IN THE
SUPREME COURT OF MISSOURI

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No. SC84956

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EIGHTY HUNDRED CLAYTON CORPORATION.
d/b/a TROPICANA LANES,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

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PETITION FOR JUDICIAL REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE WILLARD C. REINE, COMMISSIONER

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APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This case is a petition for judicial review from a decision of the Administrative Hearing Commission (AHC), rendered under § 621.050,[1] finding that Respondent, Eighty Hundred Clayton Corp. d/b/a Tropicana Lanes (Tropicana), was entitled to a refund of sales taxes it had previously remitted to the Director of Revenue.

Tropicana, which operated a bowling alley, sought a refund of sales taxes it had collected on fees it charged customers to use bowling shoes. The AHC determined that these fees were not taxable under § 144.020.1(2) (the amusement tax), because a more "specific" taxing provision, § 144.020.1(8) (the lease tax), applied. Moreover, the AHC determined that the bowling shoe fee was not taxable under the lease tax, because Tropicana paid sales tax when it purchased the bowling shoes.

Although the AHC purportedly relied on this Court's decision in *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999), to decide this issue, this case involves at least three issues involving the statutory construction of the revune laws that were not decided in *Westwood*. Consequently, simple application of this Court's decision in *Westwood* will not resolve the issues in this case.

First, this case involves the issue of whether a transaction is still taxable under a "general" taxing provision, when it not taxable under a more "specific" one. Although this

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[1]All sectional references are to the 2000 Revised Statutes of Missouri, unless otherwise indicated.

Court stated in *Westwood* that a more "specific" taxing statute applies over a more general one when both address the same transaction, this holding was based on this Court's opinion in *Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36 (Mo. banc 1996) ("*Greenbriar I*"). But as we learned in *J.B. Vending Co. v. Director of Revenue*, 54 S.W.3d 183 (Mo. banc 2001), the *Greenbriar I* court did not actually apply this principle of law, despite what the *Greenbriar I* opinion stated, because the facts in *Greenbriar* did not create a conflict between the two taxing provisions at issue:

> The [*Greenbriar*] Court determined that where two statutes on the same subject conflict, the more specific controls over the more general. But, this precept applies only where the two provisions are in such conflict that they cannot be harmonized. In *Greenbriar*, the two sections could be harmonized by recognizing that subsection (2)'s tax applied only to fees paid in places of amusement. The money paid for meals and tips in *Greenbriar* did not constitute a fee but rather constituted the price of the meal and the service being provided. Hence the two sections could be harmonized.

J.B. Vending, 54 S.W.3d at 189 n.2.

Indeed, in *Greenbriar I*, the Director actually stipulated that the service charge at issue was part of the meal and drink charge, and this Court held that the meal and drink tax, not the amusement tax, applied to the transaction at issue. *Greenbriar I*, 935 S.W.2d at 38. This Court, therefore, has not directly been presented with the issue of whether a transaction is exempt from tax under a clearly applicable, but more general, taxing

provision when a more "specific" taxing provision exists, but does not apply to the transaction at issue.

Second, this case involves an issue expressly left undecided in *Westwood*: whether Tropicana's customers' use of bowling shoes actually constituted a "lease" or "rental" as those terms are used under § 144.020.1(8). In *Westwood*, this Court elected not to address this issue and instead simply stated that golf cart fees qualified for treatment under the lease tax:

> Both parties invite us to determine whether the fees charged by Westwood were for a rental of or lease to use golf carts. . . . For the purposes of this opinion, we only hold that the golf cart fees were sufficient to qualify for treatment under section 144.020.1(8) in that ambiguities in statutes imposing taxes are to be resolved in the taxpayer's favor.

Westwood, 6 S.W.3d at 888 n.6. In *Westwood*, this Court did not construe the words "lease" and "rental" as used in § 144.020.1(8). Therefore, application of this Court's holding in *Westwood* will not resolve that issue in this case.[2]

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[2]Although this Court recently held in *Six Flags Theme Parks, Inc. v. Director of Revenue*, No. SC84563 (Mo. banc, January 14, 2003), that putting coins in a video game constitutes "a rental agreement," a motion for rehearing was still pending as of the date this brief was filed, and, thus, was not yet a final decision. Moreover, as will be discussed later, this Court misconstrued the law in reaching this holding.

Third, the *Westwood* Court also did not construe the phrase "under the conditions of sale at retail" as used in § 144.020.1(8). In *Westwood*, this Court held that the lease tax did not apply simply because the taxpayer had paid sales tax on the golf carts when it purchased them. *Id.* at 889. The *Westwood* court did not consider whether the taxpayer purchased the golf carts under the conditions of "sale at retail" because this Court misconstrued subsection (8) to provide that a transaction is exempt from the lease tax if the property leased or rented "was purchased under 'sale at retail' conditions *or* sales taxes were previously paid by the renter or seller on the original purchase or lease of the property." *Id.* at 888 [emphasis added]. The lease tax exemption actually requires that both elements be shown (payment of sales tax *and* purchase under the conditions of sale at retail) before a transaction is deemed not taxable. Consequently, the *Westwood* court did not construe subsection (8) to define what constitutes a "sale at retail" under that subsection.

In short, mere application of this Court's decision in *Westwood* does not resolve the issues raised in this case.[3] This Court is thus required to construe the sales tax laws to resolve the issues presented by this case. *Compare Branson Scenic Ry. v. Director of Revenue*, 3 S.W.3d 788, 789 (Mo. App. W.D. 1999) (holding that the court of appeals has jurisdiction over cases involving state revenue laws only when the "cases' determination turns on application of the facts of the case to the law as previously construed by the

[3]Application of this Court's decision in *Six Flags*, were it a final decision, would also not resolve all the issues raised in this case.

Supreme Court"). This case, therefore, involves the construction, and not mere application, of a state revenue law.

Jurisdiction is proper in this Court because this appeal involves the construction of one or more revenue laws of this state. MO. CONST. art. V, § 3; § 621.189, RSMo Supp. 2002.

STATEMENT OF FACTS

This case involves Tropicana's application to the Director of Revenue for a refund of $23,885.65 in sales taxes it collected from its customers on fees it charged for the use of bowling shoes. Tropicana sought a refund of taxes it collected on those fees for various months between 1997 and 2000 (the refund period) (L.F. 9-10).[4] The Director denied Tropicana's refund claim, and Tropicana appealed the decision to the AHC (L.F. 1-4, 10). The AHC determined that Tropicana was entitled to a refund of the sales taxes its customers paid on the fees Tropicana charged to use bowling shoes (L.F. 80, 87).

Tropicana operated a bowling center in St. Louis County, Missouri, and it derived its revenue from a variety of activities (L.F. 9). In addition to its charges for bowling (both open and league play), Tropicana charged customers for the use of bowling shoes and lockers (L.F. 77). Tropicana also generated income from a bar and restaurant it operated, as well as from pro shop sales, pool receipts, vending machine sales, and commissions from pinball games (L.F. 77-78).

Although Tropicana did not charge an admission fee to enter the premises, it did charge its bowling customers a fee for each game bowled, but (L.F. 10). Customers paid the bowling fee, which averaged $2.25 per game during the refund period, after completing

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[4]Tropicana's refund claimed covered the periods from July 1997 to December 1997, March 1998 to July 1998, September 1998 to January 1999, March 1999 to September 1999, and November 1999 to June 2000 (L.F. 2, 41).

their bowling activities (L.F. 10).

Tropicana required all bowlers to wear bowling shoes (L.F. 10). Bowling shoes enable bowlers to slide their feet during approach and before releasing the ball (L.F. 10). Using bowling shoes, as opposed to simply wearing socks, reduces the likelihood of injury from slipping or falling (L.F. 10). Bowling shoes also reduce safety hazards and maintenance costs because they do not leave foreign matter or marks on the bowling alley approaches like regular or "street shoes" (L.F. 10).

Although customers could bring their own bowling shoes, Tropicana also had bowling shoes available for their customers' use (L.F. 10-11). Tropicana paid between $15 and $22 a pair for the bowling shoes it allowed customers to use (L.F. 52-76). Tropicana charged a fee to use the shoes, which averaged $1.75 during the refund period (L.F. 10-11). Tropicana described this fee as a "shoe rental" on its price board and in its financial statements (L.F. 11).

