COURT OF APPEALS, STATE OF COLORADO
101 West Colfax Ave., Suite 800
Denver, CO 80202

Appeal from District Court, Denver County Court, Colorado, The Honorable William D. Roberts, District Court Judge, Case No. 2009CV5531

Appellant(s): 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

v.

Appellee(s): ARAMARK SPORTS AND ENTERTAINMENT, INC. a Delaware corporation, now known as ARMARK 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

▲COURT USE ONLY▲

Case Number: 2010CA1545

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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complied with all requirements of C.A.R. 28 and C.A.R. 32, including the formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

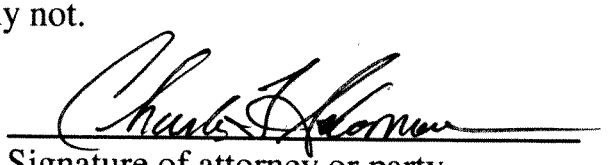
This brief complies with C.A.R. 28(g):
Choose one:

___ It contains _____ words.
_X_ It does not exceed 30 pages.

This brief complied with C.A.R. 28(k).

_X_ For the party raising the issue:
It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. ___, p. ___), not to entire document, where the issue was raised and ruled on.

___ For the party responding to the issue:
It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.



Signature of attorney or party

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The City and County of Denver, the Department of Revenue (now known as the Department of Finance) for the City and County of Denver, and Claude Pumilia, in his official capacity as the Manager of Revenue (now known as the Manager of Finance) for the City and County of Denver (collectively referred to as the "City"), respectfully submit this Opening Brief.

ISSUES PRESENTED FOR REVIEW

Denver Revised Municipal Code ("D.R.M.C.") § 53-45(b) provides that "refunds and credits [of sales tax] to vendors ... 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 vendors in this case, Aramark Sports & Entertainment ("S&E") and Aramark Entertainment ("Entertainment"), did not provide a credit or refund of sales tax to their customers, as a result, the City did not provide a credit or refund of sales tax to S&E and Entertainment. Did the District Court err in holding that the "customer reimbursement requirements" in D.R.M.C. § 53-45(b) are inapplicable in this case?

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

This case arises from sales and use tax audits of S&E and Entertainment, and an occupational privilege tax audit of Aramark Food and Support Services,

Inc. ("Support Services"). As a result of the audits, the City assessed S&E and Entertainment for unpaid sales and use taxes, interest, and penalty, and Support Services for unpaid occupational privilege tax, interest, and penalty.

S&E, Entertainment, and Support Services filed a petition with the Manager of Revenue challenging their respective assessments. The Manager of Revenue assigned the petitions to a Hearing Officer. After a hearing, the Hearing Officer upheld the assessments of tax and interest, but waived a portion of the penalties. S&E, Entertainment, and Support Services appealed the Hearing Officer's decision to the District Court pursuant to C.R.C.P. 106(a)(4).

After the parties filed their briefs the District Court issued an Order and an Amended Order, which together upheld the Hearing Office's decision in part, reversed it in part, and remanded three issues for additional findings. The City appealed the sole issue that was reversed to the Court of Appeals.

The sole issue before the Court of Appeals involves the interpretation and application of the "customer reimbursement requirements" in D.R.M.C. § 53-45(b). (Copies of the sale tax ordinances cited in this Answer Brief are attached hereto as Appendix 1).

II. Facts[1]

This case arises from excise tax audits of three related Aramark entities. The first was a sales and use tax audit of S&E for the period of January 1, 2000 through May 31, 2004 ("Audit Period"). Record pp. 129-151. S&E sold food and beverages at Coors Field during the Audit Period. Record p. 042, lns. 16-20. The second was a sales and use tax audit of Entertainment for the period of November 1, 2000 through May 31, 2004 ("Audit Period"). Record pp. 152-162. Entertainment sold food and beverages at the Pepsi Center during the Audit Period. Record p. 042, lns. 16-20. The third was an occupational privilege tax audit of Support Services for the period of January 1, 2000 through May 31, 2004 ("Audit Period"). Record pp. 163-263. Support Services provided payroll support for all Aramark entities in Colorado during the Audit Period. Record p. 038, lns. 14-22.

Among other things, the audits revealed: (1) that S&E and Entertainment did not properly charge or collect sales tax for all their taxable sales; (2) that in some instances S&E and Entertainment properly collected sales tax, but did not remit the

[1] The record certified to the Court consists of two volumes. The first volume is hardcopy and contains the record before the Hearing Officer. This volume contains three hundred and fifty (350) pages. Each page is consecutively numbered from 001 to 350 on the bottom right-hand side of the page. References to this volume will be to this page numbering and will be cited in this Opening Brief as "Record p. __." The second volume is electronic and contains the record before the District Court. References to this volume will be to the Filing ID Numbers and will be cited in this Opening Brief as "ID ____, p. __."

sales tax to the City; (3) that in some instances S&E and Entertainment did not pay sales tax for their purchases or properly accrue and remit a use tax to the City for those purchases; and (4) that Support Services did not properly withhold or remit occupational privilege tax to the City. Record pp. 129, 152, and 163.

As a result of the audit findings, on July 23, 2007, the City mailed a Notice of Final Determination, Assessment and Demand for Payment ("Assessment") to S&E for unpaid sales and use taxes, interest, and penalty; to Entertainment for unpaid sales and use taxes, interest, and penalty; and to Support Services for unpaid occupational privilege taxes, interest, and penalty. Record pp. 122-128.

On August 8, 2007, S&E, Entertainment, and Support Services filed a petition with the Manager of Revenue challenging their Assessments. Record pp. 344-350. The Manager of Revenue assigned the petition to a Hearing Officer.

After they filed their petition, S&E, Entertainment, and Support Services provided additional records to the City which resulted in the City reducing the amount of tax, interest, and penalty due from each of the three Aramark entities. Record p. 069, ln. 23 – p. 070, ln. 4. The City prepared revised audit work papers that showed the amount of tax, interest, and penalty due from each of the three Aramark entities. Record p. 070, ln. 5 – p. 071, ln. 19; Record pp. 129-263.

The Hearing Officer conducted an evidentiary hearing on February 26, 2008. Record, p. 001. At the hearing, S&E and Entertainment argued that they were entitled to a refund for sales tax that they incorrectly collected and remitted to the City for their sales of bottled water. Record p. 002 ¶ 3. It is undisputed that bottled water was not subject to the City's sales tax during the Audit Periods. However, S&E and Entertainment were "unaware that bottled water [was] not subject to sales tax." Record p. 047, lns. 5-11. As a result, S&E and Entertainment incorrectly collected sales tax from their customers for their sales of bottled water and remitted the sales tax to the City. Record p 099, ln. 22 – p. 100, ln. 6. The City argued that S&E and Entertainment were not entitled to a refund of the sales tax because they had not credited or refunded the sales tax that they incorrectly collected to their customers as required by D.R.M.C. § 53-45(b), which provides that "refunds and credits [of sales tax] to vendors ... 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." Record p. 106, ln. 4 – p. 107, ln. 11. The parties filed written closing statements. Record pp. 7-22.

The Hearing Officer issued Findings of Fact and Order ("Decision"), which upheld the assessment sales and use tax, and interest (as reflected in the revised audit work papers) against S&E and Entertainment, and upheld the assessment of

occupational privilege tax, interest, and penalty against Support Services. Record pp. 001-005 (A copy of the Hearing Officer's Decision is attached hereto as Appendix 2). The Hearing Officer rejected S&E's and Entertainment's request for refund of the sales tax that they incorrectly collected and remitted to the City for their sales of bottled water. Record pp. 003-004 (Appendix 2). However, the Hearing Officer did not do so for the reasons argued by the City. Instead, the Hearing Officer held that the City's argument regarding D.R.M.C. § 53-45(b) was "hyper-technical in the circumstances involved with this case of a large volume of individual sales to anonymous customers at sporting events attended by thousands" and decided this issue on other grounds. Record pp. 003-004 (Appendix 2).

S&E, Entertainment, and Support Services appealed the Decision to the District Court pursuant to C.R.C.P. 106(a)(4). ID 25461300. After the parties filed their briefs, the District Court issued an Order and an Amended Order, which together, upheld the Decision in part, reversed it in part, and remanded three issues to the Hearing Officer for additional findings. ID 31679343; ID 31799951 (Copies of the District Court's Order and Amended Order are attached hereto as Appendix 3 and Appendix 4). The sole portion of the Decision that the District Court reversed related to S&E's and Entertainment's request for refund of the sales tax that they incorrectly collected and remitted to the City for their sales of bottled

water. The District Court held that the "customer reimbursement requirements" in D.R.M.C. § 53-45(b) was "inapplicable" in this case. ID 31679343 p 6 (Appendix 3); ID 31799951 p. 6 (Appendix 4). As a result, the District Court ordered the City to refund S&E and Entertainment the amount of the sales tax that they incorrectly collected and remitted to the City for their sales of bottled water, plus interest. ID 31679343 p 7 (Appendix 3); ID 31799951 p. 7 (Appendix 4). The City appealed this portion of the District Court's Order and Amended Order to this Court.

The sole issue before the Court of Appeals involves the interpretation and application of the credit and refund provisions of D.R.M.C. § 53-45(b).

SUMMARY OF ARGUMENT

D.R.M.C. § 53-45(b) provides that "refunds and credits [of sales tax] to vendors ... 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 vendors in this case, S&E and Entertainment, were unaware that bottled water was not subject to the City's sales tax. As a result, they incorrectly collected sales tax from their customers for their sales of bottled water and remitted the sales tax to the City. S&E and Entertainment did not maintain sufficient records to enable them to credit or refund the incorrectly collected and remitted sales tax to

their customers. Nevertheless, S&E and Entertainment have asked the City for a refund of the incorrectly collected and remitted sales tax.

It is the City's position that S&E and Entertainment have not satisfied the requirements in D.R.M.C. § 53-45(b) for a refund.

PRESERVATION OF ISSUE

This issue was preserved for appeal. S&E and Entertainment raised this issue at the evidentiary hearing. The Hearing Officer rejected S&E's and Entertainment's request for refund of the sales tax that they incorrectly collected from their customers for their sales of bottled water and that they remitted to the City. Record pp. 003-004 ¶ 3 (Appendix 2). S&E and Entertainment appealed this issue to the District Court, which reversed the Hearing Officer's Decision and ordered the City to refund S&E and Entertainment the amount of the sales tax that they incorrectly collected and remitted to the City. ID 31679343 p 7 (Appendix 3); ID 31799951 p. 7 (Appendix 4).

STANDARD OF REVIEW

The standard of review under C.R.C.P. 106(a)(4) is limited to determining whether a governmental body or officer, in this case the Hearing Officer for the Manager of Revenue, exceeded its jurisdiction or abused its discretion, based upon the evidence in the record before it. C.R.C.P. 106(a)(4)(I).

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. *Board of County Commissioners v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996); *Van Sickle v. Boyes*, 797 P.2d 1267, 1272 (Colo. 1990); *Canyon Area Residents v. Board of County Commissioners*, 172 P.3d 905, 907 (Colo.App. 2006). "No competent evidence" means that the governmental body's or officer's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *O'Dell*, 920 P.2d at 50; *Van Sickle*, 797 P.2d at 1272; *Canyon Area Residents*, 172 P.3d at 907.

In such cases, the reviewing court is not the finder of fact; as a result, it may not weigh the evidence or substitute its own judgment for that of the governmental body or officer where competent evidence exists to support the decision. *O'Dell*, 920 P.2d at 50; *Canyon Area Residents*, 172 P.3d at 907. The reviewing court may not set aside the governmental body's or officer's decision merely because the evidence was conflicting or susceptible to more than one interpretation. *Arndt v. City of Boulder*, 895 P.2d 1092, 1095 (Colo.App. 1994). Even if evidence is presented that is contrary to the agency's ultimate decision, as long as the record as a whole contains sufficient competent evidence to support the decision, it will not be overturned. *Martinez v. Board of Commissioners of Housing Authority*, 992

P.2d 692, 696 (Colo.App.1999). The proper function of the reviewing court is to affirm the decision if there is any competent evidence to support it. *D.P.P.A. v. City and County of Denver*, 710 P.2d 3, 5 (Colo.App. 1985). The reviewing court should only set aside the governmental body's or officer's decision if it is based upon evidence that could only lead a reasonable person to reach a conclusion contrary to the decision. *Full Moon Saloon v. City of Loveland*, 111 P.3d 568, 571 (Colo.App. 2005).

Administrative proceedings are accorded a presumption of validity and regularity, and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency. *Van Sickle*, 797 P.2d at 1272; *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo.App. 2008). The burden is on the party challenging an agency decision to overcome the presumption of validity. *Kruse*, 192 P.3d at 601.

In determining the existence of an abuse of discretion, a reviewing court may consider whether the governmental body or officer misconstrued or misapplied the law. *Van Sickle*, 797 P.2d at 1274; *Canyon Area Residents*, 172 P.3d at 907. A reviewing court reviews the governmental body's or officer's interpretations of the law *de novo*. *Van Sickle*, 797 P.2d at 1274; *Canyon Area Residents*, 172 P.3d at 907.

This appeals court sits in the same position as the district court in reviewing the governmental body's or officer's decision under C.R.C.P. 106(a)(4). *Ad Two, Inc. v. City and County of Denver*, 9 P.3d 373, 376 (Colo. 2000); *Kruse*, 192 P.3d at 601; *Full Moon Saloon*, 111 P.3d at 571. In such cases, the proper consideration for the appeals court is whether there is sufficient evidence to support the governmental body's or officer's decision, not whether there is adequate evidentiary support to for the district court's decision. *Ad Two*, 9 P.3d at 376; *Kruse*, 192 P.3d at 601; *Full Moon Saloon*, 111 P.3d at 571. Also, the appeals court reviews the governmental body's or officer's interpretations of the law *de novo*. *Van Sickle*, 797 P.2d at 1274; *Canyon Area Residents*, 172 P.3d at 907.

In this case, there is competent evidence in the record to support the Hearing Officer's finding that S&E and Entertainment collected sales tax from their customers for their sales of bottled water and remitted the sales tax to the City. In addition, the Hearing Officer's decision to deny S&E's and Entertainment's request for refund of sales tax is consistent with D.R.M.C. § 53-45(b). As a result, the Hearing Officer's Decision should be upheld.

ARGUMENT

I. D.R.M.C. § 53-45(b) requires vendors to credit or refund sales tax that they incorrectly collected from their customers before the City will refund the incorrectly collected and remitted sales tax to vendors.

A. Bottled water was not subject to the sales tax.

There is no dispute that bottled water was not subject to the City's sales tax during the Audit Periods. Record p. 100, lns. 7-10.

