SC96903

IN THE SUPREME COURT OF MISSOURI

MYRON GREEN CORPORATION,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

Appeal from the Administrative Hearing Commission of Missouri
The Honorable Audrey Hanson McIntosh, Commissioner

BRIEF OF APPELLANT MYRON GREEN CORPORATION

SHOOK, HARDY & BACON L.L.P.
John W. Simpson, MO Bar #35334
Todd W. Ruskamp, MO Bar #38625
Molly S. Carella, MO Bar #56902
2555 Grand Blvd.
Kansas City, MO 64108
Phone: 816-474-6550
Fax: 816-421-5547
jsimpson@shb.com
truskamp@shb.com
mcarella@shb.com

ATTORNEYS FOR APPELLANT
MYRON GREEN CORPORATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

JURISDICTIONAL STATEMENT

Petitioner-Appellant Myron Green Corporation ("Myron Green") appeals from the December 14, 2017 decision of the Administrative Hearing Commission ("AHC") upholding a sales tax assessment by the Director of the Missouri Department of Revenue ("Director"). Myron Green's petition for review was timely filed on January 12, 2018. This Court has exclusive jurisdiction under Mo. Const. Art. V, section 3 because this appeal involves the construction of two revenue laws: specifically, whether Myron Green engaged in taxable retail sales under § 144.020.1[1] and, if so, whether those sales fall within the scope of § 144.020.1(6). *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003).

INTRODUCTION

Myron Green is a provider of cafeteria and catering services. In 2010, it entered into a contract with the Federal Reserve Bank of Kansas City (the "Bank") to prepare and serve meals, snacks, and beverages at the Bank's on-site employee cafeteria.

Under the parties' agreement, Myron Green and the Bank worked in tandem to create food and meal menus, and the Bank, with input from Myron Green, determined the prices that would be charged in the Bank's cafeteria. Myron Green then purchased the food items for the cafeteria and prepared the food for service. Myron Green invoiced the Bank directly for all of its food costs and management fees associated with the cafeteria, and the Bank paid the Myron Green invoice through a series of payments each month. Bank employees who purchased items from the cafeteria generally did so via payroll

[1] All statutory references are to RSMo 2016. LF17 n.2.

deductions arranged between the Bank and the employees. As part of that process, no money was exchanged between employees and Myron Green. Instead, the Bank retained the deductions, which were effectively used to reimburse the Bank for a portion of its payments to Myron Green. Because the Bank subsidized the cost of food and drinks for its employees, however, that reimbursement was only partial; Myron Green's invoices to the Bank always exceeded the amount of money the Bank recouped from its employees for their meals or other cafeteria items.

It is undisputed that the Bank is a tax-exempt entity under § 144.030.1 and 12 U.S.C. § 531. Accordingly, Myron Green did not charge sales tax on the invoices that it sent to the Bank. Following an audit, however, the Director determined that payments that Myron Green received from the Bank which were attributable to items purchased from the Bank's cafeteria constituted taxable sales between Myron Green and individual cafeteria patrons; thus, according to the Director, these payments did not qualify as sales between Myron Green and the Bank that would be covered by the Bank's tax-exempt status. The Director further concluded that the cafeteria qualified as a place in which meals are regularly served to the public, making those purported sales to Bank employees subject to sales tax under § 144.020.1(6). The Director thus assessed over $200,000 in unpaid sales tax and interest resulting from nearly $3 million in sales that the Director determined were made from Myron Green to Bank employees rather than from Myron Green to the Bank. Myron Green appealed the decision to the AHC, which affirmed the assessment following a hearing and legal briefing.

The AHC's decision is incorrect as a matter of law. Sales tax is imposed only when there is a "sale," *see* § 144.020.1, which requires the exchange of consideration between the seller of the goods and the purchaser. Here, the Bank paid Myron Green directly for food provided in the cafeteria; Myron Green's sales were therefore to the Bank. There is no support for the AHC's determination that any of those sales from Myron Green to the Bank were extinguished and that new sales between Myron Green and individual Bank employees somehow sprung into being. At the time food was served at the Bank's cafeteria, the food was not Myron Green's to offer for sale, and consideration was not exchanged between employees and Myron Green as part of the payroll deduction process. The fact that the Bank recouped some of its costs from employees likewise does not change the analysis; this Court has held that a sale occurs between the seller of goods and the direct purchaser, even when the direct purchaser is reimbursed for the purchase price by a third party. *See Canteen Corp. v. Goldberg*, 592 S.W.2d 754, 756 (Mo. banc. 1980).

But even if the AHC correctly determined that items served at the Bank's cafeteria represented taxable sales between Myron Green and individual Bank employees, no tax is owed because the Bank's cafeteria is not a place in which meals are regularly served to the public under § 144.020.1(6). The Bank's subsidization of the cafeteria operations, for the benefit of itself and its employees, along with the level of security maintained by the Bank and its involvement in the management and operation of the cafeteria, compel such a conclusion under *Shelter Mutual Insurance Company v. Director of Revenue*, 107 S.W.3d 919 (Mo. banc 2003).

STATEMENT OF FACTS

A. The Bank's Cafeteria and Operations

The Bank is a quasi-governmental body that among other things, oversees federal monetary policy, supervises financial institutions, and serves as fiscal agent to the United States Treasury. Tr. 112:4-21. The head office branch is located in Kansas City, and within that branch building is an employee cafeteria that is owned and subsidized by the Bank. Tr. 84:1-4/84:25-85:7/112:8-9/115:16-116:7; LF17. The Bank is a highly secure facility with limited access points controlled by Federal Reserve law enforcement and the on-site cafeteria is intended to encourage Bank employees to remain in the building for meals and breaks, thus reducing the burden on law enforcement to continually monitor large volumes of individuals leaving and entering the building. Tr. 113:22-114:3/119:11-120:14/126:13-20; Ex. A at DOR-A027; [2] LF17, 29.