Although customers could wear the shoes in Tropicana's dining, lounge, and vending areas, they were not permitted to take the bowling shoes out of Tropicana's building and were required to return the shoes after completing their bowling activities (L.F. 11). The fees Tropicana charged its customers to use bowling shoes comprised approximately 11.5% of Tropicana's total receipts from bowling activities and 7% of its total receipts from all activities conducted in its bowling center (L.F. 79).

The AHC, relying on this Court's decision in *Westwood Country Club v. Director or Revenue*, found that Tropicana was entitled to a refund of $23,888.65 in sales taxes it

had collected from its customers on the fees it charged to use bowling shoes (L.F. 85-87). The AHC determined that the lease tax applied to these transactions because it was more "specific" than the amusement tax (L.F. 84). The AHC then determined that the transactions were exempt from the lease tax because Tropicana paid sales tax on its purchases of the bowling shoes it charged its customers to use (L.F. 85-86). The Director appeals the AHC's decision to this Court.

POINT RELIED ON

The AHC erred in awarding Tropicana a refund of the sales tax that its customers paid on the fee Tropicana charged to use bowling shoes and in holding that Tropicana's bowling shoe fee was not taxable, because this decision was unauthorized by law, not supported by competent and substantial evidence on the record as a whole, was contrary to the reasonable expectations of the General Assembly, and these sales were taxable under the amusement tax (§ 144.020.1(6), RSMo), which taxes all fees paid in or to a place of amusement in that: 1) Tropicana operated a bowling center, a place of amusement, and the fee it charged to use bowling shoes was a fee paid in or to a place of amusement; 2) this Court's decision in *Westwood Country Club v. Director of Revenue,* which held that the lease tax was more "specific" than the amusement tax and that "rental" fees charged to use golf carts was tax exempt when tax had been paid when the carts were purchased, was wrongly decided and should be overruled.

Alternatively, Tropicana's shoe fee transaction did not constitute the lease or rental of tangible personal property, and, thus, the lease tax (§ 144.020.1(8), RSMo) did not apply. Finally, even if the transaction was a lease or rental, the tax exemption contained within the lease tax itself did not apply because Tropicana did not purchase the bowling shoes "under the conditions of sale at retail."

Blue Springs Bowl v. Spradling, 551 S.W.2d 596 (Mo. banc 1977);

J.B. Vending v. Director of Revenue, 54 S.W.3d 183 (Mo. banc 2001);

Brambles Indus., Inc. v. Director of Revenue, 981 S.W.2d 568 (Mo. banc 1998);

Katz v. Slade, 460 S.W.2d 608 (Mo. 1970);

Section 144.010.1(3), RSMo 2000;

Section 144.010.1(10), RSMo 2000;

Section 144.020.1(2), RSMo 2000;

Section 144.020.1(8), RSMo 2000;

Section 144.021, RSMo 2000.

ARGUMENT

The AHC erred in awarding Tropicana a refund of the sales tax that its customers paid on the fee Tropicana charged to use bowling shoes and in holding that Tropicana's bowling shoe fee was not taxable, because this decision was unauthorized by law, not supported by competent and substantial evidence on the record as a whole, was contrary to the reasonable expectations of the General Assembly, and these sales were taxable under the amusement tax (§ 144.020.1(6), RSMo), which taxes all fees paid in or to a place of amusement in that: 1) Tropicana operated a bowling center, a place of amusement, and the fee it charged to use bowling shoes was a fee paid in or to a place of amusement; 2) this Court's decision in *Westwood Country Club v. Director of Revenue*, which held that the lease tax was more "specific" than the amusement tax and that "rental" fees charged to use golf carts was tax exempt when tax had been paid when the carts were purchased, was wrongly decided and should be overruled.

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Tropicana operates a bowling center and charges its customers a fee to use bowling shoes, which all bowlers are required to wear. Section 144.020.1(2) (the amusement tax)

imposes a tax on "fees paid to, or in any place of amusement." Tropicana is admittedly a place of amusement, and this Court has construed the amusement tax as imposing a tax on all fees paid in or to a place of amusement. Tropicana's shoe fee was clearly taxable under the amusement tax.

But the AHC determined that Tropicana's shoe fee was not taxable under this Court's holding in *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999). The *Westwood* court held that the lease tax (§ 144.020.1(8)) was more "specific" than the amusement tax and that a tax exemption found in the lease tax applied to exempt a fee paid in a place of amusement from taxation altogether. This Court's decision in *Westwood* should be overruled because the "specific vs. general" theory of taxation is contrary to the sales tax law. Moreover, the lease tax does not apply in this case because the fee Tropicana charged its customers to use bowling shoes was a mere license and did not constitute the lease or rental of tangible personal property. Finally, even if Tropicana "rented" shoes to its customers, the lease tax exemption did not apply because while Tropicana paid sales tax when it purchased the bowling shoes, it did not purchase the shoes under "the conditions of sale at retail." Both of these conditions must be present before the lease tax exemption can apply.

1. STANDARD OF REVIEW

The AHC's decision is upheld only when authorized by law, supported by competent and substantial evidence upon the record as a whole, and not clearly contrary to the reasonable expectations of the General Assembly. *See Becker Elec. Co. v. Director of*

Revenue, 749 S.W.2d 403, 405 (Mo. banc 1988); § 621.193, RSMo 2000. This Court owes no deference to the AHC's decisions on questions of law, which are matters for this Court's independent judgment. *La-Z-Boy Chair Co. v. Director of Econ. Dev.*, 983 S.W.2d 523, 524-25 (Mo. banc 1999); *Hewitt Well Drilling & Pump Serv. v. Director of Revenue*, 847 S.W.2d 797, 797 (Mo. banc 1993). Because Tropicana has filed a refund claim seeking the return of sales taxes it had collected from its customers and paid to the Director, it has the burden of proof. Sections 136.300 and 621.050.2, RSMo 2000

2. THE AMUSEMENT TAX

Under the amusement tax, all fees paid in or to a place of amusement are taxable. Although Tropicana's shoe fee was clearly taxable under the amusement tax, the AHC, determined that the fee was exempt from all tax because a provision contained within a more "specific" tax, the lease tax, exempted the transaction from the lease tax. Whether the transaction was taxable under the lease tax should not affect its taxability under the amusement tax. The transaction was taxable under the amusement tax and it should not be found exempt from all tax under the "specific vs. general" theory of taxation. This theory, which exempts certain transactions from tax by negative implications created by other so-called "specific" taxing provisions, is contrary to the plain language of the taxing statutes and is unworkable in the administration of the sales tax law.

A. Tropicana's Shoe Fee Is Taxable.

State law authorizes a tax "upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this

state." Section 144.020.1. The legislature intended to broadly tax all sales of tangible personal property or taxable services and to identify specific tax rates applicable to particular types of sales:

> Considered in context, the statute as a whole evinces a legislative intent to tax all sellers for the privilege of selling tangible personal property or rendering a taxable service. The purpose of the specific subsections thereunder is to set out the types of retail sales and services that shall be taxed at particular rates.

J.B. Vending, 54 S.W.3d at 188. Section 144.020.1 divides sales into eight categories relating either to sales of personal property or taxable services and applies a specific tax rate for each category. One of these categories is the so-called amusement tax, which imposes:

> A tax equivalent to four percent of the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events;

Section 144.020.1(2).

Authority to tax fees paid in or to places of amusement is also found in the statutory definition of "sale at retail." Sellers are required to pay sales tax on their gross receipts, which is "the aggregate amount of the sale price of all sales at retail." Section 144.021. The phrase "sale at retail," includes "[s]ales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events." Section 144.010.1(10).

