IN THE
SUPREME COURT OF MISSOURI

No. SC84956

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

RESPONDENT

v.

DIRECTOR OF REVENUE,
STATE OF MISSOURI,

APPELLANT

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

BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

This case is a petition for judicial review from a decision of the Administrative Hearing Commission ("AHC" or "Commission"), rendered under §621.050,[1] finding that Respondent, Eighty Hundred Clayton Corp. d/b/a Tropicana Lanes ("Tropicana Lanes") was entitled to a refund of sales taxes it had previously remitted to the Director of Revenue (Director). This Court has exclusive appellate jurisdiction over cases involving the construction of the revenue laws of this state. *Mo. Const. Art. V, sec. 3; Kanakuk-Kanakomo Kamps, Inc. v. Director of Revenue,* 8 S.W.3d 94, 95 (Mo. banc 1999). "To be a case involving construction of a revenue law, 'the construction of a revenue law must itself be in issue.'" *Branson Scenic Ry. V. Director of Revenue*, 3 S.W.3d 788, 789 (Mo. App. W.D. 1999). When an appeal can be disposed of by the application of a prior Supreme Court construction, the Supreme Court does not have exclusive jurisdiction. *Equitable Life Assur. Soc. V. Tax Com'n*, 852 S.W.2d 376 (Mo. App. E.D. 1993). Even if the Supreme Court has not addressed the argument directly, jurisdiction is not exclusive if the argument was addressed implicitly. *Id.*

This case concerns the Missouri sales tax treatment of amounts paid for the rental of tangible personal property in a place of amusement. The AHC ruled that Tropicana Lanes rented bowling shoes to its customers. Because Tropicana Lanes had

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

paid sales tax on the purchase of the bowling shoes, the AHC ruled that, pursuant to §144.020.1(8) and this Court's decision in *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999), no sales tax was due on the bowling shoe rental receipts.

This Court has already ruled twice that rentals of tangible personal property in a place of amusement are not taxable if tax was paid on the purchase of the property. *Six Flags Theme Parks, Inc. v. Director of Revenue*, No. SC84563, slip opinion (Mo. banc, January 14, 2003); *Westwood*, 6 S.W.3d 889. In *Six Flags*, the rental fees from video games on which tax had been paid on their purchase were held not taxable. *Six Flags*, slip op. pp. 6-9. The Court ruled that the customer's exclusive right to operate the video game for a term equal to the length of the game was a rental agreement. *Id*. at 7. In *Westwood*, the rental fees from golf carts on which tax had been paid on purchase were not taxable. *Westwood*, 6 S.W.3d at 889.

In both *Six Flags* and *Westwood*, the Court examined §144.020.1(8), ("Subdivision (8)"), which taxes the "rental" or "lease" of tangible personal property, and held that it applied to the taxpayers' rentals. *Six Flags*, slip op. at 7; *Westwood*, 6 S.W.3d at 889. In *Six Flags*, the Court cited its treatment of golf cart rentals in *Westwood*:

> The taxation of receipts from the video game machines is prohibited by this Court's holding in the similar circumstance of the rental to customers of golf carts. *Westwood*, 6 S.W.3d at 888-889. In *Westwood*, this Court determined that a country club owed no sales

> tax on fees it charged for gold cart usage because the golf carts were being rented to customers and the country club previously paid sales tax on its purchases and leases of the carts. *Id*. at 888. Section 144.020.1(8) governs such a transaction. *Id*. at 889.

Six Flags, slip op. at 7 (footnote omitted).

Thus, this Court has construed Subdivision (8) and its application to rentals of tangible personal property. "This definition has not changed from case to case . . .. The real question before the court in such a case is not the construction of the term but an *application* of this term to the facts of the case."(Emphasis original.) *Hermel, Inc., v. State Tax Commission***,** 564 S.W.2d 888, 897 (Mo. banc 1978).

The Director claims the *Westwood* Court failed to properly construe the potential conflict between Subdivision (8) and Subdivision (2). In addition, the Director claims that the *Westwood* Court *misconstrued* Subdivision (8) by failing to consider whether the rented golf carts had been purchased under the "conditions of a sale at retail." The Director's arguments that the subdivisions were not properly analyzed admit that this Court has already construed the subdivisions; albeit, in the Director's view, incorrectly. These arguments, rather than in support of this Court's jurisdiction, are against it.

The Court's opinion in *J.B. Vending Co. v. Director of Revenue*, 54 S.W.3d 183, 189 n.2 (Mo. banc 2001), contrary to the Director's claim, is inapposite to this case. In *J.B. Vending*, this Court clarified that its decision in *Greenbriar Hills*

Country Club v. Director of Revenue, 935 S.W.2d 36, 38 (Mo. banc 1996), could have been decided without finding a conflict between two taxing subdivisions. *J.B. Vending Co*, 54 S.W.3d at 189 n.2. In *Greenbriar,* the original opinion addressed a potential conflict between Subdivision (2) and §144.020.1(6), ("Subdivision (6)"), the latter applying to prices for meals and drinks. This Court's clarification of its *Greenbriar* decision regarding a potential conflict between Subdivisions (6) and (2) is irrelevant as to whether this Court construed a conflict in *Westwood* between Subdivisions (8) and (2).

Accordingly, this case involves questions of application of a revenue law, §144.020.1 (8), already construed by this Court in its *Westwood* and *Six Flags* decisions and, therefore, jurisdiction of this appeal lies not in this Court but in the Eastern District of the Court of Appeals. *See, Affiliated Med. Transport v. Tax Com'n,* 741 S.W.2d 25, 27 (Mo. banc 1987).

STATEMENT OF FACTS

I. PROCEDURAL HISTORY

Tropicana Lanes timely filed a claim for refund of sales tax that it paid on "Shoe Rental" fees charged to its customers for the use of bowling shoes during various months beginning with July 1997 and ending with June 2000.[2] ("Refund Period") (SOF 3, 15, LF 9, 11). Tropicana Lanes had paid sales tax on the bowling shoes at the time of their purchase (SOF 14, LF 11). The Director denied the refund claim and Tropicana Lanes timely appealed the Director's denial to the AHC (SOF 4, 5, LF 10).

The parties filed a joint stipulation of facts in lieu of a hearing. On November 8, 2002, Commissioner Williard C. Reine, ruled that Tropicana Lanes was entitled to its requested refund. The Commission found, as a factual matter, that Tropicana Lanes "rented" the bowling shoes to its customers (LF 85). The Commission ruled, in accordance with *Westwood*, that §144.020.1(8), regarding rentals of personal property, applied to Tropicana Lanes' shoe rental fees. (LF 87). Because Tropicana Lanes paid sales tax on the purchase of the rented

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[2] Tropicana Lanes filed a refund claim for monthly periods beginning with July 1997 and ending with June 2000, other than for the months of January, February and August of 1998 and February and October of 1999 (SOF 3, LF 9). These latter months were omitted while Tropicana Lanes was attempting to obtain copies of its original returns for those months from the Director (SOF Ex. A, LF 16).

bowling shoes, no sales tax was due on the charges from their subsequent rental (LF 87).