B. S&E and Entertainment collected sales tax from their customers for their sales of bottled water and remitted the sales tax to the City.

There is ample and competent evidence in the record to support the Hearing Officer's finding that S&E and Entertainment collected sales tax from their customers for their sales of bottled water and remitted the sales tax to the City. Record pp. 003-004 (Appendix 2).

During their respective Audit Periods, S&E and Entertainment charged their customers at Coors Field and the Pepsi Center a fixed price for bottled water. Record p. 042, ln. 16 – p. 043, ln. 4. The fixed price varied between $2.50 per bottle in 2001 to $3.00 per bottle in 2004. Record p. 290. After each event at Coors Field and the Pepsi Center, S&E and Entertainment determined their gross sales of bottled water, then "backed out" the sales tax from their gross sales. Record p. 043, lns. 16-20; Record p. 060, lns. 11-19. The fixed price included the City's sales tax. Record p. 043, lns. 1-4; Record 043 p. 16-20; Record p 047, lns.

5-11. S&E and Entertainment remitted the sales tax that they "backed out" to the City. Record p. 043, lns. 16-25; Record p. 060, lns. 11-19. By way of example, if S&E and Entertainment sold a bottle of water for $3.00, they would "back out" or subtract the sales tax from the $3.00, then remit that amount to the City as sales tax. Record p. 60, lns. 11-20.

This was S&E's and Entertainment's practice throughout their respective Audit Periods. Record p. 055, lns. 11-21. This continued to be their practice until the summer of 2007 (about three years after the close of the Audit Periods), when S&E and Entertainment learned that bottled water was not subject to the City's sales tax. Record p. 101, lns. 11-19. Before that time, S&E and Entertainment were "unaware that bottled water [was] not subject to sales tax." Record p. 047, lns. 6-9. Once they realized that bottled water was not subject to the City's sales tax, S&E and Entertainment stopped this practice. Record p. 101, lns. 11-19.

The City does not dispute that S&E and Entertainment should not have collected the sales tax from their customers for their sales of bottled water and remitted it the City. However, as will be discussed below, it is the City's position that D.R.M.C. § 53-45(b) precludes it from refunding the incorrectly collected and remitted sales tax to S&E and Entertainment.

C. *D.R.M.C. § 53-45(b) requires vendors to credit or refund sales tax that they incorrectly collect from their customers before the City will refund the incorrectly collected and remitted sales tax to vendors.*

D.R.M.C. § 53-45(b) specifies the process for vendors[2] to receive a refund of sales tax that they incorrectly collected from their customers and remitted to the City. It states in relevant part:

> (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, ... (emphasis added)

(Appendix 1).

The same rules of construction apply when interpreting state statutes and municipal ordinances. *Asphalt Specialties v. Commerce City*, 218 P.3d 741, 745 (Colo.App. 2009). The court's primary task in interpreting a municipal ordinance is to give effect to the intent of the body enacting it, which is done by looking at the plain language of the municipal ordinance. *MDC Holdings v. Town of Parker*, 223 P.3d 710, 717 (Colo. 2010). Courts should read municipal ordinances in such

[2] DRMC § 53-24(20) defines "retailer or vendor" in pertinent part as "any person selling, leasing, renting or granting a license to use tangible personal property or services at retail." Appendix 1. It is undisputed that S&E and Entertainment are vendors.

a way as to give effect to every word. *Family Tree Foundation v. Property Tax Administrator*, 119 P.3d 581, 582 (Colo.App. 2005). Courts should also consider the language of the municipal ordinance in the context of the municipal code as a whole, and must give effect to the ordinary meaning of the language and read the provisions as whole, construing each consistently and in harmony with the overall statutory design. *Hygiene Fire Protection District v. Board of County Commissioners*, 205 P.3d 487, 490 (Colo.App. 2008), *affirmed* 221 P.3d 1063 (Colo. 2009). In doing so, a court should not interpret a municipal ordinance in such a way that defeats the obvious intent of the body that enacted it or render part of the municipal ordinance either meaningless or absurd. *Stevenson Imports v. City and County of Denver*, 143 P.3d 1099, 1103 (Colo.App. 2006). If the language of a municipal ordinance is clear and the intent of the body enacting it may be discerned with certainty, courts need not resort to other rules of statutory construction. *Western Fire Truck v. Emergency One*, 134 P.3d 570, 573 (Colo.App. 2006).

D.R.M.C. § 53-45(b) is clear and unambiguous. From the underlined language, it is clear that D.R.M.C. § 53-45(b) limits the circumstances that vendors are able receive a refund of the sales tax that they incorrectly collected from their customers and remitted to the City. D.R.M.C. § 53-45(b) specifies that vendors

must credit or refund the incorrectly collected sales tax to their customers before the City will refund the incorrectly collected and remitted sales tax to the vendors.

The requirement that vendors credit or refund the sales tax that they incorrectly collected to their customers before the City will refund the incorrectly collected and remitted sales tax to the vendors is consistent with the sales tax scheme that the City has adopted. Under the sales tax scheme that the City has adopted, purchasers or customers are responsible for payment of the sales tax. D.R.M.C. § 53-25 ("There is levied and there shall be collected and paid a tax ..."); D.R.M.C. § 53-27(c) ("Tax to be shown as a separate item. ... tax shall constitute a part of such price and shall be a debt from the purchaser to the retailer until paid, ..."); *J.A. Tobin Construction Co. v. Weed*, 158 Colo. 430, 407 P.2d 350, 352 (1965); *Columbine Beverage Company v. Continental Can Company, Inc.*, 662 P.2d 1094, 1096 (Colo.App. 1982). Vendors are responsible for collecting sales tax from their customers and remitting it to the City. D.R.M.C. § 53-27 ("Retailers to collect tax ... (e) *Retailer as collecting agent.* The retailer ... as collecting agent for the city ..."); D.R.M.C. § 53-28 ("Retailers responsible for payment of tax.") Vendors hold the sales tax they collect from their customers in trust for the City. Once collected, the sales tax belongs to the City. At no time

does the sales tax belong to the vendors. This is clear from D.R.M.C. § 53-40, which states:

> All sums of money paid by the purchaser to the retailer as taxes imposed by this article shall be and remain public money, property of the city, in the hands of such retailer, and the retailer shall hold the same in trust for the sole use and benefit of the city until returned and paid over to the manger as herein provided, and the failure so to pay over to the manager shall constitute a violation of this article. (emphasis added).

The requirement in D.R.M.C. § 53-45(b) that vendors credit or refund the sales tax that they incorrectly collected to their customers before the City will refund the incorrectly collected and remitted sales tax to the vendors makes sense when viewed in light of the sales tax schemed that the City has adopted. Under the sales tax scheme that the City has adopted, the incorrectly collected and remitted sales tax never belongs to the vendors. The money used to pay the sales tax belongs to the customer before it pays the sales tax to the vendor. Once the vendor collects the sales tax, it belongs to the City. The "customer reimbursement requirement" of D.R.M.C. § 53-45(b) ensures that any incorrectly collected and remitted sales tax is returned to the customers that paid the sales tax.

In this case, S&E and Entertainment did not credit or refund the incorrectly collected and remitted sales tax to their customers for their sales of bottled water. Record p. 107, lns. 8-11. Nor could they, because they did not maintain sufficient

records to enable them to do so. As a result, D.R.M.C. § 53-45(b) provides that they may not received a refund of the sales tax that they incorrectly collected from their customers and that they remitted to the City.

1. Hearing Officer's decision.

The Hearing Officer denied S&E's and Entertainment's request for refund of the sales tax they incorrectly collected from their customers for their sales of bottled water. However, the Hearing Officer did not do so for the reason set forth above. The Hearing Officer held that the City's argument regarding the "customer reimbursement requirements" in D.R.M.C. § 53-45(b) was "hyper-technical in the circumstances involved with this case of a large volume of individual sales to anonymous customers at sporting events attended by thousands." Record p. 003 (Appendix 2). The Hearing Officer went on decide this issue on other grounds. Record pp. 003-004 (Appendix 2). The Hearing Officer found that if S&E and Entertainment received the refund, they would receive a "windfall" and would "receive an amount of money [they] clearly thought for an extended period of time [they were] not entitled to." Record p. 003 (Appendix 2).

The City disagrees that its argument was "hyper-technical." The City's argument was consistent with the clear and unambiguous language of D.R.M.C. § 53-45(b), which states that vendors must credit or refund incorrectly collected sales

tax to their customers before the City will refund the incorrectly collected and remitted sales tax to the vendors. Nevertheless, the City agrees with the Hearing Officer's decision on this issue.

2. *District Court's decision.*

The District Court reversed the Hearing Officer's Decision on this issue. The District Court found that the "customer reimbursement requirement" in D.R.M.C. § 53-45(b) was inapplicable because S&E and Entertainment "could not conceivably comply with the ordinance's provisions." ID 31679343 p 6 (Appendix 3); ID 31799951 p. 6 (Appendix 4).

The City agrees that S&E and Entertainment could not comply with the "customer reimbursement requirement" in D.R.M.C. § 53-45(b). That is why they should not receive a refund of the sales that they incorrectly collected from their customers and that they remitted to the City.

The District Court's decision is contrary to the clear and unambiguous language of D.R.M.C. § 53-45(b). The District Court's decision is also inconsistent with the sales tax scheme that the City has adopted. It is crucial to keep in mind that under the sales tax scheme the City has adopted, the sales tax never belongs to the vendor. D.R.M.C. § 53-40; *see also*, D.R.M.C. § 53-27(f) ("No retailer shall benefit from the collection or payment of the [sales] tax.") That is why the

"customer reimbursement requirement" is in D.R.M.C. § 53-45(b). The "customer reimbursement requirement" ensures that any incorrectly collected and remitted sales tax is returned to the customer that paid the sales tax. If that cannot occur, the clear and unambiguous language of D.R.M.C. § 53-45(b) dictates that the incorrectly collected and remitted sales tax remains the property of the City.

CONCLUSION

The City requests that the Court uphold the Hearing Officer's decision that S&E and Entertainment are not entitled to a refund of the sales tax that they incorrectly collected from their customers for their sales of bottled water and that they remitted to the City, but for the reasons set forth in the City's Opening Brief. *Consumer Crusade v. Clarion Mortgage Capital*, 197 P.3d 285, 288 (Colo.App. 2008) (Appellate court may affirm a correct judgment using different reasoning than employed by the finder of fact.); *Talbots v. Schwartzberg*, 928 P.2d 822, 823 (Colo. 1996) (Correct result should be upheld, even if reasoning incorrect.)

Dated this 15th day of April, 2011.

Charles T. Solomon
Assistant City Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this *15th* day of *April*, 2011, a copy of the foregoing **OPENING BRIEF** was served by depositing the same in the U.S. Mail, first-class postage prepaid, properly addressed to the following:

Blain D. Myhre
Isaacson Rosenbaum, PC
1001 17th Street, Suite 1800
Denver, CO 80202

Karen A. Walton
Office of the City Attorney

APPENDIX 1

b. The cost of enforcing the regulation and the anticipated benefits or revenue to be derived from the regulation.

c. A general description of the industry or enterprises that will be affected, directly or indirectly, by the regulation if different, in the opinion of the manager, from the general tax-paying community.

No rule or regulation shall take effect without the notice described herein being given to the president of the council.

(3) Publication of the proposed regulation once in an official publication of the city after the aforesaid notification to the president of the council. The regulation shall become effective sixty (60) days after its publication unless otherwise stated in the regulation.

(4) After publication, the manager shall file three (3) copies of the regulation with the city clerk and one (1) copy each with the city attorney and the executive director of the department of revenue of the State of Colorado; such filings shall constitute evidence for the presumption that the regulation was duly adopted and promulgated in compliance with the foregoing procedures and with the requirements of article VI, chapter 2, of the Code.

The manager may delegate the administration of this article or any part thereof to duly authorized deputies or agents.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 679-87, § 1, 11-23-87; Ord. No. 26-91, § 1, 1-7-91; Ord. No. 279-03, § 8, 4-21-03)

Sec. 53-24. Definitions.

As used in this article, the following words, phrases and, where applicable, their declensional and inflectional forms shall have the meanings given to them in this section except where the context in which they are used indicates clearly and requires a different meaning according to customary usage. The words "shall" and "must" are to be construed as mandatory and not directory. In addition to the following definitions, the definitions and general provisions of chapter 1 shall be applicable insofar as not expressly inconsistent with the provisions hereof.

(1) *Aircraft* means any contrivance now known or hereafter invented, used, or designed for navigation or flight through the air and designed to carry at least one person. "Aircraft" shall not include aircraft parts; "aircraft parts" include, but are not limited to expendable aircraft parts and rotable aircraft parts.

(2) *Airline company* means any operator who engages in the carriage by aircraft of persons or property as a common carrier for compensation or hire, or the carriage of mail, or any aircraft operator who operates regularly between two (2) or more points and publishes a flight schedule. "Airline company" shall not include operators whose aircraft are all certified for a gross takeoff weight of twelve thousand five hundred (12,500) pounds or less and who do not engage in scheduled service or mail carriage service.

(3) *Automotive vehicle* means any vehicle or device in, upon or by which any person or property is or may be transported or drawn upon a public highway, or any device used or designed for aviation or flight in the air. Automotive vehicle includes, but is not limited to, motor vehicles, trailers, semi-trailers or mobile homes. Automotive vehicle shall not include devices moved by human power.

(4) *Business* shall include all activities engaged in or caused to be engaged in with the object of gain, benefit or advantage, direct or indirect.

(5) *Charitable corporation* shall mean a corporation organized and operating exclusively for the purpose of providing a gift for an indefinite number of persons who are either residents of the city or using facilities of the city on a regular basis that lessens the economic burdens of the city by making the gift to the young, aged, poor, infirm or uneducated. Lessening the

economic burden of the city by making a gift to the uneducated shall mean providing free instruction or training to a majority of enrollees on subjects useful to the individual and beneficial to the community by schools having a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where educational activities are regularly carried on. This definition of charitable corporation shall not necessarily include religious corporations, which may be exempt on a religious basis whether or not they fall within the definition of a charitable corporation.

(6) *City* shall mean the City and County of Denver or the geographical area within its territorial limits, depending upon the context.

(7) *Construction and building materials* means tangible personal property which, when combined with other tangible property, loses its identity to become an integral and inseparable part of a structure or project, and the term includes public and private improvements to real property. Construction and building materials include, but are not limited to, such things as: asphalt, bricks, builders' hardware, caulking material, cement, concrete, conduit, electric wiring and connections, fireplace inserts, electrical heating and cooling equipment, flooring, glass, gravel, insulation, lath, lead, lime, lumber, macadam, millwork, mortar, oil, paint, piping, pipe valves and pipe fittings, plaster, plumbing fixtures, putty, reinforcing mesh, road base, roofing, sand, sanitary sewer pipe, sheet metal, site lighting, steel, stone, stucco, tile, trees, shrubs and other landscaping materials, wall board, wall coping, wall paper, weather stripping, wire netting and screen, water mains and meters, and wood preserver. The above materials, when used for forms, or other items which do not remain as an integral or inseparable part of a structure or project are not construction materials.

