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

REPLY BRIEF OF APPELLANT MYRON GREEN CORPORATION

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INTRODUCTION

Throughout the tax audit and administrative proceedings in this case, the Director took the position that no tax would be imposed on sales that Myron Green made to the Bank. In contrast, the Director maintained that Myron Green was responsible for remitting tax on sales that it made to non-exempt individual Bank employees. Thus, the central legal question on appeal is the extent to which Myron Green made any "sales" to non-exempt individual Bank employees rather than to the Bank itself.

In its response brief on appeal, however, the Director devotes scant attention to that issue, instead reversing course to argue that it makes no difference to whom Myron Green was selling food and food services because even sales to the Bank are subject to sales tax. Dir. Br. at 1, 10-13-18, 20. But the Director is barred from taking a position that is directly contrary to the one it maintained during the course of this case and that has never been briefed or considered until now. The Director has consistently contended that Myron Green does not owe sales tax on sales to the Bank, this legal principle is squarely grounded in the law, and this Court should ignore efforts to distract attention by raising new arguments on appeal and focus on the real dispute in this case.

On that issue, the answer is clear. Myron Green sold the Bank food and food services, which were purchased for consideration by the Bank via payments that were made directly to Myron Green. The record is replete with evidence that such sales occurred—the Bank controlled all the food and drink in the cafeteria, and the Bank's payments to Myron Green were for amounts that the Bank owed Myron Green rather than mere "pass-through" transactions. Because the AHC failed to acknowledge any legal standards

governing the existence of a taxable "sale," it ignored this substantial and relevant record evidence and erred as a matter of law when it determined, without supporting analysis, that there were any individual sales between Myron Green and individual Bank employees.

But even if this Court concludes that Myron Green made any sales to individuals rather than the Bank, no tax is owed unless the Bank's cafeteria is considered a place in which food and drink are regularly served to the public. The Director incorrectly argues that Myron Green's status as a food services vendor necessarily means that the Bank's cafeteria is a public place. That position, however, is not supported by either *J.B. Vending Co., Inc. v. Director of Revenue*, 54 S.W.3d 183 (Mo. banc 2001) or *Shelter Mutual Insurance Company v. Director of Revenue*, 107 S.W.3d 919 (Mo. banc 2003). The Bank's subsidization of the cafeteria's operation, along with other unique circumstances present here, demonstrates that the Bank's cafeteria is not "public."

ARGUMENT

I. STANDARD OF REVIEW

As an initial matter, the Director's response brief invokes an incorrect standard of review. Dir. Br. at 8. This appeal does not involve the construction of the statutes exempting the Bank from taxation, and Myron Green is not claiming an exemption pursuant to them. *Id.* The cases cited by the Director regarding the strict construction of tax exemptions against the public are therefore distinguishable, as they involve appellants who argued that their conduct fit within the scope of various exemption statutes. *See Cook Tractor Co. v. Dir. of Revenue*, 187 S.W.3d 870, 873 (Mo. banc 2006) (noting that the issue was whether the appellant was a "common carrier" entitled to an exemption under §

144.030.2(3)); *Brinker Missouri, Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 436 (Mo. banc 2010) (noting that the issue was whether the appellant's purchases were for exempt machinery and equipment under § 144.030.2(4)-(5)).

In contrast, the only two issues in this case are: (1) whether payments that Myron Green received from the Bank that were attributable to items served in the Bank's cafeteria qualify as "sales" under § 144.020.1 between Myron Green and the Bank, or as "sales" between Myron Green and individual Bank employees; and (2) if any such "sales" took place between Myron Green and individual Bank employees, whether the Bank's cafeteria is a place in which food is regularly served to the public under § 144.020.1(6). Those questions depend entirely on the construction of Missouri's revenue laws, not any exemption statute. And it is well-established that the revenue laws "are to be construed strictly against the taxing authority in favor of the taxpayer." *Becker Elec. Co. v. Dir. of Revenue*, 749 S.W.2d 403, 406 (Mo. banc 1988). Moreover, "[i]t is the Director of Revenue's burden to show a tax liability." *Cook Tractor Co.*, 187 S.W.3d at 872.

Indeed, this issue was squarely addressed in *Becker Electric Company*, which Myron Green noted in its opening brief. Myron Green Br. at 10-11 & n.7. In that case, as in this one, the central question was whether a tax-exempt entity or a non-tax exempt entity had purchased certain tangible property. *Becker Elec. Co.*, 749 S.W.2d at 406. This Court rejected the Director's position that the matter involved the construction of an exemption statute and therefore required strict construction against the taxpayer. *Id.* Instead, this Court explained that the identity of the seller and the purchaser was a matter implicating the state's revenue laws, and those laws must be interpreted in the light most favorable to

the taxpayer. *Id.* The Director in this case has not cited *Becker* or explained why its reasoning does not control here.