In 2009, the Bank issued a Request for Proposal ("RFP") for food services. LF18; Ex. 2 at MG00277-301. The RFP solicited bids for the preparation and service of breakfast, lunch, beverages, and other food items in the cafeteria. Ex. 2 at MG00295-MG00296; LF18. The Bank would be responsible for approving menus and setting all food prices. Ex. 2 at MG00296. The Bank would directly pay the successful bidder; the RFP provided instructions for the contractor to invoice the Bank on a monthly basis, which the Bank would then pay. Ex. 2 at MG00292. Finally, because both federal and

[2] Various exhibits were introduced during AHC hearing and were referred to by Bates numbers that were stamped on the documents for purposes of the administrative proceeding. This brief cites to those exhibits by both exhibit number and, when available, specific Bates number.

state law exempt the Bank's purchases from Missouri sales tax,[3] the RFP instructed that "the bid price should not include sales or other taxes . . . ." LF147; Ex. 2 at MG00283.

Myron Green submitted the winning proposal in response to the RFP. Ex. 4 at MG00359; LF18. Pursuant to the Bank's award letter to Myron Green, the provisions of the RFP became the contract between the parties. Ex. 4 at MG00359; LF18-19. The Bank also provided Myron Green with a sales tax exemption certificate issued by the state of Missouri confirming that purchases by the Bank are not subject to sales or use tax. Ex. E at p.2; Tr. 36:9-14/52:18-22/87:13-16; LF17-18.

Myron Green began its obligations under the contract on May 3, 2010. LF149. As part of the process, Myron Green created menus in consultation with the Bank. Tr. 79:1-21/80:7-9/115:4-9. Myron Green then ordered the necessary food from vendors, the vendors delivered the food directly to the Bank, and Myron Green unloaded it and prepared it for service in the Bank's cafeteria. Tr. 79:13-80:2. The Bank heavily subsidized the cost of food to individual employees in setting the prices for items in the cafeteria. Tr. 85:5-7/126:19-20/115:10-15/60:22-24/47:14-18. In this way, the Bank paid Myron Green the invoiced amounts, which were always higher than the amount the Bank recouped from its employees. If these sales were between Myron Green and Bank employees, Myron Green would have lost money. Tr. 10:20-24/85:5-85:24; Ex. A at DOR-A027; LF30.

The Bank's point-of-sale computer system was used for employee checkouts. Tr. 81:14-21/85:11-13/115:23-116:2/129:11-12. Under this system, Bank employees

[3] 12 U.S.C. § 531; § 144.030.1; LF17/147/150/201; Tr. 52:1-53:1.

who purchased a meal or other item from the Bank's cafeteria had two payment options. Tr. 92:12-22. Most chose to pay the Bank for their food via payroll deductions, which were tracked when an employee swiped their identification badge at the point-of -sale. Tr. 81:21-23/129:11-130:5; LF20. Myron Green did not have access to employees' payroll accounts, Tr. 55:24-56:2/81:24-82:1/82:5-11, and no money was transferred directly from Bank employees to Myron Green as part of this process.[4] Tr. 45:15/56:24-57:2/63:2-8/130:6-9/131:16-23; LF19-20.

A smaller number of transactions in the Bank's cafeteria involved cash, Tr. 45:16-19/92:12-20/130:1-4/LF19-20, in which the Myron Green employee operating the Bank's point-of-sale system collected a cash payment directly from Bank employees for their food items. Tr. 61:16-18/94:16-22. Credit or debit cards were not permitted as payment methods. Tr. 82:2-4/92:12-22; LF20.

Myron Green submitted monthly invoices to the Bank for the food that Myron Green acquired for the cafeteria, along with all of its other costs such as labor and direct expenses. Tr. 85:16-19/88:10-24/107:13-15/133:19-134:6/138:22-25; LF20. The invoiced amount even included food that had not been used and needed to be discarded. Tr. 44:3-7/89:1-21/134:7-15. Cash that had been collected at the point of sale was treated as a credit against the amounts owed by the Bank under the monthly invoices submitted by Myron Green to the Bank. Tr. 94:16-22.

[4] Instead, Myron Green provided the Bank with the specific amount of the employee deductions recorded by the Bank's point-of-sale system every two-week payroll cycle. Tr. 90:14-22/130:6-16/131:9-12/138:17-21. The Bank's human resources department then withheld the individual deductions, Tr. 130:6-16, which were deposited in a Bank account. Tr. 131:16-19.

The Bank paid the monthly invoice in three installments; two represented the amount of payroll deductions, and the third represented the remaining "shortfall" amount owed on the invoice that reflected the Bank's management-fee and subsidy obligations. Tr. 13:9-12/30:1-6/35:7-19/44:23-25/45:3-14/64:4-6/130:19-131:6/131:13-15/139:5-13; Ex. A at DOR-A027-A028; LF20; LF180. Thus, apart from the limited number of cash transactions, the Bank itself directly paid Myron Green for all of the food and services it provided in the cafeteria. Tr. 44:24-45:16/54:7-11/77:16-78:1; LF179; LF19-20.

Myron Green did not charge the Bank sales tax in the monthly invoices, as Myron Green considered the Bank exempt from such tax as set forth in its exemption certificate. Tr. 87:13-88:6.

