Cite as 2018 Ark. 64

SUPREME COURT OF ARKANSAS

No. CV-17-240

LARRY WALTHER, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION APPELLANT V. FLIS ENTERPRISES, INC. APPELLEE	**Opinion Delivered:** March 1, 2018 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. 60CV-14-1628] HONORABLE CATHLEEN V. COMPTON, JUDGE REVERSED AND DISMISSED.

RHONDA K. WOOD, Associate Justice

Larry Walther, as the Director of the Arkansas Department of Finance and Administration (DFA), appeals the circuit court's order granting FLIS Enterprises, Inc.'s (Burger King) motion for summary judgment in an action seeking relief from a tax assessment pursuant to Arkansas Code Annotated section 26-18-406 (Supp. 2017). DFA argues the circuit court erroneously construed the relevant statutes and promulgated rules to find that Burger King was only required to pay taxes on the wholesale value of the food ingredients removed from stock as opposed to the retail value of the meals. We hold the circuit court's interpretation was in error. Accordingly, we reverse and dismiss.

Burger King purchases individual food ingredients used to create its menu items from third-party suppliers. The ingredients are stored separately and utilized only as needed to complete specific orders. At each location, Burger King employs managers to "oversee the operations of [its] restaurants." As an additional "perk," Burger King allows

its managers to consume one meal (manager meal) per shift at no cost to the manager. The manager selects the meal from the same menu available to Burger King's customers.

DFA conducted a sales-and-use-tax audit on Burger King's sixteen central-Arkansas restaurants for a three-year period and determined it underreported taxes by failing to account for the manager meals. Burger King did not dispute owing taxes on the manager meals, only the basis for the calculation. Burger King paid the full amount assessed but filed a protest with DFA's Hearing and Appeals Office. Following a hearing, the administrative law judge sustained the full assessment. Subsequently, Burger King filed a complaint in circuit court for judicial relief seeking a refund of the taxes paid pursuant to provisions of the Arkansas Tax Procedure Act. The parties filed cross-motions for summary judgment and agreed that all the material facts were undisputed. After a hearing, the circuit court entered an order granting Burger King's motion for summary judgment and reversing the decision of the administrative law judge. DFA appealed.

For reversal, DFA argues the circuit court erroneously granted Burger King's motion for summary judgment because (1) withdrawals from stock of processed goods are subject to tax at the full retail value, and (2) the circuit court erroneously relied upon law and argument not raised by the parties. Additionally, DFA contends that the circuit court erred by not following the principle of stare decisis and that Burger King failed to meet its burden of proof.

Part I. *Sovereign Immunity*

After briefing was completed, DFA filed a notice under Arkansas Supreme Court Rule 5-1 that it intended to cite the recent decision of *Board of Trustees v. Andrews*, 2018 Ark. 12, __ S.W.3d __ and *Koonce v. Mitchell*, 341 Ark. 716, 19 S.W.3d 603 (2000). This court ordered supplemental briefing by both parties to allow them an opportunity to fully brief their positions on the impact, if any, of *Andrews* on this matter.[1]

The general rule is that we will not address an issue raised for the first time on appeal. *See Technical Servs. of Ark., Inc. v. Pledger*, 320 Ark. 333, 896 S.W.2d 433 (1995). DFA did not raise the issue of sovereign immunity at the trial court level nor is it asserting it as a defense on appeal. Our discussion would normally end there. However, due to this court's previous language that "subject-matter jurisdiction based on sovereign immunity is an issue that is always open and it is the duty of an appellate court to raise the issue on its own volition," DFA claims that the court could, on its own initiative, dismiss the case on sovereign immunity citing *Dep't of Fin. & Admin. v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996).[2] The parties cite five cases in which this court has referenced this duty. In each cited case, with one exception, this court used this language but did not actually raise and address sovereign immunity sua sponte. *See id*.; *Carson v. Weiss*, 333 Ark. 561, 972 S.W.2d 933 (1998); *Ark. Dep't of Fin. & Admin. v. Tedder*, 326 Ark. 495, 932 S.W.2d 755 (1996); and *Pitcock v. State*, 91 Ark. 527, 121 S.W. 742 (1909). As such, the language expressed in those cases was dicta as it

[1] The dissent contends it was poor judgment to order supplemental briefing. However, once the State filed its notice regarding sovereign immunity, allowing the parties the opportunity to brief the issue was prudent as this is their case.

[2] We overturned a separate portion of *Staton* but not the case in its entirety. *Andrews*, 2018 Ark. 12 at 11-12.

was extraneous to the pending matters. In the exception, *McCain v. Crossett Lumber Co*., 206 Ark. 51, 174 S.W.2d 114 (1943), the court sua sponte raised and discussed sovereign immunity and determined at the end of the opinion that it was inapplicable. However, the order of the sovereign immunity discussion within the opinion is significant because the language contradicts the court's treatment of the issue. Subject-matter jurisdiction is a "threshold issue" that the court must consider first—not last. *Hunter v. Runyan*, 2011 Ark. 43, at 8, 382 S.W.3d 643, 648. Therefore, if the *McCain* court truly considered the issue as one of subject-matter jurisdiction, it should have considered it at the outset of the opinion. In other words, *McCain* said one thing but did another. *McCain*, 206 Ark. at 61, 174 S.W.2d at 120.