Thus, in determining to whom Myron Green sold food and food services—the Bank, or individual Bank employees—the Director bears the burden to show a tax liability, and the definitions of "sale" and "purchase" under the revenue laws must be construed in favor of Myron Green.

II. THE COURT SHOULD REJECT THE DIRECTOR'S ELEVENTH-HOUR CHANGE IN POSITION THAT MYRON GREEN MUST COLLECT TAX ON ALL ITS SALES, INCLUDING THOSE MADE TO THE TAX-EXEMPT BANK.

The Director spends much of its brief trying to claim that it is irrelevant to whom Myron Green sold food and food services because even sales to the Bank are taxable. Dir. Br. at 1, 10-13, 20. According to the Director, "Missouri places the legal incidence of the tax on sellers," Dir. Br. at 11, a proposition that the Director then contorts to argue that the state may collect sales tax from Myron Green even on its sales to the federal government and its instrumentalities. Dir. Br. at 12 ("Missouri could collect sales tax from Myron Green on *all* of its gross revenue"); *id.* at 1 ("Missouri taxes sellers, not purchasers. In cafeteria transactions, Myron Green is the seller, so it must pay sales tax."); *id.* at 11 (arguing that Missouri sellers have an obligation to pay sales tax even if they cannot collect the amount of the tax from the purchaser).

But the Director maintained the exact opposite position during the audit and administrative proceedings in this case, and it is therefore is barred from assuming a new

position now. Even on the merits, however, this argument fails: it is well-established that that a taxpayer's sales to an exempt entity like the Bank are likewise exempt from taxation.

A. The Director is Precluded from Changing Its Legal Theory on Appeal.

Under well-established principles of equity and waiver, a party is prohibited from advancing a position on appeal that contradicts the one it maintained below. *See Farrow v. Saint Francis Med. Ctr.*, 407 S.W.3d 579, 598 n.12 (Mo. banc 2013) (ignoring a basis for affirmance advanced on appeal by the defendant-appellee that had not been raised below); *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 376 (Mo. banc 1993) (holding that a party "cannot argue a different position on appeal" than the one it assumed at the trial court); *Shockley v. Dir., Div. of Child Support Enforcement*, 980 S.W.2d 173, 175 (Mo. Ct. App. 1998) (applying judicial estoppel to bar the state-appellee from taking a position on appeal contrary to the one it urged in prior administrative proceedings).

Here, the Director's claim that all of Myron Green's sales are taxable—even those to the Bank itself—is entirely contrary to what the Director argued during its audit of Myron Green and during the administrative proceeding in this case. For example, the Department of Revenue sent a letter to Myron Green in May 2015 as part of the audit in which it stated "[t]he Department agrees that the catering sales made directly to the Federal Reserve Bank by Myron Green are exempt from both sales and use tax . . . ." Resp. Ex. A at DOR-A436. The Department of Revenue's Sales and Use Audit Write Up in October 2015 likewise makes clear that catering sales "were exempted from sales tax as sales made to the Federal Reserve Bank of Kansas City." Resp. Ex. A at DOR-A027.

That was the same position urged by the Director in the administrative proceedings. *See* Tr. 35:20-36:5 (explaining that sales to the Federal Reserve and catering were considered exempt and not subject to sales tax in this case); 66:16-25 ("[S]ales directly to the Federal Reserve" were not taxable); 37:4-6 ("[T]he catering sales made directly to the Federal Reserve were not held taxable, because they are exempted"); 52:23-53:1 ("Myron Green would be entitled to rely upon [the exemption letter] with respect to sales provided to the bank"); 53:7-10 ("So the real dispute here is whether these are sales to the employees or whether these services and sales were made to the bank").

In fact, the Director even included this position in its written proposed findings of fact and conclusions of law that it submitted to the AHC. *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."); LF201 ("[T]he auditor held the catering sales and the remainder the Fed paid exempt from sales tax because she determined those payments to be sales made directly to the Fed."). And the Director prevailed in that regard, with the AHC reasoning that "[c]atering and catering tax-exempt sales and coupons were all determined by the auditor to be tax-exempt sales made to the Bank," LF21, and "Myron Green could rely on the 2002 Limited Exemption letter regarding purchases by the Bank." LF33.[1]

Thus, the Court should ignore the Director's new argument and only address the issues that were argued and developed below. *Farrow*, 407 S.W.3d at 598 n.12; *Keene*

[1] The Director did not cross-appeal any aspect of the AHC's decision.

