IN THE SUPREME COURT OF MISSOURI

No. SC91283

WEHRENBERG, INC., Appellant,

v.

DIRECTOR OF REVENUE, Respondent.

ON PETITION FOR REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE SREENIVASA RAO DANDAMUDI, COMMISSIONER

APPELLANT'S BRIEF

COOK & RILEY, LLC

Daniel J. Cook, #39447
Scott R. Riley, #41898
1900 Locust St., Ste. 300
St. Louis, Missouri 63103
dcook@cookrileylaw.com
sriley@cookrileylaw.com
Telephone: (314) 241-3314
Facsimile: (314) 241-3314

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISSOURI CONSTITUTION, STATUTES, AND REGULATIONS

MISSOURI CASES

FEDERAL CASES AND STATUTES

MISCELLANEOUS AUTHORITIES

JURISDICTIONAL STATEMENT

This case involves the construction of §144.014[1], a revenue law of the state of Missouri. Therefore, this court has exclusive jurisdiction over this appeal pursuant to Article V, Section 3 of the Missouri Constitution. Specifically, the issue before the Court in this appeal is whether certain food sales made at Appellant's Missouri movie theatres qualify for the one percent (1.0%) sales tax rate imposed by §144.014, a tax imposition statute and part of the Missouri Sales Tax Law.

[1] All statutory citations in this Brief are to the Revised Statutes of Missouri of 2000, as amended, unless otherwise noted.

STATEMENT OF FACTS

At issue in this appeal is whether Wehrenberg, Inc.'s ("Appellant") sales of certain food items at its Missouri theatres qualify for the one percent (1.0%) state sales tax rate imposed by §144.014, RSMo. The Administrative Hearing Commission determined that Appellant did not qualify to sell any food at the reduced Missouri sales tax rate based on its determination that Appellant did not meet the "80/20 test," a condition precedent to imposition of the one percent (1.0%) sales tax rate on food.

At all times relevant to this dispute, Appellant operated a chain of movie theatres, including theatres in the state of Missouri. (Tr. 68-69). In each theatre, Appellant operated one or more concession stands. The legal entity that operated both the theatres and the concession stands located inside the theatres was Wehrenberg, Inc. (Tr. 49-52). The employees that operated the Missouri theatres and those employees that operated the concession stands were all employed by Wehrenberg, Inc.

During the periods at issue, Petitioner operated twelve different Missouri theatres. (Tr. 67). On its monthly Missouri sales tax returns, Appellant reported both the gross receipts from its box office sales and the gross receipts from sales of food made at its concessions stands.[2] (Tr. 50; Pet. Ex. 1).

[2] Wehrenberg's Missouri sales tax returns also reported gross receipts from other smaller revenue streams such as arcade revenues, theatre rental revenues and advertising revenues. However, these other revenue streams are not part of this controversy.

Appellant reported its total gross receipts from all twelve (12) Missouri theatres on a single Missouri sales tax return filed monthly with Respondent. (*See* Pet. Ex. 1). Respondent assigned to Wehrenberg a single Missouri Taxpayer Identification Number (MITS number). Appellant's single monthly sales tax return is filed with Respondent using the MITS number Respondent assigned. The monthly sales tax return filed by Appellant contains gross receipts from ALL revenue streams received during the month. These revenue streams include, among others: box office receipts, concession stand and vending machine receipts. (See Pet. Ex. 1).

Each of Wehrenberg's twelve (12) theatre locations was identified on Wehrenberg's sales tax returns by its physical address (i.e. its street address). (Pet. Ex. 1). The gross receipts from each theatre location were further identified by a "local sales tax code" on the face of the returns.[3] (Pet. Ex. 1). The local sales tax code is used to

[3] For example, the Des Peres 14 Cine is identified on the amended Missouri sales tax returns by its physical address (12,800 Manchester Rd., Des Peres) and by the City and County code (the code for St. Louis County is "189" and the City code for Des Peres is "19270"). The third code "0045" is assigned by Respondent to differentiate tax rates within a given political subdivision; for example if part of a municipality contains a transportation development district that has imposed a sales tax.

determine the rate of the local sales tax and to identify which taxing district(s) these funds will be distributed.[4] (Pet. Ex. 1).