This Court has held that the "simple general language" of the amusement tax "is not limited or qualified in any way." *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 599 (Mo. banc 1977). "It applies to *all* such fees paid to or in" places of amusement. *Id.* (emphasis in original); *see also Bally's Leman's Family Fun Centers, Inc. v. Director of Revenue*, 745 S.W.2d 683, 685 (Mo. banc 1988) ("Section 144.020.1(2) . . . expresses a legislative intent to tax all fees paid in places of amusement . . . ."). Section 144.020.1(2) "plainly provides for a sales tax to be imposed: (1) on sums paid for admission to places of amusement, etc.; (2) on amounts paid for seating accommodations therein; and (3) on *all* fees paid to, or in places of amusement, etc." *L & R Distrib. Co. v. Missouri Dep't of Revenue*, 648 S.W.2d 91, 95 (Mo. 1983) (emphasis in original). All fees paid in or to a place of amusement are taxable, even if the fee is not strictly for amusement activities. *See City of Springfield v. Director of Revenue*, 659 S.W.2d 782, 783-84 (Mo. banc 1983) (holding that the amusement tax applied to sales of items at concession stands located in places of amusement or recreation); *Old Warson Country Club v. Director of Revenue*, 933 S.W.2d 400, 403 (Mo. banc 1996) (holding that a capital improvements assessment charged to country club members constituted a fee paid in or to a place of amusement, but ultimately holding that the fee was not taxable because it was not a sale at retail). Consequently, to find a transaction taxable under the amusement tax only "two elements are essential,–that there be fees or charges and that they be paid *in or to* a place of amusement." *L & R Distrib., Inc. v. Missouri Dep't of Revenue*, 529 S.W.2d 375, 378 (Mo. 1975).

The fee Tropicana charged its customers to use bowling shoes was taxable under the amusement tax. First, not only did Tropicana admit that it operated a place of amusement (L.F. 9), but this Court has held that commercial bowling establishments are places of amusement. *See Blue Springs Bowl*, 551 S.W.2d at 598. Second, Tropicana charged its customers a fee to use bowling shoes. Tropicana's fee is thus taxable under the amusement tax without any further inquiry, and it is not entitled to a refund of the taxes it collected from its customers.

B. "Specific vs. General" Taxing Provisions.

But that does not end the inquiry in this case. The AHC, relying on this Court's decision in *Westwood*, determined that Tropicana's fee to use bowling shoes was not taxable under the amusement tax because another tax–the lease tax–was a more "specific" tax and controlled over the amusement tax. The AHC, still relying on *Westwood*, then determined that because the shoe fee was not taxable under the lease tax, it was not taxable at all.

The theory that a transaction, though clearly taxable under one subdivision of § 144.020.1, is nevertheless exempt from tax because a more "specific" subdivision of that statute does not apply to the transaction in question was first articulated in *Greenbriar I*. In that case, the object of the tax was a monthly service charge that a country club collected from its members. *Greenbriar I*, 935 S.W.2d at 36-37. The country club and the Director stipulated that the service charge was used exclusively to cover tipping related to meals and drinks the club sold to its members. *Id.* at 38. The parties also stipulated that the club sold

meals and drinks only to its members, and not the public. *Id.*

This Court observed that two subdivisions of § 144.02.1–the amusement tax and the tax on meals and drinks–arguably applied to the transaction. *Id.* This Court determined that the two taxing provisions were in conflict and that the tax on meals and drinks applied because it was more "specific" than the amusement tax. *Id.* Inferring a negative implication from the fact that the tax on meals and drinks did not tax meals and drinks unless they were served to the public, this Court concluded that the service charge was not taxable at all. In other words, despite the fact that the service charge was clearly taxable under the amusement tax as a charge paid to a place of amusement, this Court held that it was not taxable under any provision because a more "specific" taxing provision did not apply to the transaction.

This argument was resurrected in *Westwood*. There, this Court held that a country club's fee charged to "rent" golf carts was not taxable, though the fee clearly fell under the amusement tax, because the fee was not taxable under the lease tax (§ 144.020.1(8)). *Westwood*, 6 S.W.3d at 889. This Court, citing *Greenbriar I*, held that the lease tax applied to the transaction because it was more "specific" than the amusement tax. *Id.* Although amounts charged for the lease or rental of tangible personal property are taxable under the lease tax, this Court held that the lease tax itself contained an exemption from tax if sales tax had been paid on the purchase price of the later leased or rented property. Because the country club had paid sales tax on its purchases of the golf carts, this Court held that the amounts the club charged to "rent" the golf carts was not taxable at all.

The underpinnings on which the *Greenbriar I* and *Westwood* decisions rested, however, were eroded by this Court's later decision in *J.B. Vending*. The decisions in both *Greenbriar I* and *Westwood* are based on the idea that when two taxing statutes conflict, the more "specific" statute controls. But in *J.B. Vending*, this Court observed that while *Greenbriar I* stated that the two taxing provisions were in conflict and that the more "specific" taxing provision controls over the more general one, this, in fact, was not the basis for the decision in *Greenbriar I*:

> But this precept applies only where the two provisions are in such conflict that they cannot be harmonized. In *Greenbriar [I]*, the two sections could be harmonized by recognizing that subsection (2)'s tax applied only to fees paid to places of amusement. The money paid for meals and tips in *Greenbriar* did not constitute a fee but rather constituted the price of the meal and the service being provided. Hence, the two sections could be harmonized.

J.B. Vending, 54 S.W.3d at 189 n.2. This observation is consistent with the *J.B. Vending* court's holding that § 144.020, the taxing statute, should be construed as imposing a tax on all those who sell tangible personal property or a taxable service, and not as creating exemptions from the taxes it imposes. *Id.* at 188.

Moreover, the decision in *Greenbriar I* was driven primarily by the parties' stipulations and not on the notion that "specific" tax statutes control over general ones. The *Greenbriar I* court recognized that the Director basically stipulated the case away before the AHC: "Upon the facts to which the parties stipulated in this case, this Court agrees with

Greenbriar." *Greenbriar I*, 935 S.W.2d at 38. This Court's footnote in *J.B. Vending* not only reinforced this conclusion, but it also retreated from the premise that separate subdivisions within § 144.020.1 taxing different transactions could conflict with each other and that a "specific" taxing provision would control over a general one. The *Westwood* court simply fell into the trap that had been left for it in *Greenbriar I*. The *Westwood* court compounded the error by holding, without explanation, that not only was the lease tax was more "specific" than the amusement tax, but also that a provision found only in the lease tax that specifically exempted certain lease and rental transactions from that tax also operated to exempt these transactions from the amusement tax, which clearly applied to tax the transactions in question.

The author of the *Westwood* opinion later realized this mistake and questioned this Court's application of the rule of statutory construction providing that specific statutes control over general ones because the taxing provisions contained in § 144.020 do not conflict:

> [T]he plain language of the rule seems logically to limit its use to when two separate statutes conflict. . . . This rule of construction, though in rare instances applied to conflicting subsections within the same statute, should be used sparingly, and only after the subsections have been thoroughly reviewed and a conflict is clearly established.
>
> In the present statute there is no clear conflict.

Greenbriar Hills Country Club v. Director of Revenue, 47 S.W.3d 346, 360 (Mo. banc

2001) (Wolff, J., dissenting) ["*Greenbriar III*"]. This author concluded that both *Greenbriar Hills I* and *Westwood* should be overruled:

> I believe the Court should revisit and overrule its decision in *Greenbriar Hills I* and its progeny, *Westwood Country Club v. Director of Revenue*, which I wrote and followed the error of *Greenbriar Hills I*–an error that should not be perpetuated.

Id. at 361-62 [citation omitted].

C. The "Specific vs. General" Theory of Taxation Should Be Abandoned.

The fee Tropicana charged its customers to use bowling shoes is undisputably taxable under the amusement tax. The AHC's decision here, and this Court's decisions in *Greenbriar I* and *Westwood*, holding that the fee is not taxable because a more "specific" taxing provision that might have applied, but by its plain language does not, somehow exempts this transaction entirely from tax is contrary to legislative intent and ultimately unworkable. The Court has neither offered any analysis regarding why the lease tax and the tax on meals and drinks are more "specific" than the amusement tax, nor has it given any guidance to taxpayers and the Director in determining which taxing provisions of § 144.020 are more "specific" than others.