The Director appealed the Commission's ruling to this Court.

II. FACTUAL BACKGROUND

Tropicana Lanes operates a bowling center in St. Louis, Missouri (SOF 1, LF 9). The bowling center is a "place of amusement" as described in §144.020.1(2) (SOF 2, LF 9). Tropicana Lanes does not charge admission to its premises but does charge its customers a "Bowling Fee" for each game that a customer bowls (SOF 6, 7, LF 10). During the Refund Period, the average customer bowled three games per visit to the bowling center and paid an average Bowling Fee of $2.25 per game (SOF 6, LF 10).

Tropicana Lanes requires its customers to wear bowling shoes when participating in its bowling activities (SOF 9, LF 10). Customers may bring and use their own shoes (SOF 11, LF 11). Alternatively, for a fee separate from the Bowling Fee, Tropicana Lanes will provide its customers with bowling shoes for their use (SOF 10, 13, LF 10, 11). Customers are not required to use Tropicana Lanes' bowling shoes and Bowling Fees are not discounted for using Tropicana Lane's bowling shoes (SOF 11, 13; LF 11).

The charge for use of the bowling shoes is stated as "Shoe Rental" on Tropicana Lanes' price board behind the cashier's counter and it must be paid when the shoes are obtained (SOF 12, LF 11). This "Shoe Rental" fee is a one time, flat charge that does not vary based on the amount of bowling activities in

which a customer participates (SOF 12, LF 11). Customers may wear the shoes throughout the bowling center's premises, including the dining, lounge and vending areas but cannot take them outside of the bowling center building (SOF 12, LF 11). The shoes must be returned no later than the close of business that day (SOF 12, LF 11).

During the Refund Period, the "Shoe Rental" fee averaged $1.75 (SOF 10, LF 10). Tropicana Lanes accounts for these fees on its internal financial statements as "Shoe Rental" receipts (SOF 16, LF 12). Based on six months of financial information, approximately one-half of the bowling center's customers participating in bowling activities rented shoes (See below calculation using financial statement information from SOF Ex. D, LF 77).

	1999 Jan to Mar	**2000 Jan to Mar**
Gross Sales Open Play Bowling	171,386.00	206,192.15
Gross Sales League Bowling	142,641.92	153,328.32
Total Gross Sales Bowling	314,027.92	359,520.47
Divide by Average Price per Game Bowled	2.25	2.25
Total Games Bowled	139,567.96	159,786.88
Divide by Average Number of Games Bowled per visit	3.00	3.00
Number of Visitors that Bowled	**46,522.65**	**53,262.29**
Shoe Rental Fees	41,582.05	45,131.49

Average Rental Fee	1.75	1.75
Number of Shoe Rentals	**23,761.17**	**25,789.42**

ARGUMENT

THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN GRANTING TROPICANA LANES A REFUND OF THE SALES TAX THAT IT PAID ON CHARGES FOR THE RENTAL OF BOWLING SHOES AND IN HOLDING SUCH CHARGES WERE NOT TAXABLE, BECAUSE THE DECISION WAS AUTHORIZED BY LAW, SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE, NOT CONTRARY TO THE REASONABLE EXPECTATIONS OF THE GENERAL ASSEMBLY AND THESE CHARGES WERE NOT SUBJECT TO TAX UNDER §144.020.1(2) IN THAT: 1) THE CHARGES WERE NOT TAXABLE AS FEES PAID IN OR TO A PLACE OF AMUSEMENT; 2) THIS COURT'S DECISION IN *WESTWOOD COUNTRY CLUB V. DIRECTOR OF REVENUE* IS CORRECT AND SHOULD NOT BE OVERRULED; 3) SECTION 144.020.1(8) APPLIED TO THE TRANSACTION OF TROPICANA LANES PROVIDING BOWLING SHOES TO ITS CUSTOMERS BECAUSE IT CONSTITUTED A RENTAL OR LEASE OF PERSONAL PROPERTY AS DESCRIBED IN THE SECTION; AND 4) TROPICANA LANES PAID TAX ON THE PURCHASE OF THE BOWLING SHOES WHICH, UNDER § 144.020.1(8), RESULTED IN AN EXCLUSION FROM TAX ON THEIR SUBSEQUENT RENTALS.

I. STANDARD OF REVIEW

This Court exercises judicial review of AHC decisions under §621.189. Section 621.193 provides:

> (T)he decision of the administrative hearing commission shall be upheld when authorized by law and supported by competent and substantial evidence upon the whole record, if a mandatory procedural safeguard is not violated and if the approval or disapproval of the exercise of authority in question by the administrative hearing commission does not create a result or results clearly contrary to that which the court concludes were the reasonable expectations of the general assembly at the time such authority was delegated to the agency.

This case was submitted on agreed stipulation of facts and presents no issue that the Commission had a lack of competent and substantial evidence to support any factual determination it made, nor is there an allegation that any mandatory procedural safeguard was violated. Furthermore, the Commission did not exercise discretion in any manner, much less in a manner contrary to the reasonable expectations of the General Assembly. Thus, this Court should uphold the Commission's decision under §621.193, unless law does not support the Commission decision. As stated in *Kanakuk:*

> This Court's review of the AHC's decision is limited and shall be upheld when authorized by law and supported by competent and substantial evidence upon the whole record. Moreover, the evidence is viewed in a light most favorable to the decision, together with all reasonable inferences that support it. (Citations omitted.)
>
> *Kanakuk*, S.W.3d at 95.

"When reading a statute that imposes a tax, (the Court) construe(s) it narrowly if it imposes a tax and broadly if it excludes something from the tax, in favor of the taxpayer and against the taxing authority." *St. Louis Country Club v. Admin. Hearing Com'n*, 657 S.W.2d 614, 617 (Mo. banc 1983). Any ambiguities in the statute imposing the tax should be resolved in the favor of the taxpayer. *Westwood,* 6 S.W.3d at 889, n.6, *citing Old Warson Country Club v. Director of Revenue*, 933 S.W.2d 400,403 (Mo. Banc 1996). While it is the taxpayer's burden to establish the right to an exemption, it is the Director's burden to show a tax liability. *Utilicorp United Inc. v. Director of Revenue*, 75 S.W.3d 725, 731 (Mo. banc 2001).