The total amount of gross receipts from each physical theatre location was reported on a single line on Appellant's originally filed sales tax returns. (Pet. Ex. 1). On its amended Missouri sales tax returns, the gross receipts for each physical theatre

[4] There are no local sales taxes at issue in this matter. The only tax at issue is the state level tax. The state sales tax rate on qualifying food sales is stated in §144.014, RSMo as one percent (1.0%). Similarly, the "regular" (i.e for items other than food) sales tax rate imposed by §144.020.1(1) is nominally stated as four percent (4.0%). Nevertheless Petitioner will refer herein to the low tax rate (i.e. sales on qualifying food items) as 1.225% and the high tax rate on other sales of other products as 4.225%. The additional 0.225% tax applicable to both sales of qualifying food items and to other sales of tangible personal property is composed of: 1) the conservation sales tax of 0.125% imposed by Mo. Const. Art. IV §43(a) and 2) the water conservation and state parks sales tax of 0.10% imposed by Mo. Const. Art. IV §47(a). Thus, the statutory tax rates are respectively one percent (1.0%) on food and four percent (4.0%) on other tangible products, but to these statutory states sales tax rates must be added the two constitutionally imposed components of the Missouri sales tax which in sum are 0.225%. See also 12 CSR 10-110.990(1) wherein the low tax rate is stated as 1.225% and the high tax rate is stated as 4.225%.

location were broken out on two lines.[5] The second line contained "qualifying food sales" reported at the food sales tax rate imposed by §144.014, RSMo. The first line reported all other sales for each physical theatre location taxable at the rate imposed by §144.020.1(1). This first line contained all other revenue streams including food items that Appellant determined did not qualify for the one percent (1.0%) sales tax rate. (Pet. Ex. 1; Pet. Ex. 2; Pet. Ex. 3).

Respondent denied Petitioner's claim for refund on the following grounds: "This refund is being denied because food sold at movie theatres does not qualify for the reduced food tax rate under section 144.014, RSMo." Resp. Ex. B at p. 4 (Form 472B). Respondent did not raise the argument that Appellant operates two distinct "establishments" (or store-within-a-store) until after the trial had concluded. Additionally, in its opening statement to the Administrative Hearing Commission, Respondent stated the issue was whether the food being sold was for home consumption.[6]

---

[5] This is consistent with the instructions to the Missouri sales tax return (Form # 53-1) which provide: "List each of your business locations in this column. Report 'item taxes,' such as the food tax on the second line for each business location."

[6] "[W]hat federal laws require is that the food be for home consumption when its purchased. Obviously, we believe that Petitioner operates a movie theatre. The concessions sales are intended for consumption either during the movie or at the theatre itself. If that's the situation, it's not intended for home consumption and it wouldn't qualify for the lower tax rate in 144.014. That's it." (Tr. 16).

Finally, when Mr. David Zanone was cross examined by Mr. Clements, the only testimony elicited by Respondent's counsel regarding Respondent's policies regarding the taxation of food related to Respondent's position that the food had to be for home consumption.[7] The store-within-a-store issue was first raised by Respondent in its brief filed with the Administrative Hearing Commission.

During the periods at issue, Appellant derived thirty-two percent (32%) of its gross receipts from concession sales, sixty-four percent (64%) from box office ticket sales, and the remainder from game rooms, theatre rentals, and advertising. (AHC Finding of Fact # 13; *see also* Pet. Ex. 14). The evidence also showed that Petitioner's sales of food were never above fifty percent (50%) of its gross receipts for any theatre during any of the periods at issue. (Tr. 53-54). Petitioner used a point of sale system (POS system) at its theatres that integrated all of its sales both from box office receipts and concession stand receipts that allowed it to track exactly how much receipts it received from each of these sources.[8] Finally, the Administrative Hearing Commission

[7] Mr. Dave Zanone was produced by the Respondent in response to a subpoena issued by Appellant to the Director or Revenue seeking a witness who could testify regarding Respondent's policy(ies) employed in the administration of §144.014. See Transcript at p. 130.