In fact, well-settled law before *Greenbriar Hills I* provided that *all* fees paid in or to a place of amusement were taxable. The purpose of § 144.020 is to impose taxes, not to exempt transactions from tax. Section 144.021; *J.B. Vending*, 54 S.W.3d at 188. If one subdivision of § 144.020 clearly taxes a transaction, then that transaction should be taxed despite whether it falls under a different taxing subdivision of that statute. It simply makes

no sense to look to other taxing provisions within the same statute that by their plain language do not tax the transaction and somehow conclude that the transaction cannot be taxed at all. Merely because a transaction is taxable under one provision of §144.020.1 but not taxable under any of the other eight subdivisions of that subsection does not mean that the taxing provisions are in conflict

In *Greenbriar I*, this Court held that a transaction is excluded from tax when two taxing provisions arguably apply to a transaction, one that taxes the transaction and a more "specific" one that does not. In *Westwood*, this Court extended that rationale and held that a transaction, which was clearly taxable under two taxing provisions, is nevertheless exempt from all taxation when a tax exemption contained within the more "specific" taxing provision exempts the transaction from tax. Although "[t]ax laws are to be construed strictly against the taxing authority . . . that rule does not require that statutory language be ignored and not given meaning that reasonably accords with the apparent intention of the legislature as expressed in the statute." *L & R Distrib. Co.*, 648 S.W.2d at 95.

Moreover, in *Westwood*, and now in this case, a tax exemption applicable only to one tax–the lease tax–has now been applied to exempt a transaction from an entirely different tax–the amusement tax–to which the exemption does not apply. A provision exempting a transaction from a specific tax should not be extended to apply to a transaction that is clearly taxable under a wholly different taxing provision. *Compare State ex rel. Powell v. Capps*, 381 S.W.2d 852, 859 (Mo. 1964) ("[T]hese are two different taxes authorized by different statutory provisions to be made at different times, and we cannot by

implication read into one statute an exception contained in the other which is contrary to the plain, concise and unequivocal language used.").

Applying the lease tax exemption to the amusement tax also violates rules of statutory applicable to provisos. The lease tax exemption, which follows the word "provided" in subdivision (8), is a proviso that qualifies as an exception to that subdivision. *See Lonergan v. May*, 53 S.W.3d 122, 130 (Mo. App. W.D. 2001). "Generally, a proviso is confined to the clause or distinct portion of the statute to which it pertains." *Id.* "The natural and appropriate office of a proviso is to create a condition precedent; to except something from the enacting clause; to limit, restrict, or qualify the statute in whole or in part; or to exclude from the scope of the statute that which would otherwise be within its terms.'" *Id.*, *quoting* 73 Am. Jur. 2d *Statues* § 318 (1974). *See also Brown v. Patterson*, 124 S.W. 1, 6 (Mo. 1909). A proviso is not considered separate legislation, and it does not enlarge or extend the provision to which it is attached. *See Thoroughbred Ford Inc. v. Ford Motor Co.*, 908 S.W.2d 719, 729 (Mo. App. E.D. 1995); *Brown*, 124 S.W. at 6. It only limits or restricts the general language preceding it. *See Brown*, 124 S.W. at 6. Finally, a "proviso can have no existence apart from the provision it is designated to limit or qualify." *State ex inf. Taylor v. Kiburz*, 208 S.W.2d 285, 288 (Mo. banc 1948).

The *Westwood* court applied the tax exemption proviso in the lease tax to transactions that were taxable under the amusement tax. This is contrary to the rule that limits application of a proviso to only that part of the statute it qualifies. In other words, the lease tax exemption applied only to the lease tax; it cannot be imported and used to

exempt from tax transactions that are taxable under other subdivisions of § 144.020.1. Using the lease tax exemption to exempt a transaction from the amusement tax violates the rule limiting a proviso to the specific statutory provision it qualifies.

The *Greenbriar I* and *Westwood* decisions are also contrary to other well-settled rules of statutory construction. The first of these provides that when statutory language is clear and unambiguous, then a court need not construe the statute. *See Corvera Abatement Tech., Inc. v. Air Conservation Comm'n*, 973 S.W.2d 851, 858 (Mo. banc 1998). Moreover, courts should not "resort to statutory construction to create an ambiguity where none exists." *Baldwin v. Director of Revenue*, 38 S.W.3d 401, 406 (Mo. banc 2001). In both *Greenbriar I* and *Westwood*, the amusement tax clearly applied to tax the transaction, while the other so-called "specific" provisions did not. Because no ambiguity existed concerning application of the amusement tax, no need existed to construe the taxing statute to find that the transactions were not taxable at all based on negative implications flowing from other inapplicable taxing provisions.

Even if an ambiguity existed, other well-settled rules of construction were ignored. One of these requires that an entire legislative act must be considered together and all provisions harmonized if possible. *Baldwin*, 38 S.W.3d at 405. "Statutory provisions relating to the same subject matter are . . . to be construed together" and "read . . . consistently and harmoniously." *Id.* In addition, statutes "should be construed in a manner to harmonize any potential conflict between . . . subsections." *Hovis v. Daves*, 14 S.W.3d 593, 596 (Mo. banc 2000). Finally, the rule that specific statutes control over

general ones "applies only in situations where there is a 'necessary repugnancy' between the statutes." *Greenbriar III*, 47 S.W.3d at 352, *quoting State ex rel. City of Springfield v. Smith*, 344 Mo. 150, 125 S.W.2d 883, 885 (Mo. banc 1939).

The *Greenbriar I* and *Westwood* courts did not attempt to construe harmoniously construe that taxing provisions contained in § 144.020.1. Instead of first resolving any potential conflict among its subdivisions, this Court immediately applied the rule that specific statutes control over general ones and assumed the taxing provisions contained in § 144.020.1 were in conflict when none necessarily existed. It then applied what it deemed to be the more "specific" subdivisions, which by their plain language did not apply to tax the transactions in question, when no "necessary repugnancy" existed among those subdivisions. No necessary repugnancy exists simply because one provision taxes a transaction in question while that transaction is not encompassed under the plain language of another taxing provision.

Yet another rule of construction applicable to this issue provides that when the legislature amends a statute courts presume that it is aware of all existing and unamended provisions of the statute. *See Graves v. Little Tarkio Drainage Dist.*, 134 S.W.2d 70, 81 (Mo. 1939). The amusement tax, first enacted in 1933, had been in place for thirty years when the General Assembly passed the lease tax in 1963. 1933-34 Mo. Laws Extra Session 157, § 2A(a); 1963 Mo. Laws 196; *see also Columbia Athletic Club v. Director of Revenue*, 961 S.W.2d 806, 812 (Mo. banc 1998) (Benton, C.J. dissenting). The decision in *Westwood* rests on the presumption that passage of the lease tax impliedly repealed the

amusement tax to the extent that it taxed fees to use or "rent" equipment in places of amusement. But repeals by implication are not favored. *Graves*, 134 S.W.2d at 81. A later statute will operate as a repeal of an earlier one only when there is "such manifest and total repugnance that the two" statutes cannot stand. *Id.* The two statutes must be construed so that the later one will not operate as a repeal of the earlier statute; if the two statutes are "not irreconcilably inconsistent" then both must stand. *Id.*

Nothing suggests that in passing the lease tax the General Assembly intended to depart from the clear language of the amusement tax, which imposed, without qualification or limitation, a tax on fees paid in or to a place of amusement. It simply makes no sense to presume that the General Assembly intended to create an amusement tax exemption in passing a provision intended solely to impose a tax on lease or rental transactions. In other words, we should not presume that the legislature impliedly intended to create a tax exemption by negative implication when it passed a new taxing provision that imposed a tax on transactions not previously subject to tax.

Moreover, the lease tax itself contains a provision specifically exempting the rental or lease of boats and outboard motors from the amusement tax:

> In no event shall the rental or lease of boats and outboard motors be considered a sale, charge, or fee to, for or in places of amusement, entertainment or recreation, nor shall any such rental or lease be subject to any tax imposed to, for, or in such places of amusement, entertainment or recreation.

Section 144.020.1(8). If a charge to rent or lease property in a place of amusement was

not taxable under the lease tax, then this exemption would be rendered meaningless. Courts do not presume that the legislature enacted meaningless provisions. *See Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. banc 1992). The General Assembly must have been aware that certain lease or rental transactions would taxable under the amusement tax. In the case of boats and outboard motors, the legislature exempted those transactions from both the lease and amusement tax. By not mentioning other similar transactions, the legislature intended that those transactions be taxable under the amusement tax. When a statute expressly mentions the subjects or things on which it operates, it is construed as excluding from its effect all those not expressly mentioned. *See Giloti v. Hamm-Singer Corp*., 396 S.W.2d 711, 713 (Mo. 1965).