Corp., 855 S.W.2d at 376; *Shockley*, 980 S.W.2d at 175 (Mo. Ct. App. 1998). Doing so would encourage the development of full argument for the lower tribunal(s) to address in the first instance—a point that is especially important here given the intricacy of the Director's new contention. Here, for example, because the Director consistently took the position that sales to the Bank were tax-exempt, the parties never briefed the issue at all before now. The cases that the Director cites in support of its changed position have been revealed for the first time on appeal, forcing Myron Green to take a position on a point of law that the Director previously claimed was not in dispute. And because this matter was never advanced below, the AHC never considered it and this Court has been deprived of any order or analysis to streamline its review on appeal.

For all of these reasons, the Court should decline to consider the Director's newly-minted theory and instead focus on the dispute that has always been at issue in this case: whether any of the Bank's payments to Myron Green that were attributable to items served in the Bank's cafeteria should be considered exempt sales to the Bank or nonexempt sales to individual Bank employees.

B. The Director's Argument Is Incorrect as a Matter of Law.

Even if the Court wishes to consider the Director's changed premise—one that raises detailed legal points with limited briefing until this point—the Director's position is incorrect as a matter of law. It is well-established in this state that a taxpayer's sales to the federal government, or to an instrumentality of the federal government, are exempt from taxation. Under 12 C.S.R. § 10-112.300(c)(A)—a regulation promulgated by the Department of Revenue—"[s]ales to the United States government are exempt from tax

under the doctrine of intergovernmental immunity and section 144.030.1, RSMo."[2] Because Federal Reserve Banks are instrumentalities of the federal government and thus enjoy the same intergovernmental immunity as the United States itself, sales to such banks are likewise exempt under § 10-112.300.[3] *See Federal Reserve Bank of St. Louis v. Metrocentre Improvement Dist.*, 657 F.2d 183 (8th Cir. 1981).

The cases cited by the Director do not compel a different conclusion. Relying heavily on a 1954 decision from the Michigan Supreme Court, *Federal Reserve Bank of Chicago v. Dept. of Revenue*, 64 N.W.2d 639 (Mich. 1954), the Director argues two related points: (1) Missouri places the legal incidence of its sales tax on sellers, not purchasers; and therefore (2) the tax-exempt status of a purchaser like the Bank is irrelevant to the determination whether sales tax is owed. Dir. Brief at 10-13. Again, the Director is wrong.

To begin, federal law determines who bears the legal incidence of a state tax when, as in this case, that determination implicates a federal instrumentality that is immune from taxation. *United States v. Lohman*, 74 F.3d 863, 867 (8th Cir. 1996); *United States v. State of Michigan*, 851 F.2d 803, 807 (6th Cir. 1988). And the Eighth Circuit held in the *Lohman*

[2] *See also* 12 C.S.R. § 10-112.300(1) ("[S]ales to the United States government are exempt from tax").

[3] Because Federal Reserve Banks are instrumentalities of the federal government exempt from state and local taxation under the doctrine of federal immunity, the Director is also wrong when it claims that "federal reserve banks likely would not receive tax immunity if 12 U.S.C. § 531 did not exist, because they are likely not federal agencies." Dir. Br. at 17. The case cited by the Director involves whether a Federal Reserve Bank is an agency for purposes of Fed. R. Civ. P. 4 in the context of a Title VII action and has no relevance to this case. *See Scott v. Federal Reserve Bank of Kansas City*, 406 F.3d 532, 534 (8th Cir. 2005). Indeed, the Eighth Circuit in *Scott* even acknowledges that an entity can be an instrumentality without being an agency, noting its decision in *Metrocentre Improvement District*. *Id.* at 535.

case that for federal immunity purposes, the legal incidence of Missouri's sales tax falls on the purchaser. 74 F.3d at 867. Put another away, *Lohman* controls and *Federal Reserve Bank of Chicago* does not.

