify – or for immediate consumption, in which case they would not. Gate Gourmet's TV-Dinner-Style Frozen Meals are not sold for immediate consumption at the St. Louis Facility; they are sold for further preparation and consumption elsewhere. Therefore, they are sold for home consumption and qualify for the one percent tax rate.

A. Off-Premises Is The Only Relevant Consumption-Location Requirement

The Director's main argument is that the TV-Dinner-Style Frozen Meals are not sold for "home consumption" because they are not ultimately eaten in a person's primary residence. The foundation of this argument is the Director's creation and the Commission's erroneous adoption of a residential consumption requirement (the food literally must be consumed in a primary residence). Such a requirement is found nowhere in the law and has never adopted by this Court.

1. The Statute Does Not Include A Primary Residence Requirement

Section 144.014.2 defines food eligible for the one percent tax rate by reference to the definition of food found in the Federal Food Stamp program's definitional statute,

7 U.S.C. § 2012(k)(1) ("Food" broadly means any food for "home consumption" other than hot food products ready for immediate consumption and alcohol or tobacco). The term "home consumption" is not defined in § 144.014 or in 7 U.S.C. § 2012(k). Ignoring her consistent ruling position (upon which Gate Gourmet and other taxpayers have relied for nearly two decades) in which she equates "home consumption" with any "off-premises consumption," *see, e.g.*, Mo. Ltr. Rul. No. CL 1182 (Sept. 2, 1998); Mo. Ltr. Rul. No. CL 2328 (Oct. 17, 2000), the Director instead directs the Court only to dictionary definitions. She now argues that the statutory term "home consumption" means "[q]uite literally … to eat or drink at a person's principal place of residence." Resp. Br. 13. The Court should reject the Director's proposed definition for two reasons.

First, the Director's proposal improperly combines selected definitions of two separate words – "home" and "consumption" – instead of addressing the meaning of the statutory term "home consumption."

Second, the Director's definition fails to account for the context of § 144.014.2 and the Federal Food Stamp program to which it refers, in which " home consumption" is not colloquially understood but as a phrase is a technical term of art. The Director never invites this Court to consider a definition more pertinent to this specialized context.

The logical place to search for the meaning of the statutory term "home consumption" in the context of 7 U.S.C. § 2012(k) is not the dictionary but the Federal Food Stamp program regulation interpreting that term as it appears in the statute. "In the absence of statutory definitions, the plain and ordinary meaning of a term may be derived [not only] from a dictionary … [but also] by considering the context of the entire statute

in which it appears." *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. banc 2007).

The regulation provides a non-colloquial and directly pertinent technical definition of "eligible food" – described in the federal statute as food for "home consumption" – as follows: "Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption." 7 CFR 271.2. Thus, the term "home consumption" has a broad meaning in the context of eligible foods under the Federal Food Stamp program and the one percent tax rate for food under Missouri law: eligible food includes all food except hot food for immediate consumption.

"Immediate consumption" has been defined by this Court to mean "eaten at the place of preparation and purchase, or while traveling to, or immediately upon arrival at another location without any further preparation." *See Krispy Kreme Doughnut Corp. v. Director of Revenue*, 358 S.W.3d 48, 53 (Mo. banc 2011). Gate Gourmet's TV-Dinner-Style Frozen Meals are never eaten at the St. Louis Facility, never eaten during transport to its customer locations, and never eaten immediately upon arrival there. These meals always require further preparation at the customer's locations before they are eaten. Gate Gourmet's meals are not sold for immediate consumption.

The Director repeatedly points out in her brief that the TV-Dinner-Style Frozen Meals were "designed, prepared, packaged, and sold" cold for later in-flight consumption on an airplane, and in doing so, she directly supports Gate Gourmet's position. Resp. Br. 8, 11-12, 15-22, 26. She never disputes the central fact that makes Gate Gourmet's meals

fall within the "home consumption" definition: They were not sold hot or for immediate consumption at Gate Gourmet's St. Louis Facility. The Commission correctly found as well that the meals were not hot foods prepared for immediate consumption; rather, they were sold frozen and required further preparation by the customer before being consumed somewhere other than the St. Louis Facility. A2; L.F. 129. Accordingly, Gate Gourmet's TV-Dinner-Style Frozen Meals were sold for home consumption and qualify for the one percent tax rate.

