COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Ave., Suite 800 Denver, Colorado 80202	
Appeal from the District Court, City and County of Denver Hon. William D. Robbins, District Court Judge, Case No. 2009CV5531 _____ **Plaintiffs-Appellees**: ARAMARK SPORTS AND ENTERTAINMENT, INC. a Delaware corporation, now known as ARAMARK Sports and Entertainment Group, LLC; ARAMARK ENTERTAINMENT, INC., a Delaware corporation, now known as ARAMARK Entertainment, LLC; ARAMARK FOOD AND SUPPORT SERVICES, INC., a Delaware Corporation v. **Defendant-Appellants:** CITY AND COUNTY OF DENVER, a home rule city and county; DEPARTMENT OF REVENUE for the City and County of Denver; CLAUDE PUMILIA, in his official capacity as the Manager of Revenue for the City and County of Denver	**▲COURT USE ONLY▲** _____ Case Number: 2010CA1545
Attorneys for Plaintiffs-Appellees Blain D. Myhre, #23329 Blain Myhre LLC PO Box 3600 Englewood, Colorado 80155 Telephone: (303) 250-3932 E-Mail: blainmyhre@gmail.com	
ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that the brief complies with C.A.R. 28(g). It contains 3,497 words. Further, the undersigned certifies that the brief complies with C.A.R. 28(k). For each issue, I have indicated whether I agree with the Appellant's statement concerning the standard of review and preservation for appeal, and where I do not agree, I have stated why I do not agree.

s/Blain D. Myhre
Blain D. Myhre

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I. Statement of the Issue

The district court properly concluded that the City must refund ARAMARK for sales tax it erroneously paid on sales of bottled water. Bottled water is exempt from sales tax under the Denver Revised Municipal Code (DRMC), and interpreting DRMC § 53-45(b) to require ARAMARK to refund thousands of customers as a condition to ARAMARK's receiving a refund would be an absurd result.

II. Statement of the Case

A. Nature of the case, course of proceedings, and disposition below

Following tax audits, Defendant Department of Revenue (now the Department of Finance) sent tax assessments to Plaintiffs (collectively, "ARAMARK"). The two assessments at issue included sales and use tax for food and beverages sold at Coors Field and the Pepsi Center from 2000 through part of 2004. *See* AR at 122-28;[1] Opening Brief at 3.

ARAMARK protested the assessments to the Department of Revenue. AR at 344-50. ARAMARK argued, among other things, that the

[1] The Record on Appeal consists of the district court and appellate pleadings on CD and a notebook that contains the Agency Record. The Agency Record is cited as AR at __. The electronic record on CD is cited by referencing the document name, reference number (when first cited only), and the CD page, for example, Complaint (22097530), CD at 1-6.

City had to refund ARAMARK for sales tax collected and remitted to the City for the sale of bottled water because bottled water sales are exempt from taxation under the DRMC. AR at 20.

The Hearing Officer agreed that bottled water sales are exempt from sales taxation under the DRMC, but declined to order the City to give a refund to ARAMARK. AR at 3-4. The Hearing Officer held that ARAMARK Sports and Entertainment owed sales and use tax of $132,991.32 plus interest and that ARAMARK Entertainment owed sales and use tax of $79,573.16 plus interest. *Id.* at 4.[2] The Hearing Officer's decision was the final agency action.

ARAMARK filed a complaint under C.R.C.P. 106(a)(4), challenging the Hearing Officer's decision. Complaint (22097530), CD at 1-6. Following briefing, the district court entered its Order, reversing the decision of the Hearing Officer and ordering the City to reimburse or credit ARAMARK for the sales tax paid on the bottled water. *See* District Court's

[2] These amounts include other sales and use tax matters, such as the failure to remit tax for purchase of a mobile food cart. Only the bottled water sales tax refund is at issue in this appeal.

Order (30707496), CD at 146-52; Amended Order (30878914), CD at 153-60.[3]

The City appealed the district court's decision ordering the City to refund ARAMARK for the sales tax remitted for bottled water sales.

B. Statement of the Facts

1. The City audits and assesses ARAMARK.

The City conducted tax audits of the Plaintiffs, including an audit of sales and use tax for ARAMARK Sports and Entertainment for food and beverage sales at Coors Field from January 1, 2000 through May 31, 2004, and an audit of sales and use tax for ARAMARK Entertainment's food and beverage sales at the Pepsi Center for November 1, 2000 through May 31, 2004. *See* Opening Brief at 3. Following the audits, the Department sent Notices of Final Determination, Assessment and Demand for Payment. AR at 122-28 (Hearing Exhibits 1-4).