(8) *Director of excise and licenses* shall mean the director of excise and licenses in and for the city; and the term "manager" shall mean the manager of finance, or the duly authorized representative thereof, in and for the city.

(9) *Farm machinery* means self-propelled or power-drawn equipment used directly for plowing, planting, cultivating and harvesting of crops, such as combines, tractors, plows, discs, planters and rakes.

(10) *Food* shall mean:

a. Food for domestic, home or household use as the manager may by regulation define which is advertised or marketed for human consumption and is sold in the same form, condition, quantities and packaging as is commonly sold by grocers.

b. Food as defined in Section 2012(g) of Title 7 of the United States Code as of, and as it may be amended after, October 1, 1987, that is eligible for purchase by the medium of exchange commonly known as "food stamps," and the sale of food as defined in or pursuant to Section 1786 of Title 42 of the United States Code as of, and as it may be amended after, October 1, 1987, that is eligible for purchase with vouchers, checks or similar certificates of exchange for the "special supplemental food program" for women, infants, and children.

c. Notwithstanding the definition of food referred to in paragraph b of this subsection, the term "food" shall not include food or drink served or furnished as described in section 53-25(5) of this article; neither shall it include carbonated water sold in containers, chewing gum, spirituous, malt or vinous liquors, seeds and plants to grow foods, prepared salads, salad bars, cold sandwiches, and deli trays unless any of those items, excepting spirituous, malt or vinous

liquors, is actually purchased with food stamps or vouchers as they are described in paragraph b of this subsection; nor shall the term "food" as used in this subsection include food and drink vended by or through machines.

(11) *Gross taxable sales* means the total amount received in money, credits, property, including the fair market value of exchange property which is to be sold thereafter in the usual course of the retailer's business, or other consideration valued in money from sales and purchases at retail or deemed to be at retail, within the city, and embraced within the provisions of this article:

a. Provided, however, that the vendor may take credit in his report of gross sales for an amount equal to the sale price of property returned by the purchaser when the full sale price thereof is refunded, either in cash or by credit;

b. Provided, further, that the fair market value of any exchanged property which is to be sold thereafter in the usual course of the retailer's business, if included in the full price of a new article, shall be excluded from gross taxable sales;

c. Provided, further, that taxes paid on the amount of gross sales which are represented by accounts not secured by a conditional sale contract or chattel mortgage and which are found to be worthless and are actually and properly charged off as bad debts for the purpose of the income tax imposed by the laws of the state may be credited upon a subsequent payment of the tax herein provided; but if any such accounts are thereafter collected by the vendor, a tax shall be paid upon the amount so collected. Such credit shall not be allowed with respect to any account or item therein arising either from the sale of any article under a conditional sale contract whereby the vendor retains title as security for all or part of the purchase price or from the sale of any article when the vendor takes a chattel mortgage on the article to secure all or part of the purchase price.

(12) *Manufacturing* is the performance as a business of an integrated series of operations which places personal property in a form, composition or character different from that in which it was acquired whether for sale or for use by the manufacturer. The change in form, composition or character must result in a different product having a distinctive name, character and use.

(13) *Medical supplies* shall mean drugs, prosthetic devices, and special beds for patients with neuromuscular or similar debilitating ailments, when sold for the direct, personal use of a specific individual in accordance with a prescription or other written directive issued by a licensed practitioner of medicine, dentistry or podiatry; corrective eyeglass lenses (including eyeglass frames), and corrective contact lenses, when sold for the direct, personal use of a specific individual in accordance with a prescription or other written directive issued by a licensed practitioner of medicine or optometry; wheelchairs, and crutches, when sold for the direct, personal use of a specific individual; oxygen and hemodialysis products for use by a medical patient, hearing aids, hearing aid batteries, insulin, insulin measuring and injecting devices, glucose to be used for treatment of insulin reactions, and human whole blood, plasma, blood products and derivatives. This exemption excludes items purchased for use by medical and dental practitioners or medical facilities in providing their services, even though certain of those items may be packaged for single use by individual patients after which the item would be discarded.

(14) *Motor fuel* shall mean gasoline, casing head or natural gasoline, benzol, benzene

and naphtha, gasohol and any liquid prepared, advertised, offered for sale, sold for use or used or commercially usable in internal combustion engines for the generation of power for the propulsion of motor vehicles upon the public highways. The term does not include fuel used for the propulsion or drawing of aircraft or railroad cars or railroad locomotives, however.

(15) *Pay television* shall include, but not be limited to, cable, microwave or other television service for which a charge is imposed.

(16) *Prepress preparation material* means all materials used by those in the printing industry including, but not limited to, airbrush color photos, color keys, dies, engravings, light-sensitive film, light-sensitive paper, masking materials, Mylar, plates, proofing materials, tape, transparencies, and veloxes, which are used by printers in the preparation of customer specific layouts or in plates used to fill customers' printing orders, which are eventually sold to a customer, either in their original purchase form or in an altered form, and for which a sales or use tax is demonstrably collected from the printer's customer, if applicable, either separately from the printed materials or as part of the inclusive price therefor. Materials sold to a printer which are used by the printer for the printer's own purposes, and are not sold, either directly or in an altered form, to a customer, are not included within this definition.

(17) *Prosthetic devices* means any artificial limb, part, device or appliance for human use which aids or replaces a bodily function; is designed, manufactured, altered or adjusted to fit a particular individual; and is prescribed by a licensed practitioner of the healing arts. Prosthetic devices include, but are not limited to, prescribed auditory, ophthalmic or ocular, cardiac, dental or orthopedic devices or appliances, oxygen concentrators and oxygen with related accessories.

(18) *Purchase price* or *price* means the aggregate value measured in currency paid or delivered or promised to be paid or delivered in consummation of a sale, without any discount from the price on account of the cost of the property sold, cost of materials used, labor or service cost, transportation and delivery charges, or any other expense whatsoever; and provided that when articles of tangible personal property are sold by the manufacturer after manufacture or after having been made to order, the gross value of all materials, labor and services, inclusive of the profit thereon, shall be included in the purchase price; but said price shall be exclusive of any direct tax imposed by the federal government, by the state or by this article; and in the case of all retail sales involving the exchange of property, also exclusive of the fair market value of the property exchanged at the time and place of exchange; provided, however, that such exchanged property is to be sold thereafter in the usual course of the retailer's business. "Price" and "purchase price" shall not include the following:

a. The consideration received for labor or services used in installing, applying, remodeling or repairing the property sold if the consideration for such services is separately stated from the consideration received for the tangible personal property in the retail sale;

b. The amount paid by any purchaser as, or in the nature of, interest or finance charges on account of credit extended in connection with the sale of any tangible personal property if the interest or finance charges are separately stated from the consideration received for the tangible personal property transferred in the retail sale.

(19) *Retail sale* means any sale within the city except a wholesale sale.

(20) *Retailer* or *vendor* means any person selling, leasing, renting or granting a license

to use tangible personal property or services at retail. Retailer or vendor shall include, but is not limited to, any:

a. Auctioneer;

b. Salesman, representative, peddler or canvasser, who as agent, directly or indirectly, of the dealer, distributor, supervisor, employer or principal under whom he operates or from whom he obtains the tangible personal property or services sold by such agent, makes sales of tangible personal property or services subject to the tax imposed herein; and in such event such agent shall be responsible for the collection and payment of the tax imposed by this article whenever the principal of such agent neglects or refuses to become licensed as a vendor hereunder.

c. Charitable organization or governmental entity which makes sales of tangible personal property to the public, notwithstanding the fact that the merchandise sold may have been acquired by gift or donation or that the proceeds are to be used for charitable or governmental purposes.

(21) *Sale or purchase* or *sale and purchase* includes installment and credit purchases and sales and the exchange of property or services that are taxable under the terms of this article as well as the purchase and sale thereof for money; and every transaction, conditional or otherwise, based upon consideration constitutes a sale. The term "sale," "purchase," or "sale and purchase" includes transactions whereby the acquisition of tangible personal property was effected by (a) the transfer, conditionally or absolutely, of title or possession or both of the tangible personal property; or (b) a lease, hire or rental of, or a grant of a license to use (including royalty agreements), tangible personal property. The terms "sale" and "purchase" and "sale and purchase" do not include:

a. A division of partnership assets among the partners according to their interests in the partnership;

b. The transfer of assets of shareholders in the formation or dissolution of professional corporations if no consideration including, but not limited to, the assumption of a liability is paid for the transfer of assets;

c. The pro rata distribution of a corporation's assets to its stockholders upon dissolution of the corporation if no consideration including, but not limited to, the assumption of a liability is paid for the transfer of assets;

d. A transfer of a partnership interest;

e. The transfer of assets to a commencing or existing partnership if no consideration including, but not limited to, the assumption of a liability is paid for the transfer of assets;

f. The repossession of personal property by a chattel mortgage holder or foreclosure by a lienholder.

(22) *Special fuel* means kerosene oil, kerosene distillate, diesel fuel, all liquefied petroleum gases, and all combustible gases and liquids for use in the generation of power for propulsion of motor vehicles upon the public highways. The term does not include fuel used for the propulsion or drawing of aircraft, railroad cars or railroad locomotives, however.

(23) *Tangible personal property* means corporeal personal property.

(24) *Tax* means either the tax payable by the purchaser of a commodity or service subject to tax or the aggregate amount of taxes due from the vendor of such commodities or services during the period for which the vendor is required to report his collections, as the context may require.

(25) *Tax deficiency* or *deficiency* means any amount of tax, penalty or interest that is not reported, returned or paid on or before the date that the return and payment of the tax are required under the terms of this article.

(26) *Taxable services* or *services* means services subject to tax pursuant to this article.

(27) *Taxpayer* shall mean any person obligated to account to the manager for taxes collected or to be collected under the terms of this article.

(28) *Telecommunications service* means the transmission of any two-way interactive electromagnetic communications including, but not limited to, voice, image, data and any other information, by the use of any means but not limited to wire, cable, fiber optical cable, microwave, radio wave or any combinations of such media. "Telecommunications service" includes, but is not limited to, basic local exchange telephone service, toll telephone service and teletypewriter service, including, but not limited to, residential and business service, directory assistance, cellular mobile telephone or telecommunication service, specialized mobile radio and two-way pagers and paging service, including any form of mobile two-way communication. "Telecommunications service" does not include separately stated nontransmission services which constitute computer processing applications used to act on the information to be transmitted.

(29) *Wholesale sale* means:

a. A sale by wholesalers to licensed retail merchants, jobbers, dealers or other wholesalers for resale, and does not include (i) a sale by wholesalers to users or consumers not for resale; (ii) the leasing, hiring or renting of, or granting of a license to use (including royalty agreements) tangible personal property to a user or consumer thereof; (iii) sales of returnable containers to manufacturers, compounders, wholesalers, retailers, jobbers, packagers, distributors or bottlers; (iv) sales of tangible personal property to persons for resale when there is a likelihood that the city will otherwise lose tax revenues due to the difficulty of policing the business operations because:

1. of the frequent replacement of independent contractors or agents;
2. of the lack of a place of business in which to display a city retail sales license;
3. of the lack of a place of business in which to keep records;
4. of the lack of adequate records;
5. the persons engaged in selling, or in the chain of selling events, are minors or transients; or
6. the persons selling, or in the chain of events leading to sale, are engaged essentially in providing services in transferring tangible personal property;

but the transactions set forth in items (i), (ii), (iii) and (iv) above shall be deemed retail sales and subject to the provisions of this article;

b. Sales to and purchases of tangible personal property by a person engaged in the business of manufacturing or compounding for use, profit or sale, which tangible personal property meets all of the following conditions: (i) is actually and factually transformed by the process of manufacture; (ii) becomes by the manufacturing or compounding process a necessary and recognizable ingredient, component and constituent part of the finished product; and (iii) its physical presence in the finished product is essential to the use thereof in the hands of the ultimate consumer; shall be deemed wholesale sales and shall be deemed exempt from taxation under this article; and

c. Sales to and purchases of tangible personal property for use as containers, labels and shipping cases by a person engaged in manufacturing, compounding, wholesaling, jobbing,

retailing, packaging, distributing or bottling for sale, profit or use, which tangible personal property meets all of the following conditions: (i) is used by the manufacturer, compounder, wholesaler, jobber, retailer, packager, distributor or bottler to contain or label the finished product; (ii) is transferred by said person along with and as a part of the finished product to the purchaser; and (iii) is not returnable to said person for reuse, shall be deemed wholesale sales and shall be exempt from taxation under this article.

Provided, however, that skin casing or cellulose casing or sales of and purchases of edible fryer oil used as a cooking medium which enters into the processing of food products intended to be sold at retail for human consumption shall be exempt from taxation when such skin casing or cellulose casing or edible fryer oil used as a cooking medium, which does not become an integral or constituent part of a food product, is directly used, consumed, dissipated or destroyed to the extent that it is rendered unfit for further use in the processing of a food product.

(30) *Wholesaler* means a person doing a regularly organized wholesale or jobbing business and selling to licensed retailers, merchants, jobbers, dealers or other wholesalers, for the purpose of resale.

(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, §§ 1—6, 12-3-84; Ord. No. 679-87, § 2, 11-23-87; Ord. No. 922-91, § 1, 12-9-91; Ord. No. 550-92, §§ 1, 2, 8-10-92; Ord. No. 262-07, § 1, 6-11-07; Ord. No. 775-07, § 92, 12-26-07; Ord. No. 755-09, § 1, 12-14-09)

Sec. 53-25. Imposition of tax.

There is levied and there shall be collected and paid a tax in the amount stated in this article, as follows:

(1) On the purchase price paid or charged upon all sales and purchases of tangible personal property at retail.

(2) In the case of retail sales involving the exchange of property, on the purchase price paid or charged, including the fair market value of the property exchanged at the time and place of the exchange, excluding however, from the consideration or purchase price the fair market value of the exchanged property if such exchanged property is to be sold thereafter in the usual course of the retailer's business.

(3) Upon the purchase price or charge for telephone and telecommunications services, including in addition to audio and video transmission and reception, other two-way electronic or electromagnetic wave transmissions, receptions or communications of any sort, by or through any medium, whether such services are furnished by public or private corporations or associations, that, except as otherwise provided by this article for mobile telecommunication services, both originate in and are charged to a telephone number or an account located within the city, excepting, however, monthly or other periodic usage charges that represent varying amounts billed to accounts for a subscriber's actual use of interstate services provided by a long-distance telecommunications company and charged to the subscriber by or on behalf of a long-distance telecommunications company.

