

Summary of SC90463, *Brinker Missouri, Inc v. Director of Revenue*

Petition for review from the administrative hearing commission, Commissioner Nimrod T. Chapel Jr.

Argued and submitted April 15, 2010; opinion issued Aug. 31, 2010

Attorneys: Brinker was represented by Ann K. Covington, Edward F. Downey and Carole L. Iles of Bryan Cave LLP in Jefferson City, (573) 556-6622; and the director was represented by Deputy Solicitor General Jeremiah J. Morgan of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A company seeks review of the administrative hearing commission's decision determining that its purchases of kitchen equipment and other items were not exempt from use tax. In a 6-1 decision written by Judge Laura Denvir Stith, the Supreme Court of Missouri affirms the commission's decision. The company does not qualify for the "production" exemptions because its restaurants are not "plants" and because its equipment is used to prepare and serve food rather than manufacture a product. The company also does not qualify for the "sale" exclusion or "resale" exemption because it neither permanently transfers nor charges its customers an additional consideration for giving its customers the temporary use of its restaurants' chairs, bar stools, tables, menus, dishes, tableware, glassware, booster seats, high chairs and similar items. In a dissenting opinion, Chief Justice William Ray Price Jr. would hold the company is entitled to the exemptions because its restaurants are "plants" and its process is "manufacturing" under this Court's previous broad interpretation of these statutes.

Facts: Brinker Missouri Inc. owns and operates 23 restaurants in Missouri. Each restaurant prepares and sells food and drink to the public and is subject to Missouri sales and use tax where applicable. During the relevant period, Brinker purchased what it refers to as "kitchen machinery, equipment and parts" that it used to prepare food and drinks for its customers and to refrigerate or heat them pending serving. Also during the period at issue, the restaurants run by Brinker were furnished with chairs, bar stools, tables, menus, dishes, tableware, glassware, booster seats, high chairs and similar items. Customers were served meals on the plates while sitting at the tables and using the silverware and glasses, as in other restaurants. The cost of these items was included in each restaurant's overhead. Brinker initially paid use tax for the period October 2003 through December 2004, but in October 2006, Brinker sought a refund of about \$54,000 of the use tax it had paid. The director of revenue denied nearly \$49,000 of the claim. Brinker sought the commission's review of the denial of about \$44,200 of that amount, arguing an exemption applied under sections 144.030.2(4) and (5) and section 144.615(6), RSMo, on the kitchen equipment used to make food and prepare it for serving customers as well as on furniture, silverware, plates and similar items it used to serve its customers food. The commission denied Brinker's claim. Brinker seeks this Court's review.

AFFIRMED.

Court en banc holds: (1) The commission correctly determined that Brinker’s purchases of kitchen equipment and other items were not exempt from use tax pursuant to sections 144.030.2(4) and (5). Exemptions are construed narrowly, and it is the taxpayer’s burden to show they apply. Brinker does not qualify for an exemption under section 144.030.2(5), which expressly states that the equipment in question must be used for new or expanded plants that manufacture, mine or fabricate products intended to be sold ultimately for final use or consumption by others. The restaurants Brinker operates are not plants. Brinker does not qualify for an exemption under section 144.030.2(4) because it is available only for equipment used directly in manufacturing, mining, fabricating or producing a product that is intended to be sold ultimately for final use or consumption. Here, Brinker’s restaurants prepare, cook and serve food and drink to their customers; they do not manufacture, mine, fabricate or produce food or drink. This more common meaning is consistent with the legislature’s treatment of the concepts of “restaurant” and “food” in other statutes.

(2) The commission correctly determined that Brinker’s purchases of chairs, bar stools, tables, menus, dishes, tableware, glassware, booster seats, high chairs and similar items – which Brinker used to supply food to the customers of its restaurants – did not qualify for a sales exclusion or resale exemption under sections 144.615.6 or 144.605(13). For a transaction to constitute a sale or resale, three elements must be satisfied: a transfer, barter, or exchange; of the title or ownership of tangible personal property, or the right to use, store, or consume the same; for consideration paid or to be paid. Here, there was no transfer of title, ownership or the right to use the items because Brinker customers only acquire *de minimus* temporary use; the items are used as a mechanism to deliver their food and drink, and this degree of control does not rise to the level of an actual transfer of a right to use. The plates, tables and chairs are not transferred to customers in any real sense any more than a piece of the restaurant floor is transferred to a customer when he or she walks on it. Further, in those few cases finding a sale takes place absent a permanent transfer of possession and title, the taxpayer did not merely incorporate the cost of the items in overhead, as Brinker has done here, but charged an additional consideration for the right to use the item for an extended period.

Dissenting opinion by Chief Justice Price: The author would hold Brinker is entitled to tax exemptions under sections 144.030.2(4) and (5). He disagrees with the principal opinion’s conclusion that restaurants are not “plants.” This term, which is not defined in the statute, is defined in part in the dictionary as a place where employees carry on a trade. Cooking and preparing food is a trade that requires manual skill and training, and Brinker’s restaurants fit within the statutory language of the statutory description of manufacturing plants and their processes, which this Court’s prior decisions repeatedly have given a broad interpretation. The author also disagrees with the principal opinion’s conclusion that Brinker does not manufacture a product. This Court repeatedly has allowed a broad interpretation of what output is sufficient to constitute manufacturing. Like in *Wilson & Co., Inc. v. Department of Revenue*, 531 S.W.2d 752, 755 (Mo. banc 1976), Brinker’s restaurants take raw ingredients and transform them into items that are ready for human consumption and that generally are twice as valuable as the ingredients.