Moreover, *Lohman*'s holding and rationale are not "doubtful" today. *See* Dir. Br. at 12. Because the interpretation of Missouri revenue statutes is a matter of federal law when federal immunity is at issue, the *Lohman* court was free to reach its decision irrespective of cases cited by the Director in its brief. *See* Dir. Br. at 12.[4] Similarly, subsequent amendments to the tax statutes do not diminish *Lohman*'s application here. *See* Dir. Br. at 12-13. The Director points out that under a 1998 amendment, the seller is obligated to pay the sales tax even if the seller is unable to collect it from the purchaser. But the Director does not explain how this impacts where the legal incidence of the tax falls. The Director also says that today, a seller is permitted to absorb the cost of sales tax in the price of goods. *See id.* at 13. Again, the Director does not explain the impact of this change on where the legal incidence of the tax falls. More importantly, that provision is irrelevant to the legal-incidence question presented by these facts because it was not enacted until after the audit period in this case.[5]

[4] In any event, those cases do not involve factual or legal issues similar to those raised here. In *Centerre Bank v. Director of Revenue,* this Court evaluated whether a purchaser was entitled to a tax credit. 744 S.W.2d 754, 759 (Mo. banc 1988). The court in *Glickert v. Loop Trolley Transportation Development District* held only that the plaintiffs did not have Article III standing as taxpayers. 2014 WL 1672005, at *5 (E.D. Mo. Apr. 28, 2014). Neither case addresses the extent to which the state may collect sales tax from the seller on payments it receives from sales to an entity exempt from taxation under federal law.

[5] Regardless, even a statutory scheme that permits sellers to absorb the cost of sales tax can still place the legal incidence of the tax on purchasers, as explained by other courts. *See State of Michigan*, 851 F.2d at 808-09; *United States v. California Bd. of Equalization*, 650 F.2d 1127, 1130-1132 (9th Cir. 1981). And Missouri's system of allowing a seller to

For all those reasons, the Director's recent reliance on a decades-old case from a Michigan state court is misguided. Indeed, the decision was subsequently rejected by the Sixth Circuit on similar grounds. *State of Michigan*, 851 F.2d at 807 (declining to follow the Michigan Supreme Court's analysis of Michigan law in *Federal Reserve Bank of Chicago* because the legal incidence of a state sales tax on a constitutionally-exempt entity is a matter of federal law).

Finally, the Director cites to a smattering of United States Supreme Court decisions involving third parties seeking to claim an exemption held by the federal government or its agents and instrumentalities. Dir. Br. at 11, 15, 17. Those cases are distinguishable. They do not involve the construction of a statute similar to § 144.030.1 or a regulation like 12 C.S.R. § 10-112.300(c)(A), both of which exempt a taxpayer's sales to the Bank. Here, Myron Green is not seeking to step into the shoes of the Bank or to extend the Bank's immunity from taxation. The question is whether Missouri exempts from taxation sales to tax-exempt entities like the Bank. As set forth above, it does.

"'It is well established that the right of the taxing authority to levy a particular tax must be clearly authorized by the statute, and that all such laws are to be construed strictly against such taxing authority.'" *Canteen Corp. v. Goldberg*, 592 S.W.2d 754, 756 (Mo. banc 1980) (quoting *State ex rel. Ford Motor Co. v. Gehner*, 27 S.W.2d 1, 3 (Mo. banc 1930)). No clear authority permits the Director to impose sales tax on sales that Myron Green made to the Bank. If the law were clear, the Director would have taken this position

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absorb the sales tax operates similarly to those in *State of Michigan* and *California Board of Equalization*.

throughout the course of the audit and AHC proceedings. To the contrary, 12 C.S.R. § 10-112.300(c)(A) specifically provides that the doctrine of intergovernmental immunity *exempts* sales to government instrumentalities like the Bank. To the extent the Court reaches this issue, it should hold that payments Myron Green received from sales to the Bank are tax-exempt.

III. MYRON GREEN'S SALES WERE TO THE BANK, NOT TO INDIVIDUAL BANK EMPLOYEES.

Turning to the central point on appeal, the AHC concluded as a matter of law that payments Myron Green received from the Bank attributable to items served in the Bank's cafeteria qualified as taxable sales between Myron Green and individual Bank employees. LF30-31. But the AHC never cited any authority or legal principles in support of its blanket conclusion. Nor did it consider the entirety of the evidence in the case, which demonstrated that the Bank both: (1) had the right to use, store, consume, or otherwise control the food that was served to Bank employees; and (2) paid Myron Green for that food. *See* § 144.010(12) ("Sale" means "any transfer . . . of tangible personal property for valuable consideration."). The Bank was the purchaser of the cafeteria food from Myron Green, and Myron Green's sales to the Bank are therefore exempt under § 144.030.1.