B. The Director's Audit and Assessment

Following an audit, the Director issued a sales tax assessment on November 30, 2015 for unpaid sales tax from July 1, 2010 through June 30, 2013. LF149; LF37-144. In particular, the Director determined that Myron Green owed sales tax on all food, snack, and beverage amounts tracked at the point of sale in the cafeteria.[5] According to the Director, these amounts—totaling more than $2.7 million—constituted "sales" to individual Bank employees and were thus not covered by the sales tax exemption held by

[5] Specifically, the Director concluded that Myron Green made individual employee "sales" in the following amounts: $2,249,765 that Myron Green received from the Bank that corresponded to employee payroll deductions for meals; $484,411 in cash that Myron Green received directly from Bank employees from cash transactions; $13,287 for other, non-meal food items referred to as "vending"; and $4,180 in employee deduct short. Tr. 67:1-7 ("cafeteria" sales refer to cash sales); 69:3-20 (vending and employee deduct short); Ex. A at DOR-A-027-028. *See also* Ex. A at DOR-A025 (providing a balance subject to tax of $2,754,016, which includes the above amounts plus an additional $2,370 stemming from cash catering that is not at issue in this appeal).

the Bank.[6] In contrast, the Director determined that the payments that Myron Green received from the Bank representing its subsidy and management fee qualified as tax-exempt sales to the Bank itself. Tr. 53:14-16; LF180; LF201.

In addition to concluding that that Myron Green had sold food to nonexempt individuals (rather than to the Bank), the Director further maintained that the Bank's cafeteria was a place in which meals are regularly served to the public, making these purported individual sales subject to a four percent tax under § 144.020(6). The Director's final assessment was for $217,266.97 tax owed plus $22,686.63 in interest, for a total balance due of $239,953.60. Tr. 25:1-2/25:18-23; Ex. A at DOR-A025, DOR-A430.

C. The AHC Proceedings

Myron Green contested the assessment and filed a complaint with the AHC. LF1-10. The AHC held a hearing, and the parties then submitted simultaneous opening and reply briefs. LF145-203. The AHC issued its decision on December 17, 2017. LF16-35.

The AHC recognized that the Bank paid Myron Green directly for its provision of food and services under the parties' contract. LF19-21. But the AHC nonetheless concluded that "the actual transaction" occurred between Myron Green and individual Bank employees at the point-of-sale, making those "personal purchases" nonexempt.

[6] *See* Ex. A at DOR-A018 ("Myron Green exempted all sales to employees of the Federal Reserve Bank."); DOR-A025 ("Taxpayer exempted all sales to employees of the Federal Reserve Bank."); DOR-A028 ("The Department has determined the . . . sales are sales to the individual employee rather than sales to the Federal Reserve Bank of Kansas City."); *see also* LF172 ("The assessed portion of the audit is for cafeteria sales made by Myron Green to the Fed employees at the Fed cafeteria."); Tr. 37:17-18 ("I held that payroll deduct charges for employee meals were taxable sales to employees.").

LF32-33. The AHC further agreed with the Director that the Bank's cafeteria was a place in which food is regularly sold to the public, triggering sales tax under § 144.020.1(6). This appeal followed.

POINTS RELIED ON

I. THE AHC ERRED AS A MATTER OF LAW IN CONCLUDING THAT MYRON GREEN OWED SALES TAX, BECAUSE ITS SALES WERE TO THE BANK ITSELF AND NOT INDIVIDUAL BANK EMPLOYEES, IN THAT THE BANK PAID MYRON GREEN DIRECTLY FOR THE FOOD AND SERVICES PROVIDED IN THE BANK'S CAFETERIA AND THUS CONSIDERATION WAS EXCHANGED ONLY BETWEEN THE BANK AND MYRON GREEN, AND IN THAT THE BANK'S REIMBURSEMENT BY INDIVIDUAL EMPLOYEES IS IRRELEVANT TO THE EXISTENCE OF ANY SALE BETWEEN MYRON GREEN AND THOSE EMPLOYEES.

Canteen Corp. v. Goldberg, 592 S.W.2d 754, 756 (Mo. banc. 1980)
Becker Elec. Co., Inc. v. Dir. of Revenue, 749 S.W.2d 403 (Mo. banc 1988)
§ 144.020.1
§ 144.010.1(12)

II. THE AHC ERRED AS A MATTER OF LAW IN CONCLUDING THAT ANY SALES TO INDIVIDUAL BANK EMPLOYEES WERE TAXABLE UNDER § 144.020.1(6), BECAUSE THE BANK'S CAFETERIA DOES NOT REGULARLY SERVE FOOD OR DRINKS TO THE PUBLIC, IN THAT THE SUBSIDIZATION OF CAFETERIA FOOD CREATES A SPECIAL RELATIONSHIP BETWEEN MYRON GREEN AND INDIVIDUAL BANK EMPLOYEES, AND IN THAT THIS CASE IS MORE ANALOGOUS TO *SHELTER MUTUAL INSURANCE* THAN *J.B. VENDING COMPANY.*

§ 144.020.1(6)
Shelter Mut. Ins. Co. v. Dir. of Revenue, 107 S.W.3d 919 (Mo. banc 2003)
J.B. Vending Co., Inc. v. Dir. of Revenue, 54 S.W.3d 183 (Mo. banc 2001)

III. THE AHC ERRED IN DETERMINING THAT ITS DECISION WAS NOT UNEXPECTED, BECAUSE IT EFFECTIVELY OVERRULES *CANTEEN* AND INVALIDATES THE EXISTING CONSTRUCTION OF A "SALE" UNDER THE REVENUE LAWS, IN THAT IT IGNORES THE REQUIREMENT THAT CONSIDERATION BE EXCHANGED FOR THE SELLER'S GOODS, AND IN THAT IT DEEMS ANY REIMBURSEMENT OR RESALE RELEVANT TO THE ANALYSIS.