(4) Upon the purchase price or charge for coal, petroleum, liquid petroleum, electric, steam and natural gas services, and any other products used for energy-producing purposes, whether furnished by municipal, public or private corporations or associations, furnished and sold for domestic, commercial or industrial consumption and not for resale.

(5) Upon the amount paid for food or drink served or furnished in or by restaurants, cafes, lunch counters, cafeterias, hotels, drugstores, social clubs, nightclubs, cabarets, resorts, snack bars, caterers, boardinghouses, carryout shops and other places at which prepared food or drink is regu-

larly sold, including sales from pushcarts, motor vehicles and other mobile facilities. Cover charges, admission or entrance fees, and mandatory service or service-related charges, whether described as tips, gratuities or otherwise, shall be included as part of the amount paid for such food or drink.

(6) Upon the purchase price or charge for the furnishing or sale to customers within the city of informational or entertainment service wherein the relay or transmission of electromagnetic waves through any medium, tangible or intangible, including cable, glass fiber and ambient air, is necessary for the service to be received, including, but not limited to, pay television, excepting however, telephone and telecommunications services described in section 53-25(3) and television, cinema or similar programming provided at a theater or similar place open to the public.

(7) Upon the purchase price or charge for data processing equipment and data processing programs.

(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, §§ 7, 8, 12-3-84; Ord. No. 679-87, § 3, 11-23-87; Ord. No. 922-91, §§ 2—4, 12-9-91; Ord. No. 649-02, § 1, 8-12-02)

Sec. 53-26. Exemptions.

There shall be exempt from taxation under the provisions of this article the following:

(1) All sales to the United States government, to the state, its departments and institutions, and the political subdivisions thereof only when purchased in their governmental capacities.

(2) All sales made to religious or charitable corporations when purchased for their regular religious or charitable functions and activities.

(3) All sales of cigarettes.

(4) All sales of motor fuel and special fuel as defined in this article.

(5) All sales and purchases of neat cattle, sheep, lambs, swine and goats; all sales of mares and stallions for breeding purposes.

(6) All sales and purchases of feed for livestock or poultry and all sales of seeds to farmers, ranchers, truck farmers, florists and horticulturists who sell the crops resulting from the propagation of such seeds or use such crops as feed for livestock or poultry.

(7) The sale and purchase of medical supplies.

(8) The sale and purchase of food.

(9) Sales of tangible personal property to purchasers residing or doing business outside the city, provided delivery thereof is made to such purchaser at such residence or business address of the purchaser outside the city by a common carrier, or by the conveyance of the seller, or by mail.

(10) All sales which the city is prohibited from taxing under the Constitution or laws of the United States or the Constitution of the state.

(11) Sale of automotive vehicles as defined in this article that are registered and required by state law to be registered outside the city.

(12) All sales of farm machinery as defined in this article.

(13) Sales of tangible personal property for use in improving real property outside the city only in the amount and to the extent that a use tax has been or will be paid in respect to the proposed use of such property to a municipal corporation organized and existing under the authority of the laws or the constitution of any state, if the purchaser presents to the retailer a building permit or other documentation acceptable to the manager showing that a use tax has been or will be paid to the municipality in which the real property is located.

(14) Sales of tangible personal property to a natural gas and electric utility or a telephone utility for use in its business operations outside the city, even though the property is delivered and temporarily stored within the city.

(15) Sales of machinery, tools, and equipment, including replacement parts, to a transportation utility to be used by the utility in the operation of an equipment maintenance facility and at an industrial building:

a. That is located in the city within an enterprise zone designated as such pursuant to state law;

b. That contains at least one million (1,000,000) square feet of enclosed, useable floor space on a single level;

c. That serves as a regular place of work and for reporting for duty for at least two thousand (2,000) employees in the third year of operations of the maintenance facility and continually thereafter; and

d. That is operated by an interstate carrier for hire primarily for maintaining, rebuilding or repairing equipment moving in interstate commerce.

This exemption may be applicable to the first and second years of operations at the industrial building provided that the utility establishes a reserve account for the tax for its return to the city at the end of the third year of operations should less than two thousand (2,000) employees be employed at the facility in said third year.

(16) Sales of construction and building materials for use in the construction, reconstruction or remodeling of a new industrial building of a transportation utility to be used by the utility for an equipment maintenance facility:

a. That is located in the city within an enterprise zone designated as such pursuant to state law;

b. That is designed to contain at least one million (1,000,000) square feet of enclosed, useable floor space on a single level;

c. That serves as a regular place of work and for reporting for duty for at least two thousand (2,000) employees in the third year of operations of the maintenance facility and continually thereafter; and

d. That is operated by an interstate carrier for hire primarily for maintaining, rebuilding or repairing equipment moving in interstate commerce.

This exemption may be applicable to the design and construction phases of the new facility and to the first and second years of operations at the facility provided that the utility establishes a reserve account for the tax for its return to the city at the end of the third year of operations should less than two thousand (2,000) employees be employed at the facility in said third year.

(17) All sales of prepress preparation materials as defined in this article.

(18) Sales made to, billed directly to, and paid for directly by, qualified hospital organizations (as defined in paragraph (a) of this subsection (18)), provided that the property or service purchased by the qualified hospital organization is employed in furtherance of an exempt function (as defined in paragraph (b) of this subsection (18)).

(a) For purposes of this subsection (18), a "qualified hospital organization" is any of the following:

(1) An organization that is exempt from federal income tax under section 115 or section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended, but only if the organization holds a license to operate a "general hospital" for people issued pursuant to sections 25-3-101 and 25-3-102, Colorado Revised Statutes (2000), as amended, including any successor provisions to those sections, and operates a general hospital;

(2) A corporation or trust that:

(a) Is exempt from federal income tax under section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended; and

(b) Owns or employs personal property or improvements that are used in the operations of one (1) or more

organizations described in subparagraph (a)(1) of this subsection (18); and

(c) Either (i) directly controls, or is controlled by, one (1) or more organizations described in subparagraph (a)(1) of this subsection (18), (ii) is controlled by a management organization as defined in subparagraph (a)(3) of this subsection (18) in common with one (1) or more organizations described in subparagraph (a)(1) of this subsection (18), or (iii) owns a hospital that is licensed to operate as a "general hospital" for people pursuant to sections 25-3-101 and 25-3-102, Colorado Revised Statutes (2000), as amended, including any successor provisions to those sections, and that is operated by an organization described in subparagraph (a)(1) of this subsection (18).

(3) An organization that is exempt from federal income tax under section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended, and a principal function of which is to manage the property or operations, or both, of one (1) or more organizations described in subparagraphs (1) or (2) of this paragraph (a); and

(4) A partnership, limited partnership, limited liability limited partnership, limited liability partnership, limited liability company, or joint venture if all of the partners, members, joint venturers or other participants in such partnership, limited partnership, limited liability limited partnership, limited liability partnership, limited liability company or joint venture are organizations described in subparagraphs (1), (2) or (3) of this paragraph (a).

(b) For purposes of this subsection (18):

(1) Except as provided in subparagraph (3) of this paragraph (b), "employed in furtherance of an exempt function" means employed by a qualified hospital organization in an activity from which none of the proceeds are treated as unrelated business income.

(2) "Unrelated business income" means gross income derived from any unrelated trade or business within the meaning of section 512 of the United States Internal Revenue Code of 1986, as amended.

(3) If the purchase and sale of any property or service would be exempt under this subsection (18) but for the fact that the property or service is employed in an activity from which a portion of the proceeds is treated as unrelated business income, the manager of finance is authorized to approve written formulas or methodologies (including formulas or methodologies of individual qualified hospital organizations) as may be appropriate and reasonable to determine, based on the evidence available, the percentage of the proceeds from such activity that is not treated as unrelated business income. This calculated percentage shall be the percentage of the cost of such property or service that will be exempt under this subsection (18). The manager of finance may condi-

tion approval of formulas and methodologies on receipt of such information as is reasonably deemed necessary for proper implementation of such formulas and methodologies.

(19) The sale of aircraft to an airline company that is used in interstate commerce by the airline company.

(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 346-82, § 1, 6-14-82; Ord. No. 638-84, §§ 9, 10, 12-3-84; Ord. No. 679-87, § 4—7, 11-23-87; Ord. No. 73-91, §§ 1, 2, 1-28-91; Ord. No. 567-91, §§ 1—3, 8-5-91; Ord. No. 570-91, § 1, 8-5-91; Ord. No. 922-91, §§ 6—8, 12-9-91; Ord. No. 550-92, § 3, 8-10-92; Ord. No. 516-01, § 1, 6-25-01; Ord. No. 262-07, § 2, 6-11-07; Ord. No. 775-07, § 93, 12-26-07)

Case law annotation—A federal contractor constructing an office building is subject to the sales tax on materials purchased out of state and incorporated into the federal office building. *Temple v. Arthur Vennevi Company*, 172 Colo. 105, 470 P. 2d 576 (1970).

Sec. 53-27. Retailers to collect tax.

(a) *Tax rates.* A tax of three and sixty-two one-hundredths (3.62) percent is imposed and levied upon all taxable sales of commodities and services except those commodities or services specified in subsection (b) of this section. In order to avoid amounts that are fractions of pennies, taxpayers shall use a rounding procedure approved by the manager when computing the tax.

On those taxable sales of commodities or services specified in subsection (b) of this section, there is levied and imposed upon all taxable sales a tax in accordance with the rates set forth in subsection (b).

(b) *Special rates.*

(1) *Special note for aviation and railway fuel.* Any fuel in the form of liquid or gas that is prepared, advertised, offered for sale, sold for use and used or commercially usable for the generation of power for the propulsion or drawing of aircraft, railroad cars or railroad locomotives shall be taxed at the rate of four cents ($0.04) for each gallon purchased. In order to avoid amounts that are fractions of pennies, taxpayers shall use a rounding procedure approved by the manager when computing the tax.

(2) *Special note for short-term rentals of automotive vehicles.* Automotive vehicles as defined in this article, when they are for any term of thirty (30) days or less, hired for use, rented, leased or transferred under a grant of a license to use shall be taxed at the rate of seven and one-quarter (7.25) percent of the rentals paid or purchase price. In order to avoid amounts that are fractions of pennies, taxpayers shall use a rounding procedure approved by the manager when computing the tax. Upon the retirement or defeasance of all excise tax revenue bonds or refunding bonds and all obligations related thereto as authorized by a vote of the people on November 2, 1999, for the improvement and expansion of the Colorado Convention Center, the tax rate provided herein shall be reduced to five and one-half (5.5) percent.

(3) *Special note for prepared food and beverages.* Food and beverages not exempted from taxation under section 53-26(8) of this article shall be taxed at the rate of four (4) percent of the purchase price. In order to avoid amounts that are fractions of pennies, taxpayers shall use a rounding procedure approved by the manager when computing the tax.

(c) *Tax to be shown as separate item.* Except as provided in this section, retailers shall add the tax imposed, or the average equivalent thereof, to the purchase price, showing such tax as a separate and distinctive item, and when added, such tax shall constitute a part of such price and shall be a debt from the purchaser to the retailer until paid, recoverable at law in the same manner as other debts.

(d) *Vending machines; liquor by the drink.* Notwithstanding provisions hereinafter regarding the unlawful assumption or absorption of the tax, any retailer selling malt, vinous or spirituous liquors by the drink or vending items through coin-operated vending machines may include in the

purchase price for the drink or the purchase price for the vended item the tax levied by this article; but no such retailer shall advertise or hold out to the public in any manner, directly or indirectly, that such tax is not included as a part of the sales price to the consumer.

(e) *Retailer as collecting agent.* The retailer shall be entitled as collecting agent of the city to apply and credit the amount of his collections of the tax levied by this article against the amount required to be paid over by him under the provisions of section 53-28, remitting any excess of collections over the amount required by section 53-28 and rounding to the nearest whole dollar as provided in section 53-28, to the manager in the retailer's next periodic sales tax return.

(f) *Retailer not to benefit.* No retailer shall gain any benefit from the collection or payment of the tax, except as permitted by this article, and the use of the rounding procedure approved by the manager shall not relieve the retailer from liability for payment of the amount required by section 53-28.

(g) *Sales tax increment to fund the Denver preschool program.* In addition to the sales tax otherwise imposed by this section, a tax of twelve one-hundredths of one (.12) percent shall be paid on all taxable sales of commodities or services, except on commodities or services specified in subsection (b) of this section, beginning January 1, 2007 and expiring December 31, 2016. The revenue from such additional tax shall be used for the sole purpose of funding the Denver Preschool Program pursuant to article III of chapter 11.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 11, 12-3-84; Ord. No. 536-85, § 1, 10-15-85; Ord. No. 465-86, §§ 2, 3, 7-28-86; Ord. No. 480-86, § 1, 8-5-86; Ord. No. 717-86, § 1, 10-27-86; Ord. No. 557-87, § 1, 10-5-87; Ord. No. 302-88, § 1, 5-23-88; Ord. No. 69-89, § 1, 2-21-89; Ord. No. 973-99, § 1, 12-27-99; Ord. No. 773-02, § 1, 9-30-02; Ord. No. 556-06, § 2, 8-7-06; Ord. No. 853-06, § 1, 12-26-06; Ord. No. 400-09, § 1, 7-20-09; Ord. No. 614-09, § 1, 10-26-09)

Sec. 53-27.1. Remittance of tax; electronic database; retailer held harmless.

(a) Any retailer that collects and remits sales tax to the manager of finance as provided in this article may use an electronic database of state addresses that is certified by the state department of revenue pursuant to § 39-26-105.3, C.R.S., to determine the jurisdictions to which tax is owed.

(b) Any retailer that uses the data contained in an electronic database certified by the state department of revenue pursuant to § 39-26-105.3, C.R.S., to determine the jurisdictions to which tax is owed shall be held harmless for any tax, penalty, or interest owed the city that otherwise would be due solely as a result of an error in the electronic database, provided that the retailer demonstrate that it used the most current information available in such electronic database on the date that the sale occurred. Each retailer shall keep and preserve such records as prescribed by the manager of finance to demonstrate that it used the most current information available in the electronic database on the date that the sale occurred. Notwithstanding the above, if the error in collecting and remitting is a result of a deceptive representation, a false representation, or fraud, the provisions of this section shall not apply.
(Ord. No. 193-06, § 1, 3-20-06; Ord. No. 775-07, § 94, 12-26-07; Ord. No. 248-08, § 1, 5-19-08)

Sec. 53-28. Retailer responsible for payment of tax.