[3] The district court's Order upheld the Hearing Officer's decision in all other respects. Those rulings are not at issue in this appeal. In addition, the district court's Amended Order held that the Hearing Officer had failed to address three additional defenses raised by ARAMARK and ordered a remand on those three defenses. Amended Order, CD at 158-60. That remand order is not at issue here.

2. ARAMARK seeks a refund for amounts remitted as sales tax for bottled water sales, which the City exempts from taxation.

ARAMARK protested the Assessments. AR at 344-50. ARAMARK asserted that the City owed a refund on sales tax remitted on bottled water sales because bottled water is exempt from sales tax under DRMC § 53-97(8). AR at 20.[4] That provision exempts from taxation the sale and purchase of food and drink. Under that provision, the City exempts bottled water sales from taxation. *See* AR at 292, ¶ 2 (City and County of Denver Tax Guide Topic No. 32 Food and Drink, exempting bottled water from sales tax); Opening Brief at 5 ("It is undisputed that bottled water was not subject to the City's sales tax during the Audit Periods").

While the City conceded that bottled water is exempt from the City's sales tax, the City refused to refund the amounts remitted for sales of bottled water. The City took the position that ARAMARK did not comply with DRMC § 53-45(b), asserting that under that section, ARAMARK had to first refund or credit its customers for the sales tax collected before the City had an obligation to refund ARAMARK. AR at 14-15. The City never

[4] The provision cited by ARAMARK, DRMC § 53-97(8), is a use tax provision, not a sales tax provision. But the identical provision appears in the sales tax portion of the City code. *See* DRMC § 53-26(8).

addressed the practical problem for ARAMARK—how to refund tens of thousands of anonymous individual customers pennies in tax for bottled water purchased at events at Coors Field and the Pepsi Center. During the audit period, ARAMARK's bottled water sales were substantial. For example, at Coors Field in 2003, ARAMARK sold 93,498 bottles of water. *See* AR at 290. During the 2003-04 season at the Pepsi Center, ARAMARK sold 156,982 bottles of water. *Id.*

3. The Hearing Officer rejects the City's interpretation of DRMC § 53-45(b) as "hyper-technical" but does not order a refund.

Addressing the City's position, the Hearing Officer noted, "the City urges that § 53-45 of the D.R.M.C. precludes a request for rebate without first offering the rebated amount to the individual purchasers of the bottled water. This argument is clearly hyper-technical in the circumstances involved in this case of a large volume of individual sales to anonymous customers at sporting events attended by thousands. Clearly in these circumstances the Taxpayer could not conceivably comply with the ordinance's provisions." AR at 3.

Despite concluding that the City's argument was "hyper-technical" and that ARAMARK "could not conceivably comply," the Hearing Officer did

not order a refund. Instead, the Hearing Officer said that ARAMARK's request for refund could not "be sustained because it was the Taxpayer that made unilateral errors of both fact and law. . . . The City cannot be held accountable for those unilateral and continuous errors of fact and of law on the part of Taxpayer." AR at 3-4. The Hearing Officer concluded that the "combined misinterpretation of the City's ordinances and the continuing nature of the collection and remittance of the sales tax causes me to find that Taxpayer's errors were unilateral and preclude my granting the relief sought by Taxpayer." AR at 4.

4. The district court rejects the City's interpretation of § 53-45(b) and orders a refund.

On C.R.C.P. 106 review, the district court said that by "determining the reimbursement clause of the statute (§53-45(b) D.R.M.C.) to be 'hyper-technical' and inapplicable under these circumstances (*Finding of Fact and Order,* p.3, ¶3) it is clear the Manager attempted to act in a way so as not to interpret the statute in a manner that would 'frustrate the purpose or lead to an absurd or unreasonable result.' This Court agrees that the customer reimbursement requirement is inapplicable here, but finds the Manager has abused his discretion in failing to order reimbursement to the Taxpayer." Amended Order, CD at 157-58 (citation omitted). The district court thus

ordered the City to refund to ARAMARK the money remitted for sales tax on bottled water. *Id.* at 158. The City appeals this ruling.

