SC91471

IN THE SUPREME COURT OF MISSOURI

KRISPY KREME DOUGHNUT CORPORATION,

Appellant,

vs.

DIRECTOR OF REVENUE,

Respondent.

On Petition for Review From
The Administrative Hearing Commission,
The Honorable Karen A. Winn, Commissioner

RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

JEREMIAH J. MORGAN
Deputy Solicitor General
Missouri Bar No. 50387
P.O. Box 899
Jefferson City, MO 65102
Telephone No. (573) 751-1800
Fax No. (573) 751-0774
Jeremiah.Morgan@ago.mo.gov

ATTORNEYS FOR RESPONDENT

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STATEMENT OF FACTS

During the tax periods at issue, April 1, 2003 through December 31, 2005, Krispy Kreme Doughnut Corporation owned and operated five different locations in Missouri. (LF 365). These "restaurants," as Krispy Kreme's own Securities and Exchange Commission filings characterize them, were located in Branson, Springfield (2), Kansas City, and Independence. (LF 305, 312-13, 365). In all material respects the retail operations were the same at each restaurant. (LF 365).[1/] Only four are still in operation today. (LF 365).

Each Krispy Kreme restaurant in this case consisted of a parking lot, front entrance, inside order and payment counter, inside display counter of doughnuts for sale, inside and outside seating area for customers, drive-through, and an electric neon sign in the window. (LF 304). The sign, well known to customers of Krispy Kreme, reads "HOT DOUGHNUTS NOW." (LF 304). The words "HOT" and "NOW" are only turned on for advertising when the original glazed doughnuts are being made and available for

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[1/] Krispy Kreme also prepares doughnuts separately for wholesale to retailers such as Walmart that resell the doughnuts in their stores. (LF 365). The preparation and sale of doughnuts for wholesale is not at issue in this case. (LF 365). Indeed, § 144.010.1(3), RSMo Supp. 2010, specifically defines "gross receipts" as receipts from "sales at retail."

customers. (LF 304). In addition to retail sales of doughnuts, Krispy Kreme also sells other food items such as coffee and related coffee drinks, hot chocolate, milk, bottled water, bottled juices, and other soft drinks, as well as bagged coffee beans and ground coffee. (LF 305).

A. Krispy Kreme Seeks a Refund Based on Three Different Theories.

For years, Krispy Kreme collected and remitted to the Department of Revenue sales tax from its retail customers at the general tax rate of four percent under § 144.020[2]. (LF 205). Section 144.020 provides, in part, that a tax is levied "[u]pon every retail sale in this state of tangible personal property" in the amount of "four percent of the purchase price paid or charged." § 144.020.1(1).

Krispy Kreme then discovered the lower tax rate of one percent in § 144.014, and alleged before the Commission that its "Missouri tax return preparer was unaware that Missouri had a lower sales tax rate that applied to sales of certain foods at its establishments in Missouri." (LF 270). Section 144.014 provides, in part, that "[n]otwithstanding other provisions of law to the contrary," the tax "on all retail sales of food shall be at the rate of one

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[2/] All statutory references are to RSMo Supp. 2010 unless otherwise noted.

percent." § 144.014.1. Section 144.014.2 goes on to define what constitutes "food" for purposes of the lower tax rate, and it is limited to "those products and types of food for which food stamps may be redeemed" under the Federal Food Stamp Program.

After discovering a potentially lower tax rate for its retail sales to customers, Krispy Kreme sought a refund of sales taxes already collected from customers. (LF 1-3). In its claim, Krispy Kreme sought a refund of the three percent difference between the general tax rate in § 144.020 and the lower tax rate in § 144.014, all on its prior retail sales of doughnuts, non-hot beverages, juices, milk, coffee beans, and ground coffee. (LF 3).