Subdivision (8) imposes a tax liability. *Six Flags*, slip op. at 6-7. It does not describe an "exemption." *Id*. Subdivision (8) provides an exception to its tax on rentals when tax is paid on the purchase of the rented property. §144.020.1(8) (Hereinafter "prepaid exclusion"). Throughout her brief, the Director erroneously refers to the "prepaid exclusion" as an "exemption." The *Six Flags* Court specifically rejected this treatment of Subdivision (8). *Six Flags*, slip

op. at 6-7. The prepaid exclusion of Subdivision (8) acts as an exclusion from tax found within a taxing statute; not as a separately codified exemption.

The Director cites *State ex rel. Union Elec. Co. v. Goldberg*, 578 S.W.2d 921, 923 (Mo. banc 1979), for an erroneous rule of statutory construction that "exclusions" or "exemptions" from tax are strictly construed against the party claiming such. *Dir. Br*. p. 52. Nowhere in the *Union Electric* opinion does the Court mention "exclusions." The correct rule is that "exemptions" are strictly construed against the taxpayer. *Union Elec. Co.*, 578 S.W.2d at 923. Contrary to the Director's claim, "exclusions" from tax are construed broadly against the taxing authority, *St. Louis Country Club*, 657 S.W.2d at 617.

II. BACKGROUND AND RELEVANT AUTHORITY

Section 144.020.1 imposes Missouri's sales tax on sales of tangible personal property and certain identified taxable services. Subdivision (1) of the section taxes sales of tangible personal property and subdivisions (2) through (8) impose the tax on the identified services. Each of the eight subdivisions applies a separate, specific tax rate to transactions that fall within their respective terms. The subdivisions do not impose separate, distinct taxes apart from the sales tax. Although a transaction could conceivably be subject to tax by more than one subdivision, §144.020.1 states "a tax is hereby levied and imposed;" thus, limiting the transaction to sales tax only once to the transaction. Potential double taxation

is disfavored under the law. *See GTE Automatic Electric, Inc. v. Director of Revenue*, 780 S.W.2d 49, 53 (Mo. Banc 1989). The purpose of Missouri's sales tax system is to tax property once and not at various stages in the stream of commerce. *Dean Machinery Co. v. Director of Revenue,* 918 S.W.2d 244, 245-246 (Mo. banc 1996).

In 1963, the General Assembly enacted Subdivision (8), which applies to the taxation of rentals or leases of tangible personal property. Mo. Laws 1963. Subdivision (8) states in relevant part that a tax is due on:

> 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 [§144.010.1(10)] or leased or rented the property and the tax was paid at the time of purchase, lease or rental, the lessor or sublessor, renter or subrenter shall not apply or collect the tax on the subsequent lease sublease, rental or subrental receipts from that property.

§144.020.1(8). This Court has stated that prior to the 1963 enactment of Subdivision (8), rentals of personal property were not subject to the sales tax. See, *IBM v. Director of Revenue*, 408 S.W.2d 833,836-837 (Mo. 1966) (*IBM*); *See, also, IBM v. State Tax Comm'n,* 362 S.W.2d 635, 637 (Mo. 1962) (*IBM Pre-1963*)

and *Federhofer, Inc. v. Morris*, 364 S.W.2d 524 (Mo. 1963), (pre-1963 law holding sales tax does not apply to leases of personal property).

Subdivision (8) provides that the lessor or renter may opt to pay the tax on the purchase of the property in lieu of paying tax on its subsequent rentals. §144.020.1(8); 12 CSR 10-108.700(3)(A)(1) (Attached as Appendix 1). In order for this "prepayment exclusion" to apply, the renter or lessor must purchase the property under the conditions of a "sale at retail" as defined in what is now §144.010.1(10). §144.020.1(8). Lessors that manufacture property they will lease cannot use the prepayment exclusion because the property was not purchased under the conditions of a sale at retail. *IBM*, 408 S.W.2d at 836-837; 12 CSR 10-108.700(3)(A)(4) (Attached as Appendix 1).

Subdivision (2) states that a tax is due on "the amount paid or charged for admission and seating accommodations, or fees paid to, or in any place of amusement." §144.020.1(2). Prior to 1974, the Director viewed this Subdivision (2) as not applying to fees charged for bowling. *See*, *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 598 (Mo. 1977). In *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596 (Mo. 1977), this Court held that receipts paid for bowling activities in a bowling center are taxable as "fees paid to, or in" a place of amusement. The issue of shoe rental fees, which are not fees for the activity of bowling, was not before the Court. The taxpayer in *Blue Springs Bowl* claimed that Subdivision (2)'s language of "fees paid to, or in" a place of amusement should be defined as a charge for admission or seating accommodations. *Id.* at

599. Based on the facts stipulated in the case, the Court held that the language was clear and unambiguous. *Id.* "It says nothing about excluding therefrom any fees paid for participating in sports or events in said establishments." *Id.*

The Court addressed a potential conflict between Subdivision (8) and Subdivision (2) in *Westwood*, 6 S.W.3d at 889. In *Westwood*, tax had been paid on the purchase of golf carts rented to club members. *Id*. at 888-889. The Director argued that the golf cart fees were not "rentals" subject to tax under Subdivision (8) but "licenses" subject to tax under Subdivision (2) as "fees paid to, or in" a place of amusement. *Id*. The *Westwood* Court cited the rule of construction that when two statutes conflict over the same subject matter, the more specific statute controls (hereinafter the "Rule of Specific over General"). *Id*. The Court held that Subdivision (8), which applied to rentals of personal property, controlled over Subdivision (2). *Id*. Because tax had been paid on the purchase of the golf carts, no tax was due on their rentals. *Id*.

The *Westwood* Court cited *Greenbriar* for the Rule of Specific over General. *Westwood*, 6 S.W.3d at 889. In *Greenbriar*, this Court addressed another potential conflict in §144.020.1 between Subdivision (6), which taxes charges for meals and drinks and Subdivision (2), which taxes fees in a place of amusement. *Id*. The Director argued that Subdivision (2) was clear and unambiguous and it applied to tax the charges for the meals and drinks in a place of amusement. *Id*. The Court held that the ambiguity and hence, the conflict, was not in Subdivision (2) but in §144.020.1 between Subdivisions (2) and (6). *Id*. The Court applied the Rule of Specific over General and

held that Subdivision (6) applied to the charge for meals and drinks, as it was more specific than Subdivision (2). *Id.*

This Court later clarified that *Greenbriar* could have been decided without finding a conflict between Subdivisions (6) and (2). *J.B. Vending Co.*, 54 S.W.3d at 189 n.2. The Court stated that "charges for meals and drinks" as described in Subdivision (6), were not "fees" as described in Subdivision (2). *Id*. Thus, the Court recognized that the term "fees" in Subdivision (2) was not all encompassing in that it did not include "charges for meals and drinks" as described in Subdivision (6). Rather than finding a conflict between two subdivisions of §144.020.1, the Court clarified that Subdivision (6) applied to charges for meals and drinks and Subdivision (2) did not. Thus, the Court's clarification reinforced the taxing scheme of §144.020.1 in that if a transaction is subject to sales tax, only one subdivision §144.020.1 applies to the transaction.