A. The Bank, not Myron Green, Owned the Cafeteria's Inventory.

In its brief, the Director first tries to strengthen the AHC's cursory analysis[6] by claiming that "Myron Green owned all food products at the time cafeteria customers

[6] Although the AHC's decision is 20 pages long, the majority is devoted to an incomplete assessment of the facts and an analysis of the "regularly-served-to-the-public" standard under § 144.020.1(6)—a legal question that is not relevant unless Myron Green was first determined to be selling food to individual employees. *See* LF1-30. Only a small portion

purchased them," such that any sales were necessarily between Myron Green and those individuals. Dir. Br. at 19. But this misstates both the law and the facts. For purposes of § 144.020.1, property is transferred as part of a taxable retail sale when the seller transfers "the right to use, store or consume" the property. RSMo § 144.605(5); *Kansas City Power & Light Co. v. Dir. of Revenue*, 83 S.W.3d 548, 552 (Mo. banc 2002); *Sipco, Inc. v. Dir. of Revenue*, 875 S.W.2d 539, 541 (Mo. banc 1994). In other words, "[t]he issue under the statutes is transfer of control of" the property. *Kansas City Power & Light*, 83 S.W.3d at 552.

Here, the evidence demonstrated the following, all of which conclusively shows that the Bank—not Myron Green—had the right to use, store, consume, or otherwise control the food in the cafeteria. As such, Myron Green's sales were to the Bank; Myron Green could not sell food it did not own to Bank employees.

- Myron Green placed food orders from its supplier "on behalf of the" Bank and "for the Bank." Tr. 134:2-6/32:3-4; Pet. Ex. 2 at MG00298.
- Food that Myron Green had ordered for the Bank was delivered directly to the Bank, not to Myron Green. Tr. 80:13-19/131:24-132:24. Myron Green never "[took] physical possession or control over the items that are delivered." *Id.* 133:10-13/80:20-23. Instead, the Bank accepted responsibility to pay for delivered items once they arrived at the Bank. *Id.* 133:14-23.
- Both Myron Green and the Bank considered the food in the cafeteria to be owned by the Bank. *Id.* 86:3-11/134:16-23. For example, the Bank was responsible for paying Myron Green for unused and spoiled food. *Id.* 43:23-44:22/89:1-21/107:8-12. And Myron Green considered its employees to be cooking the food "on behalf of the Federal Reserve Bank." *Id.* 91:23-24.

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of the decision even superficially addresses to whom Myron Green was selling cafeteria food. *See id.* at 30-31, 32-33.

- The Bank required all cafeteria food to conform to the Bank's quality standards as set forth in the RFP. Pet. Ex. 2 at MG00290, 295, 296-97.

- The Bank worked with Myron Green regarding the types of food that would be served in the cafeteria and helped create cafeteria menus. Tr. 102:12-103:5/80:7-9/115:4-9. In this way, the Bank influenced the food orders that Myron Green made to its supplier. *Id.* 80:7-12.

- The Bank approved all pricing of food items. *Id.* 84:7-9/115:10-15.

- The Bank controlled the hours that the cafeteria would be open for service to Bank employees. Pet. Ex. 2 at MG00295; Tr. 115:2-4.

- The Bank exercised control over Myron Green staff in the Bank's cafeteria, including reviewing hires. Pet. Ex. 2 at MG00290-291, 299; Tr. 82:15-23/103:19-104:1/114:4-16.

- Finally, the Bank owned all of the equipment in the cafeteria, including the equipment used to prepare food into meals. Tr. 45:20-24/83:10-84:5/115:19-22.

Contrary to the Director's suggestion, the AHC did not make any specific factual findings on the question of when a transfer of property rights occurred that are relevant to the governing legal standard. In fact, the AHC cited no law at all. Instead, it simply identified a handful of facts that it determined—without analysis—"did not prove that the food itself was the Bank's":

> The Bank's preferences regarding the food to be served and its approval on the operation of the Cafeteria is not proof that the food itself was the Bank's. Similarly, the following facts do not prove that Myron Green sold food to the Bank, and that the Bank resold the food to its employees and their guests: 1) the Bank oversaw Myron Green's food purchases, 2) most of Myron Green's customers were Bank employees, 3) the Bank employees paid for their purchases with card swipes, and 4) the Bank operated the Cafeteria at a loss but compensated Myron Green for its full cost.