To support its refund claim, Krispy Kreme not only had to establish that it sold the types of food for which food stamps may be redeemed, but also that no more than 80% of its total retail sales were "prepared . . . for immediate consumption on or off the premises." § 144.014.2. In an effort to satisfy this burden, Krispy Kreme asserted three different theories before the Commission (LF 207-08), all based on the assumption that these sub-categories of doughnuts were supposedly <u>not</u> "prepared . . . for immediate consumption on or off the premises":

1. Doughnuts made one hour in advance of sale;
2. Doughnuts taken to other locations, such as work, church, and home; and

3. Doughnuts sold in quantities of 12 or more.

(LF 207-08).

In its first theory seeking the lower tax rate, Krispy Kreme analyzed its sales of doughnuts relative to the time that the preparation was complete and the doughnuts were ready for sale. (LF 216). Krispy Kreme determined that doughnuts prepared over one hour before they were actually sold, when combined with certain other sales, constituted over 20% of retail sales during the tax periods at issue. (LF 261-64, 366). Thus, Krispy Kreme selected the one hour threshold for this theory.

To support its second theory, Krispy Kreme performed a survey consisting of customer interviews to determine where they would be actually consuming their purchases. (LF 251-52). The information was compiled to determine, as a percentage of total retail receipts, the amount of sales for "off-premises" consumption where the customer was traveling to another place, such as a home, office, church, or park, before consuming the purchase. (LF 251-52). According to Krispy Kreme's customer surveys, over 20% of each location's total retail receipts were from sales of food or drink for "off-premises" consumption. (LF 251-52).

And finally, Krispy Kreme analyzed its sales data to determine the percentage of retail sales attributed to the sale of doughnuts in quantities of 12 or more. (LF 229). This number was then combined with the sale of

products not prepared by Krispy Kreme (e.g. ground coffee and coffee beans, bottled water and juice, bottles and cartons of milk, and bottled soft drinks), and together the amount exceeded 20% of its total retail receipts. (LF 229).

B. The Director and the Commission Deny the Refund Theories.

Based on these three different theories, Krispy Kreme originally calculated a refund of $324,237.33 in Missouri state sales tax. (LF 229). That total included $46,245.13 in taxes on sales of food and drink actually consumed on the premises. (LF 229). Therefore, after Krispy Kreme reduced its original claim by food and drink actually consumed on the premises, the refund claim totaled $277,992.20. (LF 229). This amount represents the three percent differential for sales of doughnuts, juices, water, milk, soft drinks, coffee beans, and ground coffee for a limited tax period at only a few fast food doughnut restaurants. (LF 250).

Krispy Kreme filed its refund claim with the Director of Revenue on May 11, 2006. (LF 3). The Director denied the claim and Krispy Kreme appealed. (LF 1-2). The Commission heard the case and issued its decision on December 23, 2010. In its decision, the Commission recognized that Krispy Kreme's theories were "premised on the assumption that the phrase 'for immediate consumption' means 'is immediately consumed.'" (LF 373). The Commission rejected this assumption, and as a result held that Krispy

Kreme "failed to meet its burden of proof to show that less than 80% of its stores' gross receipts derive from the sale of foods prepared for immediate consumption, regardless of where the food was consumed." (LF 378).

SUMMARY OF THE ARGUMENT

There is something fundamentally inconsistent with a company advertising "HOT DOUGHNUTS NOW" and then claiming that its doughnuts are not prepared for immediate consumption. Yet, in an attempt to take advantage of a lower tax rate intended for the types of food that can be purchased with food stamps, Krispy Kreme, a fast food doughnut restaurant, entirely misconstrues the statutory language at issue – § 144.014. Ironically, Krispy Kreme misconstrues the statute not in an effort to narrow it (and therefore exclude itself from the tax), but instead to expand it (and therefore pay the tax) in order to avoid a higher tax rate that would otherwise be applied to its retail sales. *See* § 144.020. This is contrary to the normal rules of construction, and should be rejected. *See Am. Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999).