Until *Greenbriar I*, no case had ever suggested that tax exemptions could be manufactured by negative implications flowing from the language of the taxing provisions themselves. This approach is confusing to taxpayers and the Director alike by in that it requires them to guess which taxing provisions are more "specific" than others and whether one taxing provision applies to tax a transaction or whether another applies to exempt the transaction from tax by negative implication.

For instance, the AHC found that Tropicana's fee to "rent" bowling shoes was not taxable under either the amusement or lease tax. But what if Tropicana charged a fee to "rent" bowling balls or to use an electronic scoring system. Which of these transactions, if any, would be taxable under the amusement tax or would be exempt from tax by negative implication under the lease tax? Neither *Greenbriar I* nor *Westwood* offers answers, much

less guidance, on these questions. These cases, as evidenced by the AHC's decision here, simply invite more litigation to determine, on a case-by-case basis, which taxing provisions are more "specific" than others and which transactions are exempt from tax because of negative implications flowing from "specific" taxing provisions.

This inconsistency in this approach is starkly demonstrated by the AHC decision in *Tower Tee Golf, Inc. v. Director of Revenue*, No. 00-0686 (Mo. Admin. Hearing Comm'n, May 30, 2001). There, the AHC determined that a fee paid to hit golf balls at a driving range was taxable under the amusement tax even though the taxpayer argued that it leased or rented the golf balls to its customers. The taxpayer had claimed that the fee it charged was exempt from tax because it paid sales tax on its purchases of the golf balls. The AHC acknowledged this Court's holding in *Westwood*, but determined that the driving range fee was taxable because customers were required to pay the fee to use the range, while the customers in *Westwood* were not required to "rent" golf carts to play golf. *Tower Tee*, slip op. at 5.

This Court should abandon the "specific vs. general" theory of taxation applied in *Greenbriar I* and *Westwood* and restore previous tax policy by holding that if a transaction is taxable under any taxing provision contained in § 144.020, then it should be taxed unless that transaction is otherwise exempt from tax based on a specific tax exemption. This Court should abandon the idea that tax exemptions can be manufactured by negative implications flowing from the statutes that impose taxes.

If the approach adopted in *Greenbriar I* and *Westwood* is not abandoned, this Court

will continue to find itself on the same slippery slope it was after its decision in *Columbia Athletic*, which attempted to define the nebulous line separating exercise from recreation. In *Columbia Athletic*, this Court held that the health club involved in that case was not a place of recreation. 961 S.W.2d at 811. This Court later overruled *Columbia Athletic* in *Wilson's Total Fitness Center, Inc. v. Director of Revenue*, 38 S.W.3d 424 (Mo. banc 2001). In *Wilson's*, the AHC had relied on factual differences between that case and *Columbia Athletic* in determining that the health club in *Wilson's* was a place of recreation. This Court was concerned, however, that the AHC's decision in *Wilson's* led "to the anomalous result that, in the same community, one health and fitness center's membership fees are subject to state sales tax while another health and fitness center's membership fees are not." *Wilson's*, 38 S.W.3d at 426. This Court concluded that this disparate treatment resulted from "the difficulty encountered by the AHC in attempting to sift through such details" in determining whether a health club was a place of recreation.

That same difficulty is present in this case and will continue to cause problems for taxpayers and the Director in determining if a transaction that is clearly taxable under one taxing provision is nevertheless excluded from tax because another taxing provision that does not apply to the transaction is somehow more "specific." Currently, customers are deemed to "rent" golf carts, video games, and now bowling shoes, and they pay no tax on the fees charged to use this property. But customers are not deemed to "rent" golf balls and must pay tax on the fees charged at a driving range. The Director joins in the plea by the author of *Westwood* that this Court overrule both *Greenbriar I* and that part of *Westwood*

applying the "specific vs. general" theory of taxation to exempt golf cart fees from the tax.

D. This Case Is Distinguishable From *Westwood*.

Even if the "specific vs. general" theory of taxation is left in place, this case is distinguishable from *Westwood* and this Court's recent decision in *Six Flags*. The fees charged for the use of golf carts in *Westwood* and to play video games in *Six Flags* are different from the fee Tropicana charged to use bowling shoes in that nothing in either the *Westwood* or *Six Flags* opinions show that the customers were required to "rent" tangible personal property to engage in the amusement activity.

Here, on the other hand, the record shows that all bowlers were required to wear bowling shoes (L.F. 10). If they did not bring their own shoes, bowlers were required to pay a fee to use the shoes Tropicana provided (L.F. 10). In other words, the golfers in *Westwood* were not required to use golf carts to participate in the amusement or recreational activity at issue in that case (golf), but Tropicana's customers are required to pay a fee to use bowling shoes–or bring their own–to participate in the amusement or recreational activity at issue in this case (bowling). The same is also true in Six Flags, because no one was required to pay to play video games after paying the fee to enter the amusement park. This distinction makes the amusement tax more "specific" than the lease tax under the facts of this case. Because the payment of a fee to use bowling shoes was required to participate in the amusement or recreational activity in this case but not in *Westwood* or *Six Flags*, the amusement tax should apply to tax Tropicana's fee to use bowling shoes.

Distinguishing this case from Westwood on this basis demonstrates the mischief caused by the "specific vs. general" theory of taxation, and reveals the difficulty in applying it to sales tax administration. Rather than applying a simple, straight-forward rule that a transaction is taxable if one subdivision of § 144.020.1 applies to it, taxpayers and the Director must now analyze a transaction to determine which taxing provision is more "specific" under the facts of a particular case. They must do so without guidance to inform them when one taxing provision is more "specific" than another. Here, for instance, one can argue that the lease tax was more "specific" in *Westwood* because golfers were not required to use golf carts, but in this case one can argue that the amusement tax is more "specific" because bowlers were required to use bowling shoes. One can also argue that persons playing video games in *Six Flags* were not required to play video game because they had already paid the required fee to enter the amusement park. On the other hand, one could argue that the video-game players in *Six Flags* were required to pay a fee for the amusement activity because they had to put money into the machine to play a video game. These results are contrary to the reasonable expectations of the legislature when it passed the taxing statute, and it cannot be a consequence that this Court envisioned, much less intended, when it decided *Greenbriar I* and *Westwood*.

3. THE LEASE TAX

Although the AHC determined that Tropicana's bowling shoe fee constituted an amount charged for the lease or rental of tangible personal property, normally taxable under the lease tax (§ 144.020.1(8)), it nevertheless held that the fee was not taxable under a

provision found within the lease tax that exempts from that tax amounts charged for the lease or rental of property when certain conditions had been met. The AHC's decision is contrary to the reasonable expectations of the General Assembly. First, the lease tax does not apply to this situation because paying a fee to use bowling shoes does not constitute a lease or rental. Second, even if a lease or rental was involved, the tax exemption found within the lease tax does not apply to the facts of this case.

A. Paying A Fee To Use Bowling Shoes Is Not A Lease Or Rental.

The lease tax, § 144.020.1(8), imposes a tax on "the amount paid or charged for rental or lease of tangible personal property." Obviously, before a transaction is taxable under the lease tax, it must involve a lease or rental of tangible personal property. Although the words "rent" or "lease" are not specifically defined under Chapter 144, other definitions contained in that chapter shed light on what the legislature intended when it enacted § 144.020.1(8).

Taxpayers are required to pay tax on their "gross receipts," which is the "aggregate amount of the sales price of all sales at retail." Section 144.021. The phrase "gross receipts" includes lease or rental payments only when continuous possession of tangible personal property is granted under a lease or contract:

> [Gross receipts] shall also include the lease or rental consideration where the right to continuous possession or use of any article or tangible personal property is granted under a lease or contract and such transfer of possession would be taxable if outright sale were made, and, in such cases, the same shall be taxable as if outright

sale were made and considered as a sale of such article, and the tax shall be computed and paid by the lessee upon the rentals paid.

Section 144.010.1(3).