LF31. That conclusion ignores the substantial evidence in the record as a whole (set forth above) and is also legally erroneous for failing to comport with—or even acknowledge—the standard governing when property has been "transferred" under RSMo § 144.605(5).[7]

Perhaps recognizing the lack of evidentiary and legal support for the AHC's determination, the Director repeatedly cites to the AHC's statement that "Myron Green provided the Bank with a summary of purchases by employees from Myron Green," which it construes as a factual finding that Myron Green must have owned all food products in the cafeteria. Dir. Br. at 19 (citing LF19 ¶ 20);[8] *see also id.* at 7, 10. That, of course, is not what the statement says literally or in any other context. This "finding" was made only as part of the AHC's description of the cafeteria's point-of-sale[9] system and how Myron Green tracked items to bill to the Bank, and not based on any facts that are legally relevant to the transfer of ownership for purposes of a retail sale. Despite the Director's central contention that Bank employees made purchases directly from Myron Green, Dir. Br. at 10 & 12, the Director repeatedly undercuts his own argument by characterizing the Bank's transfers of funds as payments by the Bank itself. *See, e.g.*, Dir. Br. at 14 ("The Bank then

[7] Moreover, the existence of any resale is not controlling, as all sales to the Bank are exempt from tax regardless whether the food was intended for resale. *See infra* p. 18.

[8] Myron Green's brief cites to pages contained in the legal file by referring to "LF". The Director instead uses "LF" to refer only to pages of the AHC's decision. *See, e.g.*, Dir. Br. at 19 (citing to "LF4 ¶ 20," which is page 4 of the AHC's decision and page 19 of the legal file).

[9] The term "point-of-sale" refers to the system that records cafeteria transactions paid by the Bank to Myron Green, but does not reflect, nor concede, that a sale occurs between the employee and Myron Green through this system.

paid those amounts to Myron Green . . .”); 19 (“the Bank made *separate* payments to Myron Green to cover all salary-deductions . . .”).

The Director also claims that “Myron Green treated the cafeteria’s inventory as its own” because Myron Green had a “practice of moving inventory among its facilities.” Dir. Br. at 6, 19. According to the Director, Myron Green “had no legal right to move inventory it did not own.” Dir. Br. at 19. Again, the Director has both the facts and the law wrong. Myron Green testified that the shifting of food from the Bank’s cafeteria was most likely made to the Bank’s catering account, not to some other facility operated by Myron Green. Tr. 108:6-109:18. Thus, Myron Green was not taking its own inventory and moving it to another operation; it was simply shifting the Bank’s food from the Bank’s cafeteria account to the Bank’s catering account. The food was still owned by the Bank. The fact that Myron Green relocated some of the Bank’s cafeteria inventory so that it could be used for Bank’s catering needs, with appropriate credits and debits to those respective accounts, is not inconsistent with the Bank’s ownership.

If Myron Green owned the food in the first place, it would not credit the Bank when it moved some of the food to the Bank’s other account. Instead, Myron Green could do what it pleased with the food—transfer it to another company’s cafeteria, price it more profitably, or even decide not to sell it to employees patronizing the Bank’s cafeteria. But no evidence was provided to the AHC that Myron Green was free to do any of these things, which further undermines the Director’s claim that Myron Green (rather than the Bank) owned the cafeteria’s inventory. *See Cook Tractor Co.*, 187 S.W.3d at 872 (holding that the Director bears the burden of demonstrating a tax liability).

B. The Bank Paid Myron Green for the Food Served in the Cafeteria.

Nor should there be any question that the Bank paid Myron Green for the food it provided in the Bank's cafeteria. *See Becker Electric Co.*, 749 S.W.2d at 407 ("[A] purchaser is the person who pays the purchase price and exercises some dominion over the purchased property.").[10]

For employee-deduct charges,[11] the amount of those deductions were tracked at the point-of-sale by the Bank's own equipment. Tr. 115:23-116:2/129:11-130:16. Although the Bank had the ability to access that information on its own, the parties agreed instead to have Myron Green provide it with twice monthly summary reports. *Id.* 90:14-22/129:11-17/130:12-16/131:6-12/138:17-21. At that point, the Bank would withhold those amounts from employees' paychecks. *Id.* 130:6-16. When the Bank paid Myron Green, it did so via ACH from a Bank account or was also permitted to pay via the Bank's credit card. *Id.* 44:23-25/45:7-11/131:13-15/131:16-23; Pet. Ex. 2 at MG00292. Those payments, in turn, were used to compute the Bank's "shortfall" or subsidy amount every month, which it

[10] The AHC did not make any specific factual findings or conclusions of law on this point, simply stating that "[i]n the Cafeteria, the Bank's employees selected the meals or drinks and then checked out at the cash register at a 'point-of-sale' system. After the cashier totaled a purchase, an employee would scan their badge in payment or pay cash. Myron Green provided the Bank with a summary of purchases by employees from Myron Green." LF19. As it does with respect to the ownership of cafeteria inventory, *see supra* page 14, the Director twists this cursory statement into an alleged finding of fact that taxable sales occurred between Myron Green and Bank employees, rather than Myron Green and the Bank. Dir. Br. at 19. In reality, however, the AHC's analysis on this point is sparse at best and nonexistent at worst. *See* LF31 (concluding, without explanation, that the fact that "Bank employees paid for their purchases with card swipes" does "not prove that Myron Green sold food to the Bank").

