IN THE SUPREME COURT OF MISSOURI

S.C. No: 98601

SEBA, LLC,
Appellant,

v.

MISSOURI DIRECTOR OF REVENUE,
Respondent.

Appeal from the Administrative Hearing Commission,
The Honorable Renee T. Slusher, Commissioner
Case No.: 16-3073

SEBA, LLC'S SUBSTITUTE APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

On June 9, 2016, SEBA, LLC filed a Petition, appealing the Director Of Revenue's ("Director") Final Assessment Of Unpaid Sales Tax issued on April 12, 2016, assessing sales tax, a penalty as an addition to tax, and statutory interest for the period from October 1, 2011 through September 30, 2014, in the amount of $38,540.44. Pursuant to Section 621.050, SEBA requested a hearing, and that the Administrative Hearing Commission reverse the Director's Final Assessment Of Unpaid Sales Tax ("Assessment"). The Administrative Hearing Commission ("AHC" or "Commission") held a hearing on February 22, 2019. Thereafter, on July 19, 2019, the Honorable Renee Slusher, Commissioner, handed down her final Decision, holding SEBA liable for unpaid sales tax in the amount of $38,540.44, minus the sales tax assessed on $26,567.57 in income generated from SEBA's exempt sales, statutory interest, and a penalty under Section 144.250.3. On 8-15-19, SEBA filed its Notice of Appeal, pursuant to Sections 621.189 and 536.100 of the Missouri Revised Statutes. On June 9, 2020, the Western District Court of Appeals issued its Opinion, transferring the instant appeal to the Supreme Court, pursuant to Article V, Sections 3 and 11 of the Missouri Constitution.

SEBA's appeal involves issues requiring construction of the revenue laws of this state, and thus, the Supreme Court has exclusive jurisdiction[1] over the appeal, pursuant to Article V, Sections 3 and 11 of the Missouri Constitution.

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[1] For a more thorough discussion of the Court's jurisdiction, see Introduction to Argument, *infra*.

STATEMENT OF FACTS

Nature Of Eddie's Business

SEBA, LLC does business as Eddie's South Town Donuts ("Eddie's"), in St. Louis, Missouri. (Tr.8).[2] SEBA began operations in February 2007. (Tr.8). At all relevant times, Brad Artega was the owner and sole member of SEBA. (Tr.7-8). Eddie's is a small donut shop. (Tr.10). Eddie Strickland was the business' sole, paid employee. (Tr.10). Strickland was responsible for making all the donuts sold by Eddie's, as well as performing the business' daily tasks, such as acting as counterperson, answering the phone, waiting on walk-in customers, and cleaning the store. (Tr.10). Eddie's was open 7 days a week, from 5:00 a.m. to 12:00 p.m. (Tr.15). In addition to donuts, Eddie's sold coffee, milk, soda, and water. (Tr.16). Eddie's was not an automated shop. (Tr.10-11). Strickland made all the donuts by hand. (Tr.10-11,34). He made the donut mix, cut the donuts, fried the donuts, decorated the donuts with icing, and boxed the donuts. (Tr.34).

When Eddie's first opened, its primary customers were comprised of walk-in traffic. (Tr.13,17). Artega testified most walk-in customers purchased a cup of coffee, and one or two donuts at a time. (Tr.19-20). The vast majority of Eddie's walk-in customers did not purchase a dozen donuts. (Tr.20-21). It was rare during the week to sell dozens of donuts to a single customer. (Tr.20). On weekends, some Eddie's customers purchased a dozen donuts on a walk-in basis. (Tr.19-21). Of the walk-in retail sales at Eddie's, 60% were

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[2] Matters in the Transcript of the Commission hearing shall be referred to herein as (Tr.____). Matters in the Legal File shall be referred to herein as (L.F.____).

credit card sales; 40% were cash sales. (Tr.32). The average walk-in sale was approximately $3.00. (Tr.32-33,35).

After a few years, due to a significant decrease in walk-in traffic at Eddie's, Artega decided to concentrate on selling donuts on a wholesale basis. (Tr.17-18). During the audit period of 10-1-11 through 9-30-14, Eddie's business was comprised of approximately 20% retail and 80% wholesale sales. (Tr.18). Eddie's biggest wholesale accounts were Washington University, St. Louis University, the Casino Queen casino, and churches in the south side parishes of the St. Louis Archdiocese. (Tr.17). The wholesale donut orders dictated how many donuts Strickland made per day. (Tr.21). Generally, only one case was filled at Eddie's for retail sales. (Tr.23).

Eddie's sold donuts on a wholesale basis to businesses and various tax exempt entities in the St. Louis Metropolitan area, including various churches. (Tr.17-18,40). The majority of Eddie's annual revenue was generated through its wholesale business with such entities. (Tr.17-18). Wholesale customers typically paid by check or credit card. (Tr.18-19). Eddie's wholesale donut sales were made to both for-profit and non-profit entities. (Tr.40). For example, Eddie's sold donuts to Phillips 66 Station and Waters Auto Centers ("Waters"), which were retail entities. (Tr.40,44). Phillips 66 and Waters sold the donuts purchased at wholesale from Eddie's, at a higher retail price to the public. (Tr.40,44,107).

During the audit period, Eddie's made approximately 50 dozen donuts a day (35 dozen wholesale and 15 dozen retail), 350 dozen donuts a week, when wholesale and retail donuts sales were combined. (Tr.21;Ex.A,17). Eddie's charged wholesale customers $5.35

for a dozen donuts. (Tr.Ex.A,17). It charged retail customers $8.00 for a dozen donuts, and 75 cents for a single donut. (Tr.34-35).

Brad Artega was responsible for handling SEBA's financial affairs. (Tr.16). Artega went into the store once or twice a week to collect money, credit card receipts, checks, and related paperwork for the business. (Tr.16-17).

Eddie's used a cash register which only printed one receipt, which Strickland either gave to the customer or threw away. (Tr.28,54-55). The cash register did not issue double receipts, or use a Z-tape.[3] (Tr.28,54-55). Credit card sales at Eddie's were not reported on an individual basis. (Tr.27). Rather, the credit card machine issued a receipt, which set forth the total amount of credit card sales for the day. (Tr.27,47).

Generally, Artega made cash deposits on a weekly basis. (Tr.26-27). Each day, Strickland collected the cash which came into Eddie's during the day. (Tr.27). He took the receipt from the credit card machine, listing the day's total amount of credit card sales, wrapped it around the cash, and put it into a safe in the store. (Tr.27). To Artega's knowledge, Strickland did not save or underreport any cash sales. (Tr.27). Nor did Artega save or underreport any cash sales made by Eddie's. (Tr.27).

Joseph Otten is a tax accountant, bookkeeper and financial advisor. (Tr.56). He has performed bookkeeping services for Eddie's since its inception in 2007. (Tr.57-58). In

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[3] Z-tapes are tapes printed from a cash register which summarize the day's sales. ***U.S. v. Koudanis***, 207 F.Supp.3d 115,121 (D.Mass.2016).

preparing Eddie's sales tax returns, Otten used the store's bank statements, which contained all of Eddie's income and expenses. (Tr.58-59).

Otten prepared Eddie's sales tax returns during the audit period from 10-1-11 to 9-30-14. (Tr.59-60). Every three months, Artega provided Otten with stubs for checks he had written, Eddie's bank statements, and credit card statements for the quarter. (Tr.26,29,60-61). Otten prepared Eddie's sales tax returns based on this information. (Tr.61). He checked the credit card statements to confirm the numbers on those statements matched the figures on Eddie's bank statements. (Tr.61). Artega provided Otten with all the materials he thought necessary to prepare Eddie's sales tax returns. (Tr.29). Otten never requested any additional information from Artega for the purpose of preparing those returns. (Tr.29). Based on his knowledge and experience, and his review of Eddie's business records, Otten never saw anything out of the ordinary while preparing Eddie's sales tax returns. (Tr.61-62). Nor did he see anything out of the ordinary regarding the amount of cash receipts, given his knowledge of Eddie's business and business practices. (Tr.62). Based on the records Otten reviewed, there was no indication any cash of the business was being withheld from Eddie's bank accounts, or not being reported on its sales tax returns. (Tr.62).

In preparing Eddie's sales tax returns, Otten used his best professional abilities. (Tr.62-63). He double checked the figures on the returns for accuracy before filing them. (Tr.63). Likewise, Artega reviewed the sales tax returns Otten prepared, to check them for accuracy, to the best of his ability. (Tr.30). Artega relied on Otten as a professional,

competent accountant and bookkeeper, to prepare accurate sales tax returns and double check the returns before filing them. (Tr.46).

The Audit

On 10-16-14, Lisa Hoffman of the Department Of Revenue notified SEBA it had been selected for a sales tax audit. (Tr.59-60). Hoffman requested copies of SEBA's business records, including sales, use, and withholding tax returns, and supporting schedules; federal income tax returns; sales journals; sales invoices; sales tax exemption certificates and letters; detailed general ledgers; purchase invoices; payroll registers and W-2's; 1099-K forms; and bank statements. (L.F.59-60,68-69). The audit was to begin on 11-18-14. (L.F.59). In response, SEBA provided Hoffman with its federal income tax returns, depreciation schedules, bank statements, 1099-K forms, purchase invoices, payroll registers, W-2s, and a general ledger. (Tr.68-69).

At the time she performed the SEBA audit, Hoffman had only been a tax auditor for two months. (Tr.83). The SEBA audit was either the first or second audit Hoffman had ever undertaken. (Tr.83-84). Hoffman was still in training, and learning the craft of being an auditor, when she conducted the SEBA audit. (Tr.84). One of Hoffman's supervisors helped her perform the audit, assisting Hoffman with her fieldwork. (Tr.84). The supervisor trained Hoffman during the same time she was performing the audit. (Tr.84). At the time of the SEBA audit, Hoffman had no experience in making estimations or assumptions as to the amount of missing cash sales. (Tr.102). Hoffman could not recall whether she discussed how to estimate or calculate missing cash sales with her supervisor. (Tr.102). As she admitted, Hoffman is not a CPA. (Tr.66).

Prior to becoming a tax auditor, Hoffman worked in a tax assistance center. (Tr.101). Hoffman's work in tax assistance involved preparing Missouri income tax returns. (Tr.101). It did not involve sales tax returns or sales tax audits, of the nature she performed of SEBA. (Tr.101-102).

The sales tax audit covered the period from October 1, 2011 through September 30, 2014. (Tr.67). During the audit, Hoffman requested Artega provide tax documents, which included letters for Eddie's exempt sales, cash register receipts, and credit card receipts for wholesale and retail sales. (Tr.22-23,31-32). In response, Artega and Otten provided Hoffman with all the records in their possession. (Tr.31).

At the auditor's request, Strickland kept a handwritten record of all the donuts made and sold at Eddie's during July 2015. (Tr.23-24,70). Based on this handwritten record, Hoffman concluded Strickland made between 20 and 35 dozen donuts per day for wholesale. (Tr.87). During July 2015 when the handwritten inventory was kept, Eddie's sold 1,045 donuts on a wholesale basis. (1,045 divided by 30 equals 34 dozen per day). (Tr.25,92).

During the audit period, Eddie's charged retail, walk-in customers 75 cents for a single donut, and $8.00 for a dozen donuts. (Tr.34-35). Based on his listing of receipts, Artega determined the average amount of a walk-in retail sale, which usually entailed a couple of donuts and a coffee, was approximately $3.00. (Tr.20,35). Conversely, Hoffman estimated the average retail sale at Eddie's was $8.06. (Tr.36,71).

In the Audit, Hoffman found Eddie's sold 349.6 dozen donuts on a retail basis in July 2015, resulting in $12,535.93 in cash retail sales that month. (Tr.72,91). Divided by

30, this figure represented 11.4 dozen donuts in retail sales per day. (Tr.90-91). The maximum number of Eddie's wholesale donut sales per day was 34 dozen. (Tr.91). Adding to this figure the auditor's estimate of 11.4 dozen donuts in retail sales, would require Strickland to make, by hand, over 45 dozen donuts a day. (Tr.90). Hoffman admitted she saw no evidence during the audit that Strickland made 45 dozen donuts per day. (Tr.90). When asked for the basis of the extra 11 dozen retail donuts which Hoffman used in her figures, she testified it was *possible* not all the donuts made at Eddie's were recorded in the July 2015 handwritten notebook. (Tr.91). Hoffman did not base the 11 dozen retail donut figure on that notebook. (Tr.91-92). Rather, as Hoffman conceded, the additional 11 dozen retail donut figure was based on speculation. (Tr.91-92).

Artega provided Hoffman with 490 cash register receipts from Eddie's for the month of July 2015. (Tr.70-71). Those 490 cash register receipts were for walk-in customers, i.e., retail sales. (Tr.72). Hoffman believed the sales receipts for that period were incomplete, since each sales receipt had a transaction number on it, and there were gaps in the transaction numbers on the receipts. (Tr.71-72). Based on the transaction numbers, Hoffman believed she should have been provided with 1,555 receipts. (Tr.71). She reached this figure by subtracting the transaction number on the first receipt provided, No. 1512, from the transaction number of the last receipt provided, No. 3066. (Tr.,Ex.A,17).

Hoffman calculated an average retail sale price of $8.06. She did so by taking the 490 receipts for July 2015 Artega provided, and adding them up. (Tr.,Ex.A,17). The receipts totaled $3,950.23. (Tr.,Ex.A,17). Next, Hoffman calculated her average retail sale price by dividing the $3950.23 total by 490 (the number of receipts received), which

equaled $8.06. (Tr.,Ex.A,17). Hoffman then multiplied her average retail sale price of $8.06 by the number of receipts she believed to be missing (1,555), and found Eddie's retail sales in the month of July 2015 totaled $12,535.93. (Tr.,Ex.A,17). Next, Hoffman extrapolated from that amount, reaching a total of $400,487.72 in unreported retail sales for the audit period. (Tr.80-81). Hoffman subtracted $2,500.00 from the retail sales estimate, the amount Carolyn Artega loaned Eddie's. (Tr.72-73). Additionally, Hoffman subtracted the sales tax collected before arriving at the gross retail sale amount. (Tr.73).

Hoffman determined the amount of the wholesale orders for July 2015 by utilizing sales ledgers from exempt customers, along with sales exemption certificates SEBA provided. (Tr.74). For July 2015, Hoffman found the amount of wholesale orders paid by check totaled $2,944.49, and the amount of wholesale orders paid by credit card totaled $1,412.00. (Tr.74). Adding these wholesale figures to her estimate of $12,535.93 in retail sales for July 2015, Hoffman determined the total sales for July 2015 were $16,892.42. (Tr.74).

Hoffman also calculated Eddie's cash/credit sales ratio. (Tr.74-75). She started with her total estimated sales amount for July 2015 ($16,892.42), and subtracted from that amount the credit card payments received, to determine the estimated cash payments received. (Tr.75). Hoffman then divided the estimated cash payments received, by the total estimated sales amount, to arrive at the ratio of 72% cash sales, and 28% credit sales. (Tr.75).

Artega retained some tax exempt certificates for those entities to which Eddie's made wholesale donut sales. (Tr.41). He presented Eddie's exempt sales records, including

tax exemption certificates, to Hoffman. (Tr.41). During the course of the audit, Artega contacted Eddie's exempt customers to obtain tax exempt sales certificates or letters from each of the entities to which Eddie's made wholesale sales. (Tr.42-43). Consequently, he was able to produce numerous exempt sales certificates for Hoffman. (Tr.42). Artega kept many of the tax exempt sales certificates in a desk on the other side of the building in which Eddie's was located. (Tr.41-42). After Artega leased that side of the building, he discovered the lessee had disposed of the desk containing the tax exempt sales certificates. (Tr.42). Based on the exemption certificates and documentation Artega provided during the audit, Hoffman calculated the amount of Eddie's exempt sales to be $125,678.26. (Tr.80).

Hoffman calculated the total exempt sales amount, based on her review of statements from exempt customers and sales invoices, along with the tax exempt sales certificates and letters Artega provided. (Tr.78). She did not include St. Patrick Center as an exempt sale, since no exemption certificate was provided to her. (Tr.79). When Hoffman performed the audit, she did not know St. Patrick Center was a Catholic entity, which was part of the St. Louis Archdiocese. (Tr.105). Hoffman did not undertake any independent investigation to determine if St. Patrick Center was part of the St. Louis Archdiocese. (Tr.105-106). Specifically, Hoffman did not consult the Official Catholic Directory. (Tr.106).