§ 144.030.1
Lloyd v. Dir. of Revenue, 851 S.W.2d 519, 523 (Mo. banc 1993)

STANDARD OF REVIEW

"This Court will uphold the AHC's decision if authorized by law and supported by competent and substantial evidence upon the whole record." *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003). The AHC's interpretation of revenue law is an issue reviewed de novo. *Id.* *Gate Gourmet, Inc. v. Dir. of Revenue*, 504 S.W.3d 59, 61 (Mo. banc 2016). "Where the decision is based upon an interpretation or application of the law, this Court is not precluded from exercising its independent judgment." *Al-Tom Inv., Inc. v. Dir. of Revenue*, 774 S.W.2d 131, 132 (Mo. banc 1999). Indeed, if the Commission's decision is not authorized by law, this Court must reverse. *Becker Elec. Co. v. Dir. of Revenue*, 749 S.W.2d 403, 407 (Mo. banc 1988).

Revenue laws are construed strictly against the Director of Revenue in favor of the taxpayer. *Id.* at 406 (Mo. banc 1988). It is the Director's burden to show the existence of a tax liability. *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 102 S.W.3d 526, 529 (Mo. banc 2003).

In this case, the Court must decide two independent issues of law: (1) whether payments that Myron Green received from the Bank, which were attributable to items served at the Bank's cafeteria, constitute taxable sales between Myron Green and individual Bank employees; and, if so (2) whether the Bank's cafeteria is a place in which food is regularly served to the public. Because these are matters involving the

construction of the state's general revenue laws, they must be resolved in the manner most favorable to Myron Green.[7]

ARGUMENT

I. THE AHC ERRED AS A MATTER OF LAW IN CONCLUDING THAT MYRON GREEN OWED SALES TAX, BECAUSE ITS SALES WERE TO THE BANK ITSELF AND NOT INDIVIDUAL BANK EMPLOYEES, IN THAT THE BANK PAID MYRON GREEN DIRECTLY FOR THE FOOD AND SERVICES PROVIDED IN THE BANK'S CAFETERIA AND THUS CONSIDERATION WAS EXCHANGED ONLY BETWEEN THE BANK AND MYRON GREEN, AND IN THAT THE BANK'S REIMBURSEMENT BY INDIVIDUAL EMPLOYEES IS IRRELEVANT TO THE EXISTENCE OF ANY SALE BETWEEN MYRON GREEN AND THOSE EMPLOYEES.

It is undisputed that the Bank directly paid Myron Green for all the meals, snacks, and drinks that were offered in the Bank's cafeteria.[8] Likewise, it is undisputed that the Bank is exempt from paying Missouri sales tax under § 144.030.1. Nevertheless, the AHC concluded Myron Green owed sales tax because a portion of its sales were actually to non-exempt individual Bank employees rather than the Bank itself.

In doing so, the AHC failed to recognize the well-established principle that a sale under the revenue laws requires the exchange of consideration between the seller of

---

[7] While "exemptions are strictly construed against the taxpayer and, as such, it is the burden of the taxpayer claiming the exemption to show that it fits the statutory language exactly," *Cook Tractor Co., Inc. v. Dir. of Rev.*, 187 S.W.3d 870, 872 (Mo. banc 2000), this appeal does not involve the interpretation of any statutory exemption. To the contrary, it is undisputed that the Bank is an exempt entity under 12 U.S.C. § 531 and § 144.030.1. The sole issue on appeal is the interpretation of the tax statutes—specifically, § 144.020.1 and § 144.020.1(6)—which is an issue of construction that must be resolved in the manner most favorable to Myron Green. *See Becker*, 749 S.W.2d at 406 (explaining that "the question of exemption will arise only if we find that appellant was the purchaser of the [] materials and was thus subject to sales and use taxes. Therefore, in determining whether appellant was the purchaser, the sales and use tax laws will be strictly construed against respondent.").

[8] The Bank received a credit from Myron Green for the relatively limited number of cafeteria items with respect to which the employees paid cash.

goods and the purchaser. Here, the Bank paid Myron Green for food provided in the cafeteria; Myron Green's sales were therefore to the Bank. In this way, the AHC's conclusion is also at odds with this Court's decision in *Canteen*, which makes clear that a sale occurs between the seller of goods and the direct purchaser, even when the direct purchaser is reimbursed for the purchase price by a third party; no new "sales" spring into being in such circumstances.

A. A Taxable "Sale" Requires the Exchange of Consideration Between the Seller of Goods and the Purchaser.

"Sales at retail within the state of Missouri are subject to Missouri sales tax." *House of Lloyd, Inc. v. Dir. of Revenue*, 884 S.W.2d 271, 273 (Mo. banc 1994); *see also* § 144.020.1 (specifying tax rates for selling property or rendering services "at retail" in Missouri). A "sale at retail," in turn, involves the transfer of property to a purchaser for consideration. *See* § 144.010(13) (defining the term as "[1] any transfer by any person engaged in business . . . [2] of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale . . . [3] for a valuable consideration." § 144.010(13); *accord* § 144.010(12) ("Sale" means "any transfer . . . of tangible personal property for valuable consideration.").[9] Similarly, "a purchaser, for purposes of the sales and use taxes, is the person who acquires title to, or ownership of, tangible personal property, or to whom is rendered services, in exchange for a valuable consideration." *Becker*, 749 S.W.2d at 407.