III. Summary of the Argument

Bottled water is exempt from the City's sales tax, but the City asserts that ARAMARK must first refund or credit its customers before ARAMARK is entitled to a refund. The City's argument rests on an interpretation of DRMC § 53-45(b) that produces an absurd result in this case. If the language of a legislative enactment produces an absurd result when applied, then courts do not apply the language as written. Therefore, the court should reject the City's interpretation.

Both the Hearing Officer and the district court properly recognized that the City's interpretation of § 53-45(b) would produce an absurd result. ARAMARK sold hundreds of thousands of bottles of water to thousands of customers at Coors Field and the Pepsi Center during 2000-2004. It would be an impossible task for ARAMARK to issue refunds of 12 cents or less per bottle of water purchased to thousands of customers. Therefore, applying § 53-45(b) to require ARAMARK to refund its customers before the City would be required to issue a refund would produce an absurd

result. Accordingly, § 53-45(b) does not require ARAMARK to refund its customers before it is entitled to a refund from the City.

The Hearing Officer rejected the City's interpretation of § 53-45(b), but failed to order a refund by the City. Instead, the Hearing Officer concluded that because ARAMARK made a unilateral mistake in erroneously remitting funds to the City, ARAMARK was not entitled to a refund. In so concluding, the Hearing Officer misapplied the law. DRMC § 53-45(b) is mandatory, requiring the City to issue a refund of excess amounts paid. Under the mandatory refund language of § 53-45(b), the City must refund ARAMARK. The Hearing Officer's conclusion to the contrary misapplied § 53-45(b), and therefore constitutes an abuse of discretion. Accordingly, the district court's decision reversing the Hearing Officer and ordering a refund was correct, and this court should affirm.

IV. Argument

Under DRMC § 53-45(b), the City must refund ARAMARK the funds ARAMARK remitted for bottled water sales.

A. Response to the City's statement regarding preservation of the issue and standard of review

ARAMARK agrees with the City that this issue has been properly preserved for appeal.

ARAMARK disagrees with some of the City's position on the standard of review. The City asserts that a "reviewing court must uphold a governmental body's or officer's decision unless there is no competent evidence in the record to support it." Opening Brief at 9. The City also recognizes, however, that this court reviews de novo the agency's interpretation of the law, and that in "determining the existence of an abuse of discretion, a reviewing court may consider whether the governmental body or officer misconstrued the law." *See id.* at 10.

ARAMARK agrees that this court reviews de novo interpretations of law. *See MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 717 (Colo. 2010) (interpretation of a municipal ordinance involves a question of law subject to de novo review). And while interpretation of a statute by an agency charged with its enforcement is entitled to deference, the court is not bound to defer to an agency decision that misconstrues or misapplies the law. *See Skyland Metro. Dist. v. Mountain West Enterprise, LLC*, 184 P.3d 106, 115 (Colo. App. 2007). Since the issue in this case involves the legal interpretation of § 53-45(b), review is de novo. Because the issue is a legal one to which de novo review applies, the "no competent evidence" standard of review is inapplicable. Instead, this court engages in a de novo

review of the legal issue of the interpretation of § 53-45(b) and its application to this case.

This court reviews the Hearing Officer's decision to determine if it exceeded his jurisdiction or was an abuse of discretion. *See Hellas Const., Inc. v. Rio Blanco County*, 192 P.3d 501, 504 (Colo. App. 2008). An abuse of discretion occurs when the lower tribunal misapplies the law. *See People v. Hagos*, 250 P.3d 596, 608 (Colo. App. 2009) (a trial court abuses its discretion when it misapplies the law); *Hellas Const.,* 192 P.3d at 506 (under C.R.C.P. 106(a)(4), a governmental body may abuse its discretion if it misinterprets or misapplies the law). Thus, whether the Hearing Officer abused his discretion in this case involves an examination of whether the Hearing Officer properly applied the law. Review of his application of the law is de novo. *See MDC Holdings*, 223 P.3d at 717.

B. As both the Hearing Officer and the district court recognized, the City's interpretation of DRMC § 53-45(b) would lead to an absurd result.