The critical question in this case is whether more than 80% of Krispy Kreme's retail sales of doughnuts constitute food "prepared . . . for immediate consumption on or off the premises." § 144.014.2. Contrary to the plain language of the statute, Krispy Kreme would have this Court read the statute as requiring that its doughnuts be "consumed immediately after preparation." Appellant's Br., p. 14; *see also id.* p. 32 ("consumed at once"). Utilizing this incorrect construction of the statute, Krispy Kreme argues that it should therefore be subject to the lower tax rate because it assumes the

following doughnuts are not actually consumed immediately: doughnuts prepared one hour in advance of sale; sales taken by customers to other locations before consumption, such as work, church, and home; and, sales of 12 or more doughnuts. Appellant's Br., pp. 1-2, 15. These arguments fail in the face of the actual statutory language.

The plain language of the statute makes clear that the food must be "prepared . . . for immediate consumption on or off the premises," not that the food is in fact immediately consumed. § 144.014.2; *see Akins v. Dir. of Revenue*, 303 S.W.3d 563 (Mo. banc 2010). The focus of the statutory language is on the state of the preparation, not on the timing of the actual consumption. No doubt the legislature could have used different language and achieved the result Krispy Kreme urges. Indeed, in the same statutory section (and even in the very same sentence) the language selected by the legislature completely undermines Krispy Kreme's argument on this point.

The statute provides that food is "prepared . . . for immediate consumption . . . regardless of whether such prepared food <u>is consumed</u> on the premises." § 144.014.2 (emphasis added). The legislature certainly could have used the phrase "is consumed" earlier in the sentence (e.g., prepared . . . and is consumed immediately), but it did not, and the selection of different language is meaningful. Also, the language makes clear that the actual consumption can be off the premises but still "prepared . . . for immediate

consumption." This plain reading of the statute is completely at odds with Krispy Kreme's interpretation, and the Commission correctly rejected its refund claims.

ARGUMENT

Standard of Review

A decision of the Administrative Hearing Commission must be affirmed if: "(1) it is authorized by law; (2) it is supported by competent and substantial evidence on the whole record; (3) mandatory procedural safeguards are not violated; and (4) it is not clearly contrary to the reasonable expectations of the General Assembly." *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 435-36 (Mo. banc 2010); § 621.193.

When the Commission has interpreted the law or the application of facts to law, the review is *de novo. State Bd. of Registration for the Healing Arts v. McDonagh,* 123 S.W.3d 146, 152 (Mo. banc 2003); *Zip Mail Servs., Inc. v. Dir. of Revenue,* 16 S.W.3d 588, 590 (Mo. banc 2000). In addition, the Commission's factual determinations "are upheld if supported by 'substantial evidence upon the whole record.'" *Concord Publ'g House, Inc. v. Dir. of Revenue,* 916 S.W.2d 186, 189 (Mo. banc 1996) (quoting *L & R Egg Co., Inc. v. Dir. of Revenue,* 796 S.W.2d 624, 625 (Mo. banc 1990)). This Court can affirm on any basis supported by the record. *See Missouri Bd. of Nursing Home Adm'rs v. Stephens*, 106 S.W.3d 524, 528 (Mo. App. W.D. 2003). Here, the Commission's decision is supported by the record and the law, and should, therefore, be affirmed.

I. The Lower Tax Rate in § 144.014 Should be Strictly Construed, Not Expanded in Order to Avoid the General Tax Rate in § 144.020.

Before considering the merits, it is essential to establish the proper burden or construction for the interpretation of the statute at issue – § 144.014. Generally, tax imposition statutes are construed against the taxing authority and in favor of the taxpayer. *Am. Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d at 498. Yet, the circumstances and setting of this statute and Krispy Kreme's arguments are distinctly different than a general tax imposition statute.

The Director of Revenue, as the taxing authority, did not impose a tax on Krispy Kreme under § 144.014. Instead, for many years Krispy Kreme simply recognized that its sales were subject to the general four percent tax rate for the sale of food items under § 144.020. Now, in an effort to obtain a refund of taxes already collected from customers, Krispy Kreme seeks to qualify for a lower tax rate. In doing so, Krispy Kreme is unquestionably trying to expand § 144.014 in order to remit the lower one percent tax rate rather than the general four percent tax rate that would otherwise be applicable to its retail sales of doughnuts and other food items.