[11] The Director's brief inaccurately characterizes this tracking for employee deductions as a "payment" and even "an electronic form of payment", but this tracking does not equate to a payment between the employee and Myron Green. Rather it records the obligation for the employee to pay the Bank. Dir. Br. at 7, 14.

similarly paid via ACH or credit card. Tr. 130:19-131:5/131:16-23/138:22-139:13/44:23-25/45:3-11; Resp. Ex. C at MG00231-00267.

Thus, employee deductions were not "pass-through" transactions akin to a person paying for a product with funds transmitted from a third-party credit card company. Dir. Br. at 1, 14, 19-20. Instead, the amount of payroll deductions were used to offset a portion of the Bank's expense related to the cafeteria. Tr. 131:21-23. The payroll deductions were considered the Bank's own funds which it used to reimburse itself for a portion of its overall liability to Myron Green. *Id.* 139:20-22. The greater the amount of deductions, the less the Bank owed Myron Green. In this way, the deductions provided a financial benefit to the Bank; the Bank did not merely "facilitate payment" from employees to Myron Green. Dir. Br. at 20.

The Director also points out that the Bank made three payments to Myron Green each month: two in the amount of employee deduct charges, and a final one representing the shortfall amount. Dir. Br. at 19. It is unclear why the Director thinks this is "strong evidence" that Myron Green was actually receiving money directly from Bank employees. *Id.* Nor is it clear why the Director thinks the schedule was somehow improper. *Id.* The contract between Myron Green and the Bank requires Myron Green to provide point-of-sale reports to the Bank "upon request." Pet. Ex. 2 at MG00300. The contract also requires Myron Green to submit a monthly invoice and that the invoice should be paid by the Bank within 30 days. Pet. Ex. 2 at MG00292. The practice of receiving bimonthly point-of-sale reports, along with the Bank's payment of amounts reflecting employee deduct charges

and a final payment following Myron Green's monthly invoice, is not inconsistent with the contract.[12]

For similar reasons, the Director's attempt to distinguish *Canteen* and the other cases cited in Myron Green's opening brief is unpersuasive. Like in *Canteen*, there was no direct transaction between Myron Green as the cafeteria operator and the individuals who ultimately consumed the cafeteria's food. Instead, Myron Green prepared and served meals, Myron Green then billed the Bank based on the food served, and the Bank was required to pay Myron Green for the food. In *Canteen*'s analogous circumstances, this Court held that the cafeteria operator had sold the food to the retirement home rather than to individual retirees. 592 S.W.2d at 756. The Director's claim that the retirement home in *Canteen* "purchased the food in advance" is inaccurate, as the case makes clear that the cafeteria operator invoiced the retirement home monthly for the meals it had already served. *Id.* Likewise, it is irrelevant whether any "resale" occurred between the Bank and individual employees. All of Myron Green's sales to the Bank are exempt from tax regardless whether the food was resold, discarded, or ultimately used by the Bank itself.

* * * * *

Myron Green's receipt of payments from the Bank for food that Myron Green provided in the Bank's cafeteria represent sales to the Bank, not to individual Bank employees. As such, those sales are exempt from sales tax. In reaching a contrary result,

[12] As with employee deduct charges, the amount of cash exchanges also acted as a credit to the overall amount owed by the Bank in Myron Green's monthly invoice. Tr. 94:16-19 The credit both demonstrates that the cafeteria inventory was the Bank's, as well as reinforces the Bank's overall responsibility to pay Myron Green for all cafeteria items.

the AHC failed to acknowledge the governing legal standards and also failed to consider the substantial evidence provided in the record as a whole. Its decision should be reversed.

IV. TO THE EXTENT ANY SALES WERE MADE TO INDIVIDUALS, THOSE SALES ARE EXEMPT BECAUSE THEY DID NOT OCCUR IN A PLACE IN WHICH FOOD OR DRINK ARE REGULARLY SERVED TO THE PUBLIC.