(a) *Amount.* Every retailer shall, irrespective of other provisions of this article, be liable and responsible for the payment of an amount equivalent to three and sixty-two one-hundredths (3.62) percent of the retailer's gross taxable sales of commodities or services specified in this article, except:

(1) Aviation and railway fuel, as to which the rate of four cents ($0.04) for each gallon purchased shall apply;

(2) Automotive vehicles when they are for any term of thirty (30) days or less hired for use, rented, leased or transferred under a grant of a license to use, as to which a rate of taxation as set forth in section 53-27(b)(2) shall apply; and

(3) Food and beverages not exempted from taxation under subsection 53-26(8) of this article, as to which the rate of four (4)

percent shall apply. For each of which respective rates aforesaid the retailer shall be liable for an equivalent amount; and every retailer shall on or before the twentieth day of each month pay over such amount and make a return to the manager. Every retailer shall on its return round each calculation, as directed on such form as the manager of finance may require, to the nearest whole dollar and remit the rounded amount. In rounding under this section, any amount of forty-nine cents ($.49) or less shall be rounded down, and any amount of fifty cents ($.50) or higher shall be rounded up.

(b) *Return: content, form, etc.* Returns of the taxpayer, or his duly authorized agent, shall contain such information and be made in such a manner and upon such forms as the manager may prescribe, and the manager may by regulation duly adopted extend the time up to one (1) year for making returns and paying the tax due.

(c) *Exemption; burden of proof.* The burden of proving that any retailer is exempt from collecting and returning the tax upon any goods sold or taxable services rendered by the retailer, and from paying over the same to the manager, shall be on the retailer, and such proof shall be by a preponderance of evidence.

(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 12, 12-3-84; Ord. No. 536-85, § 2, 10-15-85; Ord. No. 465-86, § 4, 7-28-86; Ord. No. 480-86, § 2, 8-5-86; Ord. No. 717-86, § 2, 10-27-86; Ord. No. 557-87, § 2, 10-5-87; Ord. No. 302-88, § 2, 5-23-88; Ord. No. 69-89, § 2, 2-21-89; Ord. No. 597-93, § 1, 8-2-93; Ord. No. 660-93, § 1, 8-30-93; Ord. No. 141, § 1, 2-22-00; Ord. No. 773-02, § 2, 9-30-02; Ord. No. 1027-02, § 1, 12-16-02; Ord. No. 556-06, § 3, 8-7-06; Ord. No. 400-09, § 1, 7-20-09; Ord. No. 614-09, § 2, 10-26-09)

Cross references—Excess collections; failure to remit collections, § 53-41; collection and refund of disputed tax, §§ 53-42, 53-43; refusal to make return; estimate of taxes; penalty; notice; assessment, § 53-49; tax lien, § 53-59; violations; evasion of collection or payment of tax, § 53-70.

Sec. 53-29. Unlawful to assume or absorb tax.

It shall be a violation of this article for any retailer to advertise or hold out or state directly or indirectly to any person that the tax or any part thereof levied by this article will be assumed or absorbed by such retailer, or that the tax will not be added to the selling price of the property sold or, if added, that the tax or any part thereof will be refunded.

(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-30. Duty to keep books and records.

It shall be the duty of every vendor engaging or continuing in business in the city for the transaction of which a license is required hereunder to keep and preserve suitable records of all sales made by such vendor and such other books or accounts as may be necessary to determine the amount of the tax for the collection or payment of which such vendor is liable under this article. It shall be the duty of every such vendor to keep and preserve for a period of four (4) years following the due date of the return or the payment of the tax all such books, invoices and other records necessary to determine the tax and the same shall be open for examination by the manager of finance. Upon demand by the manager, such vendor shall make the books, invoices, accounts or other records it maintains available at the office of the manager or some other place designated by the manager for examination, inspection and audit by the manager. The manager, in the manager's discretion, may make, permit or cause to be made the examination, inspection or audit of books, invoices, accounts and other records so kept or maintained by such vendor. When such vendor shall have entered into a binding agreement with the city to reimburse it for all costs and expenses incurred by the city in order to have such examination, inspection or audit at a place other than the place designated by the manager, then such examination, inspection or audit shall be made where such records are kept or maintained by the vendor or as otherwise designated in the agreement.

(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 13, 12-3-84; Ord. No. 356-88, § 1, 6-13-88; Ord. No. 922-91, § 9, 12-9-91; Ord. No. 775-07, § 95, 12-26-07)

Sec. 53-31. Special accounting basis for remittance of tax.

If because conditions of business or the accounting methods regularly employed by the vendor

are such that making returns of the tax levied by this article on a monthly basis will impose unnecessary hardship, the manager, upon written request by the vendor, may accept returns at such regular intervals up to three (3) months as will, in his opinion, better suit the vendor and will not jeopardize the collection of the tax.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-32. Consolidation of returns.

A vendor doing business in two (2) or more places or locations, whether in or without the city, and collecting taxes under this article, may file one (1) return covering all such places or locations, when accompanied by a supplemental report showing the gross and net taxable sales and taxes collected thereon for each such place or location.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 356-88, § 2, 6-13-88)

Sec. 53-33. Tax on rentals.

When the right to possession or use of any article of tangible personal property or service taxable under the terms of this article is granted under a lease, hire, rental contract or grant of a license to use (including royalty agreements), the tax imposed by this article shall be computed, collected and returned by the vendor based on the rentals, fees or royalties paid, unless the manager directs payment of the tax on another basis.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 679-87, § 8, 11-23-87)

Sec. 53-34. Tax on credit sales, etc.

Whenever an article is sold to a person who thereby is obligated to the vendor on an account, chattel paper, contract right, general intangible, or a writing which supports a right to the payment of a purchase price, or any part thereof, the tax shall be based on the total purchase price and shall become immediately due and payable. No refund or credit shall be allowed to either party to a transaction in case of repossession by the vendor of collateral securing the purchase price or any part of the purchase price.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-35. Automotive vehicle—Registration license.

(a) No registration certificate or license shall be issued by the manager for the operation of any automotive vehicle unless and until the tax levied by this article upon the purchase and sale of such vehicle has been paid.

(b) No certificate of title evidencing ownership of any automotive vehicle shall be issued by the manager unless and until said tax upon the purchase and sale of such automotive vehicle has been paid.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-36. Same—Transfer of title.

If the applicant for the registration of or the issuance of a certificate of title for an automotive vehicle has not paid the tax levied by this article upon the sale and purchase of such automotive vehicle to the retailer as provided in this article, such tax shall be paid by the applicant directly to the manager; and until paid, no certificate of title or registration certificate or license plates shall be issued by the manager for such automotive vehicle.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 14, 12-3-84)

Sec. 53-37. Application to manufacturers of tangible personal property.

In order to assist in the avoidance of unfair competition in the marketplace as a result of some competitors obtaining an advantage because of not otherwise being subject to the tax on a similar basis to other competitors, the following shall apply:

(a) The use or consumption of tangible personal property, including the installation into or the affixing to real property of another of the tangible personal property, by a manufacturer of the tangible personal property for which there exists also a retail market and of a type that the manufacturer sells or could sell to others shall be taxable under this article, but the tax due hereunder in such case shall be levied only upon the gross value of all the materials, labor and services used and

employed in the manufacture of said property, and not upon any profit that would have been derived from the ordinary retail sale thereof by the manufacturer as, for example, to another consumer for installation in or affixing to the property of another.

(b) The tax is levied upon the full purchase price of articles sold after their manufacture or after having been made to order and includes the purchase price of materials used and service performed in connection with the manufacturing or making to order, excluding however, such articles as are otherwise exempted in this article. The purchase price is the gross value of all the materials, labor, service, and the profit thereon, included in the price charged for the tangible personal property to the user or consumer.

(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 922-91, § 10, 12-9-91)

Sec. 53-37.1. Application to mobile telecommunication services.

(a) As used in this section, unless the context otherwise requires:

(1) *Act* means the federal Mobile Telecommunications Sourcing Act, 4 U.S.C. secs. 116 to 126, as amended.

(2) *Customer* means customer as defined in section 124(2) of the Act.

(3) *Home service provider* means home service provider as defined in section 124(5) of the Act.

(4) *Mobile telecommunications service* means mobile telecommunications service as defined in section 124(7) of the Act.

(5) *Place of primary use* means the place of primary use as defined in section 124(8) of the Act.

(b) Mobile telecommunications service shall be subject to the tax imposed by this article only if the service is provided by a home service provider to a customer whose place of primary use is within the city and the service originates within the city; further, the tax shall be collected in accordance with the provisions of the Act.

(c) The manager may require payment of the tax on any other basis permitted by this article when a customer fails to provide its place of primary use or the Act is determined to be inapplicable to the tax imposed by this article on mobile telecommunication services.

(Ord. No. 649-02, § 2, 8-12-02)

Sec. 53-38. Return required upon sale of business; lien on purchaser.

(a) Any retailer, whether or not licensed hereunder, that sells out his business or stock of goods or quits business within the city shall be required to return the taxes levied by this article within ten (10) days after the date the retailer sells his business or stock of goods or quits business and at said time pay over to the manager all such taxes collected by him, and in addition thereto, the retailer shall pay over to the manager all taxes levied hereunder upon the sale itself of said business, stock of goods, fixtures and equipment to the purchaser; and the purchaser thereof, or the successor in business, shall be required to withhold sufficient of the purchase money from said retailer and seller to cover and pay the amount of said taxes due and unpaid by the seller, including the taxes due upon said sale to said purchaser, until such time as the former owner, said retailer and seller shall produce a receipt from the manager showing that all of said taxes have been paid, or a certificate that no taxes are due.

(b) If the purchaser of a business or stock of goods fails to withhold the purchase money as provided in this section and the taxes are due and unpaid after the ten-day period allowed, the purchaser, as well as the retailer, shall he liable for the payment of the taxes unpaid by the former owner. Likewise, anyone who takes any stock of goods or business fixtures of or used by any retailer under lease, title retaining contract or other contract arrangement, by purchase, foreclosure sale, or otherwise, takes same subject to the lien for any delinquent sales taxes owed by such retailer and shall be liable for the payment of all

delinquent sales taxes of such prior owner, not, however, exceeding the value of property so taken or acquired.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 15, 12-3-84)

Sec. 53-39. Status of unpaid tax in bankruptcy.

In the event that any taxpayer subject to this article shall be in bankruptcy or debtorship, all taxes, penalties, and interest imposed by this article, which accrued prior to the filing of the bankruptcy, shall remain a prior and preferred claim and lien against all goods, furniture and fixtures, tools and equipment used by the taxpayer in conducting the retail business. Similarly, all taxes, penalties, and interest imposed by this article which accrue after the filing of the bankruptcy shall remain a prior and preferred claim and lien against all goods, furniture and fixtures, tools and equipment used by the taxpayer in conducting its retail business, during the course of the bankruptcy, except as otherwise provided by preemptive federal law. To the extent any of the manager's authority to pursue collection of taxes, penalty, or interest imposed by this article is stayed or otherwise impacted by preemptive federal law, the manager is authorized to use procedural and substantive federal remedies to facilitate collection of the tax, penalty, or interest.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 16, 12-3-84; Ord. No. 922-91, § 11, 12-9-91; Ord. No. 327-00, § 1, 5-1-00)

Sec. 53-40. Trust status of tax in possession of retailer.

All sums of money paid by the purchaser to the retailer as taxes imposed by this article shall be and remain public money, the property of the city, in the hands of such retailer, and the retailer shall hold the same in trust for the sole use and benefit of the city until returned and paid over to the manager as herein provided, and the failure so to pay over to the manager shall constitute a violation of this article by the retailer.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-41. Excess collections; failure to remit collections.

If any vendor shall, during any reporting period, collect as a tax an amount in excess of the amount set forth in section 53-28 of this article during the reporting period, he shall return and pay over to the manager the full amount of the tax herein levied and also such excess. The retention by the retailer of any excess of tax collections over the aforesaid rate or the intentional failure to remit punctually to the manager the full amount required to be remitted by the provisions of this article shall be a violation of this article.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 490-87, § 1, 8-31-87)

Sec. 53-42. Collection and refund of disputed tax.

Should a dispute arise between the purchaser and vendor as to whether or not any sale is exempt from taxation hereunder, nevertheless, the vendor shall collect and the purchaser shall pay such tax; provided, however, that the purchaser thereafter may apply to the manager for a refund of such tax, and it shall then be the duty of the manager to determine the question of exemption subject to review by the courts as hereinafter provided. It shall be a violation of this article for any vendor to fail to collect, or for any purchaser to fail to pay, the tax levied by this article.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-43. Refund procedure.

(a) *Generally.* A refund shall be made or credit allowed for the tax so paid under dispute by any purchaser who has an exemption as provided in this article. Interest shall be paid on refunds, but not credits, for overpayments made after October 1, 1993. Interest shall accrue from the time the overpayment is made. The rate of interest shall be fixed and shall be the average monthly rate earned by the city on the general fund for the calendar year immediately preceding the year in which the refund is made. Such refund shall be made by the manager upon entitlement thereto shown by the applicant and only after compliance with the following conditions.

(b) *Application.* Applications for refund must be made within sixty (60) days after the purchase of the goods or the performance of the services on which the exemption is claimed. The application must be supported by the affidavit of the purchaser accompanied by the original paid invoice or sales receipt and be made upon such forms and contain such information as shall be prescribed by the manager.

(c) *Decisions.* Upon receipt of such affidavit, invoice or receipt, and application, the manager shall examine the same with all convenient speed and shall give notice to the applicant by an order in writing of his decision thereon.

(d) *Hearing.* An aggrieved applicant for a refund may, within thirty (30) days after such decision is mailed postpaid to the taxpayer, petition the manager of finance for a hearing on the claim in the manner provided in section 53-49 of this article regarding petitions to the manager protesting assessments and estimates of unpaid taxes.

(e) *Refunds not assignable.* The right of any person to a refund under this article shall not be assignable, and application for refund must be made by the same person who purchased the goods and paid the tax thereon as shown in the invoice for the sale thereof.

(f) *Penalty for violating refund provisions.* Any applicant for refund under the provisions hereinabove, or any other person, who shall make any false statement in connection with an application for a refund of any tax shall be deemed guilty of a violation of this article.

(g) *Violations of refund provisions to be used as evidence of fraudulent intent.* If any person be convicted under the provisions of this section, the proof of such conviction shall be prima facie evidence of fraud by that person in any appropriate action brought or taken for recovery of other refunds made by the manager to such person within the prior three (3) years to the conviction. A brief summary of the penalties available under this article for violations of it shall be printed on each form issued by the manager for application for refund.

(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 679-87, § 9, 11-23-87; Ord. No. 660-93, § 2, 8-30-93; Ord. No. 708-99, § 1, 9-20-99; Ord. No. 775-07, § 96, 12-26-07; Ord. No. 474-10, § 1, 9-13-10)

Sec. 53-44. Information to be confidential.