In its clarification of *Greenbriar*, the Court did not state that its *Westwood* decision was in error. *See, J.B. Vending*, 54 S.W.3d at 189 n.2. Although the use of the Rule of Specific over General may have been unnecessary in *Greenbriar,* its use and relevance in *Westwood* was not diminished. *Westwood* involved a potential conflict not addressed in *Greenbriar* between Subdivision (8), regarding amounts for rentals and leases, and Subdivision (2), regarding fees in a place of amusement. *See, Westwood*, 6 S.W.3d at 888-889. The Rule of Specific over General is a rule of construction that this Court has consistently applied when two statutes conflict over the same subject matter. *See, Community Bancshares,*

Inc. v. Secretary of State of Missouri, No. SC83306, 2001 Mo. LEXIS 48, (May 15, 2001); *Fort Zumwalt School Dist. et al., V. Dickherber***,** 576 S.W.2d 532, (Mo. banc 1979); *Terminal R.R. Assn. v. City of Brentwood*, 230 S.W.2d 768, 769 (Mo. 1950); *State ex rel. City of Springfield v. Smith*, 125 S.W.2d 883, 885 (Mo. banc 1939).

Alternatively, a similar clarification that there existed no conflict in *Westwood* between Subdivisions (8) and (2) would not change its result. The Court could view Subdivision (2)'s "fees" as not including Subdivision (8)'s "amounts paid for rental or lease." This interpretation of §144.020.1 would be similar to the Court's clarification in *J.B. Vending Co.*, that Subdivision (2)'s "fees" do not include "charges for meals and drinks" in Subdivision (6). *See*, *J.B. Vending*, 54 S.W.3d at 189 n.2. Accordingly, amounts paid for rental or lease would still be subject to tax solely under Subdivision (8) and Subdivision (2) would not apply.

Recently in *Six Flags*, this Court again addressed rentals of tangible personal property in a place of amusement. *Six Flags*, slip op. at 5-8. In *Six Flags*, the taxpayer paid tax on the purchase of video games that, for a fee, were provided to its customers for their use. *Id*. The taxpayer claimed that its charges for the use of video games were nontaxable rentals pursuant to Subdivision (8) and this Court's holding in *Westwood*. *Id.* at 6. The Court agreed with the taxpayer. *Id*. at 7. "Here, as with a golf cart, a Six Flags customer purchases the exclusive

right to operate the video game machine for a term governed by the rules of the game. This is a rental agreement." *Id.*

> "(Subdivision (8)) governs such a transaction . . . As in Westwood, the Director seeks to tax the rental of personal property previously taxed when purchased. Since the owner of the video game machines paid (tax on their purchase), the goal of taxing the property only once is met by not taxing the subsequent rental to customers."

Id. (citations omitted). Similar to *Westwood*, the Court disagreed that the short-term use of the property was a "license" and not a "lease." Id. at 6-7. *See, also*, *Six Flags*, SC84563, slip op. at 4-7 (Mo. banc, January 14, 2003) (Wolff, J., dissenting).

III. THE SHOE RENTAL FEE IS SUBJECT TO TAX SOLELY UNDER SUBDIVISION (8), WHICH TAXES "RENTALS" OR "LEASES"

The facts are not disputed. Tropicana Lanes paid tax on the purchase of bowling shoes that were for rent to customers (FOF 14, LF 11). A customer wishing to bowl may either bring bowling shoes or rent a pair from Tropicana Lanes (SOF 10, 11, LF 10, 11). Customers desiring to bowl pay a bowling fee separate and apart from the shoe rental fee (SOF 13, LF 11). Approximately one-half of Tropicana Lanes' bowling customers choose not to rent shoes (See, Tropicana Lane's br., *supra* at 11). The Director attempts to confuse this optional shoe rental with Tropicana Lanes' requirement that customers must

wear some bowling shoes. Similar to a golfer in *Westwood* foregoing golf carts and the park patron in *Six Flags* foregoing video games, a Tropicana Lanes customer may forego shoe rental and choose to bring and use his or her own bowling shoes. In all cases, the golfer, bowler or game player exercises discretion whether to rent the item of tangible personal property.

The AHC ruled that that the shoe rental fee was a "rental" as described in Subdivision (8) (LF 84-86). Because tax was paid on the purchase of the shoes, no tax was due on their rental (LF 84-86).

The law supports the AHC's ruling. There exists no meaningful way to distinguish the use of bowling shoes from the rentals of golf carts in *Westwood* and of video games in *Six Flags*. In each case, the customer obtains the exclusive use of tangible personal property for a duration governed by the rules of the game. See, *Six Flags*, slip op. at 7.

This Court in *Six Flags* reaffirmed its analysis in *Westwood* that Subdivision (8), which applies to the taxation of rentals of personal property, applies when tax is paid on the property's purchase. *Id*. at 7. Thus, to the extent that Subdivision (2) may also potentially tax the shoe rental fee, it is inapplicable as Subdivision (8) more specifically applies. Subdivision (8) would still apply to the shoe rental fee in the event the Court clarified that no conflict exists between Subdivision (8)'s "amounts paid for rental or lease" and Subdivision (2)'s "fees." In this alternative view, the shoe rental fees would be subject to tax solely by Subdivision (8). *See, J.B. Vending*, 54 S.W.3d at 189 n.2.

A. The Shoe Rental Fee Is Not Taxable Under Subdivision (2)

Subdivision (2) applies to "amounts paid for admission and seating . . . or fees paid to, or in any place of amusement (.)" Not all amounts or charges in a place of amusement are subject to tax. *See, Six Flags, supra,* (rental of video games)*; Westwood, supra* (rental of golf carts)*; Greenbriar, supra* (charges for meals and drinks)*; Old Warson Country Club v. Director of Revenue*, *supra* (certain member assessments). The Director's regulations specifically exclude from taxation amounts paid in a place of amusement for lessons (which would include bowling lessons), haircuts, shoe polishing and childcare. 12 CSR 10-3.176(12).