This Court has twice considered whether a company cafeteria constitutes a place in which food and drink are regularly served to the public under § 144.020.1(6). In *J.B. Vending Co. v. Director of Revenue*, 54 S.W.3d 183 (Mo. banc 2001), the Court held that when a third-party vendor operates the company's cafeteria, the restricted nature of the cafeteria alone is not sufficient to remove the cafeteria from the "public" ambit of the statute. In *Shelter Mutual Insurance Company v. Director of Revenue*, 107 S.W.3d 919 (Mo. banc 2003), the Court held that when the company itself operates the cafeteria, the cafeteria is not a "public" place because (1) a special relationship exists between the operator and individual consumers; and (2) the company does not regularly serve food to the public.

But the Court has never decided the issue on the present facts, none of which were present in either *J.B. Vending or Shelter Mutual*. Although Myron Green is a third-party vendor, as was the case in *J.B. Vending*, Myron Green is not operating the Bank's cafeteria as its (Myron Green's) own. Unlike in *J.B. Vending*, Myron Green does not set the price of food and drink items; instead, the Bank oversees pricing and subsidizes Myron Green's operation. The existence of this subsidy alone distinguishes the facts here from *J.B. Vending* and brings it more in line with *Shelter Mutual*. *Compare J.B. Vending*, 54 S.W.3d

at 185 ("The cost of food in cafeterias was not subsidized by the business owners") *with Shelter Mutual*, 107 S.W.3d at 920 ("Shelter subsidizes the operation of the cafeteria and the amount charged to Bank employees does not cover the operating costs of running the cafeteria.").

The Director urges a bright line when none exists. This Court has never held, and it is not "black-letter law," that a company cafeteria that is serviced by a third-party vendor is always a place in which food or drink are regularly served to the public. Dir. Br. at 2, 23-25. True, the *J.B. Vending* case involved a third-party vendor—but the Court's holding was far narrower than the Director contends. In *J.B. Vending*, this Court simply held that when a third-party vendor operates a company cafeteria, it does not become nonpublic simply because the cafeteria is restricted to company employees. *J.B. Vending*, 54 S.W.3d at 184 ("[C]afeterias do not become nonpublic merely because the buildings in which they are located happen to restrict access to those buildings.")

The Director's black-and-white approach also disregards the two factors later set forth in *Shelter Mutual*. If the dividing line between a public and a nonpublic company cafeteria was simply whether the cafeteria operator was the company itself or a third party, there would have been no need for the *Shelter Mutual* court to identify "more than one criteria" for that determination. *Shelter Mutual*, 107 S.W.3d at 921. Indeed, *Shelter Mutual* instructs that a court must consider *both* whether the taxpayer is a third-party vendor *and* whether the taxpayer has a special relationship to those whom meals are served. The Director's argument—namely, that the existence of the first factor precludes a finding of the second—reads the second, "special relationship" factor out of the analysis.

For the reasons set forth in Myron Green's opening brief, there is a special relationship between Myron Green and cafeteria consumers that renders the Bank's cafeteria nonpublic. In particular, because of the contractual arrangement between Myron Green and the Bank, Myron Green (at the Bank's request) offered those consumers discounted food and drink not available to other individuals to whom Myron Green serves. Myron Green Br. at 20-21. The Director cites no authority for its claim that in these circumstances, there may only be a special relationship between Myron Green and the Bank. In short, the relationship between Myron Green and Bank employees is far more analogous to the relationship in *Shelter Mutual* than *J.B. Vending*, which renders the Bank's cafeteria nonpublic for purposes of § 144.020.1(6).

V. ANY DECISION IMPOSING SALES TAX IN THESE CIRCUMSTANCES WOULD BE UNEXPECTED

A decision is "unexpected" if "a reasonable person would not have expected the decision or order based on prior law, previous policy or regulation of the department of revenue." § 143.903.1. It cannot seriously be contended that a decision imposing tax even on sales to the Bank itself, *see supra* pages 4-11, would be expected in light of the Director's contrary position during its audit of Myron Green, the existence of 12 C.S.R. § 10-112.300, and the Director's reliance on a 60-year old decision from Michigan. The Director's failure to locate any authority supporting its position regarding "sales" to individual Bank employees, *see* Dir. Br. at 18-20, similarly demonstrates that a reasonable person would not expect that the transactions between Myron Green and the Bank in this case should instead be characterized as sales between Myron Green and individuals. For

those reasons and the ones set forth in Myron Green's opening brief, any decision in this case should be applied prospectively only.

CONCLUSION

For all the reasons set forth here and in Myron Green's opening brief, this Court should reverse the decision of the AHC.

Respectfully submitted,

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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 7,126 words, excluding the cover, certificates, and signature block.

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CERTIFICATE OF SERVICE

The undersigned certifies that foregoing Brief of Appellant Myron Green Corporation was filed and served electronically on this 28th day of June, 2018 to all parties of interest.

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