To determine Eddie's additional taxable sales, Hoffman took the credit card deposits made to the bank, less the $2,500.00 loan, and divided by 28% (her cash credit ratio). (Tr.75). She added to that figure the Groupon sale amount of $6,000.73. (Tr.76-77). From

that amount, Hoffman subtracted the sales tax Eddie's remitted, and Eddie's exempt sales, which she calculated to be $125,678.26. (Tr.78,80). Hoffman determined Eddie's additional taxable sales totaled $400,483.72 during the audit period. (Tr.80-81). Based on this amount of unreported retail sales, Hoffman calculated $34,313.87 in additional sales tax was due. (Tr.81).

As Hoffman conceded, she made certain assumptions regarding the amount of cash sales for Eddie's retail walk-in customers, and the amount of retail sales. (Tr.85). Specifically, Hoffman determined there were missing tickets or receipts. (Tr.85). She also determined the value of each of those missing tickets. (Tr.85). However, Hoffman did not consult any books, Department guidelines, or other references to determine if her assumptions satisfied audit principals. (Tr.85-86).

As Hoffman admitted, the 490 cash register receipts for walk-in retail customers for July 2015 could be either cash or credit sale receipts. (Tr.99). Hoffman did not take the receipts for the credit sales out of the 490 total receipts, to determine what the average cash retail sale was. (Tr.99). Nor did Hoffman not ask anyone with Eddie's which of the 490 receipts represented credit sales, as opposed to cash sales. (Tr.100). And, as Hoffman conceded, she did not look at the individual receipts to determine what the actual cash sales were. (Tr.100).

Hoffman admitted she could not determine if the $8.06 average retail sale figure she used in the audit was accurate, because she believed some receipts were missing. (Tr.100). So Hoffman determined her $8.06 estimate of an average walk-in retail sale, based on a possibility. (Tr.101). Hoffman could not recall asking her supervisor whether her method

of estimating the $8.06 average retail sale was appropriate. (Tr.101). Even though Hoffman was still in training as an auditor at the time she performed the SEBA audit, she failed to consult any Department regulations or guidelines, or other resources, to ensure her assumptions and conclusions were valid. (Tr.101-102). Nor could Hoffman recall having any involved discussions with her supervisor regarding her method of determining the value of the missing receipts or the average retail sale, or whether her assumptions or conclusions were correct. (Tr.102).

Hoffman also assessed a 5% addition to tax as a penalty. (Tr.81). The auditor imposed the addition because she believed SEBA failed to double check its records when reporting its sales to the Department. (Tr.108-109). However, in deciding to assess a penalty for this reason, Hoffman did not consult any Department Of Revenue rulings or guidelines, cases, or other resources. (Tr.108-109). While Hoffman advised her supervisor of her decision to assess the 5% penalty, Hoffman could not recall whether she asked her supervisor's guidance in assessing the penalty. (Tr.109-110). Specifically, Hoffman did not ask her supervisor whether a business' alleged failure to double check its recorded sales was an adequate basis on which to assess a penalty. (Tr.110).

On 3-11-16, Hoffman issued a letter to SEBA regarding the audit. (Tr.,Ex.A,21). It stated SEBA's sales tax liability was $38,540.44. (Tr.,Ex.A,21). This liability was based on the following: Hoffman found SEBA underreported retail sales on its sales tax returns, resulting in a $26,207.50 underpayment of sales tax. (Tr.,Ex.A,21). This tax was based on Section 144.010.1(4). (Tr.,Ex.A,21). Additionally, while SEBA claimed exempt sales, Hoffman found it did not retain exemption certificates or letters, resulting in disallowed

exemptions, and a $12,332.94 underpayment of sales tax. (Tr.,Ex.A,21). This tax was based on Section 144.210.1. (Tr.,Ex.A,21). Further, the audit resulted in a total amount due of $38,540.44, which included interest and a penalty as an addition to tax. (Tr.,Ex.A,21). Hoffman found Eddie's had $400,483.72 in taxable total sales during the audit period. (L.F.87). The sales tax amount on this figure was $34,313.87. (L.F.87). To that amount, Hoffman added $2,510.87 in interest, and a $1,715.70 penalty, resulting in a total amount due of $38,540.44. (L.F.87).

Hearing Before The AHC

SEBA challenged the Assessment by filing a Petition with the Administrative Hearing Commission. (L.F.2-7). Pursuant to Section 621.050, SEBA requested a hearing, and asked the Commission to reverse the Assessment. (L.F.2). In its Petition, SEBA averred, *inter alia*, the Department performed a cash markup estimation and concluded that, during the audit period, SEBA underreported Eddie's taxable revenue by more than $400,000.00. (L.F.3). This finding suggested Eddie's earned approximately $150,000.00 per year, and SEBA failed to report approximately $100,000.00 in cash sales (i.e., in-store donut retail sales) each year. (L.F.3). SEBA asserted the Department's analysis relied on incorrect assumptions, including the assumption that each transaction was for the price of a dozen donuts at retail-$8.06. (L.F.3). As to its claimed exempt sales, SEBA alleged most of the sales in question occurred with exempt entities with which Eddie's had an ongoing relationship, and copies of tax exempt sales certificates or letters were not obtained for each exempt sales transaction. (L.F.4). However, SEBA would provide the Commission

with admissible, credible evidence, which established the sales in question were exempt from tax, pursuant to Section 144.210.1. (L.F.4).

In its Petition, SEBA argued the Department's estimated figures for total sales and taxable sales were not supported by credible evidence. (L.F.5). SEBA contended the Assessment was flawed, because it incorrectly assumed every retail cash purchase was for one dozen donuts, at a price of $8.06. (L.F.5). This assumption was not supported by admissible, credible evidence. (L.F.5). SEBA requested the Commission grant it a hearing to review the basis for the Assessment of $38,540.44, and whether SEBA was liable for any unpaid sales tax. (L.F.6).

Commissioner Slusher held a hearing on 2-22-19. (Tr.1-115,Exs.1-9,11-13,A). At hearing, SEBA presented Exhibits 12 and 13, to support the exemptions it claimed. (Tr.,Exs.12,13). Those Exhibits contained documentation regarding the tax exempt status of various entities Eddie's did business with, including the St. Louis Archdiocese. (Tr.,Exs.12,13). Exhibit 12 was a chart, listing additional exempt sales Eddie's made, which were not contained in the audit report. (Tr.,Ex.12). Included in Exhibit 12 were sales to St. John The Baptist Catholic Church ("St. John") and St. Patrick Center, both of which were part of the St. Louis Archdiocese. (Tr.Ex.12). Additionally, Exhibit 12 listed sales to Phillips 66 Station and Waters. (Tr.,Ex.12). Eddie's sold donuts to those entities at a wholesale price, and they resold the donuts to the public at a higher retail price. (Tr.44). SEBA produced exemption letters for Emmanuel Episcopal Church, Phillips 66 Station and Waters. (Tr.43-45).

At hearing, SEBA presented Exhibit 13. (Tr.,Ex.13,Pt.1). Exhibit 13 contained a 7-11-02 Exemption letter issued by the Department to the St. Louis Archdiocese, which included the exemptions SEBA claimed for St. John and St. Patrick Center. (Tr.,Ex.13,Pt.1). Also included in Exhibit 13 was a 10-16-08 letter from the Director, stating entities and organizations listed in the Official Catholic Directory ("Directory"), under the Archdiocese of St. Louis were permitted to use the 7-11-02 Missouri Sales/Use Tax Exemption Letter (7-11-02 "Exemption letter") issued to the Archdiocese by the Department. (Tr.,Ex.13,Pt.1). The 10-16-08 letter stated the Archdiocese was required to furnish the Department with current copies of the Directory to ensure the Department had updated records of the agents and instrumentalities in use of the 7-11-02 Exemption letter. (Tr.,Ex.13,Pt.1).

Exhibit 13 contained a 12-12-08 letter from Deacon Chauvin of the St. Louis Archdiocese, stating all organizations of the St. Louis Archdiocese listed in the Directory were permitted to use the 7-11-02 Exemption letter. (Tr.,Ex.13,Pt.1). Further, the 12-12-08 Chauvin letter stated it "is the suggestion of the representative of the Missouri Tax Bureau" that, when using the 7-11-02 Exemption letter issued to the Archdiocese, it be accompanied by the 10-16-08 letter, along with the dated cover page of the Directory and the appropriate page of the Directory which listed the organization. (Tr.,Ex.13,Pt.1).

During hearing before the Commission, SEBA challenged the audit on three specific grounds: 1) the finding regarding the amount of cash sales to walk-in retail customers; 2) the finding regarding the number of donuts actually made at Eddie's; and 3) the finding regarding the amount of Eddie's exempt sales. (Tr.45). Moreover, SEBA challenged the

5% penalty, for its alleged negligence in failing to double check Eddie's sales tax figures. (Tr.46). Artega testified he accurately reported what he believed the applicable sales taxes were, based on his records, and double checked the sales tax figures, to the best of his ability. (Tr.46). He relied on his tax accountant and bookkeeper, Joe Otten, to properly prepare SEBA's sales tax returns. (Tr.46). Based on his records, Artega believed he had accurately paid the proper amount of sales tax for SEBA during the audit period, and did not owe additional taxes as a result of underreported sales. (Tr.46-47).

In its 7-19-19 final Decision, the Commission found SEBA was liable for unpaid sales tax in the amount of $38,540.44, minus the sales tax assessed on $26,567.57 in income generated from SEBA's exempt sales. (L.F.122). Further, the Commission held SEBA was liable for a penalty and statutory interest. (L.F.122).

In its Conclusions Of Law, the Commission found SEBA had the burden of proof to establish, by a preponderance of the evidence, the Director's Assessment did not comply with the law. (L.F.111). The Commission found Section 144.250.4 allowed the Director to make an estimate based on any information in his possession or that may come into his possession of the amount of the taxpayer's gross receipts, for the relevant period, and based on this estimated amount, compute and assess the tax payable. (L.F.112). The Commission construed this language to mean the auditor did not need to conduct an extensive, independent search to find all possible information, but rather, need only rely on information in the Director/auditor's possession, or which may come into their possession. (L.F.112). While the Commission found the Director's assessment did not need to be perfect, "it must constitute substantial and competent evidence of SEBA's unreported

sales". (L.F.112). If the record did not allow the Commission to determine the precise amount of SEBA's sales during the audit period, the Commission was to make as close an approximation as it could. Any doubt was to be resolved against SEBA. (L.F.113).

As the Commission acknowledged, there was some speculation in the auditor's calculations. (L.F.116). The question for the Commission was whether the auditor's calculations were as close an approximation as she could make, and whether Hoffman's estimations were based on substantial and competent evidence, and not mere speculation. (L.F.116). The Commission found the auditor calculated SEBA's taxable retail income, based on its financial records and register receipts. (L.F.116). Based on the record before it, the Commission found this approach to be reasonable. (L.F.116). Specifically, the Commission found Hoffman's conclusion SEBA did not produce all 1,555 receipts for July 2015 to be reasonable, in light of the insufficient and inconsistent records SEBA provided during the audit. (L.F.116-117). From the record, the Commission could not find Hoffman's method of calculating the average retail sale was not based on competent and substantial evidence, because the auditor used the records SEBA provided. (L.F.117). While there may have been alternative methods by which Hoffman could have estimated SEBA's taxable sales for the audit period, the Commission found SEBA provided no evidence incorporating such an alternative method, and the method Hoffman used was not unreasonable or not based on competent and substantial evidence. (L.F.118).

As to SEBA's exempt sales, the Commission found neither Exhibit 12 nor Exhibit 13 provided the Official Catholic Directory "required by the Archdiocese's exemption letter". (L.F.120-121). Thus, it concluded there was no evidence St. Patrick Center and

St. John were part of the St. Louis Archdiocese, and SEBA did not meet its burden of proof regarding these entities. (L.F.121). However, the Commission went on to find Exhibit 13 established Emmanuel Episcopal Church was an exempt entity, which purchased $2,204.00 in donuts from SEBA during the audit period. (L.F.121) Moreover, the Commission found Phillips 66 Station and 7-Eleven were exempt entities, and purchased donuts from SEBA in the amount of $12,318.57 and $9,360.00, respectively. (L.F.121). Thus, SEBA established it did not owe sales tax on $26,567.57 in exempt sales. (L.F.121).

Finally, the Commission found the 5% penalty was warranted, because SEBA was negligent in its reporting of its taxable sales. (L.F.121-122). The Commission ruled SEBA was liable for unpaid sales tax in the amount of $38,540.44, previously assessed by the auditor, minus the sales tax assessed on $26,567.57 in income generated from SEBA's exempt sales. (L.F.122). SEBA was also liable a penalty and statutory interest. (L.F.122).

WESTERN DISTRICT OPINION AND TRANSFER

SEBA appealed the Commission's final Decision to the Court of Appeals. On June 9, 2020, the Western District issued its Opinion, transferring SEBA's appeal to the Supreme Court. In its Opinion, the Western District found Article V, Sections 3 and 11 of the Missouri Constitution required the case be transferred to the Supreme Court Of Missouri. (Opinion,1). Prior to addressing the merits of the issues SEBA raised, the Western District addressed, *sua sponte*, whether jurisdiction properly lay before the court. As the Opinion observed, the Missouri Constitution conferred exclusive appellate jurisdiction on the Supreme Court in all cases involving the construction of the revenue laws of this state. A revenue law was defined as a law which directly created or altered an

income stream to the government, established or abolished a tax or fee, changed the rate of an existing tax, broadened or narrowed the base or activity against which a tax or fee was assessed, or excluded from or created exceptions to an existing tax or fee. A case did not involve the construction of a revenue law, if the issue had already been interpreted by the Supreme Court, and the Court of Appeals could dispose of the issue by merely applying that interpretation of the law to the facts of the case. (Opinion,6-7). As the Western District observed, the AHC assessed a 5% addition to sales tax under Section 144.250.3 as a penalty, finding SEBA was negligent in its report of its taxable sales. However, the General Assembly did not define the term "**negligence**" in Chapter 144. SEBA and the Department offered differing definitions of the term. Because the meaning of "**negligence,**" as it pertained to Section 144.250 had not been provided by the General Assembly, nor defined by the Supreme Court, the Western District found it lacked jurisdiction to construe the meaning of the term. In so holding, the Opinion relied on ***Hiett v. D.O.R.***, 899 S.W.2d 870,871-872 (Mo.banc.1995), wherein the Supreme Court found it had exclusive jurisdiction to define the term "**negligence,**" as used in Chapter 143 of the Missouri Revised Statutes. Thus, the Opinion found construction of the penalty provision in Section 144.250.3 fell within the exclusive jurisdiction of the Supreme Court under Article V, Section 3 of the Missouri Constitution. (Opinion,7-9).

Finally, the Opinion reasoned even if some, but not all, of the issues presented in SEBA's appeal fell within the Supreme Court's exclusive jurisdiction, appeals were not bifurcated, and thus, the appeal had to be lodged in the Court having jurisdiction over all

the issues in the case. Therefore, SEBA's appeal had to be transferred to the Supreme Court for full resolution of the issues presented. (Opinion,9).

POINTS RELIED ON

I.

THE COMMISSION ERRED IN FINDING SEBA MADE $400,483.72 IN TAXABLE TOTAL SALES DURING THE AUDIT PERIOD, AND WAS LIABLE FOR $34,313.87 IN ADDITIONAL SALES TAX UNDER SECTION 144.250.4, BECAUSE ITS RULING WAS BASED ON SPECULATION AND CONJECTURE, AND WAS UNSUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD UNDER SECTION 621.193, IN THAT THE AUDITOR'S METHODOLOGY AND FINDINGS, WHICH THE COMMISSION ADOPTED AND FOUND TO BE REASONABLE, INCLUDING THE FINDINGS EDDIE'S AVERAGE RETAIL CASH SALE FOR JULY 2015 WAS $8.06, SEBA'S CASH/CREDIT RATIO WAS 72%/28%, AND SEBA'S RETAIL SALES FOR JULY 2015 WERE $12,535.93, FROM WHICH THE AUDITOR EXTRAPOLATED SEBA'S TOTAL TAXABLE SALES TO BE $400,483.72, WERE BASED ON SPECULATION AND CONJECTURE, NOT ON SEBA'S BUSINESS RECORDS, WHICH TOGETHER WITH ARTEGA'S UNIMPEACHED AND UN-OBJECTED TO TESTIMONY SHOWED SEBA'S AVERAGE RETAIL CASH SALE FOR JULY 2015 WAS $3.00, ITS CASH TO CREDIT RATIO WAS 40%/60%, AND SEBA'S WHOLESALE/RETAIL SALE RATIO WAS 80%/20%.