2. This Court Did Not Adopt A Primary Residence Requirement In Wehrenberg

The Director argues that the correct interpretation of §144.014 is found in *Wehrenberg, Inc. v. Director of Revenue*, 352 S.W.3d 366 (Mo. banc 2011), but the Director and the Commission interpret that case incorrectly and so draw an incorrect interpretation from it. As far as it goes, the Commission's statement is correct: Similar to the concession items that were intended for consumption in the theater and not for consumption at home, Gate Gourmet's TV-Dinner-Style Frozen Meals were "intended for consumption in commercial aircraft, and not for consumption at home." A6; L.F. 133. The Commission's statement is factually correct but fatally incomplete, so its holding is incorrect. The stipulated fact that is critically missing from the Commission's holding is that, while Wehrenberg's foods were sold for immediate consumption "at the theatre" (Wehrenberg's premises), Gate Gourmet's meals are never intended to be

consumed at Gate Gourmet's premises, its St. Louis Facility; these meals are intended for off-premises consumption after further preparation by the customers.

The Director overlooks the consumption-location and consumption-timing factual distinctions between the two cases – on-premises immediate consumption in *Wehrenberg* contrasted with off-premises later consumption following further preparation in Gate Gourmet's case – but it is these dramatically different facts that are central to the disposition of this dispute.

This Court has not elaborated on the meaning of "home consumption" except to conclude that the movie theater concession items at issue in *Wehrenberg* were not sold for home consumption because they were intended to be eaten on Wehrenberg's premises without additional preparation. This Court has never adopted a primary residence requirement under the qualifying food test.

The food consumption location in *Wehrenberg* (the theater) was significant only because it was the same location where the items were prepared and sold for immediate consumption, not because it was a theater or because a theater is not a home. Surely, if a person purchased a qualified food item at a grocery store at the one percent tax rate and then brought it into a movie theater to eat during the movie, this post-sale fact would not mean the grocery store should have charged the four percent tax rate. Rather, the significance of the location where Wehrenberg's nachos were consumed is simply this: Because they were sold for immediate consumption on the premises of a Wehrenberg Theater, those nachos did not qualify as "food for home consumption."

Unlike movie theater concession items prepared for immediate consumption at a Wehrenberg Theater, the TV-Dinner-Style Frozen Meals were not prepared for immediate consumption at Gate Gourmet's St. Louis Facility; they were intended to be prepared and consumed at a later time at an off-premises location.

The Commission erred when it found this case indistinguishable from *Wehrenberg*. The only similarity between the cases is that the food in each was not eaten in a personal residence. Accordingly, *Wehrenberg* sheds no light on the issue in this case and the Court should clarify the meaning of "home consumption" in order to conclude that the TV-Dinner-Style Frozen Meals are subject to the one percent rate.

B. The Director's Proposed Statutory Narrowing Is A Matter For The Legislature

The Director argues that the TV-Dinner-Style Frozen Meals cannot qualify for the one percent rate because they are purchased by airlines for a commercial use in serving their passengers. However, there is no "commercial use" exception to the one percent rate.[1] A business could purchase 100 frozen meals from a grocery store to serve clients at a business meeting, and this "commercial use" of the food would not affect its

[1] The legislature created only two tests regarding eligibility for the one percent tax rate: the qualified foods test (food for "home consumption") and the 80/20 establishment test. The 80/20 test is not at issue in this case because Gate Gourmet is not a restaurant.

qualification for the one percent tax rate. The Director cites no precedent to support its position that otherwise-qualifying food should be disqualified merely because it is purchased for a commercial use. This Court should reject the Director's attempt to write a "commercial use" exception into the statute. *See Loren Cook Co. v. Director of Revenue*, 414 S.W.3d 451, 454 (Mo. banc 2013) ("This Court must examine the language of the statutes as they are written. It cannot simply insert terms that the legislature has omitted.").

CONCLUSION

The Director's arguments for affirming the Commission's decision are misleading, based on inaccurate and irrelevant facts, and simply incorrect. This Court should reverse the Commission's decision and rule in Gate Gourmet's favor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the limitations in Rule 84.06(b), and it contains 2,620 words, excluding the parts of the brief exempted; and has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 13 point Times New Roman font.

/s/ Matthew J. Landwehr

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served through the Missouri CaseNet electronic filing system this 22nd day of April, 2016, upon the following:

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