(a) Except in accordance with judicial order or as otherwise herein provided, the manager, and those working under his supervision, shall not divulge any information gained from any investigation conducted under this article or disclosed in any document, report or any return filed in connection with the tax levied under the provisions of this article.

(b) The officials charged with the custody of such documents, reports or returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the manager in an action under the provisions of this article to which the manager is a party, or on behalf of any party to an action or proceeding under the provisions of this article or to punish a violator thereof when the report of facts shown by such report is directly involved in such action or proceeding, in any of which events the court may require the production of, and may admit in evidence, so much of said documents, reports or returns, or of the facts shown thereby, as are pertinent to the action or proceeding and no more.

(c) Nothing contained in this article shall be construed to prohibit the delivery to a person or his duly authorized representative of a copy of any return or report filed in connection with that person's tax, nor to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof, nor to prohibit the inspection by employees of the city under the control of the manager or by the city attorney of the city or any other legal representative of the city of the report or return of any person who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding is contemplated or has been instituted under this article; nor to prohibit the manager, in his discretion, from supplying and disclosing information gained from any investigation conducted under this article or reported, scheduled or disclosed in any document, report or return filed in connection with the tax levied under the provisions of this article for inspection or copying to the executive director of the state department of revenue, to the

commissioner of internal revenue of the United States government, or to the official responsible for collecting sales or use taxes in any political subdivision of the state; provided, however, that such official of a political subdivision of the state similarly be permitted by law to disclose and supply information relating to the imposition and collection of sales or use taxes gained from persons within or doing business within such political subdivision.

(d) Reports and returns shall be preserved for three (3) years and thereafter until the manager orders them destroyed.

(e) Any city officer or employee who shall divulge any information classified herein as confidential in any manner, except in accordance with proper judicial order or as otherwise provided by law, shall be guilty of a violation of this article.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 17, 12-3-84)

Sec. 53-45. Examination of returns; refunds, credits and deficiencies.

(a) As soon as practicable after the return required by this article is filed, the manager shall examine it for correctness. If it then appears that the correct amount of tax to be remitted is greater or less than that shown in the return, the tax shall be recomputed.

(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.

(c) If the amount paid is less than the amount due, the difference, together with interest thereon at the rate of one (1) percent each month, or fraction thereof, from the time the return was due until the date paid, together with applicable penalty, if any, shall be paid over by the vendor within thirty (30) days after written notice and demand for payment from the manager.

(d) An application for refund for taxes paid in error by the purchaser and not refunded or credited by the vendor to the purchaser shall be made only in accordance with the procedures found in section 53-43 of this article.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 679-87, § 10, 11-23-87; Ord. No. 922-91, § 12, 12-9-91; Ord. No. 660-93, § 3, 8-30-93; Ord. No. 474-10, § 2, 9-13-10)

Sec. 53-46. Interest on late payments, penalty.

(a) In any case in which a taxpayer fails to file a return or pay over the tax within the time required by this article, but without the intent to defraud, there shall be added as a penalty fifteen (15) percent of the total amount of the deficiency, but not less than twenty-five dollars ($25.00), and interest in such cases shall be collected at the rate of one (1) percent each month, or fraction thereof, on the amount due on the deficiency from the time the return was due to the date the tax is paid, which interest and addition shall become due and payable within thirty (30) days after the written notice and demand by the manager, and such interest shall be assessed, collected and paid in the same manner as the tax itself.

APPENDIX 2

BEFORE THE MANAGER OF REVENUE
OF THE CITY AND COUNTY OF DENVER
STATE OF COLORADO

In re: Aramark Sports and Entertainment, Inc.;
Aramark Entertainment, Inc.;
Aramark Food and Support Services, Inc.
Account Nos. 399571; 1583853; 100003011
Case No. 20070801

FINDINGS OF FACT AND ORDER

This matter came on for hearing on February 26, 2009. The City and County of Denver (hereafter the "City") was represented by Charles T. Solomon, Assistant City Attorney. Taxpayers Aramark Sports and Entertainment, Inc., Aramark Entertainment, Inc, and Aramark Food and Support Services, Inc. (hereafter collectively referred to as "Taxpayer" or individually referred to as "S & E", "Entertainment" and/or "Support Services" respectively) were represented by Angela L. Mansfield, Sean Evans and Chad Roberson of the firm of DuCharme McMillen & Associates. At the hearing the Hearing Officer heard live testimony of four (4) witnesses and received into evidence Exhibits A-1, A, B, C, D, E, F, G, H and I as offered by Taxpayers and Exhibits 1 through 9 inclusive as offered by the City. At the conclusion of the hearing on February 26th, the parties were allowed until March 13, 2009 to submit written closing statements and until March 18th to submit simultaneous rebuttal statements. Each party timely submitted both its closing and rebuttal statements. The Hearing Officer thereafter took the matter under advisement and sets forth below his Findings of Fact and Order.

FINDINGS OF FACT

On July 23, 2007, the City sent Notices of Final Determination, Assessment and Demand for Payment to S & E in the total amount of $273,119.33, to Entertainment for $121,534.11, and to Support Services for $243,342.48, each representing taxes due together with interest and penalty.[1] Each Taxpayer timely appealed from the applicable Notice of Determination. Subsequently the City modified the amounts due from each Taxpayer based on review of additional information submitted by each Taxpayer to the following total amounts:

S & E	$259,239.77 (Exhibit 5)
Entertainment	$149,133.89 (Exhibit 6)
Support Services	$261,404.08 (Exhibit 7)

At the hearing, three (3) issues arose. Those issues are:

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1 The assessments to S & E and Entertainment were for sales and use tax, while the assessment to Support Services was for OPT.

1. As to Support Services, Taxpayer asserts that it was improperly charged an occupational privilege tax ("OPT") on numerous employees who did not meet the requirements of either earning over $500 or performing work within the City and County of Denver. Support Services asserts that the City incorrectly utilized a 'weighted average method" for calculating OPT taxes that should be remitted rather than relying on the specific information submitted by Taxpayer to substantiate its claim. The City on the other hand asserts that notwithstanding the substantial amount of data provided by Taxpayer, Taxpayer did not provide the records necessary to prove the number of employees that should actually be subject to the OPT and therefore did not prove that any of the charged OPT was improper or not owing.

2. As to the allegation that the City is not entitled to collect a sales tax on the purchase by Aramark Corporation of hot dog, nacho and popcorn carts from a vendor to whom Aramark apparently paid Denver/s sales tax, Taxpayer produced an invoice (Exhibit I) dated 12/12/01 which shows that $4,264.85 was paid to the Vendor as a Denver sales tax. The City asserts that the Vendor in question, Mobile Solutions, Inc., is not licensed to do business in Denver and never remitted the sales tax to Denver, leaving Taxpayer liable for payment of such tax.

3. S & E and Entertainment contest the City's assessment of sales tax for the sale of bottled water to customers at Coors Field and Pepsi Center because bottled water is exempt from sales taxation pursuant to DRMC §53-97(8). While the City does not dispute the existence of the exemption in the applicable ordinance, the City asserts that Taxpayer has not demonstrated that it did not charge and collect sales tax as a part of the price charged to customers for bottled water purchased at those locations.

CONCLUSIONS

In hearings before the Manager of Revenue, the burden of proof is upon the Taxpayer "to show by a preponderance of the evidence the correctness of the position of the Taxpayer." Rule 15, *Rules Governing Hearings Before the Manager of Revenue*. Based upon the evidence received in both testimonial and documentary form and a review of the City's applicable ordinance provisions, I find the following:

1. Taxpayer has failed to meet its burden of proof as to the correctness of its position as to the number of employees who are subject to the Denver OPT. It is understandable that the large number of employees who work during a given time for all of the entities which make up Aramark makes this a difficult task for Taxpayer, but the evidence and records produced by Taxpayer to both the Tax Auditors of the City who worked on this matter and to the Hearing Officer without a further breakdown and explanation as to which employees are exempt from such taxation is simply not sufficient. The testimony from Jeannette Mitchell, the Senior Auditor who now has responsibility for this matter for the City, clearly established that the information submitted in the form of a computer disc as a part of Exhibit G was reviewed by the City's auditor, and found not be sufficiently explanatory of the number of actual employees of Taxpayer who are subject to the OPT. Ms. Mitchell testified as to errors in withholding and remitting reports and inconsistencies between

payroll data vs. SUTA reports. In light of these discrepancies, I find that Taxpayer has not met its burden of proof in this claim and has not established the correctness of its asserted position.

2. Taxpayer has conclusively established that it paid Denver sales taxes on a purchase it made from a non-Denver-licensed vendor. However, the City has also established that the City did not receive the sales tax thus paid by Taxpayer from the non-licensed vendor.

§53-25 of the DRMC levies a sales tax on "all sales and purchases of tangible property at retail." Exhibit I introduced into evidence at the hearing clearly evidences a retail purchase by Taxpayer which is subject to sales taxation under the DRMC. While the parties have disagreed as to the effect of two cases cited by the City, I find there is no provision in the DRMC which exempts the purchaser from paying to Denver sales taxes that are due to Denver for sale or purchase of a taxable commodity within or for use within the boundaries of the City. Taxpayer's good faith is not at issue here. The ultimate liability for payment of sales taxes is at issue. I find no provision of the DRMC which exempts Taxpayer as a purchaser in good faith from ultimate responsibility for payment of the sales tax in question. Taxpayer may in fact have a strong case for collection of that amount from the original vendor, Mobile Solutions, Inc., but the City is entitled to collection of the applicable sales tax from Taxpayer as the purchaser.

3. This issue has been the hardest issue for me to decide, because I do not believe either party has a compelling case to be made on its behalf. On the one hand, Taxpayer argues (correctly) that the D.R.M.C. specifically exempts bottled water from sales taxation, and that it should therefore be entitled to a refund of the entire amount of the purchase price received for bottled water which was remitted to the City in error as sales taxes due. This argument, however, ignores the fact that Taxpayer charged a flat rate for such bottled water and unilaterally and continuously determined and remitted the amount of sales tax it thought applicable (even though erroneously determining that any sales tax was due). On the other hand, the City urges that §53-43 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.

Whichever party prevails on this argument will be the beneficiary of what amounts, in my opinion, to a wind-fall – if Taxpayer prevails, it will receive an amount of money it clearly thought for an extended period of time it was not entitled to, and if the City prevails it will have received a significant amount of revenue from the sales of an item which is exempt from taxation.

After extended consideration and reconsideration (which resulted in the delay in issuance of this Order) I have determined that Taxpayer's request for refund cannot be sustained because it was the Taxpayer that made unilateral errors of both fact and law. Notwithstanding the fact that Taxpayer had access to the Denver City Code and could have known that the sale of bottled water was exempt from sales taxation, it accounted for and remitted sales taxes for an extended period of time before realizing its factual and legal error. The City cannot be held accountable for those

unilateral and continuous errors of fact and of law on the part of Taxpayer. Had Taxpayer been able to show (which it was not to my satisfaction) that the price charged for bottled water was clearly divided within the Taxpayer's internal records between the price for bottled water and the amount of sales tax due, I might have concluded there was no unilateral error of fact on the part of the Taxpayer. But from the evidence presented at the hearing in testimonial and documentary form, I conclude that Taxpayer merely charged a flat fee for the bottled water and thereafter performed an internal accounting function to determine the amount of sales tax that would be owed based on the City's existing sales tax rate. This indicates to me, and I so find, that Taxpayer believed bottled water was subject to sales taxation and simply included the amount of sales tax into the price charged and collected per bottle sold. This 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.

4. The City has imposed both interest and penalty upon each Taxpayer as to each Notice of Final Determination, Assessment and Demand for Payment described above. Under the circumstances of this specific case, I find that imposition of penalty against S & E as to Account Number 399571 and against Entertainment as to Account Number 1583853 is unwarranted. To the extent penalty has been imposed as to the failure of Taxpayer's vendor to remit sales taxes relating to the sale of the carts identified in Exhibit I when it is clear that Taxpayer paid the taxes due the same is unwarranted and unfair. Potential fraud by a vendor should not give rise to assessment of penalty against the taxpayer who believed in good faith that it complied with the applicable ordinance, especially when the amount of the applicable tax was paid by Taxpayer.

Similarly to assess a penalty for non-payment of taxes for sale of a commodity that is specifically exempt from sales taxation would simply add to what I believe to be a wind-fall for the City.

Accordingly, I find that imposition of penalty against S & E and Entertainment in the amounts reflected in Exhibits 5 and 6 is not appropriate, and Taxpayers' appeals from said amounts, and only those specific penalty amounts on the listed Notices, is sustained.

ORDER

Based on the foregoing Findings of Fact and Conclusions, I find that A & E owes the amount of sales and use tax as reflected on Exhibit 5 ($132,991.32) plus interest through the date hereof; Entertainment owes the amount of sales and use tax as reflected on Exhibit 6 ($79,573.16) plus interest through the date hereof; and Support Services owes the amount of OPT ($130,388.81, plus penalty of $20,644.93) plus interest through the date hereof.

DATED this 3rd day of May, 2009

MANAGER OF REVENUE
CITY AND COUNTY OF DENVER

By:_____

John E. Hayes, Hearing Officer
1350 17th Street, Suite 450
Denver, CO 80202
Phone: 303-825-6444
Fax: 303-825-1269

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing FINDINGS OF FACT AND ORDER was placed in the U.S. mail, first class, postage prepaid, this ___ day of May, 2009, addressed to:

Charles T. Soloman, Esq.
Assistant City Attorney
Land Use & Revenue Group
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APPENDIX 3

District Court, City and County of Denver, Colorado 1437 Bannock St. Denver, CO 80202	 ▲ COURT USE ONLY ▲
Plaintiffs: ARAMARK SPORTS AND ENTERTAINMENT, INC., ARAMARK ENTERTAINMENT, INC., ARAMARK FOOD AND SUPORT SERVICES, INC. v. **Defendants:** CLAUDE PUMILIA for DEPARTMENT OF REVENUE FOR THE CITY AND COUNTY OF DENVER; CITY AND COUNTY OF DENVER.	
	Case Number: 2009CV5531 Division: 10
ORDER	

This matter appears before the Court on Plaintiff's C.R.C.P. 106 action filed on January 11, 2010. The Court, having considered the Order imposed by the Manager of Revenue for the City and County of Denver, the record, and otherwise being sufficiently advised, finds and Orders as follows.

STANDARD OF REVIEW

The district court of the second judicial district of the state shall have original jurisdiction in proceedings to review all questions of law and fact determined by the manager of finance in administering the provisions by writ under Rule 106(a)(4) of the Colorado Rules of Civil Procedure.