Subject-matter jurisdiction is the "court's authority to hear and decide a particular type of case." *Hunter*, 2011 Ark. 43, at 10, 382 S.W.3d at 649. It relates more to the nature of the matter than to the identity of the litigants. Whether the court has jurisdiction over a suit against the State of Arkansas or whether the defendant has raised a defense of sovereign immunity, are not matters of subject-matter jurisdiction. Although sovereign immunity certainly has jurisdictional qualities, this court historically has treated it like an affirmative defense that must be preserved. *See Ark. Lottery Comm'n v. Alpha Mktg*., 2012 Ark. 23, at 6, 386 S.W.3d 400, 404 (concluding that the trial court's failure to rule on sovereign immunity prevented appellate review). For example, our rules permit interlocutory appeals from a denial of a motion to dismiss based on the defense of sovereign immunity. Ark. R. App. P. Civ. 2(a)(10). However, we will not consider such an interlocutory appeal without a clear ruling from the circuit court on sovereign

immunity. *See id.* While one could contend that requiring a specific ruling gives us appellate jurisdiction over interlocutory appeals, if one also accepted the proposition that sovereign immunity deprives the circuit court of subject-matter jurisdiction, remanding cases for sovereign immunity rulings would be illogical. This is why continuing to treat sovereign immunity as an affirmative defense is consistent with our precedent.

Therefore, we hold that sovereign immunity is not a matter of subject-matter jurisdiction, as it is not a limit on the court's authority to hear a particular type of case. As the parties did not raise the issue below, it is not proper for us to address it further in this case.[3] Although counsel and others may desire guidance on the impact of *Andrews*, it would be imprudent of this court to delve into the constitutional doctrine further without full development before the circuit court and when neither party is asserting it.

Part II. *Tax Assessment*

As to the merits of the case, we review a circuit court decision in a tax case de novo. *Baker Refrigeration Sys., Inc. v. Weiss*, 360 Ark. 388, 201 S.W.3d 900 (2005). We also review issues of statutory interpretation de novo, as it is this court's responsibility to determine what a statute means. *Ryan & Co. AR, Inc. v. Weiss*, 371 Ark. 43, 263 S.W.3d 489 (2007). Pursuant to Arkansas Supreme Court Rule 1-2(b)(6) (2017), we have

[3] The dissent claims that we are treating the legislative branch differently than the executive and judicial branches. The dissent confounds waiver and preservation. As a general matter, we do not raise constitutional issues for the parties—whether the party be from the legislative, executive, or judicial branch. This court simply is saying it will not raise the defense of sovereign immunity for the State. In *Andrews*, the State had raised the issue to the circuit court, and therefore, it was preserved for our review on appeal.

jurisdiction over this appeal because it involves a substantial question of law concerning the construction and interpretation of statutes and the rules of an administrative agency.

The "cardinal" rule of statutory interpretation is to give effect to the intent of the legislature. *Miller v. Enders*, 2013 Ark. 23, 425 S.W.3d 723. To do so, we first construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in the common language. *Id*. We construe the statute so that no word is left void, superfluous, or insignificant; and meaning and effect are given to every word in the statute. *Ozark Gas Pipeline Corp. v. Ark. Pub. Serv. Comm'n*, 342 Ark. 591, 29 S.W.3d 730 (2000). When the language of the statute is plain and unambiguous, there is no need to result to the rules of statutory construction, but when the meaning is not clear, we look to "the subject matter, the object to be accomplished, the purpose to the served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject." *Miller*, 2013 Ark. 23, 425 S.W.3d 723.

In general, a sales tax is imposed on all sales of tangible personal property unless an exemption applies. Ark. Code Ann. § 26-52-301 (Repl. 2014). Arkansas provides an exemption for purchasers regularly engaged in the business of reselling items purchased, the "sales-for-resale" exemption. Ark. Code Ann. § 26-52-401(12) (Supp. 2017). This provides them with relief from paying taxes on such purchases and instead requires payment of taxes upon resale. The "sales-for-resale" exemption also applies to goods purchased for subsequent use in processing or preparing different products for sale. Ark. Code Ann. § 26-52-401(12)(B)(i) (Supp. 2017).

However, if the purchaser who received the exemption later withdraws the product from stock and does not resell it, Arkansas Code Annotated section 26-52-322 (Repl. 2014) specifies that tax must be collected. The parties agree that Burger King qualifies for the "sale-for-resale" exemption, that the manager meals were a withdrawal from stock, and that Burger King was required to report and remit taxes on the withdrawal.