[8] See transcript at page 64 cross examination of Mr. Mark Rygelski CFO of Wehrenberg. Question from Mr. Clements: Are [the receipts from the concession area and the box office] all kept separate? Answer from Mr. Rygelski: We have a point of sale system

found that if the entire theatre is viewed as an establishment that Appellant would meet the requirements of the 80/20 test since less than eighty percent of its gross receipts would be received from food it prepared for immediate consumption.[9]

STANDARD OF REVIEW

The decision of the Administrative Hearing Commission shall be reversed if: (1) it is not authorized by law; (2) it is not supported by competent and substantial evidence; (3) a mandatory safeguard is violated or (4) it is clearly contrary to the reasonable expectations of the general assembly. Section 621.193. This Court reviews the AHC's interpretation of revenue laws *de novo. Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000). As §144.014 is a tax imposition statute, it should be strictly construed in favor of the taxpayer and against the taxing authority. *Goldberg v. Administrative Hearing Comm'n*, 609 S.W.2d 140, 144 (Mo. banc 1980)

---

which records every detail of the transactions. So we know exactly how much we sold from movie tickets[,] for each concession item by movie[,] by concession item [,] by size on a daily[/] hourly basis."

[9] *Wehrenberg, Inc. v. Director of Revenue,* AHC No. 09-0564RS at p. 6. "[I]f the entire theatre is viewed as the 'establishment,' the sale of food prepared by such establishment for immediate consumption on or off the premises of the establishment would not constitute more than eighty percent of the total gross receipts of the establishment."

POINT RELIED ON

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN RULING THAT APPELLANT IS NOT QUALIFIED TO SELL FOOD AT THE TAX RATE PROVIDED FOR IN SECTION 144.014 BECAUSE ITS DECISION IS NOT AUTHORIZED BY LAW UNDER SECTION 621.193 IN THAT APPELLANT'S CONCESSION STANDS ARE NOT ESTABLISHMENTS SEPARATE AND APART FROM THE THEATRES IN WHICH THEY ARE HOUSED FOR PURPOSES OF SECTION 144.014.2.

Goldberg v. Administrative Hearing Comm'n,

609 S.W.2d 140 (Mo. banc 1980);

President Casino, Inc. v. Director of Revenue,

219 S.W.3d 235 (Mo. banc 2007);

Section 144.014;

Section 136.300.

SUMMARY OF THE ARGUMENT

This case involves the construction of §144.014 a provision of the Missouri Sales Tax Law.[10] This Court reviews decisions of the Administrative Hearing Commission interpreting revenue laws *de novo*. Section 144.014 is a tax imposition statute and should be strictly construed in favor of Wehrenberg and against the taxing authority. The AHC freely admits that it failed to strictly interpret §144.014 in favor of Appellant and chose instead to "parse the statute" to reach a result the AHC determined was consistent with the General Assembly's intent.

The AHC's determination that Appellant's concession stands are "establishments" separate and apart from the theatres in which the concession stands operate is not supported by Missouri law and ignores the plain and ordinary definition of "establishment." The MDOR has never enforced §144.014 using this "store-within-a-store" concept. In fact, the MDOR's denial of Appellant's refund claim had nothing to do with the store-within-a-store concept.[11] The first time the MDOR even raised the

---

[10] §144.010.3, RSMo.

[11] On March 25, 2009 Respondent issued a denial of Appellant's refund claim under the signature of Mr. Dave Zanone. According to Mr. Zanone's letter, the reason Respondent denied the claim was: "This refund is being denied because food sold at movie theatres does not qualify for the reduced food tax rate under section 144.014, RSMo." Respondent's Ex. B at p. 4 (Form 472B).

store-within-a-store argument was in its brief to the Commission after the evidentiary phase had concluded.

The AHC's reasoning is convoluted because its basic premise, used as the touchstone for its decision, was that the legislature intended to exclude sales from "food service establishments" from the definition of "food" for purposes of §144.014. This premise is patently erroneous. The legislature did not exclude all food service establishments: just those food service establishments that receive greater than eighty percent (>80%) of their gross receipts from food they prepare for immediate consumption.