The Director claims that Tropicana Lanes' shoe rental charges are clearly fees subject to the sales tax under Subdivision (2). Specifically, the Director states that Subdivision (2) is clear and unambiguous. In *Greenbriar*, this Court specifically refuted a similar argument made by the Director. *Greenbriar*, 935 S.W.2d at 38. This Court has already held that Subdivision (8), and not Subdivision (2), applies to rental fees of tangible personal property in a place of amusement. *Six Flags, supra*; *Westwood, supra*. In the alternative, this Court could clarify that, similar to the charges for meals and drinks in *Greenbriar*, rentals of personal property are not "fees" as described in Subdivision (2). Under either approach, the result is that rentals of personal property are taxable only under Subdivision (8). Thus, §144.020.1, which applies the applicable tax rate, would apply only one subdivision to the transaction.

B. The Court's Clarification of *Greenbriar* Has No Bearing on the Shoe Rental Fee

In accordance with this Court's decisions in *Westwood* and *Six Flags*, both Subdivision (8) and Subdivision (2) potentially apply to the shoe rental fees. Because Subdivision (8) more specifically applies to the taxation of rentals of personal property, Subdivision (2) is inapplicable. *See, Six Flags*, slip op. at 6-8; *Westwood*, 6 S.W.3d at 888-889. Thus, under the Rule of Specific over General, Subdivision (8) applies. *See, Six Flags*, slip op. at 6-8; *Westwood*, 6 S.W.3d at 888-889.

In *Greenbriar*, this Court addressed a potential conflict between Subdivision (6), concerning charges for meals and drinks, and Subdivision (2), regarding fees in a place of amusement. *Greenbriar*, 935 S.W.2d at 38. *Six Flags*, *Westwood* and the instant case concern the applicability of Subdivision (8) and the taxation of rentals of tangible personal property, not Subdivision (6) and charges for meals and drinks. Accordingly, the Court's clarification that there existed no conflict in *Greenbriar* between Subdivision (6) and Subdivision (2), *(See, J.B. Vending*, 54 S.W.3d at 189 n.2) is inapposite to whether there exists a conflict between Subdivision (8) and Subdivision (2).

The Director claims that the Court's subsequent clarification of its *Greenbriar* decision removed the foundation for the *Westwood* Court's application of the Rule of Specific over General. Specifically, the Director argues that this Court's decision in *Greenbriar* was not the result of applying the Rule of Specific

over General but was driven by the parties stipulating to the amount in question as a "charge for a meal or drink." This is in error. The Rule of Specific over General is a rule of construction that is not diminished by its inapplicability to an inapposite case. *See*, Respondent's br., *supra* at 18-19. Furthermore, the *Greenbriar* Court ruled, based on the parties' stipulations, that as a factual matter, the charge in issue was for meals or drinks. *Greenbriar*. 935 S.W.2d at 38. The parties did not, however, stipulate that as a mater of law the charge was subject to Subdivision (6). This conclusion resulted from the Court's application of the more specific language of Subdivision (6) to the transaction.

C. The Court's Construction of §144.020.1 is Logical and Easily Administered

Applying only the most specific subdivision of §144.020.1 to a transaction is the appropriate approach. Taxpayers examining §144.020.1 will logically apply the most specific subdivision to their transaction. As stated in *Greenbriar*, "(a)ny taxpayer who sells meals and drinks could read §144.020.1 and logically determine that subdivision (6) governs the sale meals and drinks."[3] *Greenbriar*, 935 S.W.2d at 38. The Court's subsequent clarification that the charges for meals and drinks in *Greenbriar* were not "fees" as described in

[3] It is arguable that in *Greenbriar*, the Director did not argue that the charges for meals and drinks were taxable under Subdivision (1) as sales of tangible personal property because it viewed both Subdivisions (6) and (2) as more specific.

Subdivision (2) further supports the view that transactions are taxable under only one subdivision of§144.020.1. *See*, *J.B. Vending Co.*, 54 S.W.3d at 189 n.2.

That a specific subdivision may exclude the transaction from tax does not, as the Director claims, exempt it from taxation under the more general subdivision. Under the Court's approach, only one subdivision under §144.020.1 applies to the transaction. The more general subdivision is no longer applicable. "When reading a statute that imposes a tax, (the Court) construe(s) it narrowly if it imposes a tax and broadly if it excludes something from the tax, in favor of the taxpayer and against the taxing authority." *St. Louis Country Club*, 657 S.W.2d at 617.

The Director claims that rather than applying the more specific subdivision, taxpayers should exhaust all potentially applicable subdivisions in §144.020.1 until a tax is found due on the transaction. Because the Director claims that Subdivision (2) applies to all charges, fees or amounts in a place of amusement, Subdivision (2) will always result in a tax (other than those transactions specifically exempted by sections other than §144.020.1). This view, however, would inappropriately elevate Subdivision (2) to a taxing status greater than the other subdivisions in §144.020.1. Such a view is contrary to this Court's application of only the most specific subdivision of §144.020.1 to the transaction and contrary to the rule that taxing statutes are to be construed narrowly. *See*, *St. Louis Country Club*, 657 S.W.2d at 617.

Furthermore, in the instant case, there is a tax applied to Tropicana Lane's purchase of the shoes under §144.020.1(1). Thus even under the Director's view of §144.020.1, a tax has been paid on the taxpayer's transaction.

The Director also claims that this Court's construction of §144.020.1 rests on the erroneous presumption that in enacting Subdivision (8), the General Assembly implicitly repealed Subdivision (2)'s application to rentals of personal property. As stated above, not all charges in a place of amusement, including amounts charged for rentals, are necessarily "fees" as described in Subdivision (2).

Nor did the Court misconstrue the legislature's intent in subsequently modifying Subdivision (8), as the Director claims. Specifically, she asks this Court to reexamine the purpose of Subdivision (8)'s exception for rentals of boats and outboard motors. The Court has not been persuaded by this argument in either *Six Flags* or *Westwood*.[4]. *See, Six Flags*, SC84563, slip op. at 4-7 (Mo. banc, January 14, 2003) (Wolff, J., dissenting). The General Assembly's intent in enacting the boating exception was to tax all rentals in a place of amusement, other than for boats and outboard motors.

The General Assembly modified Subdivision (8) in 1985, when it revamped the regulation, licensing and taxation of boats and outboard motors. *See*, Mo. H.R. Sum. of Truly Agreed and Passed House Bills, 83rd General Assembly, 1st Sess., S.S.H.C.S.H.B. 280, 423 and 438,1985, 8 (Attached as Appendix 2). In its attempts to ensure that the taxation of boats and outboard

motors would be taxed only under §§144.070 and 144.440, the General Assembly included a clarification that boats and outboard motors were not taxable under Subdivision (2). This "boating exception," as it existed upon enactment, was as follows:

> *The purchase or use of motor vehicles, trailers, boats, and outboard motors shall be taxed and the tax paid as provided in sections 144.070 and 144.440, and no such tax shall then be collected on the rental or lease of motor vehicles, trailers, boats and outboard motors, except as provided in sections 144.070 and 144.440*. **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. Rental and leased boats or outboard motors shall be taxed under the provisions of the sales tax laws as provided under such laws for motor vehicles and trailers.**
>
> 1985 Mo. Laws, 693. (Italics and bold print added.)