Further understanding of the legislature's intent in passing the lease tax can be gained by examining the historical context behind its enactment. "The history of the evolution of the law into its present shape throws light upon the intention of the lawmakers, and aids in arriving at the true meaning" of a statute. *State ex rel. Frisby v. Stone*, 152 Mo. 202, 53 S.W. 1069, 1070 (1899); *see also Cummins v. Kansas City Pub. Serv. Co.*, 334 Mo. 672, 66 S.W.2d 920, 925 (1933) ("the manifest purpose of the statute, considered historically, is properly given consideration"). The history behind the passage of the lease tax shows that the legislature never intended that a fee a bowling alley charges its customers to use bowling shoes constitutes a lease or rental.

Beginning in 1935, just after the passage of the sales tax act, a dispute arose concerning whether transactions involving the lease or rental of tangible personal property that required servicing were taxable. *International Bus. Mach. Corp. v. State Tax Comm'n*, 362 S.W.2d 635, 637 (Mo. 1962). That controversy abated in 1946 with an agreement between a taxpayer, IBM, and the taxing authorities that only 50% of the rental receipts would be taxed. *Id.* But in 1959, the Department of Revenue advised IBM that only amounts directly attributable to servicing rented machines could be deducted and that IBM must report amounts received from rentals and service separately. *Id.* IBM refused to do this and claimed that no part of its rental or lease receipts were taxable. *Id.*

The transactions at issue involved written contracts entered into between IBM and its customers "for the use or rental of . . . various office and business machines." *Id.* Under the agreement, IBM agreed to both furnish its customer a machine manufactured by IBM and to keep that machine in good working order. *Id.* The agreement, which lasted for at least one year and could thereafter be terminated by either party on thirty days notice, provided for monthly payments to use the machines. *Id.* The agreement also contained other provisions concerning the amount of time the customer could use the machine, the payment of taxes, use of additional machines and other equipment, and the customer's payment of drayage (shipping) charges. *Id.*

The court held that neither the definition of sale at retail, nor the provisions of § 144.020 then in effect, allowed the taxation of proceeds from rental or lease transactions other than the types expressly identified under the law. *Id.* at 639. The court suggested that if the legislature wanted to tax all rental or lease transactions, then it could amend the sales tax law:

> In short, had the legislature desired or intended to impose a sales tax on any and all lease transactions it would have been a very simple matter to plainly manifest that purpose by express provision in the act. By carefully defining "sale at retail" and purposefully embracing in the definition and the tax certain rental-type transactions, it would appear that other rentals and leases were not embraced.

Id.

A similar result was reached in *Federhofer, Inc. v. Morris*, 364 S.W.2d 524 (Mo.

1963). *Federhofer* involved the lease or rental of automobiles under written contracts. *Id.* at 525. These contracts provided for the lease or rental of the described vehicle for a period of at least one year with the lessee making payments on a regular basis. *Id.* at 525-26. The contracts also contained numerous provisions relating to vehicle maintenance, depreciation, repossession, insurance, and other matters. *Id.* The Director determined that these transactions were taxable and that sales tax should be collected on the consideration paid for the lease or rental of the vehicles. *Id.* at 525. The court, relying on *IBM*, decided one year earlier, held that the lease or rental of motor vehicles was not a taxable event under § 144.020. *Id.* at 528.

In response to these two cases, the General Assembly, in 1963, enacted § 144.020.1(8), the lease tax, which imposed a tax on "the amount paid or charged for rental or lease of tangible personal property." 1963 Mo. Laws 196. Three years later, this tax was tested in *International Bus. Mach. Corp. v. David*, 408 S.W.2d 833 (Mo. banc 1966). In that case, IBM contended that the proceeds it received on the rental of its business machines were not taxable despite the passage of the lease tax. *Id.* at 836. This Court rejected that argument and held that the legislature accepted the invitation the court extended in the 1962 *IBM* case and in *Federhofer* to amend the statute. *Id.* at 836-37. This Court also held that the amendment to § 144.020.1 specifically made these types of lease and rental transactions taxable. *Id.*

These cases form the historical basis behind enactment of the lease tax, and they guide us in determining the types of transactions the legislature intended to tax. Each case

discussed above involved written contracts or leases for the continuous possession or use of tangible personal property over an extended period of time. Moreover, each case involved periodic payments for the lease or rental of this property. The factors present in these cases is also consistent with the statutory definition of "gross receipts," which includes lease or rental proceeds only when the transaction involves "the right to continuous possession or use of . . . tangible personal property . . granted under a lease or contract." Section 144.010.1(3). Finally, these cases involve true lease or rental transactions as those words are commonly understood and defined by the dictionary.

When construing a statute, "undefined words are given their plain and ordinary meaning as found in the dictionary." *Asbury v. Lombardi*, 846 S.W.2d 196, 201 (Mo. banc 1993). As used in this context, the definition of "rent" is "[t]o obtain occupancy or use of (another's property) in return for *regular* payments." THE AMERICAN HERITAGE DICTIONARY 1047 (2d College ed. 1985) (emphasis added). "Rental" is merely "[t]he act of renting." *Id.* "Lease" has been defined as "a contract granting use or occupation of property during a specified period in exchange for a specified rent." *Id.* at 721. "Rent," used as a noun in this definition, is defined as "[p]ayment, usually of an amount fixed by contract, made by a tenant at specified intervals in return for the right to occupy or use the property of another." *Id.* at 1047. "When used with reference to tangible personal property, [lease] means a contract by which one owning such property grants to another the right to possess, use and enjoy it for specified period of time in exchange for periodic payment of a stipulated price, referred to as rent." BLACK'S LAW DICTIONARY 461 (abr.

5th ed. 1983).

In this case, no contract was entered into and no regular or periodic payments were made to use the bowling shoes; only one fee was charged. And the use permitted for that fee was extremely limited. Tropicana's customers could only wear the shoes in Tropicana's facility and were required to return the shoes after completing their bowling activities (L.F. 11). This is not the type of transaction the General Assembly sought to tax by passing the lease tax in response to the 1962 *IBM* and *Federhofer* cases. Moreover, this limited use certainly did not constitute "the right to continuous possession or use . . . granted under a lease or contract." Section 144.010.1(3). Under the circumstances of this case, the permission Tropicana gave its customers to use the bowling shoes for a limited purpose at a time and place designated by Tropicana constituted a mere license, not a lease or rental. *See Katz v. Slade*, 460 S.W.2d 608, 613 (Mo. 1970) (holding that a golf course's "rental" of golf carts to golfers for use on the course constituted a license, not a lease); *Esmar v. Zurich Ins. Co.*, 485 S.W.2d 417, 421 (Mo. 1972) (holding that permission given by a landowner, for a charge, to allow parking at any convenient place on a lot is a license, not a lease); *Siciliano v. Capital City Shows, Inc.*, 475 A.2d 19 (N.H. 1984) (a person riding an amusement park ride holds a mere license).

The issue regarding whether transactions of the type found in this case constitute a lease or rental as the legislature used those words in § 144.020.1(8) was not decided in *Westwood*:

Both parties invite us to determine whether the fees charged by Westwood were for

> a rental of or license to use golf carts. The fees paid for the use of a golf cart are similar to fees paid for dining at Westwood–dues paid by the club's members cover the purchase, maintenance and use of golf carts. For the purposes of this opinion, we only hold that the golf cart fees were sufficient to qualify for treatment under section 144.020.1(8) in that ambiguities in statutes imposing taxes are to be resolved in the taxpayer's favor.

Westwood, 6 S.W.3d at 888 n.6. But as demonstrated above, a fee paid for the limited and restricted use of tangible personal property within the confines of a place of amusement is merely a license to use the property, not a lease or rental of it.

Moreover, the court's reliance on the rule of construction that ambiguities in taxing statutes are construed in favor of the taxpayer is misleading. The wording used by the court is shorthand for the more precise version of the rule, which is that "[l]aws imposing taxes are to be strictly construed, and so the right to tax must be conferred by plain language, for it will not be extended by implication." *Kanakuk-Kanakomo Kamps v. Director of Revenue,* 8 S.W.3d 94, 96 (Mo. banc 1999); *see also Blue Springs Bowl*, 551 S.W.2d at 599. In other words, whether a particular transaction falls within the taxing statute must plainly and clearly appear from the words of the statute. *Union Elec. Co. v. Morris*, 222 S.W.2d 767, 770 (Mo. 1949).