For purposes of administering the sales tax law Appellant is viewed as a single taxpayer with each theatre's physical address being separately broken out on the face of its Missouri sales tax returns. The definition of "establishment" used in the AHC's opinion is: "a place of business . . . with its furnishings and staff." All of the equipment in each theatre is purchased, operated and owned by Wehrenberg, Inc. All of the employees at each theatre location, including all of the concession stand workers, are employees of Wehrenberg, Inc. Each of Wehrenberg's twelve (12) Missouri theatres constitutes a separate "establishment."

Alternatively, if one looks to a layman's understanding of Appellant's business (an approach this Court recently advocated in *Brinker Mo., Inc. v. Director of Revenue,* 319 S.W.3d 433, 437-438 (Mo banc 2010)), the average person would view the concession stand as simply part of Appellant's theatre business and not as a "store-

within-a-store." Only through the use of strained or circuitous logic can one come to the conclusion that the concession stands are establishments separate and apart from the theatres which house them. However, as §144.014 is a tax imposition statute it must be strictly construed in favor of Wehrenberg and against Respondent. Strict construction of §144.014 means the concession stands cannot be considered "establishments" separate and apart from the theatres in which they are housed.

ARGUMENT

The statutory section at issue in this case is section 144.014.2, RSMo. The language of the statute reads:

> For the purposes of this section, the term "food" shall include only those products and types of food for which food stamps may be redeemed pursuant to the provisions of the Federal Food Stamp Program as contained in 7 U.S.C. Section 2012, as that section now reads or as it may be amended hereafter, and shall include food dispensed by or through vending machines. For the purpose of this section, except for vending machine sales, the term "food" shall not include food or drink sold by any establishment where the gross receipts derived from the sale of food prepared by such establishment for immediate consumption on or off the premises of the establishment constitutes more than eighty percent of the total gross receipts of that establishment, regardless of whether such

> prepared food is consumed on the premises of that establishment, including, but not limited to, sales of food by any restaurant, fast food restaurant, delicatessen, eating house, or cafe.

When this case was presented to the Administrative Hearing Commission, the evidence and the arguments focused exclusively upon the first sentence of §144.014.2:

> For the purposes of this section, the term "food" shall include only those products and types of food for which food stamps may be redeemed pursuant to the provisions of the Federal Food Stamp Program as contained in 7 U.S.C. Section 2012, as that section now reads or as it may be amended hereafter, and shall include food dispensed by or through vending machines.

Background:

The arguments and the evidence presented sought the Administrative Hearing Commission's conclusions on whether the certain food sold by Appellant met the definition of "food" and, therefore, should be taxed at the one percent state rate provided for in §144.014.1. The Commission failed to reach this issue. Instead the Commission was sidetracked by an argument made for the first time in Respondent's Brief before the Commission that Appellant did not meet the 80/20 test.

What we refer to today as "the 80/20 test" is the language in §144.014.2 that allows certain establishments to uniformly charge the high state sales tax rate of 4.0%.[12] In order for an establishment to be qualified to charge the low state sales tax rate of 1.0%, the establishment must receive greater than eighty percent (>80%) of its receipts from food prepared by the establishment for immediate consumption on or off of its premises. The evidence in the instant case was that consistently from period to period and from theatre to theatre Wehrenberg received sixty-four percent (64%) of its total gross receipts from the sale of movie tickets and it received just thirty-two percent (32%) of its gross receipts from the sale of food, and that at no time did gross receipts from food reach fifty percent (50%) of the total gross receipts for any single theatre during any of the months at issue.[13]

Because of this breakdown of Wehrenberg's gross receipts at each of its Missouri theatres it was assumed by the parties that there was no dispute that Appellant qualified to sell food at the low tax rate since more than sixty-four percent (64%) of its gross receipts came from sources other than the sale of food. Certainly this issue was never

[12] The 80/20 test was inserted into the law in 1999. This amendment also introduced the term "establishment" into §144.014.2.

[13] Transcript at pages 52-54 testimony of Mr. Mark Rygelski regarding Petitioner's Exhibit 14 a pie chart showing the make up of Appellant's sources of gross receipts. See also the AHC's finding of fact # 13.

raised by the Respondent at any time prior to its briefing of this case at the Administrative Hearing Commission.