B.R. v. M.D.S.S., 466 S.W.3d 657 (Mo.App.E.D.2015);

St. ex rel DeWeese v. Morris, 221 S.W.2d 206 (Mo.1949);

Baldwin v. DesGranges, 199 S.W.2d 353 (Mo.1947);

Concord Publishing House v. D.O.R., 916 S.W.2d 186 (Mo.banc.1996).

II.

THE COMMISSION ERRED IN RULING SEBA FAILED TO PROVE ITS SALES TO ST. JOHN AND ST. PATRICK CENTER WERE EXEMPT UNDER SECTION 144.210.1, SINCE SEBA FAILED TO PROVIDE THE OFFICIAL CATHOLIC DIRECTORY TO THE AUDITOR, OR OFFER THE DIRECTORY INTO EVIDENCE AT HEARING, BECAUSE ITS RULING WAS UNAUTHORIZED BY LAW AND UNSUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD UNDER SECTION 621.193, IN THAT THE COMMISSION IGNORED THE EXPLICIT LANGUAGE IN THE 10-16-08 DEPARTMENT LETTER, WHICH SUGGESTED, BUT DID NOT REQUIRE, THE DIRECTORY TO ACCOMPANY THE DEPARTMENT'S 7-11-02 EXEMPTION LETTER TO PROVE AN EXEMPT SALE, AND DEMONSTRATED THE DIRECTORY WAS IN THE DEPARTMENT'S POSSESSION; AND IT WAS UNNECESSARY FOR SEBA TO OFFER THE DIRECTORY AT HEARING TO PROVE ITS SALES TO ST. JOHN AND ST. PATRICK CENTER WERE EXEMPT, SINCE THE COMMISSION COULD TAKE JUDICIAL NOTICE OF THE DIRECTORY UNDER SECTION 536.070(6).

Concord Publishing House v. D.O.R., 916 S.W.2d 186 (Mo.banc.1996);

MOTO v. Bd. Of Adj. Of City Of St. Louis, 88 S.W.3d 96 (Mo.App.E.D.2002);

Sanzone v. Mercy Health, 326 F.Supp.3d 795 (E.D.Mo.2018);

Overall v. Ascension, 23 F.Supp.3d (E.D.MI.2014).

III.

THE COMMISSION ERRED IN IMPOSING A 5% PENALTY UNDER SECTION 144.250.3 FOR SEBA'S ALLEGED NEGLIGENCE IN FAILING TO DOUBLE CHECK ITS RECORDS WHEN REPORTING ITS TAXABLE SALES TO THE DEPARTMENT BECAUSE ITS RULING WAS UNAUTHORIZED BY LAW, AND UNSUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD UNDER SECTION 621.193, IN THAT IN FINDING A PENALTY WAS WARRANTED, THE COMMISSION IGNORED THE UNDISPUTED, UN-OBJECTED TO TESTIMONY OF ARTEGA AND OTTEN THAT THEY DOUBLE CHECKED SEBA'S SALES TAX RETURNS FOR ACCURACY BEFORE FILING THEM, AND OTTEN'S UNDISPUTED TESTIMONY HE USED HIS BEST PROFESSIONAL ABILITIES IN PREPARING THOSE RETURNS; THE ASSESSMENT OF A PENALTY FOR SEBA'S ALLEGED FAILURE TO DOUBLE CHECK ITS SALES FIGURES WAS UNAUTHORIZED BY LAW, SINCE THE COMMISSION DID NOT RELY ON DEPARTMENT GUIDELINES OR REGULATIONS, OR ANY CASE AUTHORITY WHICH AUTHORIZED AN ADDITION TO TAX UNDER THOSE CIRCUMSTANCES; AND SEBA WAS NOT NEGLIGENT IN REPORTING ITS TAXABLE SALES AND FILING ITS SALES TAX RETURNS, WITHIN THE MEANING OF SECTION 144.250.3, SINCE IT REASONABLY RELIED ON THE PROFESSIONAL ADVICE OF ITS TAX ACCOUNTANT.

Brambles Ind. v. D.O.R., 981 S.W.2d 568 (Mo.banc.1998);

Hiett v. D.O.R., 899 S.W.2d 870 (Mo.banc.1995);

Lora v. D.O.R., 618 S.W.2d 630 (Mo.1981).

U.S. v. Boyle, 105 S.Ct. 687 (1985);

ARGUMENT

Jurisdiction Is Appropriate Under Article V §3 Of The Missouri Constitution

In each case, the Supreme Court must determine its jurisdiction before reaching the merits of an appeal. ***Alumax Foils v. City Of St. Louis***, 939 S.W.2d 907,910 (Mo.banc.1997). The instant Court has exclusive jurisdiction over SEBA's appeal, pursuant to Article V, Section 3 of the Missouri Constitution. SEBA's appeal raises questions requiring construction of the revenue laws of this state. As the Western District noted in its Opinion, SEBA's appeal raises three issues for resolution: First, whether the Commission erred in finding SEBA made $400,483.72 in total taxable sales during the audit period, and was liable for $34,313.87 in additional sales tax. Second, whether the Commission erred in ruling SEBA failed to prove its sales to St. Patrick's Center and St. John were exempt sales, pursuant to Section 144.210.1. Third, whether the Commission erred in imposing a 5% addition to tax as a penalty under Section 144.250.3, based on SEBA's alleged negligence in failing to double check its records before filing its sales tax returns, and in reporting its taxable sales to the Department. (Opinion.6). Since the issues SEBA raises in its appeal require the construction of the revenue laws of this state, jurisdiction is proper before the Supreme Court, pursuant to Article V, Section 3 of the Missouri Constitution. **Mo.Con.Article V** §3.

Article V, Section 3 states:

> "The Supreme Court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the

> construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death. The Court Of Appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the Supreme Court." **Mo.Con.Art.V** §3.

The Supreme Court is a court of limited appellate jurisdiction. ***Alumax Foils***, 939 S.W.2d at 910;***Kuyper v. Stone County Commission***, 838 S.W.2d 436,437 (Mo.banc.1992). The Missouri Constitution limits the Supreme Court's exclusive appellate jurisdiction to the kind of cases enumerated in Article V, Section 3. Supreme Court jurisdiction only applies to the five items listed therein, namely: 1) the validity of a treaty or U.S. statute; 2) the validity of a provision of the Missouri Constitution or a Missouri statute; 3) the construction of the revenue laws of Missouri; 4) title to any state office; and 5) criminal cases in which the defendant is sentenced to death and post-conviction relief proceedings related to those cases. **Mo.Con.Art.V §3**. The question presented in regard to one or more of those items must be real, substantial, and not merely colorable. ***Sharp v. Curators Of Univ. Of MO.***, 138 S.W.3d 735, 738 (Mo.App.E.D.2003).

Among the cases falling within the exclusive appellate jurisdiction of the Supreme Court under Article V, Section 3 are cases involving the construction of the revenue laws of this state. ***Alumax Foils***, 939 S.W.2d at 910. Generally, the Supreme Court has exclusive jurisdiction to review decisions of the Administrative Hearing Commission, which involve the construction of state revenue laws. ***Elian v. D.O.R.***, 402 S.W.3d 566,567 n.3 (Mo.banc.2013). The phrase in Article V, Section 3 "construction of the revenue laws

of this state," assigns exclusive appellate jurisdiction to the Supreme Court, when each of three separate elements are present: 1) construction; 2) of revenue laws; 3) of this state. ***Alumax Foils***, 939 S.W.2d at 910. Within this context, a revenue law is a law which directly creates or alters an income stream to the government, which imposes a tax or fee on property owned or used or on an activity undertaken in that government's area of authority. ***Id***. Thus, a revenue law either establishes or abolishes a tax or fee, changes the rate of an existing tax, broadens or narrows the base or activity against which a tax or fee is assessed, or excludes from or creates exceptions to an existing tax or fee. ***Id.;Myron Green Corp. v. D.O.R.***, 567 S.W.3d 161,164 (Mo.banc.2019).

Specifically, a revenue law "of this state" is a law adopted by the General Assembly to impose, amend or abolish a tax or fee on all similarly-situated persons, properties, entities or activities in this state, the proceeds of which are deposited in the state treasury. ***Alumax Foils***, 939 S.W.2d at 910. See, ***Interventional Center For Pain Management v. D.O.R.***, 592 S.W.3d 350,352 (Mo.banc.2019), holding the Supreme Court had exclusive jurisdiction over a taxpayer's proceeding, seeking judicial review of an AHC decision, ruling certain pain treatment service items used in compounding medications did not fall under the use tax exemption in Section 144.054.2 for materials used or consumed in the manufacturing, processing, compounding or producing of any product, where the case involved the construction of the state's revenue laws.

To invoke the Supreme Court's exclusive jurisdiction over a case involving a revenue law, the construction of a revenue law must be directly and primarily involved. ***Housing Authority Of Poplar Bluff v. Eastwood***, 736 S.W.2d 46-47 (Mo.banc.1987). For

purposes of Article V, Section 3, "construction" means to determine the meaning and proper effect of a word or phrase. ***Ewing v. City Of Springfield***, 449 S.W.2d 681,684 (Mo.App.1970). Thus, the construction of the revenue laws of this state is defined as determining the meaning and proper effect of the language used by consideration of the subject matter, and the attendant circumstances, in connection with the words employed. ***Hermel, Inc. v. State Tax Commission***, 564 S.W.2d 888,897 (Mo.banc.1978). Specifically, a case requires the construction of revenue laws where the statute at issue does not specifically define the terms utilized therein, and there are no cases from the Missouri Supreme Court interpreting the words or phrases utilized in the statute, and the case presents an issue of first impression, where there is no pre-existing precedent to apply. ***Id.*** Conversely, a case does not involve the construction of a revenue law, sufficient to trigger the Supreme Court's exclusive jurisdiction, where the law at issue has already been interpreted by the Supreme Court, and the Court of Appeals can dispose of the issue by merely applying that construction of the law to the facts of the case before it. ***Twelve Oaks Motor Inn v. Strahan***, 96 S.W.3d 106,108-109 (Mo.App.S.D.2003).

The instant case involves the construction of the revenue laws of this state, in two respects. First, SEBA contends the auditor's methodology and retail sales estimate, which the AHC adopted, were not supported by competent or substantial evidence, since those findings were premised upon speculation and conjecture. (See Point I, *infra*). Resolution of this legal issue involves Section 144.250.4, which states if a person neglects or refuses to make a return and payment, as required by Sections 144.101 to 144.525, the Director shall make an estimate based on any information in his possession, or which may come

into his possession of the amount of the gross receipts of the taxpayer for the period in respect to which he failed to make and return payment, and upon the basis of said estimated amount, compute and assess the tax payable. **RSMo** §144.250. In adopting the Director's retail sales estimate and methodology, the AHC relied on ***Dick Proctor Imports v. D.O.R.***, 746 S.W.2d 571,575 (Mo.banc.1998). However, ***Dick Proctor*** simply holds an auditor's calculation and methodology must be based on competent and substantial evidence, not on mere speculation. Neither ***Dick Proctor***, nor any other decision of the Supreme Court delineates the method by which an auditor can estimate a taxpayer's retail sales for the purpose of calculating the appropriate sales tax under Section 144.250.4. There presently exists no case from the instant Court, providing a method whereby the estimation of retail sales can be made, or even the factors or items which are properly considered in making such an estimation under Section 144.250.4. In the absence of such precedent, the instant case involves the "construction" of the revenue laws of this state, in particular, Section 144.250.4. Accordingly, the instant cause falls within the Supreme Court's exclusive appellate jurisdiction under Article V, Section 3 of the Missouri Constitution. ***Hermel***, 564 S.W.2d at 897;***Alumax Foils***, 939 S.W.2d at 910.

Section 144.250 and related statutes governing Missouri sales tax are revenue statutes, within the meaning of that constitutional provision. ***Alumax Foils***, 939 S.W.2d at 910. At present, there exists no Supreme Court case, i.e., "interpretation," setting forth the guidelines under which the Director is to estimate a taxpayer's retail sales under Section 144.250 for the purpose of assessing and paying sales tax. Nor, at present, does there exist any Supreme Court precedent, indicating how an auditor or the AHC is to determine a

taxpayer's cash/credit sale ratio or wholesale/retail sale ratio when estimating a taxpayer's retail sales under Section 144.250.4. The issue of whether the auditor's methodology and retail sales estimate, which the AHC adopted in its Decision, were proper under Section 144.250.4 involves the construction of the revenue laws of this state, implicating the Supreme Court's exclusive jurisdiction under Article V, Section 3. ***Id.***;***Hermel***, 564 S.W.2d at 897.

The instant case presents a second issue falling within the Supreme Court's jurisdiction: the propriety of the AHC's assessment of a 5% addition to tax as a penalty under Section 144.250.3. (See Point III, *infra*). Specifically, whether SEBA was "**negligent**" in reporting its taxable sales within the meaning of Section 144.250.3, because it allegedly failed to keep adequate records and/or failed to double check its sales figures prior to reporting them to the Department, such that a penalty could be assessed against it. As the Western District's Opinion properly noted, the General Assembly failed to define the term "**negligence**" as used in Chapter 144 of the Missouri Revised Statutes. No prior decision of this Court has determined the meaning of "**negligence,**" as it pertains to the imposition of a penalty under Section 144.250.3. Rather, it appears this is an issue of first impression.

The meaning of "**negligence**" for purposes of assessing a penalty against a taxpayer under Section 144.250.3 is an issue requiring construction of the revenue laws of this state, and thus, an issue falling within the Court's exclusive jurisdiction. See, e.g., ***Hiett v. D.O.R.***, 899 S.W.2d 870, 871-872 (Mo.banc.1995)(Supreme Court possessed jurisdiction to define the meaning of "**negligence**" for purposes of Section 143.751, allowing

assessment of a penalty for an income tax deficiency). The collection of sales taxes directly affects an income stream to the state of Missouri, and thus, Section 144.250.3 addressing the assessment of a penalty as an addition to sales taxes, which are deposited into the Missouri state treasury, is a revenue law of this state, for purposes of Supreme Court jurisdiction under Article V, Section 3 of the Missouri Constitution. ***Alumax Foils***, 939 S.W.2d at 910;***Hermel***, 564 S.W.2d at 897. Accordingly, resolution of this issue involves not only construction of the revenue laws of this state, but also an issue of first impression arising under Missouri's revenue laws, and thus, SEBA's appeal falls within the exclusive jurisdiction of the Supreme Court pursuant to Article V, Section 3. ***Id;State ex rel Goldberg v. Barber & Sons Tobacco, Inc.***, 649 S.W.2d 859,860 (Mo.banc.1983) (Supreme Court possessed jurisdiction where a taxpayer challenged the assessment of interest and penalties on a delinquent tax liability).

I.

THE COMMISSION ERRED IN FINDING SEBA MADE $400,483.72 IN TAXABLE TOTAL SALES DURING THE AUDIT PERIOD, AND WAS LIABLE FOR $34,313.87 IN ADDITIONAL SALES TAX UNDER SECTION 144.250.4, BECAUSE ITS RULING WAS BASED ON SPECULATION AND CONJECTURE, AND WAS UNSUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD UNDER SECTION 621.193, IN THAT THE AUDITOR'S METHODOLOGY AND FINDINGS, WHICH THE COMMISSION ADOPTED AND FOUND TO BE REASONABLE, INCLUDING THE FINDINGS EDDIE'S AVERAGE RETAIL CASH SALE FOR JULY 2015 WAS $8.06, SEBA'S CASH/CREDIT RATIO WAS 72%/28%, AND SEBA'S RETAIL SALES FOR JULY 2015 WERE $12,535.93, FROM WHICH THE AUDITOR EXTRAPOLATED SEBA'S TOTAL TAXABLE SALES TO BE $400,483.72, WERE BASED ON SPECULATION AND CONJECTURE, NOT ON SEBA'S BUSINESS RECORDS, WHICH TOGETHER WITH ARTEGA'S UNIMPEACHED AND UN-OBJECTED TO TESTIMONY SHOWED SEBA'S AVERAGE RETAIL CASH SALE FOR JULY 2015 WAS $3.00, ITS CASH TO CREDIT RATIO WAS 40%/60%, AND SEBA'S WHOLESALE/RETAIL SALE RATIO WAS 80%/20%.