Thus, the lower tax rate of § 144.014, in effect, is an exception or exclusion from the general tax provisions of § 144.020, and as such should be

strictly construed and certainly not expanded. *See Southwestern Bell Tel. Co. v. Dir. of Revenue,* 182 S.W.3d 226, 228 (Mo. banc 2005) (holding that tax exemptions are "strictly construed against the taxpayer, and any doubt is resolved in favor of application of the tax"); *see also Branson Props. USA, L.P. v. Dir. of Revenue,* 110 S.W.3d 824, 825 (Mo. banc 2003) (noting that the taxpayer carries the burden of showing they are entitled to an exemption under the statutes). The language of the statute, structure, and purpose all confirm this proper construction.

The plain language of § 144.014 supports the conclusion that it should be strictly construed against Krispy Kreme's efforts to expand it. The statute begins with the language "[n]otwithstanding other provisions of the law to the contrary." § 144.014.1. The contrary provisions of the law, of course, include the general four percent tax rate for the sale of food items, and the term "notwithstanding" is defined in the dictionary as:

> 1: [W]ithout prevention or obstruction from or by : in spite of . . . 2: nevertheless, however, yet . . . 3: although . . . .

Webster's Third New International Dictionary 1545 (1993). These definitions of "notwithstanding" all convey the message that what follows is an exception to the general rule. Thus, the plain language of the statute is in the nature of an exemption or exclusion.

Furthermore, the structure and purpose of the statute support the same conclusion. *See Ross v. Dir. of Revenue,* 311 S.W.3d 732, 735 (Mo. banc 2010) (holding that in statutory interpretation, the statutory language is considered in context and in comparison with other sections of the statute to determine its meaning). Section 144.014 provides for a reduced tax rate for the purchase of food items of the "type" for which food stamps can be redeemed. There is a related provision in chapter 144, § 144.037. Section 144.037 exempts from sales taxes actual purchases with food stamps. Specifically, § 144.037 creates a complete exemption for "all sales at retail made through the use of federal food stamp coupons."

These two provisions in chapter 144 work together to ensure that the purchases of basic or staple food items under the Federal Food Stamp Program – whether because they are actually paid for with food stamps or because they are the "type" of food for which food stamps can be redeemed – are either tax free or at a significantly reduced tax rate. It would be contrary to the purposes of Missouri law and the Federal Food Stamp Program to strictly construe one of these statutes as an exemption and then broadly expand the other. Both should be strictly construed.

II. Doughnuts Prepared by Krispy Kreme for Retail Sale are "Prepared . . . for Immediate Consumption." – Responding to Appellant's Point Relied On.

Regardless of how § 144.014 is construed, this case comes down to the plain meaning of essentially four words in the statute – "prepared . . . for immediate consumption" – all in the context of a fast food doughnut restaurant. *Id.* (emphasis added). This language in § 144.014.2 is clear, not ambiguous, and therefore does not require resort to rules of statutory construction. *See Abrams v. Ohio Pacific Express*, 819 S.W.2d 338, 340 (Mo. banc 1991) (holding that where the language of a statute is unambiguous, courts give effect to the language as written and will not resort to rules of statutory construction).

The plain language of the statute focuses on the state of the preparation of the food items, and not on the timing of actual consumption. *See Canteen Corp. v. Dep't of Revenue*, 525 N.E.2d 73, 77 (Ill. 1988) (focusing on the term "prepared" in the phrase "prepared for immediate consumption" under Illinois law). This is exactly what the Commission concluded by holding that the phrase "prepared . . . for immediate consumption" does not mean "is immediately consumed." (LF 373). Krispy Kreme, however, ignores the plain language of the statute and argues that it is entitled to the lower tax rate because certain doughnuts are not actually "consumed immediately,"

Appellant's Br., p. 14; namely, doughnuts prepared one hour in advance of sale; doughnuts taken by customers to other locations before consumption, such as work, church, and home; and sales of 12 or more doughnuts. Appellant's Br., pp. 1-2.