A Rule 106 challenge is reviewed according to Rule 106 (a)(4) and is limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion based on the evidence in the record before them. *Krupp v. The Breckenridge Sanitation Dist.*, 1 P.3d 178 (Colo.App. 1999). In order for the Court to set aside the decision of an inferior body on review pursuant to Rule 106, there must be "no competent evidence in the record to support such [a] decision." *Ford Leasing Dev. Co. v. Board of County Comm'rs*, 186 Colo. 418, 425, 528 P.2d 237, 240 (1974). 'No competent evidence' means that the ultimate decision of the administrative body is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Brass Monkey, Inc. v. Louisville City Council*, 870 P.2d 636 (Colo.App. 1994).

The reviewing court may also consider "whether the hearing officer misconstrued or misapplied the applicable law" in their determination of the existence of an abuse of discretion. *Van Sickle v. Boyes*, 797 P.2d 1267, 1274 (Colo. 1990)(*citing* Electric Power Research Inst. Inc. v. City & County of Denver, 737 P.2d 822, 825-26 (Colo. 1987)). However, when addressing matters that are within the scope of the hearing officer's authority, the court must defer to the hearing officer's decision if there is competent evidence in the record to support it. *See Ross v. Fire & Police Pension Ass'n,* 713 P.2d at 1308-09. To determine whether any administrative action is arbitrary or an abuse of discretion, it is necessary to look at the functions of the agency involved and the background in which the agency was functioning at the time of the act. In this evaluation, deference is given because "the primary responsibility for the function under review lies in the administrative agency and not in the courts." *See Bennett v. Price,* 167 Colo. 168, 173, 446 P.2d 419, 421 (1968).

The District Court is bound by the record below, and the action taken by the inferior tribunal must be affirmed if there is any competent evidence to support it. *See Hazelwood v. Saul*, 619 P. 2d 499 (Colo. 1980). The taking of additional testimony is also improper. *Id.*

ISSUES PRESENTED

A. Issue I: Occupational Privilege Tax

(a) The Tax

The Occupational Privilege Tax (OPT) is imposed on individuals earning money (over $500) in the City during a given month. (D.R.M.C. §53-237). It is not an income tax, but rather a head tax that is excised on the privilege of earning money in the City. It is applied on persons working only in the city, not on the residents or the income of the residents of the City. *Hamilton v. Denver*, 176 Colo. 6, 490 P.2d 1289 (1971).

(b) Taxpayer Duty to Maintain Books and Records

In accordance with §53-245 of the Denver Revised Municipal Code (D.R.M.C.), " it shall be the duty of every taxpayer to keep and preserve suitable records and other such books or accounts as may be necessary to determine the amount of tax for the collection of which the taxpayer is liable under this article." *D.R.M.C. §53-245* (Code 1950, § 166C.15; Ord. No. 925-91, § 1, 12-9-91; Ord. No. 775-07, § 140, 12-26-07).

(c) Authorization of Estimated Assessment

The City is authorized to make an estimated assessment of the taxes due based on such information as was made available to them by the taxpayer, with or without investigating the matter in accordance with their vested powers. *D.R.M.C. §53-254(a).*

(d) Finding by the Manager of Revenue

The Manager of Revenue found that Taxpayer "failed to meet its burden of proof as to the correctness of its position as to the number of employees who are subject to the Denver OPT" (*Findings of Fact and Order,* p.2, ¶5) because the records produced by Taxpayer to both the Tax Auditors and to the Hearing Officer did not contain "sufficient breakdown and explanation" as to which employees were exempt from the applied tax. *Id.*

The Manager heard testimony from the City Auditor who stating that the evidence provided by Taxpayer was not sufficiently explanatory as it contained errors and inconsistencies between payroll data and the SUTA reports. The City Auditor requested from Taxpayer all employee payroll information for the State of Colorado to ensure their records were complete, so that the Auditor could "winnow out locations not in Denver." (Record p. 59, lns. 7-17), thereby creating a complete picture for the audit. The Auditor requested SUTA reports for a certain time period in addition to the Taxpayer entity's reports for the same time period so that they could be compared to clear up any discrepancies. (Record p. 72, lns. 7-24, p.075, lns.5-25, p.076, lns.1-11).

The record reflects that the City Auditor did not receive all of the necessary SUTA reports to complete the audit, and was thereby forced to impose a five percent estimated error rate based on the large discrepancies. The City Auditor added a five percent estimated error because there were a large number of employees for whom the Auditor could not confirm where they were working based on what had been reported. The Auditor felt the five percent error rate was a "reasonable estimate" (Record p.067, lns. 2-9) given that the remitted records had data missing, and certain requested SUTA information was never received (Record p. 068, lns.11-14).

(e) Review by District Court of Finding

As per statute, the City is authorized to make an estimated assessment based on the evidence and information available to them. *D.R.M.C. §53-254(a).* The City had already revised and lowered their initial amount based on the updated information provided by Taxpayer. (Record p.65, lns. 2-12). Taxpayer appeals the decision using the same information that had been provided to The City prior to the initial suit and to the Manager of Revenue during the hearing, and proffered no further evidence to support their claim of overpayment. (Record p.58, lns. 6-12, Exhibit G).

As the Manager stated, it is "understandable that the large number of employees...make this (computation of OPT) a difficult task for Taxpayer." (*Findings of Fact and Order,* p.2 ¶5). Despite this difficulty, taxpayers are still required by statute to provide The City with adequate information to perform their auditing duties, leaving the City with discretion to make any estimates they feel are necessary to reach a more accurate computation of amount owing or owed.

The Record supports the findings of the Manager of Revenue that the information supplied by Taxpayer was incomplete. The Manager therefore did not abuse his discretion or exceed his jurisdiction in his finding on this matter.

B. Issue II: Sales and Use Tax Paid to Unregistered Vendor

(a) The Tax

The Tax in question is a "Sales and Use" tax as was applied to hot dog, nacho, and popcorn carts purchased from Mobile Solutions, Inc. D.R.M.C. §53-25 levies sales tax on "all sales and purchases of tangible personal property at retail." D.R.M.C. §53-92 levies use tax on "every person who stores, uses, distributes or consumes in the city any article of tangible personal property or any service subject to the provisions of this article, purchased at retail."

(b) The Claim

Taxpayer purchased hot dog, popcorn and nacho carts from Mobile Solutions, Inc. They paid a sales tax of $4,264.85 in good faith to this vendor. (Record p.317). However, this vendor was unlicensed and not registered with the City and County of Denver (meaning they did not have a sales tax account), and did not remit the collected tax to the City. (Record p.91). Taxpayer claims that because they have already remitted and provided documentation of remittance of the sales tax to Mobile Solutions, Inc., an unregistered vendor, they are thereby not liable for the tax imposed by the City.

(c) Finding by the Manager of Revenue

D.R.M.C. §53-25 states that a sales tax is levied on "all sales and purchases of tangible property at retail." Licensed retailers or vendors are agents of the state for collection and payment of sales tax, and are therefore subject to D.R.M.C. §53-40. The Manager of Revenue found that there was no provision within the D.R.M.C. which exempted Taxpayer as a "purchaser in good faith from ultimate responsibility for payment of the sales tax in question." (*Findings of Fact and Order,* p.3, ¶2) Therefore Taxpayer was required to remit the appropriate tax to the City.

(d) Review by District Court of the Finding

Taxpayer is correct that licensed retailers have been made agents of the state to collect sales or use taxes, and that payment of the sales tax by the purchaser to the retailer or vendor amounts to payment to the state. *See* J. A. Tobin Constr. Co. v. Weed, 158 Colo. 430, 436 (Colo. 1965). Regardless of the absence of a D.R.M.C. provision stating that Taxpayer has a duty to verify a vendor's registration, Taxpayer still has a duty to remit that sales tax to the City. "The duty to pay the tax is imposed on the customers." *Apollo Stereo Music Co. v. City of* Aurora, 871 P.2d 1206, 1210 (Colo. 1994) (citing *Dep't of Revenue v. Modern Trailer Sales, Inc.*, 175 Colo. 296, 302 (1971)). Payment to an unlicensed vendor is not payment to the state, and provides no protection against a demand by the state upon the purchaser for payment of the tax. *Weed*, 158 Colo. at 436.

Taxpayer, upon remittance of the applicable tax to the City is free to pursue reimbursement from the unlicensed vendor. There is record support for the Manager of Revenue's finding, and he did not abuse his discretion or exceed his jurisdiction on this issue. Therefore, this Court upholds the finding of the Manager of Revenue with regards to Issue II, including the upheld appeal of the imposed penalty.

C. Issue III: Sales Tax on Bottled Water

(a) The Tax

On this matter, the issue is that there is no tax to be actually imposed. The Record reflects that, as per D.R.M.C. §53-26(8), bottled water is exempt from sales tax. However, Taxpayer sold bottled water during the audit period, and remitted what they thought to be the appropriate sales tax to the City. Upon discovery of their error, they requested a refund of the amount remitted plus interest. The City concedes there indeed is no sales tax on bottled water; however, they feel they should be permitted to retain the excess payment because Taxpayer is unable to satisfy the reimbursement requirement that they are only eligible if they have either "credited to their customer's account or refunded to their customer the taxes paid by their customer in error." *D.R.M.C.* §53-45 (b).

(b) The Claim

Taxpayer claims that they mistakenly paid tax on the exempted bottled water due to their practice of taking a total inventory of items sold, assessing particular items, and then adding the sales tax to the gross amount. (Record p.21, lns. 16-20). They admit that they erroneously assessed the tax on bottled water. (Record p.21, lns. 22-25).

The tax itself was "backed out" of the consumer sale price (meaning that consumers were charged a flat rate, and the actual sale price plus tax was later calculated based on volume of sales). The City urged that if the Manager reimbursed Taxpayer, it would be a "windfall." (Record p. 89, ln.21). Taxpayer argued they would have charged the exact same price for the bottled water to the consumer, and would simply not have "backed out" the tax had they realized bottled water was not subject to sales tax in the City and County of Denver.

(c) Finding of the Manager of Review

The Manager of Revenue conceded that Taxpayer had mistakenly remitted sales tax for bottled water, which the City was not supposed to collect. He stated that no matter what his ruling, the prevailing party would receive a "windfall." (*Findings of Fact and Order,* p.3, ¶3). The Manager rejected the City's argument because it was "hyper-technical" in this circumstance because of the large volume of anonymous consumers. The Manager of Revenue ultimately held that because it was Taxpayer's "unilateral error of both fact and law," they should not be able to receive funds which they had not believed to be theirs. The Manager found in favor of the city and refused to order reimbursement.

(d) Review by District Court of the Finding

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." (*Asphalt*

Specialties Co., Inc. v. City of Commerce City, 218 P.3d 741 (Colo. App. 2009)). 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.

§1-12 of D.R.M.C. states that if any "provision of the Code is held invalid or inoperative, such invalidity or inoperativeness shall not affect other provisions or applications of the Code or rules or regulations...the provisions of this Code and all rules and regulations...are severable." *See also Geer v. Alaniz*, 138 Colo. 177, 331 P. 2d 260 (1958) and *Crawford v. Denver*, 156 Colo. 292, 398 P. 2d 627 (1965) (stating that a severability clause means if a complete valid law remains after invalid portions are stricken, the court should so hold.). The Code does not provide a strict interpretation of the term "inoperative," and so this Court adopts the definition proposed by the Manager that "inoperative" means impossible to enforce or implement because "clearly in these circumstances the Taxpayer could not conceivably comply with the ordinance's provisions." (*Findings of Fact and Order*, p.3, ¶3).

According to the Code:

> 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....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.*]
> §53-45(b) D.R.M.C. (Severed portion highlighted in brackets).

The Manager did not adhere to this application of the statute when he found he was "precluded from granting the relief sought by Taxpayer on the grounds that there was "unilateral error". (*Findings of Fact and Order*, p.4, ¶1). There is no indication the error had to be "unilateral" with regards to fact or law, as the Manager of Revenue acknowledged. The error may in fact have been mutual because "as soon as practicable after the return required...is filed, the *manager shall examine it for correctness.*"(§53-45(a) D.R.M.C. (emphasis added)). If the amount that was remitted was greater or less than required, "the tax shall be recomputed." *Id.* And as stated in the code, the excess "*shall be refunded with interest.*" *Id.* (emphasis added).

The order of the Manager is reversed. Taxpayer is to be reimbursed or credited the amount of Sales tax as assessed on the bottled water.

THE ORDER

Based on the preceding review of the Manager of Revenue's Findings of Fact and Conclusions, I find that:

1. ARAMARK owes the amount of OPT as calculated, plus penalty, plus interest through the date hereof.

II. ARAMARK owes the amount of Sales and Use tax as calculated for the purchase of the hot dog, popcorn and nacho carts from the third-party vendor, plus interest through the date hereof.

III. ARAMARK shall be reimbursed or credited the amount of Sales and Use tax as assessed for the sale of bottled water, plus interest, through the date hereof.

This matter is remanded to the Department of Revenue for further proceedings consistent with this order.

Dated this 16th day of June, 2010.

By the Court

William D. Robbins
District Judge

cc Def. Counsel, Pl. Counsel, Manager of Revenue

APPENDIX 4

District Court, City and County of Denver, Colorado 1437 Bannock St. Denver, CO 80202	 ▲ COURT USE ONLY ▲
Plaintiffs: ARAMARK SPORTS AND ENTERTAINMENT, INC., ARAMARK ENTERTAINMENT, INC., ARAMARK FOOD AND SUPORT SERVICES, INC. v. **Defendants:** CLAUDE PUMILIA for DEPARTMENT OF REVENUE FOR THE CITY AND COUNTY OF DENVER; CITY AND COUNTY OF DENVER.	
	Case Number: 2009CV5531 Division: 10
AMENDED ORDER	

This matter appears before the Court on Plaintiff's C.R.C.P. 106 action filed on January 11, 2010. The Court, having considered the Order imposed by the Manager of Revenue for the City and County of Denver, the record, and otherwise being sufficiently advised, finds and Orders as follows.

STANDARD OF REVIEW

The district court of the second judicial district of the state shall have original jurisdiction in proceedings to review all questions of law and fact determined by the manager of finance in administering the provisions by writ under Rule 106(a)(4) of the Colorado Rules of Civil Procedure. *D.R.M.C. §53-56.*

A Rule 106 challenge is reviewed according to Rule 106 (a)(4) and is limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion based on the evidence in the record before them. *Krupp v. The Breckenridge Sanitation Dist.*, 1 P.3d 178 (Colo.App. 1999). In order for the Court to set aside the decision of an inferior body on review pursuant to Rule 106, there must be "no competent evidence in the record to support such [a] decision." *Ford Leasing Dev. Co. v. Board of County Comm'rs*, 186 Colo. 418, 425, 528 P.2d 237, 240 (1974). 'No competent evidence' means that the ultimate decision of the administrative body is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Brass Monkey, Inc. v. Louisville City Council*, 870 P.2d 636 (Colo.App. 1994).