[9] The difference between a "sale" and a "sale at retail" is that property sold at retail is not intended to be resold.

Accordingly, a potentially taxable sale of goods or services only occurs when consideration has been exchanged between the seller of goods and the purchaser. In this case, that happened when Myron Green agreed to provide, prepare, and serve food in the Bank's cafeteria in exchange for the Bank's payment to Myron Green of all its costs to do so. Put another way, Myron Green sold the Bank food and food services, which were purchased for consideration by the Bank via three monthly payments, thereby establishing a "sale" under § 144.010 between Myron Green and the Bank—not between Myron Green and particular cafeteria patrons.

Indeed, this Court deemed a similar transaction a "sale" in *Canteen Corporation v. Goldberg*, 592 S.W.2d 754 (Mo. banc 1980). In that case, Canteen operated a dining facility in a retirement home. 592 S.W.2d at 756. The dining facility was owned by the retirement home, but Canteen provided and served meals to residents there. *Id.* Canteen billed the retirement home directly for the meals, which the retirement home was obligated to pay. Individual residents paid the retirement home for their meals via a bill from the retirement home. *Id.* In these analogous circumstances, this Court held that Canteen had sold meals to the retirement home, which were then resold to individual residents. *Id.*[10]

The AHC's decision—that some payments Myron Green received from the Bank are actually taxable sales between Myron Green and individual cafeteria patrons—is circular, flatly contrary to these straightforward legal principles, and unsupported by any

[10] Whether any resale exists in this case is irrelevant, as all sales to the Bank are exempt from tax regardless whether the food was intended for resale.

relevant analysis. Indeed, the AHC focused on an irrelevant inquiry: whether cafeteria food was provided for "personal" consumption[11] rather than who was actually purchasing the food from Myron Green. In doing so, the AHC appeared to hold that food intended for resale or individual consumption could never be considered a sale to the Bank itself:

> Myron Green argues that the real transaction was between itself and the Bank, not the Bank employees, and that the sales tax exemption applies because the Bank purchased food from Myron Green. . . .
>
> While Myron Green could rely on the [Bank's exempt status] regarding purchases by the Bank, that [does] not apply to individual employees making personal purchases. . . .
>
> Myron Green's customers made individual purchases of meals and drinks during breakfast and lunch, as well as vending sales throughout the workday. All meal and drink purchases were tracked by and must go through a point of sale at the cashier. The Cafeteria was operated by Myron Green employees. The Bank's employees purchased meals and drinks from the cafeteria for their own consumption. When Bank employees scanned their identification badge at the point of sale, the cost of the meal or drink (that was subsidized by the Bank) was deducted from their payroll. Therefore, Myron Green's sales of food and drinks in the Cafeteria do not fall within the criteria for making them exempt from sales tax.

LF32-33;[12] *see also* LF29 (stating, without analysis, that "customers purchased meals and drinks from [Myron Green]"); LF29 (same; noting that "Myron Green was a third-party

[11] The exemption certificate states: "Purchases by your agency are not subject to sales or use tax if conducted within your agency's exempt functions. . . . Individuals making personal purchases may not use this exemption." Ex. E at p.2; LF18.

[12] The testimony put on by the Director during the AHC's hearing likewise failed to connect the facts of this case with any governing legal principles. *See, e.g.*, Tr. 48:11-14 ("So as an independent contractor, when a payroll deduction is being made from individual employees, those are individual sales to employees and not sales to the Federal Reserve."); Tr. 49:19-50:1 ("Because Myron Green is making all the purchases of the foodstuffs, because Myron Green is preparing all of the foodstuffs, because Myron Green is setting the prices for all of the foodstuffs, and because the exemption certificate is exclusively for the Federal Reserve and not for individuals purchasing, when you look at all of it in context, it appears to me that these are sales to individuals and not sales to the Federal Reserve."); Tr. 56:13-23 ("[T]hose are employee purchases . . . [I]f that money

independent contractor that sold meals and drinks to the Bank's employees and their guests.").

As the *Canteen* court recognized, however, a sale occurs between the seller of food and the entity purchasing the food, even when the food is ultimately served or resold to individual consumers and the purchaser is reimbursed for some or all of its cost. 592 S.W.2d at 756. And that conclusion is compelled by a host of other decisions by this Court. *See, e.g.*, *First Nat'l Bank of Calloway Cty. v. Dir. of Revenue*, 931 S.W.2d 471, 472-73 (Mo. banc 1996) (rejecting the Director's argument that a bank was merely the conduit of a sale between a check-printing business and individual bank customers; the bank was invoiced directly for the checks, and the fact that bank customers were charged a service fee deducted from their accounts did not transform the sale into one between the check-printing business and the bank customers); *Kansas City Power & Light Co. v. Dir. of Revenue*, 83 S.W.3d 548 (Mo. banc 2002) (case involving the sale of electricity from KCP&L to a hotel; no suggestion that the hotel's room charge to hotel guests, which included electricity costs, extinguished the existence of the sale between KCP&L and the hotel or created a sale between KCP&L and hotel guests); *King v. Nat'l Super Markets, Inc.*, 653 S.W.2d 220, 220-222 (Mo. banc 1983) (case involving the sale of grocery bags to a grocery store; no suggestion that the grocery store's factoring in of the costs for grocery bags into food sales prices extinguished the existence of the sale between the

---

came out of my personal check, I paid it. The fact that I remitted it to the Federal Reserve to give to Myron Green makes it no less a debt out of my pay.").

grocery bag provider and grocery store or created a sale between the provider and grocery store shoppers).