Construing the lease tax to include any transaction in which a fee is charged to use personal property on a limited basis is contrary to the rule requiring that taxing statutes be strictly construed. In other words, extending the definition of the words lease and rental to

include the payment of a fee to use bowling shoes or a golf cart constitutes a broad, not a strict or narrow, construction of the lease tax. Proper application of this rule would have resulted in a finding that the transactions at issue both here and in *Westwood* did not constitute the lease or rental of tangible personal property and, thus, did not fall under the lease tax. In *Westwood*, the court broadly construe the lease tax to include a transaction that the legislature did not intend to tax so that the taxpayer could take advantage of a tax exemption applicable only to the lease tax and avoid being taxed under the amusement tax, which clearly taxed the transaction in question.

The AHC in this case has broadly construed the lease tax and extended the definition of the words rent and lease beyond the bounds of legislative intent. In *Tower Tee*, on the other hand, the AHC determined that a driving range's customer's did not "lease" golf balls. "At some point, the activity in a place of amusement is so ephemeral that applying the term 'lease' to the personal property involved does not make common sense." *Tower Tee*, slip op. at 5.

Also, simply because Tropicana has described its fee to use bowling shoes as a "rental" fee does not by itself prove that the lease tax applied to this transaction. Many transactions are casually referred to as "rentals" when, in fact, they are not under the law. When a word in a statute is obscure, or capable of many meanings, it may be defined by reference to associated words to avoid giving the statute unintended breadth. *See Pollard v. Board of Police Comm'rs*, 665 S.W.2d 333, 341 n.13 (Mo. banc 1984); *O'Malley v. Continental Life Ins. Co.*, 75 S.W.2d 837, 840 (Mo. banc 1934). To broadly define the

word "rental," as it is used in the lease tax, to include all transactions in which one person is permitted to use the property of another would be inconsistent with the more commonly understood, and restrictive, definition of the word lease and give the statute an unintended breadth.

Under *Westwood* and the AHC's decision in this case, any fee or charge paid in or to a place of amusement to use personal property, even if use of that property either enhances the amusement or recreational aspect of the activity involved or is required to participate, is not subject to tax if the lessor or renter can show that the transaction is exempt from tax under the exemption clause contained in § 144.020.1(8). Under this scheme, charges or fees to use bowling shoes, ice skates, go carts, and other equipment would not be taxable if the owner paid sales tax on the original purchase of such equipment. The lease tax has now been so broadly construed that putting coins in a video game constitutes "a rental agreement." *Six Flags*, slip op. at 7.

But the General Assembly did not reasonably expect that any fee charged to use property within an amusement or recreational facility would constitute a lease or rental consideration falling under the provisions of the lease tax. This is shown by language in the lease tax exempting the rental or lease of boats and outboard motors from the amusement tax. Section 144.020.1(8). By including this provision, the legislature anticipated that other charges to "rent" or "lease" property for amusement or recreational activities within a place of amusement or recreation would fall under the amusement tax. Moreover, this language reveals that the legislature intended that all fees paid to use property as part of an

amusement or recreational activity would be subject to the amusement tax and that the lease tax would be restricted to transactions that constituted a true rental or lease obligation.

Tropicana's bowling shoe fee was not taxable under the lease tax (§ 144.020.1(8)), because those charges were not "amounts paid or charged for rental or lease of tangible personal property." Since this fee did not fall under the lease tax, it follows that the tax exemption found within that particular tax could not have been employed to exclude this fees from any tax whatsoever. To the extent that *Westwood* holds that transactions similar to the one at issue here constitute a lease or rental, it should be overruled.

B. The Shoes Were Not Purchased Under "The Conditions of Sale At Retail."

Assuming that Tropicana's bowling shoe fee was an amount paid for rental or lease under the lease tax, the provision exempting certain lease and rental transactions from that tax under certain conditions did not apply here.

The AHC, relying on this Court's holding in *Westwood*, determined that Tropicana's shoe fee was not taxable because Tropicana paid sales tax when it purchased the bowling shoes that it "rented" to its customers. The *Westwood* court held that the golf cart fee at issue in that case was not taxable under the lease tax solely because the taxpayer had paid sales tax on its purchases of the golf carts. *Westwood*, 6 S.W.3d at 888 ("Section 144.020.1(8) imposes a tax on fees charged for the rental or lease of personal property unless the property was purchased under "sale at retail" conditions *or* sales taxes were previously paid by the renter or seller on the original purchase or lease of that property") (emphasis added) (footnote omitted). This holding is contrary to the plain language of the

statute and was incorrect.

Under the lease tax, rental or lease charges are taxable unless two conditions are met: 1) the renter previously purchased the property under the conditions of "sale at retail" as defined in § 144.010.1(8); *and*, sales tax was paid at the time of purchase:

> A tax equivalent to four percent of the amount paid or charged for rental or lease of tangible personal property, provided that if the lessor or renter of any tangible personal property had previously purchased the property under the conditions of "sale at retail" as defined in subdivision (8) of section 144.010 or leased or rented the property and the tax was paid at the time of purchase, lease or rental, the lessor, sublessor, renter or subrenter shall not apply or collect the tax on the subsequent lease, sublease, rental or subrental receipts from that property.

Section 144.020.1(8). When the extraneous matter related to subleases and subrentals is omitted, the plain language of the exemption clearly states that not only must sales tax have been paid at the time of purchase, but that the lessor or renter must have purchased the property under the conditions of sale at retail for the exemption to apply:

> [I]f the lessor or renter of any tangible personal property had previously purchased the property under the conditions of "sale at retail" . . . *and* the tax was paid at the time purchase . . . , the lessor [or] renter shall not apply or collect the tax on the subsequent lease [or] rental receipts from that property.

Section 144.020.1(8) (emphasis added). The *Westwood* court erred both in holding that this exemption applies solely if sales tax was paid on the purchase of the leased or rented

property and in not addressing the issue of whether the taxpayer purchased the golf carts under the conditions of sale at retail. Since no one disputes that Tropicana paid sales tax on its bowling shoe purchases, the issue before this Court is whether these purchases were made "under the conditions of 'sale at retail.'"

Two important rules of statutory construction must be kept in mind when construing this tax exemption. First, exclusions or exemptions from tax are strictly construed against the party claiming such. *See State ex rel. Union Elec. Co. v. Goldberg*, 578 S.W.2d 921, 923 (Mo. banc 1979). Despite the fact that this provision appears in a taxing statute, it is, nevertheless, an exemption from tax and must be strictly construed against Tropicana, which contends that its shoe fee is exempt from the lease tax. Although in *Six Flags*, this Court stated that § 144.020.1(8) does not describe an exemption, but imposes a tax, this statement does not fully describe the structure of subdivision (8). *Six Flags*, slip op. at 6. While this subdivision imposes a tax on lease or rental proceeds, it also clearly contains a proviso granting a tax exemption from that tax under certain conditions. Thus, the provision imposing the tax should be strictly construed against the Director, but the proviso containing the tax exemption should be strictly construed against the taxpayer.

The second rule of construction applicable here is that the provision containing the exemption is a proviso; it limits or restricts the general language preceding it, which in this case is the lease tax itself. *See Lonergran*, 53 S.W.3d at 130. A proviso can have no existence apart from the statutory language it limits or qualifies. *See Kiburz*, 208 S.W.2d at 288.

Merely because Tropicana paid sales tax on its bowling shoe purchases does not prove that these purchases were made under the "conditions of sale at retail." Otherwise, the separate requirement that the purchase be made under the "conditions of a sale at retail" would be rendered meaningless. *See R. B. Indus., Inc. v. Goldberg*, 601 S.W.2d 5, 6 (Mo. banc 1980). The legislature is presumed to have intended that every part of a statute have effect and be operative, and that it did not intend any part of a statute to be meaningless. *See Graves*, 134 S.W.2d at 78. "A statute should be construed that effect may be given to all its provisions so that no part will be inoperative, superfluous or that one part will destroy another." *Id.* Therefore, in determining whether these purchases were made under the conditions of a sale at retail, one must look beyond whether Tropicana simply paid sales tax on its bowling shoe purchases.