Standard Of Review[4]

In a tax case, the Commission's duty is not simply to review the Director's assessment, but also to find the facts, and determine, by application of existing law to those facts, the taxpayer's tax liability for the period at issue. ***Custom Hardware Engineering & Consulting v. D.O.R.***, 358 S.W.3d 54,58 (Mo.banc.2012). When reviewing the Commission's Decision, the Court must determine whether the Decision is authorized by law, supported by competent and substantial evidence on the record as a whole, or arbitrary, capricious or unreasonable. ***Myron Green Corp.*** 567 S.W.3d at 164;***B.R. v. M.D.S.S.***, 466 S.W.3d 657,663 (Mo.App.E.D.2015). In determining whether the agency's findings are supported by competent and substantial evidence, the Court must look to the whole record, not merely the evidence which supports the agency's decision. ***Lagud v K.C. Bd. Of Police Commrs.***, 136 S.W.3d 786, 791 (Mo.banc.2004). The Court is not required to view the evidence in a light most favorable to the agency's decision. ***Id.***

The Commission's determinations of factual issues will be upheld, if they are authorized by law and supported by competent and substantial evidence, on the whole record. **RSMo** §621.193;***Visionstream v. D.O.R.***, 465 S.W.3d 45,47-48 (Mo.banc.2015). While the Court defers to the Commission's credibility findings, it reviews the Commission's interpretation and application of the law, including taxing statutes, on a *de novo* basis. ***Visionstream***, 465 S.W.3d at 48;***Business Aviation v. D.O.R.***, 579 S.W.3d 212,215 (Mo.banc.2019). Questions of law are matters for the independent judgment of

[4] This Standard of Review also applies to the Argument under Points II and III, *infra*.

the Court. ***King v. Laclede Gas***, 648 S.W.2d 113,114 (Mo.banc.1983). On review of a decision in a tax matter, the Court will uphold the decision, only to the extent it is authorized by law. ***Brambles Ind. v. D.O.R.***, 981 S.W.2d 568,570 (Mo.banc.1998).

The finding of an administrative agency is arbitrary and unreasonable where it is not based on substantial evidence. ***Edmonds v. McNeal***, 596 S.W.2d 403,407 (Mo.banc.1980);***Stacy v. D.S.S.***, 147 S.W.3d 846,852 (Mo.App.S.D.2004). "Substantial evidence" is competent evidence which if true, has probative force on the issues and from which the trier of fact can decide the case. ***Hermel***, 564 S.W.2d at 895. Evidence has probative force if it has any tendency to make a material fact more or less likely. ***Ivie v. Smith***, 439 S.W.3d 189, 199 (Mo.banc.2014).

Whether an agency's action is arbitrary focuses on whether the agency had a rational basis for its decision. ***Stacy***, 147 S.W.3d at 852;***Mo. Natl. Educ. Assoc. v. Mo. St. Bd. Of Ed.***, 34 S.W.3d 266,281(Mo.App.W.D.2000). To meet basic standards of due process and avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using something other than mere surmise, guesswork or "gut feeling." ***Id.*** Capriciousness concerns whether the agency's action was whimsical, impulsive, or unpredictable. ***Mo. Natl. Educ. Assoc.***, 34 S.W.3d at 281. Liability cannot be based on conjecture, guesswork, or speculation beyond inferences reasonably to be drawn from the evidence. ***Mprove v. KLT Telecom***, 135 S.W.3d 481,489 (Mo.App.W.D.2004). An agency must not act in a totally subjective manner, without any guidelines or criteria. ***Mo. Natl. Educ. Assoc.***, 34 S.W.3d at 281. A finding based on speculation and conjecture is without evidentiary support, and cannot stand. ***Baldwin v. DesGranges***, 199 S.W.2d 353,358 (Mo.1947).

Missouri Sales Tax

Missouri sales tax is a gross receipts tax imposed on the seller. ***St. Louis Rams, LLC v. D.O.R.***, 526 S.W.3d 124,127 (Mo.banc.2017). Section 144.020.1 imposes a tax on sales of tangible personal property and certain enumerated services. **RSMo** §144.020.1. Thereunder, a tax is levied and imposed upon all sellers for the purpose of engaging in the business of selling tangible, personal property, or rendering taxable service at retail. The rate of tax on every retail sale of tangible, personal property shall be equivalent to 4% of the purchase price paid or charged. **RSMo** §144.020.1(1).

The primary tax burden is placed on the seller making the taxable sale of property or service. Section 144.021.1 requires all sellers of tangible personal property to report their gross receipts, and remit sales tax on those receipts. **RSMo** §144.021.1. "**Gross receipts**" means the total amount of the sale price of the sales at retail, including any services other than charges incident to the extension of credit that are a part of such sales made by the business, capable of being valued in money. The total amount of the sale price shall be deemed to be the amount received. **RSMo** §144.010.1(4). A "**sale at retail**" is any transfer made by any person engaged in business, of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption. **RSMo** §144.010.1(13). It is the Director's burden to show a tax liability. ***Cook Tractor v. D.O.R.***, 187 S.W.3d 870,872 (Mo.banc.2006).

The Auditor's Methodology

In her Sales and Use Audit Write Up, Hoffman discussed her methodology, and the records she relied on in performing the audit. (Tr.,Ex.A,16-20). Hoffman found SEBA

did not retain adequate records during the audit period. (Tr.,Ex.A,16-17). She requested sales documentation for July 2015. (Tr.,Ex.A,17). Artega provided Hoffman with a handwritten notebook, in which Strickland recorded donuts made for wholesale, donuts made for retail, donuts sold at retail, and donuts thrown away as waste. (Tr.,Ex.A,17). Moreover, Artega provided credit card batch totals, cash register transaction receipts, credit card receipts, and a calculation tape. (Tr.,Ex.A,17). The auditor found Eddie's sold 349.6 donuts at retail in July 2015. (Tr.,Ex.A,17). Eddie's sold a dozen donuts for $8.00, and a single donut for $.75 at retail. (Tr.,Ex.A,17). Hoffman found retail sales during July 2015 should have been between $2,796.80 (349.6 dozen sold at $8.00 a dozen) and $3,146.40 (349.6 dozen sold, 12 donuts per dozen, at $.75 per donut). (Tr.,Ex.A,17). However, per SEBA's records, retail sales for July 2015 were $3,950.23. (Tr.,Ex.A.,17).

Artega provided Hoffman with 490 cash register receipts for July 2015. Hoffman found the cash register receipts provided were incomplete. (Tr.,Ex.A,17). Each cash register receipt had a transaction number. (Tr.,Ex.A,17). The first cash register transaction receipt was Number 1512, while the last cash register transaction receipt was Number 3066, leading Hoffman to believe there should have been at least 1,555 cash register transaction receipts. (Tr.,Ex.A,17). Hoffman compared Eddie's July 2015 sales to SEBA's bank statements. (Tr.,Ex.A,17). Even though the bank statements were a close match to the records Artega provided, due to her belief there were missing receipts, Hoffman concluded not all cash was being put into SEBA's bank account. (Tr.,Ex.A,17).

Hoffman explained how she estimated Eddie's retail cash sales. (Tr.,Ex.A,17). She began with the presumption there should have been 1,555 transaction receipts for July

2015. (Tr.,Ex.A,17). Next, Hoffman calculated an average retail sale amount of $8.06 by dividing the total payments received for July 2015, according to the receipts ($3,950.23), by the number of receipts provided (490). (Tr.,Ex.A,17). Hoffman then multiplied the $8.06 average retail sale amount times 1,555.00, resulting in $12,535.93 in estimated retail sales for July 2015. (Tr.,Ex.A,17). This amount is significantly larger than the amount of retail sales Hoffman believed Eddies' should have had for July 2015-an amount between $2,796.80 and $3,146.40. (Tr.,Ex.A,17). Likewise, Hoffman's $12,535.93 retail sales figure for July 2015 far exceeded the amount documented in SEBA's records for that month, which was $3,950.23. (Tr.,Ex.A.,17).

Eddie's wholesale donut sales were not run through the cash register. (Tr.,Ex.A,17). Hoffman added her $12,535.93 retail sales estimate for July 2015 to the amount of wholesale orders paid by check ($2,944.49) and paid by credit card ($1,412.00), to arrive at total estimated sales for the month of $16,892.42. (Tr.,Ex.A,17).

As to how she arrived at her cash/credit ratio, Hoffman divided credit card payments received per the batch total ($4,699.32) by her total estimated sales for July 2015 ($16,892.42), to arrive at a cash/credit ratio of 28%. (Tr.,Ex.A,18). Hoffman determined estimated cash payments by subtracting the credit card payments received per the batch total ($4,699.32) from the total estimated sales of $16,892.42. (Tr.,Ex.A,18). She then divided the estimated cash payments ($12,193.10) by the total estimated sales of $16,892.42 to arrive at a cash percentage ratio of 72%. (Tr.,Ex.A,18). Then Hoffman took the total credit card payments deposited during the audit period and divided that amount

by the 28% credit ratio obtained from the July 2015 estimated sales, to estimate gross sales for the audit period. (Tr.,Ex.A,18).

Gross sales represented all sales deposits. (Tr.,Ex.A,18). Adjustments represented the bank deposits which SEBA indicated were exempt sales. (Tr.,Ex.A,18). Hoffman compared gross deposits per SEBA's bank statements to the gross sales reported on SEBA's sales tax returns. (Tr.,Ex.A,18). Significantly, there were **no** material differences, except for a $2,500.00 loan. (Tr.,Ex.A,18). However, due to "other anomalies" Hoffman discovered during the audit, she concluded not all cash sales hit SEBA's bank account. (Tr.,Ex.A,18). For this reason, Hoffman conducted an estimated cash markup determination. (Tr.,Ex.A,18). Hoffman recorded exempt sales, which SEBA documented. (Tr.,Ex.A,18). She determined taxable sales after deducting the tax SEBA reported and the exempt sales she found to be valid from the total estimated sales. (Tr.,Ex.A,18). Hoffman found SEBA underreported taxable sales on its sales tax returns, resulting in an underpayment of sales tax in the amount of $26,207.50, including interest and a 5% penalty. (Tr.,Ex.A,19).

The Commission found SEBA had the burden of proving the Director's Assessment did not comply with the law. (L.F.111). As to the proper standard by which to measure the Director's estimation of SEBA's additional taxable sales, the Commission noted Section 144.250.4 stated if a person neglects or refuses to make a return and payment as required by Sections 144.010 to 144.525, the Director shall make an estimate based upon any information in his possession, or which may come into his possession of the amount of the gross receipts of the taxpayer for the period in respect to which he failed to make return

and payment, and upon the basis of said estimated amount, compute and assess the tax payable. (L.F.112). **RSMo** §144.250.4. The Commission read Section 144.250.4 to mean the Director did not need to conduct an extensive, independent search to find all possible information, but rather, the Director need only rely on information in his possession, or which might come into his possession. (L.F.112). While the Director's Assessment need not be perfect, it must constitute competent and substantial evidence of SEBA's unreported sales. (L.F.112). If the record before the Commission did not allow it to determine the precise amount of SEBA's sales during the audit period, the Commission was to make as close an approximation as it could, and any doubt was to be resolved against SEBA. (L.F.113).

At hearing, Hoffman admitted her conclusions were based on possibilities, a fact the Commission acknowledged in its Decision. (L.F.116). Likewise, the Commission recognized there was speculation in the auditor's calculations. (L.F.116). Relying on ***Dick Proctor Imports v. D.O.R.***, 746 S.W.2d at 575, the Commission noted the question was whether the auditor's calculations were as close an approximation as she could make, and whether her methodology and estimations were based on competent and substantial evidence, and not speculation. (L.F.116). The Commission concluded that Hoffman calculated SEBA's taxable retail income, based on "its financial records and register receipts", an approach it found to be reasonable. (L.F.116).

While SEBA argued the auditor overestimated Eddie's taxable retail sales, the Commission rejected that argument. (L.F.116-117). The Commission found the auditor's method of calculating Eddie's taxable retail sales and the amount of the average retail sale

was appropriate, because the auditor "used the very records SEBA provided to her." (L.F.117). Thus, the Commission concluded the method Hoffman utilized to calculate SEBA's retail cash sales was not unreasonable, and was based on competent and substantial evidence. (L.F.117).

The Commission erred in so holding. Specifically it erred in adopting the auditor's findings, since they did not constitute competent and substantial evidence of Eddie's taxable retail sales during the audit period. As such, the Commission's reliance on ***Dick Proctor Imports***, 746 S.W.2d at 575, was misplaced. In rendering her findings, which the Commission adopted, the auditor did not rely on the records SEBA provided, but rather, chose to engage in speculation and conjecture. Moreover, the auditor's analysis regarding SEBA's taxable retail sales, which the Commission found to be reasonable, was premised not on competent and substantial evidence, but on certain flawed assumptions, which were not born out or supported by the record. Given the Commission's errors in this regard, its Decision must be reversed. ***Myron Green Corp.***, 567 S.W.3d at 164;***Edmonds***, 596 S.W.2d at 407.

The first erroneous assumption the auditor made, and the Commission adopted, was that the amount of Eddie's average walk-in retail sale was $8.06. (L.F.116-117). In so finding, the Commission erred in rejecting undisputed evidence regarding the nature of Eddie's sales generally (wholesale vs retail), the nature of donut purchases made by Eddie's walk-in retail customers, and the price of such retail purchases. In discarding this evidence, which came in at hearing without objection, without making a specific finding that it was not credible or unworthy of belief, the Commission erred. ***B.R.***, 466 S.W.3d at 663. An

agency cannot disregard unimpeached or undisputed evidence, unless the agency makes a specific finding such evidence is incredible or unworthy of belief. ***B.R.***, 466 S.W.3d at 663. Probative evidence received without objection in a contested case *must* be considered in an administrative hearing of the nature the Commission held below. ***Concord Publishing House v. D.O.R.***, 916 S.W.2d 186,195 (Mo.banc.1996);***MOTO v. Bd. Adj. Of City Of St. Louis***, 88 S.W.3d 96,102 n.3 (Mo.App.E.D.2002). Section 536.070(8) states any evidence received without objection, which has probative value, shall be considered by the agency. **RSMo** §536.070(8). As used in Section 536.070(8), the term "**shall**" is mandatory, not permissive. ***Welch v. Eastwind Care Center***, 890 S.W.2d 395,397 (Mo.App.W.D.1995).

At hearing, Brad Artega testified regarding the nature of Eddie's business. This evidence was undisputed, and come in without objection. ***B.R.***, 466 S.W.3d at 663. Artega testified Eddie's was not an automated shop. (Tr.10). Strickland made all the donuts by hand. (Tr.11). Additionally, Strickland performed all the store's daily business tasks, such as answering the phone, waiting on walk-in customers, and cleaning the store at the end of the day. (Tr.11). When Eddie's first opened in 2007, its primary customers were comprised of walk-in, retail traffic. (Tr.13). Due to a significant decrease in walk-in traffic, Artega decided to concentrate on selling donuts on a wholesale basis. (Tr.17-18). During the audit period from 10-1-11 to 9-30-14, Eddie's business was comprised of approximately 80% wholesale sales, and 20% retail sales. (Tr.18). The number of wholesale donut orders dictated how many donuts Strickland made per day for retail sales. (Tr.21).

Moreover, Artega testified the vast majority of Eddie's walk-in retail customers purchased only a cup of coffee and one or two donuts at a time, with the average retail sale costing approximately $3.00. (Tr.20,35). Most of Eddie's walk-in retail customers did not purchase a dozen donuts. (Tr.20-21). It was rare during the week to sell dozens of donuts to a single customer. (Tr.20). During the audit period, Eddie's charged retail customers $8.00 for a dozen donuts, and 75 cents for a single donut. (Tr.35).

Artega's testimony regarding the nature of Eddie's wholesale/retail business, typical purchases made by Eddie's retail customers, and the cost of such retail purchases came in at hearing without objection. In its Decision, the Commission made no finding Artega's testimony in this regard was not credible or was unworthy of belief. In disregarding this undisputed and unimpeached evidence, without making such a finding, the Commission erred. ***B.R.***, 466 S.W.3d at 663;***Concord Pub. House***, 916 S.W.2d at 195;***MOTO***, 88 S.W.3d 96,102 n.3;**RSMo** §536.070(8).

Compounding this error, the Commission failed to recognize the auditor's methodology and her $8.06 average retail sale estimate, which it adopted, were based on nothing more than erroneous presumptions, and speculation, which were without support in the record. ***Baldwin***, 199 S.W.2d at 358;***Mprove***, 135 S.W.3d at 489.

Hoffman determined Eddie's average retail cash sale was $8.06, the cost of a dozen donuts at retail. (Tr.,Ex.A,17). She did so by taking the 490 cash register receipts for July 2015, adding up the amounts on those receipts, and dividing the total of $3,950.23 by 490, the number of receipts received. (Tr.,Ex.A,17). In determining the average retail sale, Hoffman did not analyze the individual receipts to see if they showed any specific

regularities, purchase patterns, or abnormalities. (Tr.97). Because she failed to analyze the 490 receipts for July 2015 in this manner, Hoffman was unable to determine whether the daily retail sales figures were consistent.