Relatedly, the AHC's conclusion is likewise inconsistent with the definition of "sale" under the revenue laws, which—as explained above—requires the exchange of consideration between the seller of goods and the purchaser. *See Becker*, 749 S.W.2d at 404-08 (tax-exempt agency was the purchaser in sales of construction materials because it paid for the materials directly from the vendor; no sales occurred between the construction company and the vendors because no consideration had been exchanged between them). Here, it is undisputed that payroll deductions were withheld by the Bank; they were not transferred between individual employees and Myron Green, and Myron Green did not have access to Bank employees' payroll accounts. Moreover, all of the food in the cafeteria was purchased by the Bank. Thus, at the time of individual checkout, it was not Myron Green's to offer for purchase by anyone else, regardless of the selected payment method—the food was the Bank's.[13] For these reasons, no taxable "sales" occurred between Myron Green and cafeteria patrons, and Myron Green is unaware of any authority that would find the existence of any sales in such circumstances.[14]

[13] Because the Bank purchased all cafeteria items from Myron Green, any cash given by an individual Bank employee to Myron Green was used to credit amounts owed by the Bank. If the food in the cafeteria was Myron Green's to sell, there would be no need for the credit to the Bank.

[14] It is also difficult to reconcile the Director's position in this case with its position regarding Myron Green's sales of food to two schools for service in their cafeterias. "The Department determined that the sales of food at the cafeterias were sales to the school rather than sales to the individual students. As such the purchases by the school are fully exempt." Ex. A at DOR-A021. The only apparent justification for the disparate

A hypothetical illustrates the irrationality of the AHC's contrary conclusion. In the hypothetical, the Bank purchases cafeteria food from a grocery store rather than a vendor like Myron Green. As in this case, given the Bank's exempt status, the grocery store does not tax those purchases under § 144.030. Moreover, as in this case, the "grocery store" food served in the cafeteria is generally purchased by individual employees by payroll deduction; point-of-sale equipment tracks individual purchases. Again, as in this case, payroll deductions are collected by the Bank and used to offset the cost that the Bank incurred in buying the cafeteria food directly from the grocery store. In the hypothetical, it would be nonsensical to treat the amount of payroll deductions as somehow spawning taxable sales between the grocery store and individual employees—indeed, doing so would impose an obligation on the store to track and itemize how much of the Bank's original purchase was later reimbursed by the employees, not to mention effectively upend the well-established concepts of "sale" and "purchase" in the revenue laws. *Cf. Becker*, 749 S.W.2d at 408 (recognizing the "economic realities" of a tax-exempt entity contracting with third parties to provide goods and services from other for agency purposes and holding that the agency's purchases are remain tax exempt under such circumstances); *Dravo Corp. v. Spradling*, 515 S.W.2d 512, 517 (Mo. banc 1974)

---

treatment between Myron Green's food sales to the Bank and Myron Green's food sales to the schools is that the individual students paid the schools for their meals as part of their tuition or in advance on a weekly or monthly basis. Tr. 64:22-65:19. That fact, however, is irrelevant to the taxing framework set forth under § 144.010-.020. Similarly, it is unclear why the Director did not deem Myron Green's cafeteria food sales to the Bank exempt when the exact circumstances existed (direct payment by the Bank) that supported the Director's determination that catering sales were, in fact, exempt. *See* LF173 ("The Director did not tax the catering sales at the Fed because the catering sales were sales directly to the Fed and paid directly by the Fed.").

("It would be unreasonable, and we might say absurd, to circumvent the obvious purpose of this exemption and deny its effect, merely because Pellet Company chose to acquire and use the machinery and equipment through a contractor instead of making the purchase [of machinery directly] itself."). But that is precisely what the AHC's decision does here.

Finally, while not addressed below, it should be noted that no public policy or other justification undergirds the AHC's decision. The issue in this case is narrow in scope, applying only to the limited number of entities that are exempt under § 144.030. In contrast, all food that Myron Green (and other food and food-service providers) sells to nonexempt entities is required to be taxed when those sales are made to the entities or when the food is resold. The record reflects no slippery-slope or other large-scale revenue concerns by the Director. This case simply presents a straightforward and discrete matter of law that arises solely when a taxpayer sells goods to an exempt entity.

* * * * *

There is no legal or factual basis for the AHC's position that a portion of the payments that Myron Green received from the Bank actually constitute taxable sales to individuals. The Bank paid Myron Green directly for food provided in the cafeteria; Myron Green's sales were therefore to the Bank. There is no support for the AHC's contrary conclusion that some of these sales were extinguished and sprung into being as sales to individual employees in these circumstances. The checkout process in the cafeteria was simply a mechanism for the Bank to track the type and amount of food and meals consumed in the cafeteria so that the Bank could collect the meal charges from its

employees, by way of the payroll deduction. Because the AHC's decision is not authorized by law, it must be reversed.

