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
Attorneys for Appellant: City Attorney for the City and County of Denver Charles T. Solomon #26873 Assistant City Attorney 201 West Colfax Avenue, Dept. 1207 Denver, CO 80202 Telephone: (720) 913-3286 Facsimile: (720) 913-3180 E-Mail: charles.solomon@denvergov.org	
REPLY 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):
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_____
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 Reply Brief.

I. S&E's and Entertainment's interpretation of D.R.M.C. § 53-45(b) is inconsistent with the plain language of the ordinance and would lead to an absurd result.

Aramark Sports & Entertainment ("S&E") and Aramark Entertainment ("Entertainment") incorrectly assert that they are entitled to a refund of the sales tax that they incorrectly collected from their customers and that they remitted to the City. Their assertion is inconsistent with the plain language of D.R.M.C. § 53-45(d). Their assertion would also lead to an absurd result.

A. D.R.M.C. § 53-45(b) requires vendors to credit or refund sales tax that they incorrectly collected from their customers before they may receive a refund from the City.

D.R.M.C. § 53-45(b) specifies the process for vendors, such as S&E and Entertainment, to receive a refund of sales tax that they incorrectly collected from their customers and that they remitted to the City. This ordinance 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)

The City agrees that the term "shall" in the first clause of the ordinance is a mandatory term. *Plains Metropolitan Dist. v. Ken-Caryl Ranch Metropolitan Dist.*, 250 P.3d 69, 699-700 (Colo.App. 2010). If the ordinance concluded at the end of the first clause, the City would agree that it would be required to refund incorrectly collected and remitted sales tax, regardless of the circumstances. However, the ordinance does not conclude at the end of the first clause and the second clause of the ordinance cannot be ignored. Courts should read municipal ordinances in such 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 read municipal ordinances as a whole, giving consistent, harmonious, and sensible effects to all of its parts. *Mounkes v. Industrial Claim Appeals Office of State*, 251 P.3d 485, 487 (Colo.App. 2010).

The second clause of the ordinance limits the circumstances in which the City is able to refund incorrectly collected and remitted sales taxes to vendors. The second clause of the ordinance states 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." S&E and Entertainment do not dispute that this is the actual language of the second clause of the ordinance. Instead, they assert that applying the second clause of the ordinance as written would lead to an absurd result. Answer Brief pp. 12-13. There is no merit to that assertion.

B. Applying D.R.M.C. § 53-45(b) as written would not lead to an absurd result.

The plain language of the second clause of D.R.M.C. § 53-45(b) provides that vendors, such as S&E and Entertainment, must credit or refund the sales tax that they collected from their customers before they may receive a refund from the City. The "customer reimbursement requirement" does not lead to an absurd result.

The "customer reimbursement requirement" only comes into play when vendors incorrectly collect sales tax from their customers and remit the sales tax that they incorrectly collected to the City. Under the sales tax scheme that the City has adopted, customers and vendors have two distinct roles. Customers are responsible for paying 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, …"). 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 …"). 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. D.R.M.C. § 53-40 ("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 ..."). In addition, vendors may not receive benefit from the sales tax that they collect from their customers and remit to the City. D.R.M.C. § 53-27(f) ("No retailer shall benefit from the collection or payment of the [sales] tax.") The "customer reimbursement requirement" is intended to ensure that sales tax that a vendor incorrectly collects from a customer is returned to that customer.

In this case, S&E and Entertainment have not credited or refunded their customers for the sales tax that they incorrectly collected from their customers. Record p. 107, lns. 8-11. Nor can they, because they do not know who their customers were. S&E and Entertainment assert that under these circumstances, it

would be absurd for them to identify, locate, and issue refunds to their customers. Answer Brief p. 12. The City disagrees.

Under these circumstances it would be absurd to require the City to issue a refund to S&E and Entertainment for the sales tax that they incorrectly collected from their customers and that they remitted to the City. S&E and Entertainment are asking for sales tax that does not belong to them. S&E and Entertainment did not pay the sales tax that they are asking for, their customers did. This is precisely what the "customer refund requirement" is intended to prevent – i.e., vendors benefiting from incorrectly collecting sales tax. *See also*, D.R.M.C. § 53-27(f) ("No retailer shall benefit from the collection or payment of the [sales] tax.") The "customer reimbursement requirement" is intended to ensure that incorrectly collected sales tax is returned to the customer who paid it. If that cannot occur, such as in this case, the clear and unambiguous language of D.R.M.C. § 53-45(b) dictates that the incorrectly collected sales tax remains with 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 and that they remitted to the City, but for the reasons set forth in the City's Opening Brief and in this Reply 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 29th day of July, 2011.

Charles T. Solomon
Assistant City Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this *29th* day of July, 2011, a copy of the foregoing **REPLY BRIEF** was served by depositing the same in the U.S. Mail, first-class postage prepaid, properly addressed to the following:

Blain D. Myhre
Blain Myhre LLC
P.O. Box 3600
Englewood, CO 80155

Karen A. Walton
Office of the City Attorney