The reviewing court may also consider "whether the hearing officer misconstrued or misapplied the applicable law" in their determination of the existence of an abuse of discretion. *Van Sickle v. Boyes*, 797 P.2d 1267, 1274 (Colo. 1990)(*citing* Electric Power Research Inst. Inc. v. City & County of Denver, 737 P.2d 822, 825-26 (Colo. 1987)). However, when addressing matters that are within the scope of the hearing officer's authority, the court must defer to the hearing officer's decision if there is competent evidence in the record to support it. *See Ross v. Fire & Police Pension Ass'n,* 713 P.2d at 1308-09. To determine whether any administrative action is arbitrary or an abuse of discretion, it is necessary to look at the functions of the agency involved and the background in which the agency was functioning at the time of the act. In this evaluation, deference is given because "the primary responsibility for the function under review lies in the administrative agency and not in the courts." *See Bennett v. Price,* 167 Colo. 168, 173, 446 P.2d 419, 421 (1968).

The District Court is bound by the record below, and the action taken by the inferior tribunal must be affirmed if there is any competent evidence to support it. *See Hazelwood v. Saul*, 619 P. 2d 499 (Colo. 1980). The taking of additional testimony is also improper. *Id.*

ISSUES PRESENTED

A. First Claim for Relief: Occupational Privilege Tax

(a) The Tax

The Occupational Privilege Tax (OPT) is imposed on individuals earning money (over $500) in the City during a given month. (D.R.M.C. §53-237). It is not an income tax, but rather a head tax that is excised on the privilege of earning money in the City. It is applied on persons working only in the city, not on the residents or the income of the residents of the City. *Hamilton v. Denver*, 176 Colo. 6, 490 P.2d 1289 (1971).

(b) Taxpayer Duty to Maintain Books and Records

In accordance with §53-245 of the Denver Revised Municipal Code (D.R.M.C.), " it shall be the duty of every taxpayer to keep and preserve suitable records and other such books or accounts as may be necessary to determine the amount of tax for the collection of which the taxpayer is liable under this article." *D.R.M.C. §53-245* (Code 1950, § 166C.15; Ord. No. 925-91, § 1, 12-9-91; Ord. No. 775-07, § 140, 12-26-07).

(c) Authorization of Estimated Assessment

The City is authorized to make an estimated assessment of the taxes due based on such information as was made available to them by the taxpayer, with or without investigating the matter in accordance with their vested powers. *D.R.M.C. §53-254(a).*

(d) Finding by the Manager of Revenue

The Manager of Revenue found that Taxpayer "failed to meet its burden of proof as to the correctness of its position as to the number of employees who are subject to the Denver OPT" (*Findings of Fact and Order,* p.2, ¶5) because the records produced by Taxpayer to both the Tax Auditors and to the Hearing Officer did not contain "sufficient breakdown and explanation" as to which employees were exempt from the applied tax. *Id.*

The Manager heard testimony from the City Auditor who stating that the evidence provided by Taxpayer was not sufficiently explanatory as it contained errors and inconsistencies between payroll data and the SUTA reports. The City Auditor requested from Taxpayer all employee payroll information for the State of Colorado to ensure their records were complete, so that the Auditor could "winnow out locations not in Denver." (Record p. 59, lns. 7-17), thereby creating a complete picture for the audit. The Auditor requested SUTA reports for a certain time period in addition to the Taxpayer entity's reports for the same time period so that they could be compared to clear up any discrepancies. (Record p. 72, lns. 7-24, p.075, lns.5-25, p.076, lns.1-11).

The record reflects that the City Auditor did not receive all of the necessary SUTA reports to complete the audit, and was thereby forced to impose a five percent estimated error rate based on the large discrepancies. The City Auditor added a five percent estimated error because there were a large number of employees for whom the Auditor could not confirm where they were working based on what had been reported. The Auditor felt the five percent error rate was a "reasonable estimate" (Record p.067, lns. 2-9) given that the remitted records had data missing, and certain requested SUTA information was never received (Record p. 068, lns.11-14).

(e) Review by District Court of Finding

As per statute, the City is authorized to make an estimated assessment based on the evidence and information available to them. *D.R.M.C. §53-254(a).* The City had already revised and lowered their initial amount based on the updated information provided by Taxpayer. (Record p.65, lns. 2-12). Taxpayer appeals the decision using the same information that had been provided to The City prior to the initial suit and to the Manager of Revenue during the hearing, and proffered no further evidence to support their claim of overpayment. (Record p.58, lns. 6-12, Exhibit G).

As the Manager stated, it is "understandable that the large number of employees...make this (computation of OPT) a difficult task for Taxpayer." (*Findings of Fact and Order,* p.2 ¶5). Despite this difficulty, taxpayers are still required by statute to provide The City with adequate information to perform their auditing duties, leaving the City with discretion to make any estimates they feel are necessary to reach a more accurate computation of amount owing or owed.

The Record supports the findings of the Manager of Revenue that the information supplied by Taxpayer was incomplete. The Manager therefore did not abuse his discretion or exceed his jurisdiction in his finding on this First Claim for Relief.

B. Second Claim for Relief: Sales and Use Tax Paid to Unregistered Vendor

(a) The Tax

The Tax in question is a "Sales and Use" tax as was applied to hot dog, nacho, and popcorn carts purchased from Mobile Solutions, Inc. D.R.M.C. §53-25 levies sales tax on "all sales and purchases of tangible personal property at retail." D.R.M.C. §53-92 levies use tax on "every person who stores, uses, distributes or consumes in the city any article of tangible personal property or any service subject to the provisions of this article, purchased at retail."

(b) The Claim

Taxpayer purchased hot dog, popcorn and nacho carts from Mobile Solutions, Inc. They paid a sales tax of $4,264.85 in good faith to this vendor. (Record p.317). However, this vendor was unlicensed and not registered with the City and County of Denver (meaning they did not have a sales tax account), and did not remit the collected tax to the City. (Record p.91). Taxpayer claims that because they have already remitted and provided documentation of remittance of the sales tax to Mobile Solutions, Inc., an unregistered vendor, they are thereby not liable for the tax imposed by the City.

(c) Finding by the Manager of Revenue

D.R.M.C. §53-25 states that a sales tax is levied on "all sales and purchases of tangible property at retail." Licensed retailers or vendors are agents of the state for collection and payment of sales tax, and are therefore subject to D.R.M.C. §53-40. The Manager of Revenue found that there was no provision within the D.R.M.C. which exempted Taxpayer as a "purchaser in good faith from ultimate responsibility for payment of the sales tax in question." (*Findings of Fact and Order,* p.3, ¶2) Therefore Taxpayer was required to remit the appropriate tax to the City.

(d) Review by District Court of the Finding

Taxpayer is correct that *licensed* retailers have been made agents of the state to collect sales or use taxes, and that payment of the sales tax by the purchaser to the retailer or vendor amounts to payment to the state. *See* J. A. Tobin Constr. Co. v. Weed, 158 Colo. 430, 436 (Colo. 1965). Regardless of the absence of a D.R.M.C. provision stating that Taxpayer has a duty to verify a vendor's registration, Taxpayer still has a duty to remit that sales tax to the City. "The duty to pay the tax is imposed on the customers." *Apollo Stereo Music Co. v. City of Aurora*, 871 P.2d 1206, 1210 (Colo. 1994) (citing *Dep't of Revenue v. Modern Trailer Sales, Inc.*, 175 Colo. 296, 302 (1971)). Payment to an *unlicensed* vendor is not payment to the state, and provides no protection against a demand by the state upon the purchaser for payment of the tax. *Weed*, 158 Colo. at 436.

Taxpayer, upon remittance of the applicable tax to the City is free to pursue reimbursement from the unlicensed vendor. There is record support for the Manager of Revenue's finding, and he did not abuse his discretion or exceed his jurisdiction on this issue. Therefore, this Court upholds the finding of the Manager of Revenue with regards to the Second Claim for Relief, including the upheld appeal of the imposed penalty.

C. Third Claim for Relief: Sales Tax on Bottled Water

(a) The Tax

On this matter, the issue is that there is no tax to be actually imposed. The Record reflects that, as per D.R.M.C. §53-26(8), bottled water is exempt from sales tax. However, Taxpayer sold bottled water during the audit period, and remitted what they thought to be the appropriate sales tax to the City. Upon discovery of their error, they requested a refund of the amount remitted plus interest. The City concedes there indeed is no sales tax on bottled water; however, they feel they should be permitted to retain the excess payment because Taxpayer is unable to satisfy the reimbursement requirement that they are only eligible if they have either "credited to their customer's account or refunded to their customer the taxes paid by their customer in error." *D.R.M.C.* §53-45 (b).

(b) The Claim

Taxpayer claims that they mistakenly paid tax on the exempted bottled water due to their practice of taking a total inventory of items sold, assessing particular items, and then adding the sales tax to the gross amount. (Record p.21, lns. 16-20). They admit that they erroneously assessed the tax on bottled water. (Record p.21, lns. 22-25).

The tax itself was "backed out" of the consumer sale price (meaning that consumers were charged a flat rate, and the actual sale price plus tax was later calculated based on volume of sales). The City urged that if the Manager reimbursed Taxpayer, it would be a "windfall." (Record p. 89, ln.21). Taxpayer argued they would have charged the exact same price for the bottled water to the consumer, and would simply not have "backed out" the tax had they realized bottled water was not subject to sales tax in the City and County of Denver.

(c) Finding of the Manager of Review

The Manager of Revenue conceded that Taxpayer had mistakenly remitted sales tax for bottled water, which the City was not supposed to collect. He stated that no matter what his ruling, the prevailing party would receive a "windfall." (*Findings of Fact and Order,* p.3, ¶3). The Manager rejected the City's argument because it was "hyper-technical" in this circumstance because of the large volume of anonymous consumers. The Manager of Revenue ultimately held that because it was Taxpayer's "unilateral error of both fact and law," they should not be able to receive funds which they had not believed to be theirs. The Manager found in favor of the city and refused to order reimbursement.

(d) Review by District Court of the Finding

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." (*Asphalt*

Specialties Co., Inc. v. City of Commerce City, 218 P.3d 741 (Colo. App. 2009)). 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.

§1-12 of D.R.M.C. states that if any "provision of the Code is held invalid or inoperative, such invalidity or inoperativeness shall not affect other provisions or applications of the Code or rules or regulations...the provisions of this Code and all rules and regulations...are severable." *See also Geer v. Alaniz,* 138 Colo. 177, 331 P. 2d 260 (1958) and *Crawford v. Denver,* 156 Colo. 292, 398 P. 2d 627 (1965) (stating that a severability clause means if a complete valid law remains after invalid portions are stricken, the court should so hold.). The Code does not provide a strict interpretation of the term "inoperative," and so this Court adopts the definition proposed by the Manager that "inoperative" means impossible to enforce or implement because "clearly in these circumstances the Taxpayer could not conceivably comply with the ordinance's provisions." (*Findings of Fact and Order,* p.3, ¶3).

According to the Code:

> 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....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.*]
> §53-45(b) D.R.M.C. (Severed portion highlighted in brackets).

The Manager did not adhere to this application of the statute when he found he was "precluded from granting the relief sought by Taxpayer on the grounds that there was "unilateral error". (*Findings of Fact and Order,* p.4, ¶1). There is no indication the error had to be "unilateral" with regards to fact or law, as the Manager of Revenue acknowledged. The error may in fact have been mutual because "as soon as practicable after the return required...is filed, the *manager shall examine it for correctness.*"(§53-45(a) D.R.M.C. (emphasis added)). If the amount that was remitted was greater or less than required, "the tax shall be recomputed." *Id.* And as stated in the code, the excess "*shall be refunded with interest.*" *Id.* (emphasis added).

The order of the Manager regarding the Third Claim for Relief is reversed. Taxpayer is to be reimbursed or credited the amount of Sales tax as assessed on the bottled water.

D. Fourth Claim for Relief: Defenses Raised by ARAMARK not Addressed by Hearing Officer

(a) The Claim

Taxpayer claims that the Manager of Revenue failed to address or rule on the following for defenses: sales tax imposed, tax collected but not remitted, credit for vendor local tax paid, and penalty abatement.

(b) Defense I: Sales Tax imposed on ARAMARK Entertainment, Inc.

Taxpayer claims that the sales taxes assessed on Entertainment were done without any legal basis because the City did not indicate how it calculated the applied error rates, and used the rate that had been calculated for S & E instead. (Plaintiff's Opening Brief, p.17, ¶2).

(c) Defense II: Tax Collected but not Remitted

Taxpayer claims that the error rate applied by the City was created through a weighted average method that was "flawed."

(c) Defense III: Credit for Vendor Local Tax Paid

Taxpayer claims that the City improperly assessed S & E for underpayment of use tax. Taxpayer asserted that the City deemed several invoices to not include Denver tax because the vendors were not licensed or registered. Taxpayer claims to not have a duty to ensure the vendors were licensed or registered to collect Denver tax.

(d) Defense IV: Issue of Penalty Abatement

The Manager of Finance made an express finding regarding the penalty abatement raised in closing arguments. In his order, the Manager found that the "imposition of penalty against S & E, and Entertainment...is not appropriate."*Findings of Fact and Order*, p.4, ¶4. The penalties that had been imposed on the bottled water and the remitted sales tax to vendors were removed, with only the penalty applied to the OPT tax remaining. Therefore I do not find that it was an abuse of discretion or that the Manager exceeded his jurisdiction in this matter.

THE ORDER

Based on the preceding review of the Manager of Revenue's Findings of Fact and Conclusions, I find that:

I. ARAMARK owes the amount of OPT as calculated, plus penalty, plus interest through the date hereof.
II. ARAMARK owes the amount of Sales and Use tax as calculated for the purchase of the hot dog, popcorn and nacho carts from the third-party vendor, plus interest through the date hereof.
III. ARAMARK shall be reimbursed or credited the amount of Sales and Use tax as assessed for the sale of bottled water, plus interest, through the date hereof.
IV. ARAMARK shall pay the penalty imposed on Support Services for the assessment of the OPT, and shall not be charged the penalties imposed on S & E and Support Services.
V. The Court finds the manager made explicit findings regarding "Defense IV" but made no clear findings on "Defenses I, II, and III."

Dated this 23rd day of June, 2010.

By the Court

This matter is remanded to the Department of Revenue for further proceedings consistent with this order and to address "Defenses I, II and III" with cites to the record to support his conclusions.

William D. Robbins
District Court Judge

cc Def. Counsel, Pl. Counsel, Manager of Revenue