To be clear, Krispy Kreme concedes that the great majority of its retail sales are of doughnuts that are not only prepared for immediate consumption, but are actually immediately consumed. Thus, Krispy Kreme does not argue, for example, that doughnuts eaten by customers in its restaurants are not prepared for immediate consumption. Krispy Kreme also does not argue that most doughnuts purchased at its drive-throughs are not prepared for immediate consumption. And of course, Krispy Kreme's most well-recognized trademark – "HOT DOUGHNUTS NOW" – finds no place in its argument that these doughnuts are not prepared for immediate consumption.

Instead, Krispy Kreme has culled out certain sub-categories of doughnuts – categories defined solely by differences in post-preparation consumption – in order to persuade this Court that it is entitled to a refund and a lower tax rate. If this strikes the Court as incredibly outcome oriented, that is because it is purely outcome oriented. We need only ask some revealing questions to uncover the ruse. Are some doughnuts sold at retail by Krispy Kreme "prepared . . . for immediate consumption" and some – though

prepared in the same batch, but sold a few minutes later – prepared for storage or delayed consumption? Are the doughnuts for retail sale somehow distinguishable depending on how they were prepared or who will eventually select them for purchase? The answer to these questions is simply, no.

The doughnuts Krispy Kreme prepares for retail sale at its fast food doughnut restaurants are all prepared the same, "for immediate consumption." The fact that one doughnut is actually consumed minutes after it is put in the display case and another is consumed by someone on the way to work or by a family at a park does not change the fact that all were prepared for immediate consumption.

A. The Plain Language of § 144.014 Looks to How the Doughnuts are Prepared Not When They are Actually Consumed.

As with any statutory provision, "the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *Akins v. Dir. of Revenue*, 303 S.W.3d 563 (Mo. banc 2010) (citing *State ex rel. White Family Partnership v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008)). "In the absence of statutory definitions, the plain and ordinary meaning of a term may be derived from a dictionary … and by considering the context of the entire statute in which it appears." *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. banc 2007) (citing *Am.*

Healthcare Management, Inc., 984 S.W.2d at 498 and *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. banc 1995)).

Here, the language at issue in § 144.014 – "prepared . . . for immediate consumption" – makes clear the legislative intent. Although there are no statutory definitions, the language is not at all ambiguous. The critical term "prepared," is defined by the dictionary as:

> **prepare 1a:** to make ready beforehand for some purpose : put into condition for a particular use, application, or disposition **b:** to make ready for eating . . . .

Webster's Third New International Dictionary 1790 (1993). The terms "immediate" and "consumption," are defined, in turn, as follows:

> **immediate 1a:** acting or being without the intervention of another object, cause, or agency . . . **3a:** occurring, acting, or accomplished without loss of time : made or done at once : near to or related to the present . . . .
>
> **consumption 1a:** the act or action of consuming or destroying **b:** the wasting, using up, or wearing away of something **2:** the utilization of economic goods in the satisfaction of wants or in the process of

> production resulting in immediate destruction (as in the eating of foods) . . . .

Id. at 1129, 490.

At its fast food doughnut restaurants, Krispy Kreme does just as described in the dictionary definitions of "prepared," it makes doughnuts ready beforehand for immediate consumption. If the term "immediate consumption" was not connected to the term "prepared" then the terms might have a different meaning (maybe even the one suggested by Krispy Kreme). But by attaching the term "immediate consumption" to the term "prepared," the meaning of the statute is quite plainly focused on the state of the preparation of the food and not on the timing of actual consumption.

It is apparent where Krispy Kreme goes wrong in its argument. Krispy Kreme does not focus on the entire statutory phrase "prepared . . . for immediate consumption," but instead focus solely on the terms "immediate consumption." Indeed, to accept Krispy Kreme's view the statute would need to read, "prepared and is immediately consumed." It does not. As a result of its misreading of the statute, Krispy Kreme is reduced to arbitrary line-drawing and speculation as to when and how many doughnuts retail customers actually eat. The three arbitrary lines manufactured by Krispy Kreme in this case, however, have no support in the statute and fail for a multitude of reasons.