Failure to Raise*:*

It was not appropriate for Respondent to raise a new theory of the case for the first time in its Reply Brief submitted to the Administrative Hearing Commission. The argument that the 80/20 test should be applied to just concession stand sales as opposed to the total sales of each theatre was raised for the first time by Respondent on page 21 of its brief filed with the Commission—this argument will be referred to herein as the "store-within-a-store argument."

Petitioner was never put on notice that Respondent questioned its ability to pass the 80/20 test until after the close of the trial. The refund denial letter sent to Appellant simply stated: This refund is being denied because food sold at movie theatres does not qualify for the reduced food tax rate under section 144.014, RSMo.[14] Respondent's opening statement presented to the AHC provides further evidence that the store-within-a-store theory was just an afterthought thrown into the Respondent's Brief at the Administrative Hearing Commission. During its opening statement before the Administrative Hearing Commission, counsel for Respondent framed the issue as follows:

[14] Respondent's Ex. B at p.4 (Form 472B).

> So what the federal laws require is that the food be for home consumption when it's purchased. Obviously we believe that Petitioner operates a movie theatre. The concession sales are intended for consumption either during the movie or at the theatre itself. If that's the situation, it's not intended for home consumption and it wouldn't qualify for the lower tax rate in §144.014. That's it.

Transcript at page 16.

Even more demonstrative that the store-within-a-store argument was merely an afterthought tossed into Respondent's AHC brief is the brief itself. Respondent's brief filed with the AHC contained twenty-five (25) pages and the "store-within-a-store" theory constituted slightly more than one page of Respondent's brief near the very back of the brief.[15]

Respondent's Previous Administration has not Required a Store-within-a-Store Analysis***:***

Not only did Respondent fail to timely raise the store-within-a-store argument in this case, but Respondent has never administered §144.014 so as to require a store-within-a-store analysis. Respondent's regulation 12 CSR 10-110.990 never suggests the store-within-a-store analysis and neither do any of Respondent's letter rulings dealing with §144.014, RSMo. Respondent's previous silence on this subject further corroborates that the store-within-a-store concept is one newly hatched by Respondent

[15] Respondent's Reply Brief to the AHC at pages 21-22.

and one that represents a change in the Respondent's previous policy in the administration of §144.014, RSMo. The short portion of Respondent's brief that was dedicated to the store-within-a-store argument contained no citations to any case law, regulation or even a letter ruling. Respondent's brief was void of authority to support the store-within-a-store argument because no such authority exists.

In fact, at least one letter ruling which Respondent made part of the record in Exhibit D, shows that Respondent chose not to employ its store-within-a-store theory. Part of Respondent's Exhibit D is letter ruling CL2328. Respondent issued this letter ruling on October 17, 2000. The facts upon which this letter ruling is based are contained in a single paragraph:

> Applicant operates a chain of retail grocery stores, a number of which are located in Missouri. The average store size exceeds 40,000 square feet. Applicant is primarily engaged in the sale of groceries for home consumption, but it also offers various other categories of sales for convenience. Some of Applicant's stores have service meat counters, prepared food counters, salad bars within the produce departments and deli counters. The salad bars offer some hot items, including soup. The prepared food counters also offer some hot items including rotisserie chicken and pizza. Applicant's stores have limited interior seating. When combined, sales from the meat counters, prepared food counters, salad bars and deli

counters constitute a small percentage of total store sales at any one of Applicant's stores.

Respondent concluded that the letter ruling Applicant should charge the reduced rate of tax on sales of cold food items at its deli counters and at its salad bars if the cold food items are sold "to go." In reaching this conclusion Respondent addressed the 80/20 test as follows: "The facts presented by Applicant indicate that its primary business activity is the sale of groceries. Only a small percentage of Applicant's gross receipts come from the sale of food at its meat counters, prepared food counters, salad bars and deli counters." When the Department of Revenue made the statement that only a small percentage of the Applicant's sales come from its sale of food it prepares, the Department was obviously taking into consideration all of the prepackaged food sold by the grocery stores. It was this prepackaged food sold throughout the aisles of the store that caused the Applicant to meet the 80/20 test. In other words, the Department of Revenue concluded that the Applicant grocer met the 80/20 test because, in its analysis, the Department did not treat the deli counters, salad bars as separate establishments from remainder of the store. The bottom line here was the MDOR did not employ a store-within-a-store analysis in letter ruling CL2328.