Moreover, as Hoffman acknowledged, the 490 receipts for July 2015 could represent either cash or credit card sales. (Tr.99). She did not take the receipts and separate the cash sales from the credit sales, to determine the total amount of cash sales for each day in July 2015, and for the month as a whole. (Tr.99). As part of her methodology, Hoffman did not remove the credit card receipts from the 490 receipts, and analyze the remaining receipts to determine what the average cash sale was. (Tr.99). Thus, while there was a different methodology by which the auditor could determine the average cash retail sale for July 2015-by taking the available receipts for the cash sales during that month, totaling those receipts up, and dividing that figure by the number of cash sale receipts-she chose not to utilize this methodology. (Tr.99-100). The auditor's methodology, which included both credit card and cash sales in her total for July 2015, resulted in a higher average retail sale figure, since credit card receipts were likely to include higher sales amounts than cash receipts. (Tr.99-100).

The auditor did not know which of the 490 receipts for July 2015 were for cash sales, as opposed to credit card sales, because she chose not to ask. (Tr.100). As Hoffman conceded, she could not determine if her $8.06 average retail cash sale estimate was accurate. (Tr.100). Moreover, Hoffman acknowledged she had no prior experience in making estimations as to amounts for missing cash sales before the SEBA audit. (Tr.102).

She could not recall whether she asked any specific questions of her supervisor while estimating Eddie's average retail cash sales. (Tr.102).

The Commission's methodology, and its finding Eddie's average retail cash sale was $8.06, were not supported by competent and substantial evidence on the whole record. **RSMo** §621.193. Rather, they were premised on speculation or conjecture. As such, they must be set aside. ***Shrock v. Walt Auto Sales***, 358 S.W.2d 812,815 (Mo.1962);***Mo. Natl. Ed. Assoc.***, 34 S.W.3d at 281. The Commission's finding that Eddie's average retail cash sale was $8.06, the price of a dozen donuts, was arbitrary and unreasonable, since it was based on speculation, not on substantial evidence. ***Edmonds***, 596 S.W.2d at 407.

The auditor could have calculated the average cash retail sale in a more certain manner by determining which of the 490 receipts for July 2015 represented cash sales, totaling the cash sale receipts, and dividing that figure by the number of cash sales receipts. In its Decision, the Commission found Hoffman's methodology, which it adopted, was not erroneous, since the auditor used the information provided to her. (L.F.116-117). However, the auditor chose not to determine Eddie's average cash retail sale by utilizing the above method, which would have been based on the *actual receipts* SEBA provided. (Tr.99-100). To the contrary, she chose to engage in speculation, based on the *possibility* receipts might be missing for July 2015, and her unfounded assumption that not all the cash from SEBA's sales was being deposited in the bank. (Tr.Ex.A.,17-18). In adopting the auditor's methodology, as well as her speculation regarding the number of missing receipts, the Commission erred. ***Shrock***, 358 S.W.2d at 815;***St. ex rel DeWeese v. Morris***, 221 S.W.2d 206,209 (Mo.1949).

Compounding this error, the Commission adopted the auditor's cash/credit ratio of 72/28%. (L.F.117-118). Had Hoffman simply asked Artega which of the 490 receipts for July 2015 represented cash sales, as opposed to credit card sales, it would have been entirely unnecessary for her to calculate a cash/credit ratio. However, she chose not to make this simple inquiry. (Tr. 100). Moreover, the cash/credit ratio the auditor calculated, and the Commission adopted, was contrary to the undisputed, unobjected-to evidence in the record, regarding the nature of Eddie's business. ***MOTO***, 88 S.W.3d 102 n.3;***B.R.***, 466 S.W.3d at 663;**RSMo** §536.070(8).

Artega testified, based on his personal knowledge, Eddie's walk-in retail sales were 60% credit card sales, and 40% cash sales. (Tr.32-33). Artega's testimony regarding Eddie's cash/credit sales ratio came in at hearing without objection. (Tr.32-33). ***Id.*** The Commission chose to ignore this testimony, which was based on Artega's personal knowledge of SEBA's actual sales, and Eddie's business practices. (L.F.116-117). Section 536.070(8) *mandates* the Commission consider any evidence which has probative value, which is received without objection. ***Id;Concord Pub. House,*** 916 S.W.2d at 195. Instead of using this 40%/60% cash/credit ratio, the Commission adopted the auditor's cash/credit ratio, which was based on speculation and conjecture, not on substantial evidence. (L.F.116-117). ***Shrock***, 358 S.W.2d at 815;***DeWeese,*** 221 S.W.2d at 209. It erred in doing so. ***Id;*** **RSMo** § 536.070(8); ***MOTO***, 88 S.W.3d 102 n.3;***B.R.***, 466 S.W.3d at 663;***Concord Pub. House***, 916 S.W.2d at 195.

Likewise, the Commission erred in refusing to consider Artega's undisputed testimony, which came into evidence without objection and which was based on his

personal knowledge of Eddie's business and exempt sales, that during the audit period of 10-1-11 to 9-30-14, Eddie's business was comprised of 20% retail sales and 80% wholesale sales. (Tr.16-18). **RSMo** §536.070(8);***Concord Publishing House***, 916 S.W.2d at 195.

The Commission adopted the auditor's finding that Eddie's cash retail sales for July 2015 totaled $12,535.93, and its wholesale orders for July 2015 totaled $4,356.49. (Tr.72-74;L.F.116-118). These findings were entirely inconsistent with, and refuted by, Artega's undisputed and un-objected to testimony regarding Eddie's wholesale/retail sales ratio during the audit period. ***Id.;MOTO***, 88 S.W.3d 102 n.3;***B.R.***, 466 S.W.3d at 663. The Commission's findings were based, not on the actual, undisputed evidence in the record regarding Eddie's business practices and actual sales income, but rather, on speculation and conjecture, which does not constitute competent or substantial evidence. ***Id.;Shrock***, 358 S.W.2d at 815;***DeWeese,*** 221 S.W.2d at 209. In making these findings, the Commission acted arbitrarily and unreasonably. ***Stacy***, 147 S.W.3d at 852;***Edmonds***, 596 S.W.2d at 407.

The Commission erred in adopting the auditor's findings. Hoffman conceded she could not determine if her findings that the average retail cash sale was $8.06, the cost of a dozen donuts, and that the total amount of Eddie's retail cash sales for July 2015 was $12,535.95 were accurate, since those estimates were based on a "*possibility*". (Tr.100-101). As the auditor acknowledged, she did not discuss with her supervisor whether $8.06 was an accurate or appropriate figure to utilize in determining Eddie's average retail cash sale for July 2015, and on which to calculate Eddie's retail sales for that month, and by extrapolation, the entire audit period. (Tr.101).

In looking at the auditor's methodology, which the Commission adopted, it is crucial to remember the SEBA audit was only the first or second audit Hoffman performed, and she was still undergoing training as an auditor during the time she performed the audit. (Tr.83-84). As Hoffman admitted, she made certain assumptions, including assumptions as to the amount of Eddie's walk-in retail cash sales during July 2015 generally, and specifically, as to the average amount of a retail cash sale during that month. (Tr.85). However, these assumptions were not based on or supported by evidence in the record, or information SEBA provided during the audit, but rather, on speculation and conjecture. ***Shrock***, 358 S.W.2d at 815;***DeWeese,*** 221 S.W.2d at 209. While the Commission found the auditor drew her findings from the records SEBA provided, this is simply not the case. ***Id.***;**RSMo** §621.193. Rather, the auditor substituted unsupported assumptions and speculation for the information SEBA provided.

SEBA provided Hoffman with 490 receipts for July 2015. (Tr.,Ex.A,17). Hoffman engaged in certain presumptions regarding those receipts, which the Commission adopted, even though those presumptions were not supported by competent and substantial evidence. Those assumptions were first, that there were missing receipts, and second, the number of missing receipts was 1,555. (Tr.,Ex.A,17;L.F.116-118). An additional presumption was that a purchase occurred every time the cash register at Eddie's recorded a transaction. (Tr.,Ex.A,17). In other words, Hoffman assumed each of the 1,555 missing receipts represented a purchase of donuts. (Tr.,Ex.A,17). The sole basis for this presumption, which the Commission adopted, was the transaction numbers on the 460 receipts provided for July 2015. (Tr.,Ex.A,17). Apart from those random transaction

numbers, there is no evidence, whatsoever, in the record demonstrating receipts were, in fact, missing for July 2015. ***Baldwin***, 199 S.W.2d at 358.

As the auditor readily admitted, she did not consult any Department regulations, guidelines, cases or other authorities to determine whether the assumptions she made were valid, and whether they were consistent with audit principles. (Tr.85-86). And, as Hoffman conceded, she simply presented her supervisor with these assumptions, and asked whether the supervisor agreed with them. (Tr.86). Hoffman could recall no detailed discussions with her supervisor regarding the validity of her assumptions that 1,555 receipts were missing, and that the amount of each missing receipt was $8.06, the cost of a dozen donuts at retail. (Tr.86,101). When she conducted the SEBA audit, Hoffman had no experience in determining the amount of missing cash sales. (Tr.102).

While SEBA provided Hoffman with a handwritten notebook documenting the donuts made and sold at Eddie's in July 2015, she chose not to rely on that notebook, based upon her belief it was "*possible*" there were dozens of donuts being made and sold, which were not recorded in the handwritten notebook for that month. (Tr.,Ex.A,17,91-92). Hoffman admitted her findings were based on speculation. (Tr.92). She conceded she saw no evidence Eddie's, in fact, made the number of donuts during July 2015, which she based her findings on. (Tr.93). In adopting the auditor's findings, which were premised on speculation and conjecture, the Commission acted arbitrarily and unreasonably. ***Stacy***, 147 S.W.3d at 852;***Edmonds***, 596 S.W.2d at 407. The Commission's findings, which were unsupported by substantial evidence, cannot stand. ***Baldwin***, 199 S.W.2d at 358;***Shrock***, 358 S.W.2d at 815;***DeWeese,*** 221 S.W.2d at 209.

II.

THE COMMISSION ERRED IN RULING SEBA FAILED TO PROVE ITS SALES TO ST. JOHN AND ST. PATRICK CENTER WERE EXEMPT UNDER SECTION 144.210.1, SINCE SEBA FAILED TO PROVIDE THE OFFICIAL CATHOLIC DIRECTORY TO THE AUDITOR, OR OFFER THE DIRECTORY INTO EVIDENCE AT HEARING, BECAUSE ITS RULING WAS UNAUTHORIZED BY LAW AND UNSUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD UNDER SECTION 621.193, IN THAT THE COMMISSION IGNORED THE EXPLICIT LANGUAGE IN THE 10-16-08 DEPARTMENT LETTER, WHICH SUGGESTED, BUT DID NOT REQUIRE, THE DIRECTORY TO ACCOMPANY THE DEPARTMENT'S 7-11-02 EXEMPTION LETTER TO PROVE AN EXEMPT SALE, AND DEMONSTRATED THE DIRECTORY WAS IN THE DEPARTMENT'S POSSESSION; AND IT WAS UNNECESSARY FOR SEBA TO OFFER THE DIRECTORY AT HEARING TO PROVE ITS SALES TO ST. JOHN AND ST. PATRICK CENTER WERE EXEMPT, SINCE THE COMMISSION COULD TAKE JUDICIAL NOTICE OF THE DIRECTORY UNDER SECTION 536.070(6).

The Supreme Court will affirm a Commission decision if it is supported by competent and substantial evidence, and is not arbitrary, capricious, unreasonable, unlawful, or in excess of jurisdiction. ***Myron Green Corp.***, 573 S.W.3d at 164. An agency's failure to consider important factors regarding an issue may support a finding that the decision was arbitrary and capricious. ***Lewis v. City of Univ. City***, 145 S.W.3d 25,32-

33 (Mo.App.E.D.2004). The Commission's decision on whether a taxpayer qualifies for an exemption will be affirmed on appeal, if the decision is supported by law, and competent and substantial evidence on the whole record. ***Wetterau, Inc. v. D.O.R.***, 843 S.W.2d 365,367(Mo.banc.1992).

Tax exemptions must be strictly construed against the taxpayer, and any doubt must be resolved in favor of application of the tax. ***Bartlett Int., v. D.O.R.***, 487 S.W.3d 470,472 (Mo.banc.2016). The taxpayer has the burden to show an exemption applies. ***Id.*** When construing sales tax exemptions, the Court must give effect to the legislature's intent, using the plain and ordinary meaning of the words in the statute. ***AAA Laundry & Linen Supply v. D.O.R.***, 425 S.W.3d 126,128 (Mo.banc.2014). Statutes granting tax exemptions should not be so strictly construed as to avoid the effect of the exemption all together. ***Lincoln Ind. v. D.O.R.***, 51 S.W.3d 462,465-466 (Mo.banc.2001).

Under Section 144.210, the burden of proving a sale of tangible, personal property is not a sale at retail is on the person who made the sale. The seller shall obtain and maintain exemption certificates signed by the purchaser as evidence for any exempt sales claimed; provided, however, before any administrative tribunal, a seller may prove the sales exempt from tax under this chapter, in accordance with proof admissible under the applicable rules of evidence. **RSMo** §144.210.1.

At hearing before the Commission, SEBA offered Exhibits 12 and 13 to support the exemptions it claimed. (Tr.,Exs.12,13). Exhibit 12 set forth Eddie's additional exempt sales for the audit period of 10-1-11 to 9-30-14. (Tr.,Ex.12). Listed therein were sales to

St. John, in the amount of $2,462.50, and St. Patrick Center, in the amount of $810.00. (Tr.,Ex.12).

Exhibit 13 contained multiple letters regarding the exempt status of the St. Louis Archdiocese, and its member entities and organizations. (Tr.,Ex.13,Pt.1). The first letter was a 7-11-02 letter from the Taxation Bureau, approving the St. Louis Archdiocese's application for sales/use tax exempt status under Section 144.030.2(19) ("7-11-02 Exemption letter"). (Tr.,Ex.13,Pt.1). The 7-11-02 Exemption letter stated, *inter alia*, purchases by the Archdiocese were not subject to sales or use tax, if conducted within the organization's exempt charitable, religious and educational functions and activities. This was a continuing exemption. (Tr.,Ex.13,Pt.1).

The second letter in Exhibit 13 was a 10-16-08 letter to the St. Louis Archdiocese from the Taxation Bureau of the Department ("10-16-08 letter"). (Tr.,Ex.13,Pt.1). The 10-16-08 letter confirmed that organizations listed in the Directory, under the Archdiocese Of St. Louis, were agencies and instrumentalities of the Archdiocese, and therefore, those organizations were permitted to use the 7-11-02 Exemption letter. (Tr.,Ex.13,Pt.1). The 10-16-08 letter went on to state the St. Louis Archdiocese was required to furnish the Department with current copies of the Directory, to ensure the Department had updated records of the agencies and instrumentalities in use of the 7-11-02 Exemption letter. (Tr.,Ex.13,Pt.1).

The third letter in Exhibit 13 was a 12-12-08 letter from Deacon Chauvin, Chief Financial Officer of the St. Louis Archdiocese ("12-12-08 letter") to all Archdiocese parishes, offices and agencies. (Tr.,Ex.13,Pt.1). Therein, Chauvin stated the Taxation

Bureau of the Department had issued the 10-16-08 letter, which confirmed all organizations of the St. Louis Archdiocese which were listed in the Directory were permitted to use the 7-11-02 Exemption letter issued to the Archdiocese. (Tr.,Ex.13,Pt.1). Further, Chauvin stated it was the *suggestion* of the representative of the Taxation Bureau that, when using the 7-11-02 Exemption letter, it be accompanied by the 10-16-08 letter, along with the dated cover page of the Directory, and the appropriate page from the Directory, which listed the organization. (Tr.,Ex.13,Pt.1).

At hearing, SEBA contended Eddie's donut sales to St. Patrick Center and St. John were exempt, since those entities were part of the St. Louis Archdiocese, and thus, fell within the 7-11-02 Exemption letter. (Tr.,Exs.12,13;L.F.120). While acknowledging that Exhibits 12 and 13 were admitted into evidence without objection, the Commission went on to find those Exhibits did "not provide the Official Catholic Directory required by" the 7-11-02 Exemption letter. (L.F.120-121). The Commission concluded there was no evidence St. Patrick Center and St. John were part of the St. Louis Archdiocese, and found SEBA did not meet its burden of proving its sales to those entities were exempt. (L.F.121).