1. Doughnuts made one hour in advance of sale are still "prepared . . . for immediate consumption."

The first sub-category of doughnuts Krispy Kreme argues are not for immediate consumption are those that were made at least one hour in advance of sale. Appellant's Br., p. 1-2. The plain language of the statute does not support this argument. In fact, the time selected is purely arbitrary – other than it conveniently allows Krispy Kreme to claim a reduced tax rate.

The imposition of an arbitrary one-hour time limit also produces absurd results. *Murray v. Missouri Highway and Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo. banc 2001) (holding that statutes should be construed so as to avoid unreasonable and absurd results). Under Krispy Kreme's interpretation, if it sells a doughnut within 59 minutes of being prepared, the doughnut is for immediate consumption. In contrast, if a doughnut from the same batch is sold one minute later, 60 minutes after being prepared, it is not for immediate consumption. Literally, two doughnuts sitting side-by-side in the display case could subject the entire restaurant to different tax rates merely on the basis of which one was picked up first by the employee. *Cf. Canteen Corp.*, 525 N.E.2d at 78 (calling the suggestion that doughnuts sold at different times would be subject to different tax rates "absurd"). Even doughnuts advertised as "HOT DOUGHNUTS NOW," which are

unquestionably prepared for immediate consumption, could be delayed in purchase and consumption beyond one hour.

Furthermore, there is nothing stopping Krispy Kreme (or some other company) from arguing in the future that the real time controlling whether food items are for "immediate consumption" should be 30 minutes, 5 minutes, or even 1 minute following preparation. Indeed, the logical extension of Krispy Kreme's argument is that food items would have to be "made to order" to qualify as prepared for immediate consumption.[3/] If that were the case, a host of restaurants could simply alter very slightly the way in which they prepare food in order to reduce their tax rate and circumvent the legislature's intent.

There are still further problems with Krispy Kreme's argument on this point. Krispy Kreme simply cannot make up law for its own benefit even if it seems reasonable to them. Yet, that is exactly what Krispy Kreme is doing. Nothing in the statute remotely suggests a time limit, let alone a one hour time limit, between the food preparation and the actual sale or consumption of the food. To do so would result in distinguishing between two doughnuts

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[3/] Even then Krispy Kreme would likely still argue that "made to order" food, such as a hamburger, sub sandwich, or burrito that is taken home and eaten would not be for immediate consumption.

side-by-side in the display case based merely on the time of sale. Instead, the plain language of the statute provides that "immediate consumption" describes the state of preparation for the food and not the time or circumstances of actual consumption.

Still more statutory language in § 144.014 completely undermines Krispy Kreme's argument. In the very same paragraph as the language at issue, the statute provides that food can qualify as prepared for immediate consumption "regardless of whether such prepared food is consumed on the premises." § 144.014.2. Thus, the statute rejects any notion that the time between preparation and actual consumption matters, because it explicitly disclaims any connection with where the food is actually consumed.

2. Doughnuts taken to other locations are still "prepared . . . for immediate consumption."

Related to its first argument, and equally unavailing, Krispy Kreme argues that doughnuts that are taken to work, church, or home are not for immediate consumption. The statute expressly provides that food can qualify as prepared for immediate consumption "regardless of whether such prepared food is consumed on the premises." § 144.014.2. Thus, the plain language of the statute directly contradicts Krispy Kreme's argument. If the legislature had intended Krispy Kreme's interpretation to apply (i.e. that the food must

be consumed immediately), then it would not have included references to consumption "on or off the premises." § 144.014.2.

Statutes should not be interpreted to render language meaningless. *Kerperien v. Lumberman's Mut. Cas.* Co., 100 S.W.3d 778 (Mo. banc 2003). And Krispy Kreme's interpretation renders meaningless the language "regardless of whether such prepared food is consumed on the premises." § 144.014.2. In fact, families regularly purchase fast food items and take them home for consumption. This does not mean that the food was not prepared for immediate consumption. Indeed, there is no way to tell the difference between a "Happy Meal" that is consumed immediately in the car and a "Happy Meal" that is taken home or to the park to be consumed. Both are prepared the same way, and both are "for immediate consumption." § 144.014.2.