Section § 53-45(b) states, "If the amount paid exceeds that which is due, the excess shall be refunded with interest pursuant to section 53-43, or credited against any subsequent remittance from the same person; provided, however, that refunds and credits to vendors, or the vendor's

assignees, are limited to those who at the time of the refund or credit have either credited to their customer's account or refunded to their customer the taxes paid by their customer in error . . . ." The City argues that under this provision, ARAMARK was required to first refund or credit its customers for the sales tax before ARAMARK could receive a refund from the City. In the circumstances of this case, the City seeks to apply § 53-45(b) in a manner that will produce an absurd result. *See MDC Holdings*, 223 P.3d at 717 (when interpreting local government legislation, courts apply the language employed "unless doing so would lead to an absurd result").

The phrase "shall be refunded" in § 53-45(b) is mandatory, an absolute requirement that affords the City no discretion in deciding whether to refund excess amounts. Colorado case law holds that "shall" is "a word of command, denoting obligation and excluding the idea of discretion." *Hodges v. People*, 158 P.3d 922, 926 (Colo. 2007); *People v. Davis*, 935 P.2d 79, 87 (Colo. App. 1996) ("shall" connotes a mandatory meaning); *see also* DRMC § 53-24, introductory paragraph (in construing the municipal code, "shall" is "to be construed as mandatory and not directory"). Thus, the language of § 53-45(b) mandates the refund of the excess tax collected by the City.

The only limitation placed on the mandatory refund is the next clause of § 53-45(b), which states that refunds "are limited to those who at the time of the refund or credit have either credited to their customer's account or refunded to their customer the taxes paid by their customer in error . . . ." DRMC § 53-45(b). The City argues that the language of § 53-45(b) is "clear and unambiguous" and that it limits the circumstances in which a vendor may receive a refund. *See* Opening Brief at 15. The City maintains that ARAMARK had to either refund or credit its customers first before it would be entitled to a refund from the City. Under the circumstances here, however, an absurd result would occur by applying that condition. Both the Hearing Officer and the district court recognized the absurdity and therefore rejected the City's interpretation of § 53-45(b) in this case.

Under the City's position, ARAMARK would have to locate and issue refunds to hundreds of thousands of anonymous customers who purchased bottled water at the hundreds of sporting events and other events held at Coors Field and the Pepsi Center from 2000 through 2004. During that period, ARAMARK sold more than 400,000 bottles of water at the Pepsi Center. AR at 290. In 2003 and 2004, ARAMARK sold more than 180,000 bottles of water at Coors Field. *Id.* The price for a bottle of water ranged

from $2.50 to $3.00. *Id.* The City's tax rate on beverages is 4%. *See* DRMC § 53-27(b)(3). Thus, the per bottle tax would have been 12 cents or less. Under the City's reasoning, ARAMARK would have had to refund these 12 cents to each of the hundreds of thousands of customers in order to be eligible for a refund. Therefore, the City's interpretation of § 53-45(b) produces an absurd result here, as both the Hearing Officer and the district court recognized.

The Hearing Officer called the City's position "hyper-technical," noting that in the circumstances of the case, involving "a large volume of individual sales to anonymous customers at sporting events attended by thousands," ARAMARK "could not conceivably comply with the ordinance's provisions." AR at 3. The district court agreed, noting that "it is clear that the Manager attempted to act in a way so as not to interpret the statute in a manner that would 'frustrate the purpose or lead to an absurd or unreasonable result.'" Amended Order, CD at 157-58, citing *Asphalt Specialties Co., Inc. v. City of Commerce City*, 218 P.3d 741 (Colo. App. 2009). The district court agreed with the Hearing Officer that "the customer reimbursement requirement is inapplicable here." Amended Order, CD at 158.

The City never explains why requiring a vendor to refund pennies to hundreds of thousands of anonymous customers does not produce an absurd result. The City argues that the plain language of § 53-45(b) dictates that ARAMARK first had to refund or credit its customers before ARAMARK would be entitled to a refund from the City. But the City fails to recognize that if the plain and unambiguous language of the section would lead to an absurd result, then under *MDC Holdings*, that plain and unambiguous language is not applied as written. 223 P.3d at 717. The facts here demonstrate unequivocally that applying § 53-45(b) in the way the City suggests would produce an absurd result—a result that courts should avoid when interpreting legislative enactments. *See MDC Holdings*, 223 P.3d at 717 ("We first look to the language employed and, if unambiguous, apply it as written *unless doing so would lead to an absurd result.*" (Emphasis added)). Accordingly, this court should decline to apply the City's interpretation of § 53-45(b).

The proper application of § 53-45(b) here is that ARAMARK is entitled to its refund for sales tax erroneously paid to the City for bottled water sales, without having to satisfy the absurd condition of refunding

pennies to each of its tens of thousands of customers. *See MDC Holdings*, 223 P.3d at 717.