The Commission erred as a matter of law in so finding. It ignored the explicit, unambiguous language in the 12-12-08 letter, stating it was the *suggestion* of the Taxation Bureau that, when using the 7-11-02 Exemption letter, it be accompanied by the dated cover page and appropriate page of the Directory, which listed the organization. [Emphasis added]. (Tr.,Ex.13,Pt.1). The 12-12-08 letter merely *suggested* the Exemption letter be accompanied by the Directory. (Tr.,Ex.13,Pt.1). It did not state the Exemption letter

"**shall**" or "**must**" be accompanied by the Directory, or contain similar language of a mandatory nature. (Tr.,Ex.13,Pt.1).

Giving the word "*suggestion*" in the 12-12-08 letter its plain and ordinary meaning, SEBA was not required to offer the Directory and the pages therein listing St. Patrick Center and St. John along with the 7-11-02 Exemption letter and the 10-16-08 letter, to demonstrate its sales to those entities were exempt. In ruling to the contrary, the Commission erred, since it failed to give the explicit, unambiguous language of the 12-12-08 letter its plain and ordinary meaning. The Commission's finding was not supported by competent and substantial evidence in the record, since it was without support in the explicit terms of the 12-12-08 letter. The language in that letter, *suggesting* use of the Directory was permissive, and did not indicate a mandate to act. See, e.g., ***Welch***, 890 S.W.2d at 397 (general rule is use of "**shall**" is mandatory, and not permissive). In finding the 12-12-08 letter required the 7-11-02 Exemption letter be accompanied by information from the Directory to demonstrate an exempt sale, the Commission acted unreasonably. ***St. Louis Rams***, 526 S.W.3d at 126. Its finding was without support in the evidence, in particular, the express terms of the 12-12-08 letter. (Tr.,Ex.13,Pt.1). ***Id.***

The Commission's finding that SEBA failed to satisfy its burden of proving its sales to St. Patrick Center and St. John were exempt was arbitrary and capricious, since it failed to consider two significant factors, which affected the resolution of the exemption issue. ***Missouri Real Estate Comsn. v. Held***, 581 S.W.3d 668,676 (Mo.App.W.D.2019);***Lewis***, 145 S.W.3d at 32-33. First, it was unnecessary for SEBA to offer the Directory, since the

Department had possession of, and thus access to, the Directory. Second, the Commission erred in failing to take judicial notice of the Directory, as Section 536.070(6) permitted.

In ruling on the exemption issue, the Commission failed to acknowledge and give effect to the explicit language in the 10-16-08 letter. That letter stated organizations listed in the Directory under the St. Louis Archdiocese were instrumentalities of the Archdiocese, and thus, permitted to use the 7-11-02 Exemption letter. (Tr.,Ex.13,Pt.1). Further, the 10-16-08 letter expressly stated the St. Louis Archdiocese was *required* to furnish the Department with current copies of the Directory, to ensure the Department had updated records of the agencies and instrumentalities in use of the 7-11-02 Exemption letter. (Tr.,Ex.13,Pt.1).

The 10-16-08 letter, and Exhibit 13 of which it was a part, were admitted into evidence without objection. (Tr.47;Ex.13,Pt.1). At hearing, the Department did not offer any evidence to refute the 10-16-08 letter, stating the Archdiocese furnished the Department with current copies of the Directory. This unimpeached and undisputed evidence, which the Commission erroneously ignored, demonstrated the Department had the most recent version of the Directory in its possession. To determine whether SEBA's sales to St. John and St. Patrick Center were exempt, as SEBA claimed, all the auditor had to do was to check the Directory. However, as Hoffman admitted, she failed to consult the Directory when addressing the exemption issue. (Tr.106).

In its Decision, the Commission made no finding that either the 10-16-08 letter, demonstrating the most up-to-date version of the Directory was in the Department's possession, or Hoffman's hearing testimony that she failed to consult the Directory during

the audit in making her findings regarding Eddie's exempt sales, was not credible or unworthy of belief. (L.F.120-121). Despite this fact, the Commission chose to disregard this crucial, undisputed evidence. It erred in doing so.

An agency such as the Commission cannot disregard unimpeached or undisputed evidence, unless the agency makes a specific finding such evidence is incredible or unworthy of belief. ***B.R.***, 466 S.W.3d at 663. Probative evidence received without objection in a contested case *must* be considered in an administrative hearing of the nature the Commission held below. ***Concord Pub. House***, 916 S.W.2d at 195;***MOTO***, 88 S.W.3d at 102 n.3. Section 536.070(8) states any evidence received without objection, which has probative value, shall be considered by the agency. **RSMo** §536.070(8). The term "**shall**" used in Section 536.070(8), is mandatory. ***Welch***, 890 S.W.2d at 397.

Two records of the Department were admitted at hearing without objection-the 7-11-02 Exemption letter and 10-16-08 letter regarding the St. Louis Archdiocese, its affiliated entities, and the tax exemption applicable to those entities. (Tr.,Ex.13,Pt.1). Moreover, the Directory, which was on file with the Department, was also a record or document of the Department, within the plain and ordinary meaning of Section 536.070. (Tr.,Ex.13,Pt.1). The 7-11-02 Exemption letter, the 10-16-08 letter and the Directory were properly before the Commission. In failing to consider this undisputed evidence when ruling on the exemption issue, the Commission erred. **RSMo** §536.070(8);***Concord Pub. House***, 916 S.W.2d at 195;***MOTO***, 88 S.W.3d at 102 n.3;***B.R.***, 466 S.W.3d at 663.

Moreover, it was not necessary for SEBA to offer the Directory into evidence at hearing to support the exemptions it claimed regarding its sales to St. Patrick Center and

St. John, since the Commission could take judicial notice of the Directory. Section 621.050 states any person or entity shall have the right to appeal to the Commission from any decision or assessment made by the Director. **RSMo** §621.050.1. Relatedly, Section 621.050 states the procedures applicable to such hearings shall be those established by Chapter 536. **RSMo** §621.050.2. As to administrative procedure, Section 621.135 states the provisions of Chapter 536 shall apply to and govern the Commission's proceedings, and the rights and duties of the parties involved. **RSMo** §621.135.

The Commission erred in failing to take judicial notice of the Directory, as Section 536.070(6) permitted. Section 536.070 addresses evidence and judicial notice in contested cases. Section 536.070(6) states agencies shall take official notice of all matters of which the courts can take judicial notice. **RSMo** §536.070(6). It necessarily follows that decisions establishing when a court can permissibly take judicial notice necessarily determine the parameters of when an administrative agency can permissibly take official notice of particular matters. ***Moore v. Mo. Dental Bd.***, 311 S.W.3d 298,305 (Mo.App.W.D.2010);***Wagner v. Mo. St. Bd. Of Nursing***, 570 S.W.3d 147,155 (Mo.App.W.D.2019). Thus, in ruling on the exemption issue, the Commission could take official notice of any matter of which Missouri courts could take judicial notice. See, for example, ***M.D.S.S. v. Trinity Lutheran Hospital***, 930 S.W.2d 426,429 (Mo.App.W.D.1996), holding the Commission properly applied a circuit court decision, holding an administrative cap on per-diem Medicaid reimbursement rates for inpatient psychiatric services was invalid, to a hospital's claim challenging the psychiatric cap, even

if the hospital did not cite to the case, as the Commission was required to take official notice of all matters of which courts could take judicial notice.

Sanzone v. Mercy Health, 326 F.Supp.3d 795,806-807 (E.D.Mo.2018), recognized the Directory's probative effect in establishing entities listed therein are part of the Roman Catholic Church. At issue in ***Sanzone*** was whether an employer, a non-profit corporation which operated Catholic healthcare facilities, qualified for ERISA's church plan exemption. Mercy Health operated one of the largest Catholic healthcare systems in the U.S. It offered a retirement plan for its employees. Retired Mercy employees who received benefits under the plan filed suit, claiming the Mercy Health Pension Account Plan was not a church plan, and thus, was not governed by ERISA. ***Sanzone***, 326 F.Supp.3d at 799-800. To qualify as a church plan under ERISA, a plan had to be for employees of a church, or association of churches, and the organization's principal purpose had to be controlled or associated with a church, convention or association of churches. In determining whether Mercy Health was a church, the District Court consulted the Directory. Mercy Health was listed therein. As the District Court observed, courts viewed an organization's listing in the Directory as a public declaration by the Catholic Church that the organization was associated with the Church. The IRS considered any organization listed in the Directory as associated with the Catholic Church in the U.S. Thus, by listing Mercy Health in the Directory, the Roman Catholic Church had publicly declared it to be a Catholic organization. The Directory listing constituted substantial evidence Mercy Health was governed by and operated in furtherance of the principles of the Catholic Church, for purposes of ERISA. ***Sanzone***, 326 F.Supp.3d at 806-807.

In so ruling, ***Sanzone*** relied upon ***Overall v. Ascension***, 23 F.Supp.3d 816 (E.D.MI.2014). ***Overall*** demonstrates the Commission erred in failing to take judicial notice of the Directory. In ***Overall***, participants in a Catholic hospital's pension plan filed suit, alleging the hospital's parent, participating employer breached its duties under ERISA by failing to provide notice of a reduction in benefit accruals. As was the case in ***Sanzone***, one of the issues was whether the non-profit company which operated a network of hospitals and related health entities, fell within ERISA's church plan exemption. Suit was filed against multiple defendants associated with pension plans provided by Ascension Health Alliance. Plaintiffs contended the pension plans did not qualify for the church exemption, because Ascension was not controlled by or associated with the Catholic Church. ***Overall***, 23 F.Supp.3d at 819.

Corporate documents showed Ascension and its subsidiaries were obligated to operate Catholic health ministries in conformance with Roman Catholic doctrine, and the Catholic Church appointed the members who controlled Ascension. ***Overall***, 23 F.Supp.3d at 822. At hearing, Ascension submitted evidence demonstrating it was controlled by and associated with the Catholic Church. Included in that evidence was the Directory. As the District Court observed, the Directory was a published book, widely disseminated, publicly available, and generally known. The Directory had been relied on to demonstrate a defendant was a religious organization. For example, ***Hartwig v. Albertus Magnus Coll.***, 93 F.Supp.2d 200,202-203 (D.Conn.2000), found the Directory was the definitive compilation of Roman Catholic institutions in the U.S. The Catholic Church had publicly declared Ascension to be a Catholic organization, by including it in the Directory. ***Overall***,

23 F.Supp.3d at 831. The District Court held it could take judicial notice of the fact Ascension Health Alliance was listed within the Directory. It reasoned courts could take judicial notice of public documents and government documents, including the Directory. ***Overall***, 23 F.Supp.3d at 824-825.

Pursuant to ***Overall*** and Section 536.070(6), the Commission could take judicial notice of the Directory, since it is a public document. ***Id.***;***Sanzone***, 326 F.Supp.3d at 806-807. Likewise, the Commission could take judicial notice of the fact that St. Patrick Center and St. John, being listed in the Directory, were Catholic organizations, within the meaning of the 7-11-02 Exemption letter. ***Overall***, 23 F.Supp.3d at 831. Thus, the Commission erred in ruling Eddie's sales to St. Patrick Center and St. John were not exempt sales, and that SEBA failed to satisfy its burden under Section 144.210.1. ***Id.***;***Bartlett***, 487 S.W.3d at 472.

III.

THE COMMISSION ERRED IN IMPOSING A 5% PENALTY UNDER SECTION 144.250.3 FOR SEBA'S ALLEGED NEGLIGENCE IN FAILING TO DOUBLE CHECK ITS RECORDS WHEN REPORTING ITS TAXABLE SALES TO THE DEPARTMENT BECAUSE ITS RULING WAS UNAUTHORIZED BY LAW, AND UNSUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD UNDER SECTION 621.193, IN THAT IN FINDING A PENALTY WAS WARRANTED, THE COMMISSION IGNORED THE UNDISPUTED, UN-OBJECTED TO TESTIMONY OF ARTEGA AND OTTEN THAT THEY DOUBLE CHECKED SEBA'S SALES TAX RETURNS FOR

ACCURACY BEFORE FILING THEM, AND OTTEN'S UNDISPUTED TESTIMONY HE USED HIS BEST PROFESSIONAL ABILITIES IN PREPARING THOSE RETURNS; THE ASSESSMENT OF A PENALTY FOR SEBA'S ALLEGED FAILURE TO DOUBLE CHECK ITS SALES FIGURES WAS UNAUTHORIZED BY LAW, SINCE THE COMMISSION DID NOT RELY ON DEPARTMENT GUIDELINES OR REGULATIONS, OR ANY CASE AUTHORITY WHICH AUTHORIZED AN ADDITION TO TAX UNDER THOSE CIRCUMSTANCES; AND SEBA WAS NOT NEGLIGENT IN REPORTING ITS TAXABLE SALES AND FILING ITS SALES TAX RETURNS, WITHIN THE MEANING OF SECTION 144.250.3, SINCE IT REASONABLY RELIED ON THE PROFESSIONAL ADVICE OF ITS TAX ACCOUNTANT.

Generally, the Court will affirm a Commission Decision in a tax matter if it is authorized by law, and supported by competent and substantial evidence on the whole record. ***Jones v. D.O.R.***, 981 S.W.2d 571,574 (Mo.banc.1998). However, the Commission's interpretation of revenue statutes, such as Section 144.250, receives *de novo* review. ***Business Aviation***, 579 S.W.3d at 215.

SEBA challenges the assessment of a 5% addition to tax as a penalty against it under Section 144.250.3. That provision states, in relevant part:

> "In the case of failure to pay the full amount of tax required under Sections 144.010 to 144.525 on or before the date prescribed therefor, determined with regard to any extension of time for payment, due to negligence or intentional disregard of rules and

regulations, but without intent to defraud, there shall be added to the tax an amount equal to five percent of the deficiency." **RSMo** §144.250.3.

Basis For Assessment Of A Penalty Under Section 144.250.3

Hoffman believed SEBA was negligent in failing to double check its records when reporting its sales to the Department, to verify its sales figures were accurate. (Tr.108-109, Ex.A,19). In the audit, under "**Additional Comments,**" Hoffman stated SEBA "displayed intentional disregard and negligence by failing to double check its sales figures to verify that they were accurate," and imposed a 5% addition to tax as a penalty under Section 144.250.3. (Tr.Ex.A,19). This was the sole basis in the audit for imposition of a penalty. (Tr.108-109, Ex.A,19).

Significantly, in deciding to assess a penalty against SEBA for its alleged failure to double check its records, the auditor failed to consult any Department rulings, regulations or guidelines, appellate decisions, or other authorities. (Tr.108-110). The audit sets forth no authorities, such as cases or Department rulings, to support the penalty imposed under Section 144.250.3. (Tr.Ex.A,19). Moreover, before assessing a penalty against SEBA, the auditor did not consult with her supervisor, to determine whether a business' alleged failure to double check its recorded sales was an adequate basis on which to assess a penalty. (Tr.81,109-110). The SEBA audit was either the first or second sales tax audit Hoffman performed. (Tr.83-84). At the time she conducted the audit, Hoffman had only been an auditor for two months, and was still undergoing training. (Tr.83-84).

The Commission upheld the penalty. (L.F.121-122). It found the penalty was appropriate under Section 144.250.3, "because SEBA was negligent[5] in its reporting of its taxable sales. It failed to keep adequate records, and what records it did retain were inconsistent. The Director established through competent and substantial evidence SEBA was negligent in not reporting its full taxable sales and is subject to additions to tax." (L.F.122).

In its Decision, the Commission failed to cite any appellate decision, or Department ruling, guideline or regulation, providing a penalty can be assessed under Section 144.250.3, for a taxpayer's alleged failure to double check its sales figures when reporting them to the Department. (L.F.121-122). Nor did the Commission cite any caselaw or Department authority, holding a penalty can be imposed for a taxpayer's alleged failure to keep adequate records of its taxable sales. (L.F.121-122). The Commission provided no relevant authority which could support the imposition of a 5% penalty under Section 144.250.3, and thus, its imposition of a penalty was unauthorized by law. **RSMo** 621.193; ***Brambles Ind.***, 981 S.W.2d at 570.

The Commission's finding SEBA was negligent in reporting its taxable sales, so as to warrant imposition of a penalty under Section 144.250.3 must be set aside, since that finding was neither authorized by law nor supported by competent and substantial evidence. ***Id***. In addressing the propriety of the penalty, the Commission failed to consider

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[5] The Commission made no finding SEBA intentionally disregarded any rules or regulations, within the meaning of Section 144.250.3. (L.F.121-122).

relevant, dispositive case precedent, holding a taxpayer is not negligent where he relies on the professional advice of an accountant or lawyer. (L.F.121-122). SEBA was not negligent within the meaning of Section 144.250.3, since it reasonably relied on professional advice from its longtime tax accountant. ***U.S. v. Boyle***, 105 S.Ct. 687, 692 (1985).