In a very real sense, Krispy Kreme is trying to add words or change the meaning of the words in § 144.014. Krispy Kreme would like to substitute the language – "prepared . . . for immediate consumption" – with the language – "prepared . . . and immediately consumed." The actual statutory language does not require that the doughnuts actually be consumed, as Krispy Kreme asserts. The statute only speaks of the state of the food in terms of its preparation. Otherwise, the statutory phrases "on or off the premises" and "regardless of whether such prepared food is consumed on the

premises of that establishment" would have no meaning. § 144.014.2. This Court should therefore reject Krispy Kreme's efforts to substitute, alter, or expand the language of § 144.014.

3. Doughnuts sold in amounts of 12 or more are also "prepared . . . for immediate consumption."

In its final attempt to qualify for a lower tax rate and a refund of taxes already collected from customers, Krispy Kreme argues that doughnuts sold in an amount of 12 or more are not consumed immediately and are thus not "prepared . . . for immediate consumption." Appellant's Br., p. 40. In support of this argument, Krispy Kreme states that "[i]t is reasonable to assume that a person who purchases a dozen doughnuts does not intend to consume them immediately." Appellant's Br., p. 40. This argument misses the mark in many ways.

First, there is no basis for the selection of 12 or more doughnuts as an arbitrary line for doughnuts "prepared . . . for immediate consumption." The statute does not provide (nor does the regulation; *see* 12 CSR 10-110.990) any such quantitative amount. Krispy Kreme, again, engages in pure speculation. The purchaser may, after all, be buying doughnuts for a family, little league team, or church or office group, that is loaded in the vehicle and that will eat them all within minutes.

What is truly unlikely, not to mention unsupported, is Krispy Kreme's speculation that a customer purchasing 12 or more doughnuts "will then consume them one by one, over the course of some time." Appellant's Br., p. 42. Typically, when a consumer purchases a dozen or more donuts, the intention is that they will be consumed by more than one person rather than consumed one by one over the course of time. Ironically, on the previous page of its brief to this Court Krispy Kreme states a most obvious principle it just violated – "statutory interpretation cannot be based on mere conjecture." Appellant's Br., p. 41. That is exactly what Krispy Kreme's argument and arbitrary selection of 12 doughnuts is – mere conjecture.

Second, such an arbitrary interpretation of the statute would produce unreasonable and absurd results. Under Krispy Kreme's interpretation, if 11 doughnuts are sold, the doughnuts are for immediate consumption. If 12 doughnuts are sold, however, they are supposedly not for immediate consumption. Nevertheless, there is no difference in the doughnuts or how they were prepared. All of the doughnuts are prepared for immediate consumption. Krispy Kreme does not specifically prepare some doughnuts to be sold at retail to customers in amounts of 12 or more and then prepare some to be sold individually or in twos or threes. *Cf. Nevada Dep't of Taxation v. McKesson Corp.*, 896 P.2d 1145, 1147 (Nev. 1995) (noting that the water was not prepared in individual serving sizes but in gallons).

Instead, Krispy Kreme prepares all of its doughnuts for retail sale the same way, and the employees just pull the number based on the customer's order. This is in contrast to doughnuts sold at wholesale (which are not at issue in this case) that are specifically prepared for wholesale and packaged accordingly.

Finally, once again Krispy Kreme is changing the very language of the statute. Under § 144.014, it does not matter how many doughnuts are purchased or actually consumed. It also does not matter if they are immediately consumed. The standard is whether the doughnuts were "prepared . . . for immediate consumption." *Id.* Whether one doughnut fewer or one doughnut more are added to the bag or the box does not change this determination.