II. THE AHC ERRED AS A MATTER OF LAW IN CONCLUDING THAT ANY SALES TO INDIVIDUAL BANK EMPLOYEES WERE TAXABLE UNDER § 144.020.1(6), BECAUSE THE BANK'S CAFETERIA DOES NOT REGULARLY SERVE FOOD OR DRINKS TO THE PUBLIC, IN THAT THE SUBSIDIZATION OF CAFETERIA FOOD CREATES A SPECIAL RELATIONSHIP BETWEEN MYRON GREEN AND INDIVIDUAL BANK EMPLOYEES, AND IN THAT THIS CASE IS MORE ANALOGOUS TO *SHELTER MUTUAL INSURANCE* THAN *J.B. VENDING COMPANY.*

Even if point-of-sale charges constitute sales to individual Bank employees rather than to the Bank itself, sales tax is owed only if the Bank's cafeteria is a place in which food or drink are regularly served to the public. § 144.020.1(6). Concluding that the cafeteria was such a place, the AHC likened the facts here to those in *J.B. Vending Co. v. Director of Revenue*, 54 S.W.3d 183 (Mo. banc 2001) and distinguished the Court's decision in *Shelter Mutual Insurance Company v. Director of Revenue*, 107 S.W.3d 919 (Mo. banc 2003). The AHC's analysis and conclusion are incorrect as a matter of law.

In *J.B. Vending*, a cafeteria food and service vendor operated cafeterias in the buildings of several private businesses. 54 S.W.3d at 184. The vendor owned and operated its own equipment in the cafeteria, and the vendor sold food directly to individual employees. *Id.* at 184-85, 189. Food sales were not subsidized by the businesses in which the cafeterias were located. *Id.* at 185. In holding that the vendor owed sales tax on sales that it had made to cafeteria customers, this Court rejected the argument that the restricted nature of access to the cafeteria in and of itself precluded application of § 144.020.1(6):

> As used in section 144.020.1(6), the word "public" means those members of the public who can patronize a business. The fact that someone other than the seller—here, the building owner—artificially limits who can do so, does not change the fact that those who reach the cafeteria are members of the public; hence, the sale of meals or drinks to them is taxable.

Id. at 190.

In *Shelter Mutual Insurance Company*, cafeteria sales to employees were made by the private business itself, not an outside vendor, as part of the business's ownership and operation of the cafeteria. 107 S.W.3d at 920. Shelter subsidized the operation of the cafeteria, as the sales charged to individual patrons did not cover the cafeteria's operating costs. *Id.* at 920.

In contrast to *J.B. Vending*, this Court held that the employee cafeteria in *Shelter Mutual Insurance* was not a place in which meals were regularly served to the public. *Id.* at 922-23. Reconciling the two cases, the Court identified two criteria that were relevant to the analysis under § 144.020.1(6): (1) whether a special relationship exists between the taxpayer and the individuals who are served the meals; and (2) whether the taxpayer has invited the trade of the public, in that the taxpayer regularly serves food to the public or holds itself out to do so. *Id.* at 921-22. The fact that the business itself was selling food and drinks to its own employees in the *Shelter Mutual Insurance* case was evidence both of a special relationship and the absence of regular trade with the public, leading the Court to conclude that the cafeteria was not within the scope of § 144.020.1(6). *Id.* at 922.

In this case, the AHC determined that no special relationship existed between Myron Green and cafeteria patrons because Myron Green did not own the cafeteria and

because the patrons were not Myron Green's own employees. LF28. But this conclusion overlooked a crucial fact: the Bank's right to determine menu pricing and its subsidization of food and drinks served in the cafeteria, which required Myron Green to publish prices for individual items for Bank employees at a point much lower than what Myron Green would have charged if it was independently operating the cafeteria. LF30. In effect, the pricing and subsidy arrangement between the Bank and Myron Green created a unique relationship between Myron Green and individual Bank employees, under which Myron Green—at the Bank's request—offered those employees discounted food and drink not available to its other customers. In this way, Bank employees were not like J.B. Vending's customers, which were charged the price selected by J.B. Vending just like a typical restaurant patron would be charged. *See Shelter Mut. Ins. Co.*, 107 S.W.3d at 921, 922 (noting that "J.B.'s patrons were no different than 'typical' restaurant patrons"). Instead, the Bank's employees were given special, discounted prices resulting from the specific agreement between Myron Green and the Bank. Accordingly, a unique relationship existed between Myron Green and Bank employees, and the AHC erred in determining otherwise.[15]

With respect to the second factor, Myron Green does hold itself out to the public for cafeteria and related food services. But *Shelter Mutual Insurance* does not require a contrary conclusion for Myron Green to invoke § 144.020(6). Put another way, although

[15] The AHC's emphasis on the fact that the subsidy paid by the Bank covered Myron Green's costs, such that Myron Green did not lose money on the arrangement, does not change the analysis. LF30. A special relationship between Myron Green and Bank employees exists irrespective of how Myron Green was paid; the fact remains that Myron Green's provision of food and services to Bank employees was different than the arms-length, restaurant-patron scenario in *J.B. Vending*.

Shelter Mutual Insurance identified two considerations relevant to whether a place regularly serves food or drinks to the public—the existence of a special relationship and the absence of other public trade—it did not hold that both must be present in order to deem a particular place nonpublic.

Moreover, there are additional facts present here that demonstrate that the Bank's cafeteria is not a place in which food is regularly served to the public. First, the Bank is a highly secured facility. Federal Reserve law enforcement officers control access to the building, making the on-site cafeteria an important part of the Bank's overall security plan. Tr. 113:24-114:2. While restricted access alone is not sufficient to render a place nonpublic for purposes of § 144.020(6), *see J.B. Vending*, 54 S.W.3d at 190, neither *J.B. Vending* nor *Shelter Mutual Insurance* involved a facility that limited ingress and egress to this extraordinary degree. *See* Tr. 119:11-121:17.[16]

Second, the Bank's subsidization of food further demonstrates that the cafeteria is not a place that regularly serves the public. The subsidy benefits the Bank by helping keep its own employees on-site during business hours. In contrast, the Bank "do[es] not have any desire or intention to subsidize meals to the general public." Tr. 126:19-21. This circumstance thus makes the cafeteria more like the one in *Shelter Mutual Insurance* than in *J.B. Vending*. *See Shelter Mut. Ins. Co*., 107 S.W.3d at 920 (noting that Shelter subsidized the operation of the cafeteria, and holding that "Shelter's de minimus sales directly to authorized and escorted guests should not invoke the taxing provisions of section 144.020.1(6).").