The City also argues that applying the customer reimbursement requirement is consistent with the tax scheme for the City. *See* Opening Brief at 16. The City asserts that vendors "hold the sales tax they collect from their customers in trust for the City. Once collected, the sales tax belongs to the City." *Id.* The problem with that position here is that the money collected and remitted to the City was never sales tax since bottled water sales are tax exempt. Thus, the funds remitted from ARAMARK to the City were not, and never could have been, sales tax. The funds thus do not belong and have never belonged to the City.

Were the City's position to prevail here, the City would receive a huge windfall. ARAMARK did not owe the amounts it mistakenly remitted to the City. The City was not, and is not, entitled to those amounts as sales tax because the City has made the legislative and regulatory decision to exempt bottled water from sales tax. *See* AR at 292; DRMC § 53-26(8). But instead of refunding ARAMARK the amounts mistakenly remitted, the City asks this court to apply § 53-45(b) to impose an impossible and absurd requirement on ARAMARK as a condition precedent to the City's obligation

to refund the erroneously-remitted funds. This court should decline the City's invitation.

C. The Hearing Officer abused his discretion by declining to order the City to give a refund to ARAMARK. The refund is mandatory under § 53-45(b).

The Hearing Officer correctly concluded that the City's interpretation of § 53-45(b) was "hyper-technical." AR at 3. But after reaching that conclusion, the Hearing Officer held that ARAMARK should not receive a refund because it committed a "unilateral mistake" by remitting the tax. *Id.* at 3-4. He cited no authority in support of his conclusion, nor explained why the mandatory language of § 53-45(b) did not require the City to give ARAMARK a refund. That was error.

The language of the refund provision is mandatory. *See* DRMC § 53-45(b) ("If the amount paid exceeds that which is due, the excess *shall* be refunded . . ." (Emphasis added)). Thus, once the Hearing Officer concluded that the customer reimbursement provision of § 53-45(b) did not apply to the circumstances of this case, the mandatory refund language required him to order a refund. The Hearing Officer's failure to order the mandatory refund was a misapplication of the law, which constitutes an abuse of discretion. *See Hagos*, 250 P.3d at 608 (misapplication of the law

is an abuse of discretion); *Hellas Const.*, 192 P.3d at 506. The proper application of § 53-45(b) required the City to refund ARAMARK. The district court recognized this and correctly reversed the Hearing Officer's failure to order the refund.

V. Conclusion

This court should affirm the decision of the district court ordering the City to refund ARAMARK the amounts erroneously paid to the City for sales tax on bottled water.

Respectfully submitted this 30th day of June, 2011.

/s/ Blain D. Myhre
Blain D. Myhre
Attorney for Appellees

CERTIFICATE OF SERVICE

The undersigned certifies that on this 30th day of June, 2011, a copy of the foregoing **ANSWER BRIEF** was served by depositing the same in the U.S. Mail, first-class postage prepaid, properly addressed to the following:

Charles T. Solomon, Esq.
Assistant City Attorney
201 West Colfax Avenue, Dept. 1207
Denver, CO 80202

/s/ Blain D. Myhre

APPENDIX

Denver Revised Municipal Code § 53-45(b)

If the amount paid exceeds that which is due, the excess shall be refunded with interest pursuant to section 53-43, or credited against any subsequent remittance from the same person; provided, however, that refunds and credits to vendors, or the vendor's assignees, are limited to those who at the time of the refund or credit have either credited to their customer's account or refunded to their customer the taxes paid by their customer in error, if any, and in such case vendors may receive from the manager a refund or credit for the amount, limited, however, for any transaction or series of transactions premised upon the error to an aggregate amount of not more than one hundred fifty thousand dollars ($150,000.00) that is claimed within three (3) years after the return is filed, provided, however, that if the three-year period for assessment of tax has been extended pursuant to section 53-68(d), then a claim for refund or credit may be made within such extended period; and provided, further, that if excess payments that the vendor did not collect from the customer are discovered by the manager, those payments, if made within the aforesaid three-year period or extended three-year period, shall be refunded or credited against subsequent remittances up to an aggregate amount of one hundred fifty thousand dollars ($150,000.00) only to the extent they exceed any deficiencies disclosed by an audit by the manager of the vendor's books and records of accounts.