Krispy Kreme's doughnuts are prepared for immediate consumption even if purchased one hour after being prepared, taken to another location, or purchased in an amount of 12 or more.[4/]

[4/] Unable to support an expansion of § 144.014 by the plain language, statutory structure, or reason, Krispy Kreme and its amicus descend into the labyrinth of federal and foreign state regulations purporting to address similar issues. These regulations, however, are not only irrelevant to Missouri's statutory language, but they are completely unhelpful. For

B. The Statutory Structure and Purpose Further Support the Plain Language.

In addition to the plain language of § 144.014, the structure and purpose of the statute support the same conclusion. *See Ross,* 311 S.W.3d at 735. For example, in the very same sentence as the critical language – "prepared . . . for immediate consumption" – the legislature provides that this standard applies "regardless of whether such prepared food is consumed on the premises." § 144.014.2. This language confirms the Director and the Commission's interpretation of the statute in several ways.

The language "prepared food" reiterates that the focus is on the state of the food – its readiness to be consumed without further preparation – and not on when the food is actually consumed. In the later phrase, the statute uses "is consumed," which contrasts with the language at issue focusing on the

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example, Connecticut, Massachusetts, and Rhode Island's six-doughnut rule has nothing to do with the Missouri statutory language. Instead, the regulatory authorities in those states were trying to define what constituted a "taxable meal." *See* Appellant's Appdx. A20, A26-27, A42-43. And the federal regulations cited by Krispy Kreme and its amicus are no more helpful. Those regulations deal merely with food labeling. Appellant's Br., pp. 26-29.

preparation of the food. Certainly the legislature could have used this same "is consumed" phrase in other places in the statute. For example, the legislature could have written the statute to state "prepared . . . and is consumed immediately." But it did not, and the difference in language demonstrates that it does not matter when the food is actually consumed. Finally, the statutory language makes clear that the actual consumption can occur off the premises, thus leading to the conclusion that the definition of "immediate" that Krispy Kreme adopts ("at once," "without loss of time," or "without delay," Appellant's Br., p. 22) is absolutely wrong.

Krispy Kreme also argues that the Director and Commission's interpretation of § 144.014 should not be adopted because it "would render a portion of section 144.014 superfluous"; namely "'restaurant' or 'fast food restaurant.'" Appellant's Br., p. 24. This is also not true. Not only are these merely examples of the types of establishments that may or may not qualify, but there are certainly restaurants that could qualify. For example, restaurants that do not complete the preparation of the food (*e.g.* take and bake style), those that require additional preparation (*e.g.* requiring some assembly), or those that sell preserved and packaged food items to their retail customers (*e.g.* sauces) could potentially qualify.

Moreover, the very purpose of the statute undermines Krispy Kreme's arguments. Section 144.014 is intended to permit a reduced tax rate for the

"types of food for which food stamps may be redeemed." § 144.014.2. One hardly thinks of a fast food doughnut restaurant as a place that food stamps may be redeemed. And although doughnuts may be purchased at a grocery store with food stamps, it is not appropriate to try and stretch the interpretation of this statute beyond the plain language in order to accommodate a lower tax for the benefit of a fast food doughnut restaurant.

CONCLUSION

For the foregoing reasons, the Administrative Hearing Commission's decision should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

By:_____
JEREMIAH J. MORGAN
Deputy Solicitor General
Missouri Bar No. 50387
P.O. Box 899
Jefferson City, MO 65102
Telephone No. (573) 751-1800
Fax No. (573) 751-0774
Jeremiah.Morgan@ago.mo.gov

ATTORNEYS FOR THE DIRECTOR OF REVENUE

CERTIFICATION OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on this 3rd day of August 2011, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Edward F. Downey
BRYAN CAVE LLP
221 Bolivar Street, Suite 101
Jefferson City, MO 65101

Igor V. Timofeyev
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, DC 20005

Attorneys for Appellant

Mairiam J. Gueggenheim
COVINGTON & BURLING, LLP
201 Pennsylvania Ave., N.W.
Washington, DC 20004

Attorney for Amicus Retail Bakers of America and American Bakers Association

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 6,307 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

_____
Jeremiah J. Morgan

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