Several statutory definitions provide guidance in making that determination. "Sale at retail" is defined as "any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption *and not for resale in any form* as tangible personal property, for a valuable consideration." Section 144.010.1(10) (emphasis added). In other words, a transaction is not a sale at retail if the property is intended for resale in any form. In addition, sellers pay sales tax on their "gross receipts" which includes:

> the total amount of the sale price of the sales at retail . . . . It shall also include the lease or rental consideration where the right to continuous possession or use of any article of tangible personal property is granted under a lease or contract and such

> transfer of possession would be taxable if outright sale were made and, in such cases, the same shall be taxable as if outright sale were made and considered as a sale of such article, and the tax shall be computed and paid by the lessee upon the rentals paid.

Section 144.010.1(3). "[T]he proceeds of a lease are includable in gross receipts only to the degree that proceeds from a comparable sale would be . . . ." *Brambles Indus., Inc. v. Director of Revenue*, 981 S.W.2d 568, 570 (Mo. banc 1998). Finally, a "purchaser" under the sales tax law is "a person who purchases tangible personal property or to whom are rendered services, receipts from which are taxable under sections 144.010 to 144.510." Section 144.010.1(6).

As mentioned above, the lease tax exemption requires that a purchase be made under the *conditions* of sale at retail. The definition of "condition" most appropriate here is "something that restricts or modifies something else; qualification." THE AMERICAN HERITAGE DICTIONARY 306 (2d College ed. 1985). To be exempt from sales tax, Tropicana's bowling shoe purchases must qualify as sales at retail.

But the purchase of tangible personal property with the intent to rent or lease that property constitutes a sale for resale. In *Brambles*, the taxpayer leased pallets to a customer which manufactured soap. *Brambles*, 981 S.W.2d at 569 The manufacturer then used the pallets to ship the soap to its retail customers, and it did not receive the pallets back from these customers. *Id.* The taxpayer, which had collected sales tax on the proceeds from these leases, sought a refund on the ground that the lease proceeds were

excluded from tax in that the manufacturer purchased the pallets for resale to its retail customers. *Id.* The AHC held that the resale exclusion did not apply to lease transactions because title was not transferred. *Id.*

This Court, however, held that the lease proceeds were not taxable under the lease tax "[b]ecause . . . the right to use property may also qualify as a sale for resale, and that personal property leased under circumstances where a sale would be excludable qualifies for a parallel exclusion under section 144.010(3) [definition of 'gross receipts']. *Id.* In reaching this holding this Court held that "to the degree that a lease would be a sale for resale if an outright sale had been made, section 144.010(3) requires that the proceeds from such a lease be excluded from gross receipts." *Id.* at 570. This Court concluded that it was not necessary for title to the property to pass before the lease proceeds may be excluded from tax as a sale for resale. *Id.*

The issue of whether purchases intended for use as rental or lease property can be considered as sales at retail was also addressed in *Weather Guard, Inc. v. Director of Revenue,* 746 S.W.2d 657 (Mo. App. E.D. 1988). There, the court held that a taxpayer's purchases of insulation blowing machines that were intended to be rented to its customers were purchases for resale, and that the taxpayer was not subject to use tax on the purchases. The court found that a rental qualifies as a sale under the use tax law. *Id.* at 658. Although the decision in *Weather Guard* was based on the definition of sale and resale contained in the use tax law, this Court has held that the same analysis is applicable to both use and sales tax. *See House of Lloyd, Inc. v. Director of Revenue,* 884 S.W.2d 271, 275 (Mo. banc

1994); *Dean Machinery Co. v. Director of Revenue*, 918 S.W.2d 244, 246 (Mo. banc 1996).

A purchase of property with the intent to lease or rent that property to a third party in transaction qualifying as a retail sale is a sale for resale. Under § 144.010.1(10), no sale at retail occurs when property is purchased for resale in any form. The resale exclusion applies only when property is purchased with the intent to resell that property in a sale at retail. *See Westwood*, 6 S.W.3d at 887-88. Under *Brambles* and *Weather Guard*, a purchase with the intent to lease or rent the purchased property in a retail sale qualifies as a sale for resale. Tropicana purchased the bowling shoes to resell the shoes at retail to its customers by renting the shoes for a fee. The shoe fee transaction was a sale at retail because fees paid in or to places of amusement are expressly identified as sales at retail under § 144.010(10)(a).

Assuming that Tropicana's bowling shoe fee fell under the lease tax, it is apparent that Tropicana did not purchase the shoes under the "conditions of sale at retail." Tropicana purchased the shoes for the purpose of "renting" them to its customers for a fee. Tropicana's customers were "purchasers" under the sales tax law, since rental charges constitute "gross receipts" under § 144.010.1(3). Gross receipts, of course, are the total amount of all sales at retail, and include lease and rental consideration, as well as any fee paid in or to a place of amusement. Section 144.010.1(10)(a). Tropicana's shoe fee thus qualified as a sale at retail under § 144.010.1(10), which is required before the sale for resale exclusion applies. Tropicana's purchase of bowling shoes for resale to its customers

in the form of a "rental" was not made under "the conditions of sale at retail."

Because a rental is considered a sale, Tropicana's bowling shoe purchases for the purpose of "renting" or "leasing" would constitute sales for resale. For a transfer to be considered "a sale at retail," however, it must be for use or consumption, and not for resale in any form. Tropicana's purchases, therefore, were not made under the "conditions of sale at retail." Although Tropicana paid sales tax on its purchases of bowling shoes, it did not purchase them "under the conditions of sale at retail" as required. It, therefore, cannot avail itself of the tax exemption contained in the lease tax.

The AHC determined that because Tropicana paid sales tax when it purchased the bowling shoes, the resale argument did not apply (L.F. 86). But the imposition of tax is determined by the statutes, not by the actions of an individual taxpayer. In other words, simply because Tropicana paid tax when it purchased the shoes does not establish that its purchases were not for resale. Tropicana clearly resold the shoes by "renting" them to its customers. Whether Tropicana mistakenly paid sales tax and was entitled to issue a resale exemption certificate to the seller of the shoes is not relevant to the issues in this case.

The AHC also supported its decision by noting that sales are taxed only once in the stream of commerce and that Tropicana paid tax on its purchases of the shoes (L.F. 87). The theory behind the resale exclusion is to tax the sale of tangible personal property not simply once, but to tax the sale at the retail level, when its value is at its highest.

Tropicana paid between $15 and $22 for a pair of bowling shoes, but its shoe fee averaged $1.75 during the refund period (L.F. 10-11, 52-73). In as few as nine or as many

as thirteen rentals, the total shoe fee Tropicana charged would equal the value of the shoes. Although not mentioned in the record, common senses dictates that Tropicana "rented" each pair of shoes well more than thirteen times before that pair was retired. In fact, during the refund period, Tropicana collected over $341,000 in shoe fees averaging over $11,000 a month (L.F. 20). Its shoe fee accounted for 11.5% of its total bowling revenues and over 7% of its total revenues (L.F. 79).

The General Assembly did not intend to tax only the shoe purchase and pass on the shoe fee receipts simply because Tropicana chose to pay on its shoe purchases and seek a refund of the taxes its customers have already paid. Indeed, in *Tower Tee*, the AHC took a position contrary to the one it took in this case, and stated that "[w]e doubt that the General Assembly intended to forego the collection of sales tax on the amounts paid for such fleeting, but lucrative, transactions by considering them to be 'lease . . . receipts from that property.'" *Tower Tee*, slip op. at 5-6.

The sheer amount of the shoe "rental" receipts in this case also demonstrates why the legislature limited application of the tax exemption contained in the lease tax only in situations in which both the sales tax was paid at the time of purchase *and* the property was purchased under the conditions of sale at retail. Certainly the legislature did not intend that hundreds of thousands of dollars in shoe fee receipts go untaxed simply because the lessor or renter chose to pay tax when it purchased the property. The tax exemption avoids this result by requiring that the purchases also be made under the conditions of sale at retail.

CONCLUSION

The AHC erred in setting aside the Director's decision denying Tropicana's refund claim and in awarding Tropicana $23,888.65 in sales taxes Tropicana collected from its customers and remitted to the Director. The AHC's decision should be reversed.

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 13,902 words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk, which contains a copy of this brief, filed with this Court has been scanned for viruses and is virus-free; and

(3) That a copy of this brief and a floppy disk containing this brief, were mailed, postage prepaid, on February 24, 2003, to:

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