While Section 144.250.3 allows for imposition of a penalty in cases of taxpayer "**negligence**," neither Section 144.250, nor Chapter 144, defines the term "**negligence.**" In determining the meaning of "**negligence**" in Section 144.250.3, the Court must be mindful that taxing statutes, such as Section 144.250.3, are to be strictly construed against the taxing authority, and in favor of the taxpayer. ***Conagra Poultry v. D.O.R.***, 862 S.W.2d 915,918 (Mo.banc.1993).

Generally, where a statute does not define a term, courts give the term its plain and ordinary meaning, as contained in the dictionary. ***St. ex rel Burns v. Whittington***, 219 S.W.3d 224, 225 (Mo.banc.2007). As defined by **Black's Law Dictionary**, 11th Edition, "**negligence**" is the failure to exercise the standard of care which a reasonably prudent person would have exercised in a similar situation; any conduct which falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights; the doing of what a reasonable and prudent person would not do under the particular circumstances, or the failure to do what such a person would do under the circumstances. **Black's Law Dictionary** (11th Ed.2019). This definition distinguishes between ordinary negligence, which is the lack of ordinary diligence or the failure to use ordinary care, and gross

negligence, which is willful and wanton misconduct, or a conscious, intentional act or omission in reckless disregard of a legal duty, and of the consequences to another party. ***Id.*** Black's Law Dictionary defines "**tax negligence**" as negligence arising out of the disregard of tax-payment laws, for which the Internal Revenue Service may impose a penalty-5% of the amount underpaid, citing 26 **USCA** §6651(a). ***Id.***

Even though Section 144.250.3 does not contain an express definition of "**negligence**," Missouri decisions applying Section 144.250, and Section 144.220, governing the statute of limitations in sales tax cases, give meaning to the term. These cases suggest a taxpayer is not negligent where they act reasonably, including relying on professional advice, and do not act willfully, intentionally, or in bad faith.

Lora v. D.O.R., 618 S.W.2d 630,634 (Mo.banc.1981), addressed the meaning of "**negligence**" for purposes of Sections 144.250.1 and 144.220. In ***Lora***, a taxpayer appealed an AHC decision, affirming an assessment for unpaid sales tax and a penalty. Lora, a housewife, who was unschooled and unexperienced in business, assumed operation of her husband's business, a miniature golf course, on his death. ***Lora***, 618 S.W.2d at 632. Based on a prior Department interpretation that Section 144.020.1(2) did not require sales taxes be paid on gross receipts derived from fees paid for participating in bowling or similar places of amusement, Lora did not collect sales tax on receipts from the golf course. Following ***Blue Springs Bowl v. Spradling***, 551 S.W.2d 596 (Mo.banc.1977), which held sales taxes were to be paid on fees for participating in such places of recreation, the Department audited Lora, and assessed sales taxes on receipts and a 10% penalty under Section 144.250.1. ***Id.*** Lora petitioned for reassessment, contending she was not liable for

taxes, since state revenue rules previously provided sales tax was not due on a business engaged in operating a miniature golf course, and after altering its position in 1974 without any statutory change, the state failed to notify Lora of its reinterpretation of the statute. She did not collect sales taxes from customers, based on the reasonable belief her business activity was excluded from the purview of the Act. ***Lora***, 618 S.W.2d at 632.

Lora challenged the Commission's ruling the statute of limitations in Section 144.220 did not apply. ***Lora***, 618 S.W.2d at 632-633. Under Section 144.220, the 2 year limitations period did not apply where a fraudulent tax return was filed, or the taxpayer neglected or refused to make a return. ***Lora***, 618 S.W.2d at 633. Lora contended "**neglect**" in Section 144.220 meant the taxpayer negligently failed to file a return. ***Id.*** She argued she was not negligent, because she did not collect sales tax from customers based on her reasonable belief the business activity was excluded from the scope of the Act, and because she exercised reasonable prudence and good faith, without the intention to evade, conceal, deceive, or otherwise mislead taxing authorities. The Director posited "**neglect**" to file a return under Section 144.220 equated with the mere "failure" to file a return. ***Id.***

"**Neglect**" had various shades of meaning. ***Id.*** In some instances, the term implied a mere failure or omission to do something without regard to the gravity of the reasons which prompted the failure to act, while in other instances, the term was used in the sense of a designed refusal or unwillingness to perform one's duty with respect to a matter with which one was charged with the duty to act. ***Id.***

The first exception in Section 144.220.1 made the limitations period inapplicable if a fraudulent return was filed. ***Lora***, 618 S.W.2d at 633-634. The third exception applied

when there was a conscious refusal by the taxpayer to file a return. Thus, the Court had to adopt an interpretation of the second exception-neglect to file a return-which gave it a meaning separate and distinct from the other two exceptions, to avoid making "**neglect**" a needless repetition the other terms. ***Lora***, 618 S.W.2d at 634. If "**neglect**" meant mere failure to file a return, it would cover every instance in which no return was filed. Nothing other than failure to file was necessary to make the statute of limitations inapplicable. ***Id.*** But if "**neglect,**" meant a negligent or careless failure to file a return, all three exceptions in Section 144.220.1 had meaning. ***Id.***

Lora was not negligent or careless. She exercised reasonable prudence and good faith on the basis of a reasonable belief her business was not covered by the Act. Therefore, the second exception was not triggered, and the 2-year statute of limitations governed. ***Id.*** Additionally, the Court addressed assessment of a penalty under Section 144.250.1, which authorized a penalty where a taxpayer "neglects or refuses" to make a return. ***Lora***, 618 S.W.2d at 634. These were the same terms used in Section 144.220.1, and thus, they had to be interpreted consistently with the interpretation the Court placed on the terms in Section 144.220. Since there was no evidence Lora refused or negligently or carelessly failed to file a return, there was no basis for the assessment of a penalty. ***Id.***

Where a taxpayer acts contrary to the professional advice of counsel, penalties have been upheld. See, ***Lynn v. D.O.R.***, 689 S.W.2d at 45. Lynn operated a vessel and barge, through which he conducted an excursion-sightseeing business on the Missouri river. While the vessel traveled into Kansas, passengers embarked and disembarked from the same point, which was in Missouri, and admission fees for the excursions were collected

in Missouri. ***Lynn***, 689 S.W.2d at 46. In 1967, the Department first contacted Lynn concerning a possible liability for sales taxes on admission fees for excursions. However, Lynn's attorney was ultimately advised the operation was exempt. ***Id.*** In 1976, the Department audited Lynn, and assessed sales tax against him for the period from 1974 to 1976. ***Lynn***, 689 S.W.2d at 47. When Lynn's attorney inquired regarding the tax liability, a Department employee opined the state had waived its right to collect taxes, but attached the caveat that verification from Jefferson City was required. However, Lynn took no further action. He neither appealed the assessment, nor collected sales tax or filed sales tax returns. ***Id.*** This inaction on Lynn's behalf was contrary to his attorney's advice to prepare himself to avoid a legal dispute, since it appeared the Department would seek payment of sales tax. ***Id.***

In 1980, the Department again audited Lynn, and assessed taxes. ***Id.*** Lynn contended his operations were part of interstate commerce, and therefore, exempt from sales tax under 144.030.1. However, the Court found there was a substantial basis for upholding the taxes assessed. ***Lynn***, 689 S.W.2d at 48. ***Fostaire Harbor v. D.O.R.***, 679 S.W.2d 272 (Mo.banc.1984), was directly on point. In ***Fostaire***, a taxpayer challenged the assessment of sales tax on admission fees he charged for sightseeing tours by helicopter. The helicopter flights began and ended at a barge moored in the Mississippi river. ***Id.*** ***Fostaire*** held fees paid for helicopter flights were subject to sales tax. ***Id.*** The excursions Lynn provided were in the same category as the helicopter tours in ***Fostaire***. Since the sole objective of boarding the vessel was personal recreation, not transportation, it fell within the ambit of ***Fostaire***. ***Id.***

Additionally, Lynn challenged the assessment of a penalty under Section 144.250.1. ***Lynn***, 689 S.W.2d at 49-50. While Lynn relied on ***Lora,*** that decision was distinguishable. In ***Lora***, the taxpayer was relieved of penalties after her good faith reliance on longstanding revenue department interpretations, which had recently changed. Lynn was audited in 1976 and received assessments for 1974 through 1976. He was then on notice of his tax liability but took no action, despite the advice of his attorney he should prepare himself. ***Id.*** The assessment in issue covered a period commencing January 1976. Because Lynn had received the earlier assessment, plus the advice of counsel regarding a possible tax collection action, it was not good faith for Lynn to now claim unawareness. Thus, Lynn was liable for penalties assessed against him. ***Id.***

Additionally, Lynn argued the assessment for the period from 1976 through 1979 was invalid because of the limitations in Section 144.220. ***Id.*** Section 144.220.1 applied, except in the case of a fraudulent return, or neglect or refusal to make a return. As the court observed, Lynn failed to take any action after the 1976 assessment. ***Id.*** When a taxpayer neglected or refused to file returns, as occurred therein, the statute of limitations was tolled, and the Director could assess sales tax beyond the 2-year limitation period. ***Id.*** In a concurring opinion, Judge Gunn noted it was Lynn's neglect and refusal to make a return which provided the necessary fulcrum to lift the limitations period for the assessment of back taxes. The concurring opinion also observed the taxpayer, Lynn, was an experienced businessman with several business interests, who paid sales taxes on all of his businesses. ***Lynn***, 689 S.W.2d at 50. Lynn was warned by his attorney he should prepare himself for the collection of taxes, unless he wanted a court battle. ***Id.*** This statement should have

been sufficient to forewarn a seasoned businessman of the obligation to pay tax, or appeal, when faced with tax assessments on two separate occasions. ***Id.***

While ***Hiett v. D.O.R.***, 899 S.W.2d 870, 873-874 (Mo.banc.1995), involved a penalty against a taxpayer for an income tax deficiency, it is instructive. In ***Hiett***, the taxpayers acted contrary to the advice of their accountant/tax preparer. ***Id.*** At issue was Section 143.751, which provided a 5% penalty if any part of a deficiency was due to negligence or intentional disregard of rules and regulations, but without intent to defraud. ***Hiett***, 899 S.W.2d at 872. Like Section 144.250.3, Section 143.751 did not define "**negligence**." ***Id.*** The AHC found the Heitts were not negligent, since they acted in good faith. ***Hiett***, 899 S.W.2d at 873. However, the Court held reasonableness, rather than good faith, was the standard by which negligence was determined. Good faith could only be considered as it related to the reasonableness of the taxpayer's conduct. ***Id.*** Moreover, in concluding the Heitts were not negligent, the AHC noted they were "confronted with an unusual and complicated problem". This factor, the Court found, supported an opposite conclusion. ***Id.***

The Court concluded the Heitts were negligent, since they failed to make a reasonable attempt to comply with Missouri tax laws regarding income deductions. ***Id.*** Specifically, the Heitts' decision to rely on their own lay judgment was not reasonable, given the complexity and uniqueness of the case, which involved the deductibility of income earned in another state, and the magnitude of the claimed deduction, in the amount of $483,750.00. While the Heitts' return was signed by a tax preparer, an attachment to the return stated "taxpayers are of the opinion that due to circumstances beyond their

control . . . the $483,750 salary earned in Florida while Florida residents is not taxable in Missouri." ***Id.*** That the taxpayers included this statement with the return showed the taxpayers were not relying on their accountant, making suspect their claim that the deduction was taken in good faith. The Heitts' course of conduct, the Court found, stood in stark contrast to cases where there was significant evidence the taxpayer sought out and relied on professional advice, which subsequently proved to be erroneous. ***Id.***

Given the record before it, the Court found it was patently unreasonable for the Heitts, who were faced with a complex and unique tax situation to take a deduction of hundreds of thousands of dollars without reliance on at least colorable statutory authority or reliance on the advice of a lawyer or accountant. ***Id.*** That the taxpayers took the deduction in view of their own tax preparer's apparent disclaimer compounded the unreasonableness of their action. In concluding the penalty was warranted, the Court found it significant the Heitts did not rely on the advice of a professional, such as an attorney or accountant in taking their course of action, and in fact, appeared to act contrary to the advice of their tax preparer. ***Id.*** The Heitts were negligent in deducting $483,750 from their 1991 income, and thus, a penalty was lawfully imposed. ***Hiett***, 899 S.W.2d at 873-874.

Unlike the Heitts, SEBA sought, obtained, and reasonably relied on professional advice, in reporting its sales tax and filing its sales tax returns. ***U.S. v. Boyle***, 105 S.Ct. 687,692-693 (1985). That this is the case is demonstrated by the undisputed evidence. At hearing, Brad Artega testified he accurately reported what he believed the applicable sales taxes were, based on his records, and double checked the sales tax figures, to the best of

his ability. (Tr.45-46). Artega believed he had accurately paid the proper amount of sales tax for SEBA during the audit period, and did not owe additional taxes, as a result of underreported sales. (Tr.45-47).

Significantly, Artega relied on the professional advice and services of Joseph Otten, SEBA's longtime accountant, bookkeeper and financial advisor, to properly prepare accurate sales tax returns for SEBA, and double check those returns prior to filing them. (Tr.46). Otten had prepared Eddie's sales tax returns since the business began operations in 2007, and prepared Eddie's sales tax returns during the audit period. (Tr.57-60). Every three months, Artega provided Otten with the information necessary to prepare Eddie's sales tax returns, including check stubs, Eddie's bank statements, and credit card statements. (Tr.26,29). Otten prepared Eddie's sales tax returns, based on this information. (Tr.60-61). Artega provided Otten with all the materials he believed to be necessary to properly prepare Eddie's sales tax returns. (Tr.29). At no time did Otten ever request any additional information from Artega, for the purpose of preparing those returns. (Tr.29). Artega reviewed the sales tax returns Otten prepared, to check them for accuracy, to the best of his ability. (Tr.30). Brad Artega relied on Otten as a professional, competent accountant and bookkeeper to prepare accurate sales tax returns, and double check those returns prior to filing them. (Tr.46).

In preparing Eddie's sales tax returns, Otten reviewed Eddie's credit card statements, to determine if those statements matched with the numbers in Eddie's bank statements. (Tr.61). Otten also reviewed Eddie's cash deposits, as recorded in its bank statements. (Tr.61). In preparing Eddie's sales tax returns, Otten used his best professional abilities,

and double checked the returns for accuracy. (Tr.62-63). The stated basis for the auditor's imposition of a penalty-SEBA's alleged failure to double check Eddie's sales figures to verify they were accurate[6]-was entirely without support in the record. ***Stacy***, 147 S.W.3d at 852. Both Artega and Otten testified, without objection, that they, in fact, double checked Eddie's sales tax returns. (Tr.30,62-63).