Why the 80/20 Test?:

Because there is no official legislative history in Missouri, Appellant cannot state with certainty why the General Assembly chose twenty percent (20%) as the dividing line between establishments responsible for collecting just the high tax and establishments

required to collect both the high and low rates of tax. If the establishment has gross receipts from sources other than food prepared by such establishment for immediate consumption that are equal to or greater than twenty percent (20%) of the establishment's total gross receipts, then the establishment must charge the low rate of tax on qualifying food. If the twenty percent threshold is not met, then the business must charge the high rate of tax on all food sales.

While the statute does specifically mention "restaurants," this 80/20 test applies to all business establishments "including, but not limited to sales of food by any restaurant." While some establishments will "fail" this 80/20 test and, as a result of such failure, must charge the high rate of tax on all sales, other establishments will "pass" the test and consequently must charge both the high rate and the low rate. Wehrenberg's theatres "pass" the 80/20 test and, as a result of passage, should charge the low rate of tax on all sales of qualifying "food" and the high rate of tax on other taxable gross receipts.

Based on the AHC's logic, the General Assembly intended that all restaurants should fail the 80/20 test. If this assumption is true, then the 80/20 test is a farce and the legislature would have performed a useless act. "[I]t is presumed that the legislature does not enact meaningless provisions." *Bartley v. Special School Dist.*, 649 S.W.2d 864, 867 (Mo banc 1983). The interpretation given by the AHC essentially redacts from the statute all of the text dealing with the 80/20 test. Such an interpretation runs afoul of the rule of statutory construction that "the entire legislative act must be considered together and all provisions must be harmonized, if reasonably possible, and every word, clause,

sentence, and section of an act must be given some meaning." *City of Willow Springs v. Missouri State Librarian*, 596 S.W.2d 441, 446 (Mo banc 1980).

Moreover, in statutory construction "[t]he primary rule ... is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning." *President Casino, Inc. v. Director of Revenue*, 219 S.W.3d 235, 240 (Mo. banc 2007) *quoting Nelson v. Crane*, 187 S.W.3d 868, 869-70 (Mo. banc 2006); *see also Cook Tractor v. Director of Revenue*, 187 S.W. 870, 873 (Mo. banc 2006)("This Court's primary responsibility in statutory construction is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Undefined words are given their plain and ordinary meaning as found in the dictionary in order to ascertain the intent of lawmakers.") (citations omitted). The Administrative Hearing Commission strayed from this primary rule of statutory construction by ignoring the plain language of §144.014. The Administrative Hearing Commission then compounded its error by failing to apply the dictionary definition of "establishment."

Definition of "establishment":

The Commission was so distracted by its bedrock assumption that commercial food establishments can never charge the low rate of tax, that it proceeded to endorse Respondent's newly minted store-within-a-store analysis. There simply is no statutory support for this analysis. The word "establishment" is not defined in Chapter 144 or in any of the Respondent's regulations. The dictionary definition of "establishment" as

quoted by the Commission on page seven of its decision is: "a place of business or residence with its furnishings and staff."

As applied to Wehrenberg, the place of business is the theatre. As the record establishes in this case, all of the employees of both the theatres and the concession stands were employed by Wehrenberg. On its Missouri sales tax returns, Wehrenberg reported its gross receipts from all sources of revenue based upon each theatre's "street address"/ "physical location" and all such revenues were reported to Respondent under the single Missouri taxpayer identification (MITS) number assigned to Wehrenberg by Respondent. Furthermore, when it comes to furnishings, these too were all owned by Wehrenberg, Inc. from the projectors showing the movies to the popcorn poppers at the concession stands.

Alternatively, this Court recently looked to a layman's perspective to assist in finding the plain and ordinary meaning of words in a statute. This Court stated: "In lay terminology, one does not speak of a restaurant as manufacturing or producing food or drink; instead, restaurants prepare, cook and serve food and drink to their customers." *Brinker Mo., Inc. v. Director of Revenue*, 319 S.W.3d 433, 437-438 (Mo banc 2010). In the present case, a layperson would not be likely to differentiate the concession stands operated by Wehrenberg as establishments separate and apart from the theatres in which they are located. This would also be consistent with the manner in which theatres hold themselves out to the public. If one wants to look up a theatre in a phone directory, one

looks under “movies” or “theatres,” not under “concessions.” Likewise, theatres tend to publish movie tables, not menus, to attract customers.

