

Summary of SC91471, *Krispy Kreme Doughnut Corporation v. Director of Revenue*
Appealed from the administrative hearing commission, Commissioner Karen A. Winn
Argued and submitted Sept. 8, 2011; opinion issued Dec. 20, 2011

Attorneys: Krispy Kreme was represented by Igor Timofeyev of Paul, Hastings, Janofsky & Walker LLP in Washington, D.C., (202) 551-1700, and Edward F. Downey of Bryan Cave LLP in Jefferson City, (573) 556-6622; the director was represented by Jeremiah J. Morgan, deputy state solicitor for the attorney general's office in Jefferson City, (573) 751-3321. The Retail Bakers of America and American Bakers Association, which filed a brief as friends of the Court, were represented by Miriam J. Guggenheim of Covington & Burling LLP in Washington, D.C., (202) 662-5235.

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 an administrative hearing commission's summary decision for the director of revenue regarding a sales tax issue. In a 7-0 decision written by Judge William Ray Price Jr., the Supreme Court of Missouri affirms the commission's decision in part, reverses it in part and remands (sends back) the case, holding that neither party was entitled to summary decision. Food "prepared ... for immediate consumption on or off the premises," as used in the statute authorizing a lower sales tax for certain food sales, includes all food that is eaten at the place of preparation and purchase, while traveling away from the place of preparation and purchase, and immediately upon the arrival at another location without any further preparation. The commission, on remand, is to apply this definition.

Judge Edward Sweeney, a judge of the 22nd Judicial Circuit (St. Louis city), sat in this case by special designation to fill a then-vacancy on the Court (from before the appointment of Judge George W. Draper III).

Facts: Krispy Kreme Doughnut Corp. operates four retail stores in Missouri, with most of its sales coming from doughnuts cooked on the premises. Each store also sells coffee beans, ground coffee, coffee drinks, hot chocolate, milk, bottled water, juices and soft drinks. Until 2006, Krispy Kreme charged its customers a general 4-percent sales tax for all of its retail sales. It subsequently sought from the director of revenue a partial refund of taxes paid between 2003 and 2005. In its refund claim, Krispy Kreme asserted that products such as coffee that clearly are intended for home use, products the individual store did not prepare and doughnuts cooked in the stores are entitled to a special 1-percent state sales tax that applies to some food sales. The director denied the refund in May 2006, and the company sought review from the administrative hearing commission. In summer 2010, each party filed a motion for summary decision before the commission, which denied Krispy Kreme's motion and sustained the director's motion. Krispy Kreme seeks review from this Court.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Court en banc holds: Because neither party demonstrated that it was entitled to a favorable decision based on a correct understanding of the substantive law, neither party was entitled to summary decision, and the commission erred in determining otherwise. Section 144.020, RSMo, establishes a general tax of 4 percent on every retail sale of tangible personal property, while section 144.014, RSMo, imposes a 1-percent tax on the retail sale of “food.” Section 144.014.2 lays out a two-part test for determining when the reduced tax rate applies. Part one of the test determines whether certain food products qualify for the reduced rate, while part two – also known as the “80/20 test” – determines whether certain stores are eligible to charge its customers the reduced rate. The director here does not dispute the commission’s finding that Krispy Kreme’s request qualifies under the first part of the test. Whether it qualifies under the second part of the test depends on the application of the words “food prepared by such establishment for immediate consumption on and off the premises,” as used in section 144.014. No interpretation offered by either party as to these words is correct. Giving the words their full effect, the fact that the words “on or off the premises” modify “immediate consumption,” it becomes clear that “immediate consumption” is not an abstract concept regarding food that could be consumed immediately but rather is a concrete event in which food actually is consumed at the time of purchase or within the time necessary to travel to another location “off the premises.” Accordingly, the language of the statute includes all food eaten at the place of preparation and purchase, while traveling away from the place of preparation and purchase, or immediately upon the arrival at another location without any further preparation by the purchaser. The commission is to apply this definition to the facts developed by the parties on remand to determine whether Krispy Kreme is entitled to a refund.