Missouri law is clear. Where, as here, probative evidence is received without objection, the Commission must consider such evidence. ***Concord Pub. House***, 916 S.W.2d at 195;**RSMo** §536.070(8). In ignoring this undisputed evidence, which directly contradicted the auditor's rationale for imposing a penalty, the Commission erred. ***Id.*** In its decision, the Commission made no finding that either Artega or Otten's testimony in this regard was incredible or unworthy of belief. ***B.R.***, 466 S.W.3d at 663. Absent such a finding, the Commission was not free to disregard this evidence, which disproved the auditor's reason for assessing a penalty under Section 144.250.3. ***Id.***

There is no evidence in the record, showing either Artega or Otten under-reported any cash sales made by Eddie's, withheld any monies made by Eddie's, or failed to deposit money into Eddie's bank account. Artega testified he did not save or underreport any cash sales made by Eddie's. (Tr.27). Otten never saw anything out of the ordinary while preparing Eddie's sales tax returns. (Tr.62). There was no indication any cash was being withheld from Eddie's bank accounts, or not being reported on its sales tax returns. (Tr.62). While the auditor believed Artega was not depositing all of Eddie's cash into SEBA's bank

[6] (Tr.Ex.A,19).

account, the record contains no competent or substantial evidence to support this supposition. (Tr.,Ex.A,17). To the contrary, the testimony of Artega and Otten, which came in without objection, was that no money was withheld from SEBA's bank accounts, and SEBA did not under-report its sales. (Tr.27,62). ***Id.;MOTO;*** 88 S.W.3d 102 n.3. The Commission erred in failing to consider this undisputed testimony in determining whether the assessment of a penalty was warranted. ***Id.***

Under Section 144.250, the taxpayer's intent must be taken into consideration when determining whether penalties are appropriate. ***City of Aurora v. Spectra Comm. Group, LLC***, 592 S.W.3d 764,800 (Mo.banc.2019). The undisputed evidence shows Artega reasonably relied on SEBAs tax accountant to properly prepare and file Eddie's sales tax returns. (Tr.46). When an accountant or an attorney advises a taxpayer on a matter of tax law, it is reasonable for the taxpayer to rely on that advice. As the Supreme Court observed in ***Boyle***, 105 S.Ct. at 692-693, courts frequently held reasonable cause was established when a taxpayer showed he reasonably relied on the advice of an accountant or an attorney, such that it was unnecessary to file a return, even when such advice turned out to have been a mistake. In such a situation, reliance on the opinion of a tax advisor could constitute reasonable cause for failure to file a tax return. When an accountant or attorney advised a taxpayer on a matter of tax law, such as whether a liability existed, it was reasonable for the taxpayer to rely on that advice. Most taxpayers were not competent to discern error in the substantive advice of an accountant or attorney. ***Id.***

That is the case herein. As his testimony shows, Brad Artega, owner of Eddie's, is not and has never been a lawyer, accountant or tax professional. (Tr.7). Rather, Artega is

a commercial photographer by trade. (Tr.7). He only has a high school education, and thus, is not a trained lawyer or accountant. (Tr.7). In this way, Artega was like the taxpayer in ***Lora***, who was also unschooled in tax matters. ***Lora***, 618 S.W.2d at 632. Artega relied on Otten, his bookkeeper and accountant, to properly prepare Eddie's sales tax returns. (Tr.46). Given Artega's lack of tax and accounting expertise, it was reasonable for him to seek out the services of Joseph Otten, a tax accountant and bookkeeper, and to rely on Otten's professional advice in regard to reporting Eddie's sales and determining the amount of sales taxes owed by the business. ***Boyle***, 105 S.Ct. at 692-693. Because he was not trained in accounting or tax matters, Artega was not competent to discern any errors in Otten's preparation of Eddie's sales tax returns or tax advice. ***Id.***

The instant case does not present a scenario like that in ***Hiett***, 899 S.W.2d 873-874, where the taxpayer appeared to reject his tax preparer's advice. As the undisputed evidence shows, Artega provided Otten with all the information Otten requested to prepare Eddie's sales tax returns, and at no time did Otten request any additional information, apart from that which Artega provided. (Tr.29). In relying on Otten to properly determine the amount of sales tax owed by Eddie's and to file Eddie's sales tax returns, SEBA's conduct was reasonable, and what an ordinarily prudent taxpayer would do under the circumstances. ***Boyle***, 105 S.Ct. at 692-693. The Commission's finding SEBA was negligent in the reporting of its taxable sales, within the meaning of Section 144.250.3, was not supported by the competent, substantial and undisputed evidence. ***Id.;Stacy***, 147 S.W.3d at 852; ***Lora***, 618 S.W.2d at 634. Accordingly, the penalty must be set aside. ***Id.***

Finally, the imposition of the 5% penalty must be set aside, since it was unauthorized by law. **RSMo** §621.193;***Brambles Ind.***, 981 S.W.2d at 570. Neither Hoffman, nor the Commission which adopted the penalty, cited or relied on any Department regulation or guideline, or case authority, providing for the assessment of a penalty for a taxpayer's alleged failure to double check a business' sales figures. (Tr.,Ex.A,19-20;L.F.121-122). As Hoffman acknowledged, the Department had written guidelines regarding when the imposition of a penalty was appropriate. (Tr.109). However, Hoffman did not consult those guidelines in deciding to assess a penalty for SEBA's alleged failure to double check its sales figures. (Tr.109). The auditor was unaware of any statute or Department ruling which permitted the imposition of a penalty for failure to double check sales figures. (Tr.109). Hoffman did not ask her supervisor whether an alleged failure to double check sales figures was an adequate basis on which to impose a penalty under Section 144.250.3. (Tr.110).

In affirming the 5% penalty under Section 144.250.3, the Commission failed to cite any relevant caselaw authority, Department ruling, regulation, or guideline which could support imposition of the penalty. (L.F.121-122). Specifically, neither Hoffman, in the audit, nor the Commission in its final Decision, referenced any Missouri appellate decision, Department ruling, guideline or regulation, specifically providing that a taxpayer was negligent, within the meaning of Section 144.250.3, so as to impose a penalty, where the taxpayer failed to double check its sales figures prior to reporting them to the Department. No provision of the Sales Tax Act so provides, including Section 144.250, authorizing the imposition of a penalty against a taxpayer in certain instances. **RSMo** §144.250. To meet

basic standards of due process, and avoid being arbitrary and unreasonable, an administrative agency's decision must be based on objective data, rather than surmise or speculation. ***Mo. Natl. Ed. Assoc.***, 34 S.W.3d at 281. An agency must not act in a subjective manner without any guidelines or criteria. ***Id.*** However, that is exactly what the auditor and the Commission did herein. Since neither the auditor nor the Commission based the imposition of a penalty on objective criteria and guidelines, such as Department rulings, regulations and decisions, or appellate cases, the decision to impose a penalty was arbitrary, capricious, unreasonable, and served to deny SEBA's substantive right to due process. ***Id.*** In imposing a penalty, the Commission acted in an unlawful manner. ***Mo. Natl. Ed. Assoc.***, 34 S.W.3d at 280-281.

The audit was bare of any statutory or case authority, specifically providing that failure to double check sales figures was a sufficient basis on which to assess penalties against a Missouri taxpayer. The audit contained no indication that imposing a penalty solely for a taxpayer's alleged failure to double check sales figures was warranted under Department guidelines regarding assessment of a penalty. It is important to remember that Hoffman conceded such Department guidelines existed, but also conceded she did not review or check those guidelines when finding a penalty appropriate for this reason. (Tr.81,108-109).

On reviewing the audit, there does not exist therein any legal authority, whether in the form of a Department ruling, regulation, guideline, or decision from the Missouri Court Of Appeals or Supreme Court, providing the Department may impose a penalty on a taxpayer for the taxpayer's alleged failure to double check their sales figures when

reporting those figures on sales tax returns. Since the audit contained no authority for the imposition of a penalty under these circumstances, the penalty imposed under Section 144.250.3 was unauthorized by law. **RSMo** §621.193;***Brambles Ind.***, 981 S.W.2d at 570.

The same can be said for the Commission's Decision, affirming the auditor's imposition of a penalty. In its final Decision, the Commission found SEBA was negligent in reporting its sales tax figures to the Department. Specifically, the AHC found SEBA was negligent in failing "to keep adequate records." (L.F.121-122). While the Commission concluded SEBA was negligent "in not reporting its full taxable sales," other than SEBA's alleged failure to keep adequate records, the Decision fails to set forth, with any particularity, how SEBA was negligent in reporting its taxable sales to the Department. (L.F.121-122).

To the extent the Commission found SEBA failed to keep adequate records of its taxable sales, and to the extent this finding served as the basis for the Commission's affirmance of a penalty, the finding must be set aside. On reading both the audit and the Commission's Decision, it appears the Commission's conclusion SEBA failed to keep adequate records was premised on its findings that SEBA failed to turn over all of the cash register receipts for July 2015, that cash register receipts were missing for that month, and that there should have been 1,555 receipts for July 2015. These findings were made by the auditor, and adopted by the Commission. (L.F.116-118).

As discussed in Point I *infra*, other than speculation, conjecture and assumption unsupported by the record, there is no evidence that cash register receipts were, in fact, missing for July 2015 or that SEBA should have provided 1,555 receipts to the auditor for

that month. In this regard, it is crucial for the Court to keep in mind the auditor's admissions that her findings were based on possibilities, and that she saw no evidence Eddie's made the number of donuts during July 2015 to substantiate the figures she utilized in her audit. (Tr.90-92). The Commission's finding that SEBA failed to keep adequate records, being based on speculation rather than on competent and substantial evidence, that finding could not serve as the basis for imposition of a penalty under Section 144.250.3. ***Myron Green Corp.***, 567 S.W.3d at 164;***Baldwin***, 199 S.W.2d at 358.

Relatedly, in finding a penalty was appropriate for SEBA's alleged failure to keep adequate records, the Commission, like the auditor, failed to provide any relevant legal authority to support imposition of a penalty on these grounds. (L.F.121-122). In particular, the Commission failed to cite any appellate decision or Department ruling, which could support the imposition of a penalty under the circumstances of the instant case. Nor did the Commission cite any appellate decision or Department ruling regarding the nature of the records a taxpayer must keep or retain to properly document its taxable sales. In short, the Commission failed to cite any relevant legal authority, setting standards for the keeping of adequate taxpayer records regarding taxable sales, and actions or conduct by Missouri taxpayers which fall short of those standards. (L.F.121-122).

The failure of both the auditor and Commission to cite any relevant case authority to support the imposition of a penalty is significant. As the cases discussed above, including ***Lora***, ***Lynn*** and ***Hiett*** demonstrate, there exist Missouri decisions discussing taxpayer neglect or negligence for the purpose of imposing a penalty under Section 144.250.1, and application of the statute of limitations in Section 144.220, which contain

terms similar to those permitting the imposition of a penalty in Section 144.250.3. While these cases, and others exist, providing guidance on what may constitute taxpayer negligence for purposes of Section 144.250.3, neither the auditor, nor the Commission which affirmed the auditor's imposition of a penalty, cited or discussed any of these case authorities, and whether the penalty imposed herein was consistent with those decisions, and authorized by the rulings of the Court therein. (L.F.121-122).

In particular, the Commission failed to discuss ***Lora***, ***Lynn***, and ***Hiett.*** Therein, the Court discussed a taxpayer's reliance on professional advice, such as that provided by an attorney or accountant, and the consequences of a taxpayer's decision to reject or ignore that advice. The Commission's failure was significant, given the undisputed evidence that Brad Artega, owner of SEBA, had sought out professional advice and relied upon the same in the preparation and reporting of SEBA's sales tax returns. Given the existence of this Supreme Court precedent, and given the failure of the Commission to consider or rely on the same in determining whether a penalty was appropriate, the propriety of the penalty must be questioned. Because the Commission failed to rely on available Missouri precedent in affirming the auditor's imposition of a penalty under Section 144.250.3, the Commission's affirmance of the penalty was unauthorized by law. As such, the penalty must be set aside. **RSMo** §621.193;***Brambles***, 981 S.W.2d at 570.

Unlike the Hietts and Lynn, SEBA sought out, and acted consistently with, the professional advice provided to it. Specifically, SEBA sought out and obtained an accountant and tax preparer for Eddie's, and relied on that accountant to prepare and file all of the sale tax returns for that business, since its inception in 2007. (Tr.46,56-59). There

has been no suggestion of, and there exists no evidence to show, that SEBA and its sole owner, Brad Artega, did not act reasonably and in good faith in preparing and filing sales tax returns on behalf of Eddies's. Nor is there any evidence, whatsoever, that either Brad Artega or Joseph Otten intentionally underreported Eddie's retail sales. Absent herein is any competent or substantial evidence that SEBA's sole owner, Artega, or its accountant, Joe Otten, acted with the intent to evade, deceive, or mislead taxing authorities. At all relevant times, both before and during the audit period, Artega and Otten exercised reasonable prudence, and acted in good faith. ***Lora***, 618 S.W.2d at 632.

As Brad Artega's testimony indicates, he reasonably believed SEBA was fulfilling its duty to pay the required sales taxes to the state. Absent in the record is any evidence showing Artega, or Otten for that matter, willfully or intentionally sought to avoid Eddie's obligations under Section 144.020.1 to pay the necessary sales taxes on the gross receipts generated by Eddie's. Missing herein is any competent or substantial evidence to show Eddie's consciously or intentionally acted in a manner to violate Missouri sales tax statutes, or with an intention to do anything other than fully satisfy its obligation to pay sales taxes under Section 144.020.1. ***Id.***

The instant facts are distinguishable from those in ***Gammaitoni v. D.O.R.***, 786 S.W.2d 126,132 (Mo.banc.1990), where the taxpayer made no attempt to ascertain what their tax liability was, or to remit the appropriate taxes to the Department. Gammaitoni ran Video Tech, a sole proprietorship which produced television commercials and videotape presentations, instructional videotapes, accident reconstruction tapes, and depositions. ***Gammaitoni***, 786 S.W.2d at 128. It duplicated tapes for other businesses, and provided

editing and audio engineering for a manufacturer on tapes produced by another company. After auditing Videotech, the Director assessed additional sales and use tax, and penalties. ***Id.*** Gammaitoni asserted sales of original and duplicate videotapes were not subject to Missouri sales tax, arguing they were non-taxable services, rather than sales at retail. ***Id.*** Rejecting this argument, the Court found it was the finished videotapes themselves, which were the object of the transaction, and thus, sales of the videotapes were subject to Missouri sales tax as taxable, personal property. ***Gammaitoni***, 786 S.W.2d at 130. Gammaitoni contended no penalties were warranted. ***Gammaitoni***, 786 S.W.2d at 132. To uphold the imposition of penalties under Section 144.250.1, the Director had to show Video Tech failed to pay taxes due because of willful neglect, evasion or fraudulent intent. Gammaitoni did nothing to ascertain what her tax liabilities were, and in many transactions where it should have been clear to Gammaitoni tax was due, such as in the sale and rental of blank videotapes, she did not collect or remit any tax. Since this conduct fell into the category of willful neglect, the assessment of penalties was appropriate. ***Id.***

And, unlike the Hietts, SEBA and its owner, Artega, made a reasonable attempt to comply with Missouri sales tax law. ***Hiett***, 899 S.W.2d at 873. Specifically, Brad Artega chose not to rely on his own lay judgment in regard to the amount of sales taxes Eddie's owed to the Department, but rather, chose to rely on the professional advice of his bookkeeper and tax accountant, and to act in accordance with that professional advice. Unlike the Hietts, Artega did not spurn the professional advice of SEBA's accountant, or take a different course of action, rather than that Otten suggested. ***Hiett***, 899 S.W.2d at 873-874.

In looking at the reasonableness of SEBA's conduct, it must be noted that Artega provided Otten, his tax preparer and accountant, with all the records Otten requested for preparation of SEBA's sales tax returns, and there exists no evidence Artega ever withheld any information requested by Otten, or at any time deceived or mislead Otten as to the amount of Eddie's gross receipts and taxable sales. Rather, Artega provided all of the information necessary for Otten to prepare SEBA's tax returns. Otten, at no time either before or during the audit period, ever requested any information regarding Eddie's sales or receipts which Artega refused to provide. (Tr.26,29-30,59-63). Nor does the instant case present the scenario which was present in ***Lynn***, where the taxpayer had been previously put on notice of a tax assessment or deficiency, and took no action in regard to a potential tax liability, and did not follow the professional advice of his attorney in regard to his tax liability. ***Lynn***, 689 S.W.2d at 49-50.

Significantly, Brad Artega, sole owner of SEBA, was not in the same situation as was the taxpayer in ***Lynn.*** As the concurring opinion in ***Lynn*** noted, the taxpayer therein, Lynn, was an experienced businessman with several business interests who paid sales taxes on all of his business. Given this fact, and given the fact Lynn chose to ignore his attorney's warning he should prepare himself for the collection of taxes, the imposition of a penalty against Lynn was appropriate. ***Lynn***, 689 S.W.2d at 50. Conversely, herein, Artega, was neither a seasoned or experienced businessman, and chose to follow, rather than reject, the professional tax advice provided to him. ***Lynn***, 689 S.W.2d at 50. SEBA having acted reasonably, in good faith, and consistent with the professional advice of its accountant as

to its liability for sales tax, it did not acted negligently, and the penalty against it must be set aside. ***Lora***, 618 S.W.2d at 632; ***Boyle***, 105 S.Ct. at 692-693.

CONCLUSION

The Commission's Decision must be reversed. Its assessment of sales tax is unsupported by competent and substantial evidence. The imposition of a penalty was unauthorized by law. Moreover, SEBA was not negligent within the meaning of Section 144.250.3, since it reasonably relied on professional advice. Accordingly, both the Assessment and the penalty must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing document was filed with the Missouri Electronic filing system this 22nd day of July, 2020, which will send a copy to: Thomas Arthur Houdek, attorney for Respondent, at 301 West High Street, Room 670, P.O. Box 475, Jefferson City, Missouri 65105; and Emily Dodge, attorney for Respondent, at P.O. Box 899, Jefferson City, Missouri 65102.

/s/ Mary Anne Lindsey

CERTIFICATE OF COMPLIANCE

This Substitute Appellant's Brief complies with Rule 84.06(b) and contains 21,591 words. To the best of my knowledge and belief, the copy of the Brief forwarded to the Clerk of the Court, via electronic mail, has been scanned for viruses, and is virus-free.

/s/ Mary Anne Lindsey