Change in Policy & Unexpected Decision:

The Department’s argument, that the concession stands represent establishments separate and apart from the theatres in which they are located (the store-within-a-store argument), represents a change in policy by Respondent. Pursuant to §32.053 any final decision of the director of revenue which is the result of a change in policy or interpretation by the department of revenue may only be applied prospectively.

Any decision by this Court or the Administrative Hearing Commission validating Respondent’s freshly minted store-within-a-store argument would also represent an unexpected decision pursuant to §143.903, RSMo. Appellant believes that no one should have been expected to foresee the “store-within-a-store doctrine” based on the statutory language drafted by the General Assembly.

Strict Construction of Tax Imposition Statutes:

As §144.014 imposes a tax, any ambiguity existent, should be found in favor of Wehrenberg and against the Respondent. Not only is the language of § 144.014 unambiguously a tax imposition statute[16], but Respondent does not even attempt to deny

[16] The language of §144.014.1 could not be clearer: “Notwithstanding other provisions of law to the contrary . . . the tax ***levied and imposed*** pursuant to sections 144.010 to

it. In fact, at page twenty-three (23) of its Brief filed with the Administrative Hearing Commission Respondent readily admits that §144.014 is a tax imposition statute and that this statute should be strictly construed in favor of Wehrenberg and against the Respondent. The exact language contained in Respondent's AHC Brief is: "**Wehrenberg correctly states in its brief that section 144.014, RSMo imposes a tax, and any ambiguity existing in its construction should be found in favor or the taxpayer and against the taxing authority**." Respondent's AHC Brief at p. 23 (emphasis added).

Tax imposition statutes must be construed strictly and narrowly against the taxing authority and in favor of the taxpayer. Section 136.300.1 provides: "With respect to any issue relevant to ascertaining the tax liability of a taxpayer all laws of the state imposing a tax shall be strictly construed against the taxing authority and in favor of the taxpayer." *See also Goldberg v. Administrative Hearing Comm'n*, 609 S.W.2d 140, 144 (Mo. banc 1980)("We are bound by the rule that all statutes relating to taxation are to be strictly and narrowly construed against the taxing authority and in favor of the taxpayer."); *Staley v. Director of Revenue***,** 623 SW2d 246, 250 **(**Mo. banc 1981)("**If the two interpretations of an 'occasional or isolated liquidation sale' by 'a non-business enterprise' were viewed as equally valid, the meaning asserted by petitioner would still be favored because it provides a tax-exemption of greater scope. Tax statutes are to be strictly**

144.525 . . . on all retail sales of food shall be at the rate of one percent." (Emphasis added).

construed in favor of the taxpayer and against the taxing authority.")(Emphasis added); *Old Warson Country Club v. Director of Revenue,* 933 S.W.2d 400, 403 (Mo. banc 1996)("An ambiguity in a statute imposing a tax must be resolved in favor of the taxpayer."); *Utilicorp United, Inc. v. Director of Revenue,* 75 S.W.3d 725, 727 at n. 5 (Mo. banc 2001); *Delta Air Lines, Inc. v. Director of Revenue*, 908 S.W.2d 353, 356 (Mo banc 1995)("Construing tax statutes as we must, in favor of the taxpayer and against the taxing authority, we reject the Director's interpretation . . .."). However, the Administrative Hearing Commission's decision completely ignores this rule of statutory construction and effectively amends §144.014 to require "a store-within-a-store analysis."

The AHC's Fundamental Error in Interpretation:

To borrow a term from the Supreme Court's opinion in *Mobil Oil Corp v. Commissioner of Taxes*[17], the linchpin of the Administrative Hearing Commission's determination was its conclusion that the General Assembly "expressed its intent that items sold by commercial food service establishments such as restaurants, fast food restaurants, delicatessens, and cafes do not come within the definition of 'food' for purposes of the reduced sales tax rate." AHC decision at p. 8. The plain text of §144.014.2 clearly refutes this bedrock assumption upon which the remainder of the Commission's opinion is constructed.