[16] These pages of the transcript have been filed under seal.

Overall, the facts of this case are more closely aligned with those in *Shelter Mutual Insurance* than *J.B. Vending*. The cafeteria was subsidized by the Bank, which created a special pricing structure that benefitted individual employees and the Bank itself. The Bank owned the space and all the equipment used in the cafeteria. LF17. The Bank was significantly involved in the management and operation of the cafeteria, working with Myron Green to create available menus and setting the hours of operation. LF17. The Bank required Myron Green to hire certain individuals to work in the cafeteria, and the Bank reviewed and approved any new hires. LF19. And, as explained in Section I.A above, individual Bank employees generally did not pay Myron Green for their cafeteria food; instead, the Bank contracted with Myron Green for its own benefit, paying the company directly for all food and drinks provided in the cafeteria.[17]

For all of these reasons, the Bank's cafeteria is not a place in which food or drinks are regularly served to the public.

[17] Of course, if the Court agrees that Myron Green had no "sales" to individual Bank employees, it need not address the question of whether the Bank's cafeteria is a place in which food and drinks are regularly served to the public. Regardless, this fact further demonstrates the difference between the cafeteria in this case and the cafeterias in *J.B. Vending*. Indeed, because J.B. Vending was selling food directly to individual patrons, it was able to (and did) collect sales tax from those customers on each purchase. *J.B. Vending*, 54 S.W.3d at 184. Myron Green did not have the same ability, as it invoiced the Bank itself rather than charged individual employees. *See supra* page 16.

III. THE AHC ERRED IN DETERMINING THAT ITS DECISION WAS NOT UNEXPECTED, BECAUSE IT EFFECTIVELY OVERRULES *CANTEEN* AND INVALIDATES THE EXISTING CONSTRUCTION OF A "SALE" UNDER THE REVENUE LAWS, IN THAT IT IGNORES THE REQUIREMENT THAT CONSIDERATION BE EXCHANGED FOR THE SELLER'S GOODS, AND IN THAT IT DEEMS ANY REIMBURSEMENT OR RESALE RELEVANT TO THE ANALYSIS.

To the extent this Court affirms the AHC's decision, it should be applied prospectively only, as an unexpected decision. § 143.903.1. "A decision is unexpected if the decision overrules a prior case or invalidates a previous statute, regulation or policy of the director of revenue and the decision was not reasonably foreseeable." *Lloyd v. Dir. of Revenue*, 851 S.W.2d 519, 523 (Mo. banc 1993). Here, for the reasons articulated above, the AHC's determination that some payments Myron Green received from the Bank constituted taxable sales between Myron Green and individual Bank employees upends this Court's decision in *Canteen*, along with the related definition of a "sale" under § 144.020.1.

Indeed, the well-settled nature of these governing principles—and the corresponding surprise if they are not followed—is evidenced by the parties' conduct in this case. It is undisputed that Myron Green believed its sales were to the Bank. Tr. 76:9-13/29:24-25. The Bank instructed potential contractors not to include sales tax in their responses to the RFP. The Bank provided Myron Green with an exemption certificate, issued by the Department of Revenue, confirming that purchases by the Bank were exempt from sales tax. And no authority existed, then or now, that would have put Myron Green on notice that some of the income it received from the Bank itself should be construed as a sale to an individual, thus exceeding the scope of the Bank's

exemption.[18] Thus, far from "a reasonable extension of the law or a reasonable application of the law to areas not previously specifically addressed," *Sneary v. Dir. of Revenue*, 865 S.W.2d 342, 348 (Mo. banc 1993), the AHC's decision here unforeseeably contradicts existing precedent, rendering it unexpected under § 143.903.

CONCLUSION

For all reasons described above, Myron Green respectfully requests this Court reverse the AHC's decision. To the extent it does not, its decision should be applied prospectively only.

Respectfully submitted,

/s/ *John W. Simpson*
John W. Simpson, MO Bar #35334
Todd W. Ruskamp, MO Bar #38625
Molly S. Carella, MO Bar #56902
SHOOK, HARDY & BACON LLP
2555 Grand Blvd.
Kansas City, MO 64108
Phone: 816-474-6550
Fax: 816-421-5547
jsimpson@shb.com
truskamp@shb.com
mcarella@shb.com

Attorneys for Appellant Myron Green Corporation

[18] For similar reasons, Myron Green should be relieved of liability based on its good-faith reliance on the Bank's exemption certificate. *See* § 32.200, art. V, subd. 2.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06(b), the undersigned certifies that the foregoing Brief of Appellant Myron Green Corporation complies with the limitations in that rule and contains 7,388 words, excluding the cover, table of contents, table of authorities, signature block, and the certificates.

/s/ *John W. Simpson*
Attorney for Appellant Myron Green Corporation

CERTIFICATE OF SERVICE

The undersigned certifies that foregoing Brief of Appellant Myron Green Corporation was filed and served electronically on this 23rd day of March, 2018 to all parties of interest.

/s/ *John W. Simpson*
Attorney for Appellant Myron Green Corporation