The Director speculates that the General Assembly provided this exception with the anticipation that other rental or lease charges for tangible

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[4] The Director also raised this argument in its *Westwood* briefs.

personal property in a place of amusement would be subject to tax under Subdivision (2). However, the boating exception specifically excludes all boating rentals or leases from tax under either Subdivision (2) or Subdivision (8); regardless of whether tax was paid on the purchase of the boat. Thus, the boating exception provides an exclusion independent of Subdivision (8)'s exclusion for paying tax on the purchase of property. The two exclusions apply to two different, but sometimes overlapping, transactions. The boating exception does not demonstrate any legislative intent that all rental payments in a place of amusement are otherwise taxable.

In addition, the boating exception clarifies that only sections 144.070 and 144.440 apply to the rental or lease of boats and outboard motors. The language of the boating exception clearly states that rental fees for boats or outboard motors can never be construed to be a fees or charges in a place of amusement. Without this exception, a charge for the use of boats not construed as a rental would arguably be subject to tax under Subdivision (2) and not sections 144.070 and 144.440. The boating exception confirms this treatment in its last line that states, "Rental and leased boats or outboard motors shall be taxed under the provisions of the sales tax laws as provided under such laws for motor vehicles and trailers." §144.020.1(8).

Subdivision (8) clearly applies to the transaction, as the exclusive right to use the bowling shoes for a specified period is a "rental" or "lease." *See*, *Six Flags*, slip op. at 7. Contrary to the Director's claim, taxpayers do not need

guidance as to whether their transactions are "specific" or "general." Rather, the issue before taxpayers is whether their transaction is a "rental" or "lease" as Subdivision (8) requires. This Court has provided this guidance in its *Westwood* and *Six Flags* decisions, both of which are applicable to the facts of this case. The Director can consider additional guidance through regulations that could describe and provide examples of the plain and ordinary meanings of "rental" and "lease" as construed by this Court.

IV. THE SHOE RENTAL FEE IS A "RENTAL"

The Director argues, in the alternative, that Tropicana Lanes did not rent or lease the bowling shoes, as those terms in Subdivision (8) require. Her argument specifically rejects this Court's holding in *Westwood* and is contrary to the Court's opinion in *Six Flags*.

In circumstances similar to Tropicana Lanes' shoe rental, this Court has held that a one-time charge for the use of tangible personal property for the duration of an activity played in a place of amusement was a "rental" or "lease" as described in Subdivision (8). See, *Westwood*, *supra* and *Six Flags*, *supra*. The Director makes the dubious argument that the *Westwood* Court did not construe the terms "rental" or "lease" in Subdivision (8), while simultaneously holding that the taxpayers' transactions were "rentals" as described in Subdivision (8).

The *Westwood* Court not only addressed the issue but also specifically identified the Director's counter arguments for treating the use as a "license." *Westwood*, 6 S.W.3d at 888 n.6. The *Westwood* Court's reference to "ambiguities in the statutes" is not, as the Director implies, an acknowledgement by the Court to avoid construing the requirements and terms of Subdivision (8). Rather, the statement reflects the ambiguity in §144.020.1 that results from the potential conflict between Subdivision (8)'s "amount(s) paid or charged for rental or lease" and Subdivision (2)'s "fees."[5]

More importantly this Court recently held in *Six Flags* that the use of coin-operated video games were rentals as described in Subdivision (8). *Six Flags*, slip op. at 7. The customer purchased the exclusive right to operate the video game machine for a term governed by the rules of the game. *Id*. The Court held this arrangement, which it stated was similar to the golf cart rental in *Westwood*, was a rental agreement. *Id.*

The Director states several arguments in support of her position that this Court has misinterpreted the terms "rental" or "lease" as described in Subdivision (8). These arguments have previously been presented to and rejected

[5] The *Westwood* Court's reference to the manner in which the golf cart fees were paid (through membership dues) indicates the Court's consideration of the potential conflict between Subdivision (8) and Subdivision (2).

by this Court. Accordingly, this Court should reject the Director's request to overrule *Westwood* and *Six Flags*.

A. The Shoe Rental Fee is a "Rental" or "Lease" Under its Plain and Ordinary Meaning

The Director disagrees with this Court's definition of the terms "rental" and "lease." The Director's initial reference to the history surrounding the enactment of Subdivision (8) is premature. The "rental" or "lease" language of Subdivision (8) is clear. "(W)hen a statute is clear and unambiguous, extrinsic aids to statutory construction cannot be used." *Blue Springs Bowl*, 551 S.W.2d at 599. Language is clear and unambiguous if plain and clear to one of ordinary intelligence. *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). The Court will first give words in a statute their plain and ordinary meaning as found in the dictionary. *Moon Shadow v. Director of Revenue*, 945 S.W.2d 436, 437 (Mo. banc 1997).

Rent is "the amount paid by a hirer of personal property to the owner for the use thereof." Merriam Webster's Collegiate Dictionary 991 (10th ed. 1997). The Director selects a definition of rent that includes a reference to occupying real estate and states "(t)o obtain occupancy or use of (another's property) in return for regular payments." American Heritage Dictionary at 1047 (2d College ed. 1985). "Regular," does not, as the Director implies, mean "periodic." Rather, the definition of "regular" is "NORMAL, STANDARD."

Merriam Webster's Collegiate Dictionary at 985. Under either definition, the shoe rental fee is a "rental."

Subdivision (8) applies if Tropicana Lanes rents ***or*** leases the bowling shoes; it need not do both. The Director muddies the definition of "rent" by stating that "rent" requires "periodic payments." "Periodic payments," however, are included in Black's Law Dictionary definition of "lease," not the above definitions of "rent." Black's Law Dictionary 800 (5th ed. 1979). Furthermore, both the American Heritage and Meriam Webster dictionaries' definitions of "lease" do not include "periodic payments" but describe a payment under a lease as for a "specified period or term for a specified rent." *See*, American Heritage Dictionary at 721; Meriam Webster's Collegiate Dictionary at 674. Under the plain and ordinary dictionary definitions, the shoe rental fee can also be considered a "lease."