[17] *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 439 (1980).

The AHC then goes on to assert that Appellant must agree with this conclusion because certain foods which are described in the record as "restaurant style foods[18]" were excluded from Appellant's refund claim. However, this assertion is erroneous for two reasons.

First, Petitioner's Exhibit 1 demonstrates certain "restaurant style foods" actually were included in the refund claim.[19] Second, and more importantly, however, the reason the majority of the "restaurant style foods" were excluded from the refund claim is simply because these items were "hot foods or hot food products ready for immediate consumption." Federal law does not allow food stamps to be used to purchase hot foods and hot food products ready for immediate consumption. See 7 U.S.C. §2012(g). Hence, the restaurant style food items contemplated by the AHC—items such as hot dogs, hot wings, cheeseburgers and pizza among others (see footnote 18 supra), are "nonqualifying foods" at both the federal level (ability to buy with food stamps) and state level (cannot charge low tax). It is the temperature at which these "restaurant style food items" are

[18] Items that Petitioner classified as "restaurant style food" include the following: hot dogs, hot wings, cheeseburgers and pizza among others. (TR pp.21-24; Pet. Ex. 1). Restaurant style foods was a label given by Wehrenberg to track sales of certain food items in its point of sale system.

[19] Examples of restaurant style foods included in the refund claim are: latte shakes, Fred's sodas, ice coffee and various ice cream products. See Pet. Ex. # 1.

served that disqualified them, not the fact that these items might also be served at a restaurant.

Even the Respondent does not adopt the AHC's radical view of the General Assembly's intent regarding sales by restaurants. At page seventeen (17) of its brief filed with the Administrative Hearing Commission, Respondent addresses the 1999 amendment to §144.014 which added the 80/20 test to §144.014.2 as follows:

> The 1999 amendment [to §144.014] also did not affect those establishments that sold prepared cold foods or drinks for home consumption and whose sales of prepared cold foods or drinks were less than 80 percent of the establishment's gross receipts. Those establishments not meeting the 80 percent requirement were still [i.e. post amendment] to charge the reduced tax rate on its sales of cold food and drinks. (Emphasis in the original).

Thus according to the Respondent, restaurants that pass the eighty percent test, that is businesses that do not prepare more than eighty percent of the items they sell should continue to charge the low sales tax rate on qualifying "food."

The legislature could easily have accomplished the result that the Commission declared was its purpose in enacting §144.014.2. Such a hypothetical statute might have simply read: "For purposes of this section, the term 'food' shall not include any food sold by any restaurant, fast food restaurant, delicatessen, eating house, or café." The very fact that the general assembly chose not to use this simple and clear cut language requires this Court to find that the legislature must have meant something different. Additionally,

because §144.014 is a tax imposition statute, this Court should interpret it strictly against Respondent and in favor of Wehrenberg.

CONCLUSION

Wehrenberg's concession stands should not be viewed as establishments separate and apart from the theatres in which they are located. Each of Wehrenberg's Missouri theatre's earned far more than twenty percent (20%) of its gross receipts from sales other than food it prepared for immediate consumption on or off the premises. Each of Wehrenberg's Missouri theatres "passes" the 80/20 test and therefore meets the condition precedent to selling "food" within the meaning of §144.014. This Court should further find that as adopted by the General Assembly, §144.014 does not require food be for home consumption in order to qualify for the one percent tax rate imposed in §144.014.1.

COOK & RILEY, LLC

Daniel J. Cook, #39447
Scott R. Riley, #41898
1900 Locust St., Ste. 300
St. Louis, Missouri 63103
dcook@cookrileylaw.com
sriley@cookrileylaw.com
Telephone: (314) 241-3314
Facsimile: (314) 241-3314

Attorneys for Appellant

RULE 84.06(c) CERTIFICATION

The undersigned counsel certifies that this brief includes the information required by Rule 55.03, complies with the limitations provided for in Rule 84.06(b) and contains 6307 words.

_____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing brief, and one CD containing the foregoing brief were mailed, first class, postage prepaid, this 4th day of May, 2011, to:

Mr. James Layton
Solicitor General
P.O. Box 899
Jefferson City, Missouri 65102

_____

APPENDIX

Table of contents