The Director also asserts that the term "rental" should be defined as synonymous with the more restrictive term "lease." Such a definition would render the term "rental" as redundant and useless, which the legislature is presumed not to favor. *See, Blue Springs Bowl*, 551 S.W.2d at 599.

Notwithstanding the plain and ordinary meaning of "rental" and "lease," the Director asks this Court to consider the circumstances surrounding the enactment of Subdivision (8). The Director argues that this history clearly reflects an intent of the legislature to tax only those rentals or leases that were pursuant to

written contracts and were for the continuous possession or use of tangible personal property with minimal restrictions over an extended period of time.

The courts must give effect to the language as written. *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 620 (Mo. 2002). They are without authority to read into a statute legislative intent contrary to intent made evident by plain language. *Id.* The Court will not read into the statute words or provisions that do not appear there. *Fidelity Sec. Life Ins. Co. v. Director of Revenue & Dir. of Ins.*, 32 S.W.3d 527, 531 (Mo. 2000).

The enactment of Subdivision (8) did result in the taxation of continuous leases with periodic payments. *See*, *IBM v. Director of Revenue*, 408 S.W.2d 883 (Mo. 1966)). There exists no indication in the statute, however, that the General Assembly desired to restrict the taxing reach of the section in such a manner. Nor is there any indication in the statute that a rental or lease agreement must be in writing. On the contrary, the legislatures' use of the term "rental," in addition to the term "lease," indicates intent to broaden the type of arrangements that the statute would reach. The term "rental" is much less restrictive then the term "lease." *See*, Tropicana Lanes Br., *supra*, pp.31-32; Dir. Br. p. 48.

Nor did the General Assembly's 1985 passage of the "boating exception" dictate that other charges for the use of property within a place of amusement constitute a Subdivision (2) fee. The "boating exception" provides an independent exclusion from tax under §144.020.1. *See*, Tropicana Lanes br., *supra* pp. 25-26.

The Director requests this Court to rule that Subdivision (8) only applies to long-term rentals or leases with multiple payments. Is "long-term" more than an hour? One day? What duration will suffice as "long-term?" Will two payments suffice? Had the General Assembly desired to limit Subdivision (8) to long-term leases of property that required more than one payment, it could have easily done so.

The Director's argument that Subdivision (8) only applies to arrangements with multiple payments would produce some unexpected and absurd results. For instance, rental businesses that commonly charge one, rather than multiple payments, would not be subject to sales tax on their rental receipts. Receipts from the rental of movie videos, catering supplies such as tables, dishes and glasses and other personal property that required only one payment for the rental term would no longer be taxable. In addition, the business that required one payment for a thirty-day use of tangible personal property would not pay tax on its receipts while the business that rented the same property for thirty payments of one day each would. Construction of statutes should avoid unreasonable results. *Lewis v. Gibbons*, 80 S.W.3d 461, 466 (Mo. banc 2002).

Applying Subdivision (8) solely to long-term rental arrangements with more than one payment would also conflict with the plain and ordinary meaning of the term "rental" as previously applied by the Director. In LR10222 (Feb. 13, 1998), attached as Appendix 3, the Director ruled that the owner of shopping mall and airport baggage carts could elect to pay tax on the purchase of

the carts in order to forego paying sales tax on the lease of the carts, citing §144.020.1(8). The carts were rented for an average of five to ten minutes and remained in the shopping mall or airport. Similarly, the Director has twice ruled that the pay-per-view, short-term use of movies or video games in a hotel guest's room was a rental or lease as described in Subdivision (8). LR 8762 (Feb. 9, 1996); LR 9931 (Sept. 5, 1997), (attached as Appendix 4 and Appendix 5, respectively). In the rulings, the movies and video games were paid with a one-time charge and were supplied to the guest's television from centralized, remote equipment. *Id.* While these rulings are not cited as precedent, they are an indication of what an ordinary person would view as the plain and ordinary meaning of "rental" and "lease."

B. The Shoe Rental Fee is not a "License"

Customers have the exclusive use and possession of the bowling shoes when renting them from Tropicana Lanes. They may use the bowling shoes throughout Tropicana Lanes' facility, including the dining area, lounge and vending area, but they cannot be taken outside the facility (SOF 12, LF 11). The Director argues this restriction on use, coupled with the required return of the shoes after the completion of bowling activities, results in the shoe use constituting a "license" rather than a "rental" or "lease."

All rental or lease agreements have, to some extent, restrictions on use. A lessor of personal property certainly has the right to condition and restrict the use of the rented property, including who can use the property as well as

limiting the area of its use. *See, Truck Leasing Corp. v. Esquire Laundry & Dry Cleaning Corp*., 252 S.W.2nd 108 (Mo. Ct. App 1952). In addition, the Director's own regulation, 12 CSR 10-3.228, entitled "Lessors-Renters Include," states

> PURPOSE: This rule indicates that a person may be a lessor or renter even though the location of the leased or rented article remains unchanged and interprets and implies §§ 144.010 and 144.020, RSMo.
>
> (1) Lessors and renters include those persons whose tangible personal property remains on their own premises, but which is operated by the lessee or is under the direct control of the lessee for a specified period of time.

Accordingly, the Director's claim that the restrictions on the period and place of shoe use are not indicative of a lease, is contrary to her own definition of "rental" and "lease" and the plain and ordinary meanings of the terms.

Labeling the use of the shoes as a "license" does little to differentiate the transaction from a "rental" or "lease." A license is defined as "permission to act." Webster's Ninth New Collegiate Dictionary, 688 (9th Ed. 1988). Paying a specified fee for the "permission to (use and possess)" tangible personal property for a specified period does not significantly differ from the plain and ordinary meanings of the terms "rental" or "lease." This Court in *Westwood* implied as

much in that the use of golf carts, whether a "license" or a "rental" or "lease," was subject to Subdivision (8). *Westwood*, 6 S.W.3d at 888 n.6. Even the Director, in LR 10020 (Oct. 9, 1997), (attached as Appendix 6), stated that a "license is a form of a lease" taxable under Subdivision (8). In LR 10020, the Director ruled that the licensing of prewritten (canned) computer software was a lease of tangible personal property. *See, also*, LR 7343 (Jun. 6, 1994) and LR 5831 (Feb. 24, 1992) (license of software is a lease) (attached as Appendix 7 and Appendix 8, respectively).

The Director cites several non-tax cases for support that the shoe rental use is a "license." In *Katz v. Slade*, 460 S.W.2d 608, 613, (Mo. 1970), this Court addressed plaintiff's claim of strict liability against a city for injuries sustained on the municipality's golf course from a defective golf cart. Although repeatedly referring to the golf cart rental arrangement as a lease or rental, the Court held it was a license for purposes of the strict liability claim. *Id.* at 613. The Court's reasoning, however, was based on the its analysis that the extension of strict liability to lessors is limited to "mass lessors" that widely promote and advertise their product to rent, which was not the case with the renting of golf carts.

The Director also cites, *Esmar v. Zurich Insurance Company*, 485 S.W.2d 417, 421 (Mo. 1972), in which the Court held that a landowner who had permission to park in a parking lot was not a renter but a license holder. The Court found no rental arrangement because no specific parking space was assigned

to the renter. However, if a designated parking space had been assigned, the arrangement would have constituted a lease. *Id.* Similarly, in *Siciliano v. Capital City Shows, Inc*., 475 A.2d 19 (N.H. 1984), the use of a non-designated spot on an amusement ride was deemed by the New Hampshire Court as a license. The shoe rental fee in the instant case is for a specific pair of shoes.

V. THE SHOES WERE PURCHASED UNDER "THE CONDITIONS OF A SALE AT RETAIL."

Tropicana Lanes purchased bowling shoes from a vendor and paid sales tax on the purchase (SOF 14, LF 11). Tropicana Lane's purchase was "a sale at retail as defined in §144.010.1(10)" as required in Subdivision (8)'s prepayment exclusion.

Subdivision (8) includes language:

> . . . 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. . .

§144.020.1(8).

By its express terms, the above "prepayment exclusion" excludes rental or lease payments if the tangible personal property was purchased under the conditions of a "sale at retail" and tax was paid at the time of its purchase. The prepayment exclusion prevents double taxation on the property to be leased. *See*, *Six Flags*, slip op. at 7; *Westwoo*d, 6 S.W.3d at 888.

A "sale at retail" as defined in [144.010(10)] is "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[.]" §144.010.1(10). The Director argues that a purchase for lease is a resale and thus not a "sale at retail." Therefore, the Director contends that any tangible personal property purchased for the purpose of leasing the same is not subject to the prepayment exclusion in Subdivision (8) because it was not purchased "under the conditions of sale at retail."

The glaring hole in the Director's argument is that it renders Subdivision (8)'s prepayment exclusion available only to those taxpayers that purchase property without the intention of leasing it but subsequently change their minds and lease it. Under such a view, the prepayment exclusion is effectively rendered useless. Each word, clause, and sentence of a statute, however, must have a meaning. *Brown Group v. Director of Revenue*, 649 S.W.2d 874, 881 (Mo. banc 1983).

Subdivision (8) refers to the definition of "sale at retail" now found in §144.010.1(10). That definition excludes sales "for resale in any form of tangible personal property." The Director assumes that the resale exclusion within the definition of "sale at retail" applies to purchases for lease or rental. A lease, however, is not a sale "in the form of tangible personal property." Rather, it is a sale in the form of a service possibly taxable under §144.020.1(8). Indeed, if the rental of tangible personal property were a sale "in the form of tangible personal property," lease proceeds would be taxable under §144.020.1(1), (regarding retail sales of tangible personal property), and there would be no need for Subdivision (8). See *IBM Pre-1963,* 362 S.W.2d at 637; *Federhofer*, 364 S.W.2d at 524 (Mo. 1963).

In *Brambles Industries, Inc., a/k/a Chep USA v. Director of Revenue*, 981 S.W.2d 568 (Mo. banc 1998), this Court held that there is a resale exemption for leases, but it is not found in §144.010.1(10). The Court concluded: "(b)ecause we find that transfer of 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 §144.010.1(3), we reverse." Id.

The Director cites *Weather Guard, Inc. v. Director of Revenue*, 746 S.W.2d 657 (Mo. App. E.D. 1998), in support of his argument. In *Weather Guard*, the taxpayer claimed that a purchase of insulation blowing equipment was exempt from use tax because it was "reselling" the machines by leasing them to its

customers. The Court concluded that the purchases were exempt because leases and rentals were included under the definition of "sale" within §144.605(5). That provision, however, does not contain the language "in the form of tangible personal property." §144.605(5). Thus, *Weather Guard* is inapposite because it does not address whether a lease is a resale "in the form of tangible personal property," as described under the "sale at retail" provision of §144.010(10).

Of course, the purchase of tangible personal property for the purpose of subsequent renting may qualify as an excluded or exempt transaction under sections other than §144.010(10). The last sentence of Subdivision (8) states that "tangible personal property which is exempt from . . .tax under (the exemption provisions of) §144.030 upon a sale thereof is likewise exempt from . . . tax on a lease or rental thereof." §144.020.1(8). Similarly, the term "gross receipts" as defined under §144.010.1(3) provides that rental receipts are "taxable as if outright sale were made." Accordingly, it is sections 144.010.1(3) and 144.020.1(8), and not §144.010.1(10), which exempt or exclude purchases of property that will be subsequently rented.

The "sale at retail" requirement does not, as the Director claims, prevent a lessor that purchases the property from using the prepaid exclusion. The "sale at retail" requirement prevents a manufacturer from claiming the prepaid exclusion on leased property that it manufactured. Although the manufacturer might pay taxes on the materials comprising the property, the property will not have been purchased under the "conditions of a sale at retail" as defined in

§144.010.1(10). *See, IBM*, 408 S.W.2d 833; 12 CSR 10-108.700(3)(A)(4) (Attached as Appendix 1); *See, also*, LR 9011 (Jun. 28, 1996)(Attached as Appendix 9), (Rental receipts from purchased canned software on which tax was paid ruled not taxable but taxable if the canned software was developed in house by the lessor.)

Tropicana Lanes purchased the bowling shoes under the conditions of a sale at retail, as defined by §144.010.1(10) and paid tax on their purchase. The clear purpose of Subdivision (8)'s express prepaid exclusion is to prevent double taxation. Without the express exclusion, a taxpayer who paid tax on its acquisition of tangible personal property (whether by purchase or lease) would have to again remit tax on its subsequent rental. Double taxation is disfavored under the law, and will not be imposed in the absence of clearly expressed legislative intent. *GTE Automatic Electric, Inc. v. Director of Revenue*, 780 S.W.2d 49, 53 (Mo. banc 1989); *State ex rel Denny's Inc. v. Goldberg*, 578 S.W.2d 925, 928 (Mo. banc 1979).

CONCLUSION

The Decision of the Commissioner should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

AND OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that Respondent's Brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06 and Local Rule 360, and contains 10,742 words as determined by the undersigned's word processing system. I further certify that the attached 3.5" floppy disk, which contains a copy of the Respondent's Brief, was scanned with the Anti Virus program and was found to be free from viruses.

The undersigned hereby certifies that two hard copies and one floppy disk were mailed, postage pre-paid on the 8th day of April, 2003 to:

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