At issue here, and DFA's first point on appeal, is whether the tax for the manager meals should be assessed on the wholesale cost paid by Burger King to purchase the individual food ingredients or the retail sales price paid by customers to purchase identical meals. Ark. Code Ann. § 26-52-322 reads, in pertinent part, as follows:

> (b)(2) For purposes of calculating the gross receipts tax or the compensating use tax . . . the gross receipts or gross proceeds for a withdrawal from stock is the value of any goods, wares, merchandise, or tangible personal property withdrawn.
>
> (c) The Director of the Department of Finance and Administration may promulgate rules to implement this section.

Ark. Code Ann. § 26-52-322 (b)(2), (c). Both parties agree that the proper calculation for the tax Burger King should remit for the meals it gives to the managers is the "value of goods … withdrawn." However, because there is nothing in the language of the statute to indicate whether "value" refers to the wholesale value or the retail value, we turn to the rules promulgated by DFA since the General Assembly expressly provides it with the authority to promulgate rules. Ark. Code Ann. § 26-52-322(c).

DFA promulgated the Arkansas Gross Receipts Tax Rule GR-18(D). The parties devote their arguments to whether section (1) or section (2) applies. The rule provides, in pertinent part, as follows:

> 1. Withdrawal of purchased goods.
> If a seller has a retail permit and purchases goods from its suppliers without paying tax to those suppliers claiming the "sale for resale" exemption and the seller withdraws the merchandise from stock and gives the merchandise to customers or other third parties, or uses the merchandise itself, then the value of this merchandise is a part of the seller's gross receipts or gross proceeds and the seller must remit the tax on the purchase price of the goods paid by the seller.
>
> 2. Withdrawal of manufactured or processed goods.
> (a)A business that manufactures or produces products and sells the products to third parties or at retail may at times transfer title to certain of those products to itself or give the products to another person or entity. The business should report and remit tax on the sales price of the products rather than the value of the raw materials used to manufacture or produce the products.

Ark. Admin. Code 006.005.212-GR-18(D)(1), (2) (Westlaw 2017).

Section (1), which is the more general provision, states that if "purchased goods" are bought for resale and later withdrawn from stock, the tax assessed when the goods are removed and given away is the wholesale price paid by the seller. However, section (2) specifies that if the goods withdrawn from stock and given away were "manufactured or produced" by the seller, then the tax assessed is based on what would have been the sales price of the goods. Therefore, the question becomes whether the goods withdrawn are produced.

Burger King contends that section (D)(2) cannot apply because the manager meals could not be accurately described as "processed," as used in title of the section or "produced" goods, which is the term used within the text of the section. To "produce" simply means "to create," and "processed" simply means "to put through the steps of a prescribed procedure." *Black's Law Dictionary* (10th ed.); *American Heritage College*

Dictionary (3rd ed.)[4]. Either definition is consistent with Burger King's description of its process. Burger King's complaint states that it prepares the food fresh each day and does not store fully-compiled menu items to be withdrawn and sold. Instead, when a customer orders a meal, Burger King gathers the necessary ingredients and uses them to fill the order. Its complaint explains, "[s]imilarly, when a manager meal is consumed by a manager, [Burger King] withdraws the necessary ingredients from its stock and *uses them to create* the manager meal." Thus, Burger King uses the *Black's Law Dictionary* definition of the word "produce" to explain how it "creates" the manager meals.

In its complaint, Burger King refers to the free benefit it provides its managers as a "meal." Burger King states that it "creates" a meal from the ingredients it has purchased and provides that "meal" to the manager free of charge. It is not providing the manager the individual ingredients, and as such, it cannot claim it is proper to assess taxes on the individual ingredients. As the manager receives the meal, a produced good, section (D)(2) applies and the tax is assessed on the retail value of the meal. In short, it is the prepared meal that is withdrawn from stock and given to the manager, not the individual ingredients.

To hold otherwise and accept Burger King's argument that the calculation should be based on the value of the individual ingredients would lead to absurd results. *See*

[4] We depart from *Black's Law Dictionary* for "processed" because in the legal context it is related to service of a judicial complaint.

According to the International Food Information Council Foundation, an example of "processed" food is "food(s) prepared in quick-service restaurants." Understanding Our Food (2010), http://www.foodinsight.org/sites/default/files/what-is-a-processed-food.pdf

Clark v. Johnson Reg'l Med. Ctr., 2010 Ark. 115, 362 S.W.3d 311 ("This court will not engage in statutory interpretations that defy common sense and produce absurd results."). Consider the practical effect of Burger King's argument: Burger King would have to (1) determine the value of one slice of tomato, one slice of cheese, one bun, an uncooked hamburger patty, several pieces of chopped lettuce, and count out how many frozen french fries or raw onion slices each manager took from stock (and that is not even attempting to determine how to assess the amount of condiments withdrawn from stock) and (2) add them all together to reach a value. Even Burger King did not attempt this calculation when it arrived at its proposed tax assessment in its complaint; rather, it used thirty-two percent of the retail price paid by customers for meals.[5]

Burger King argues that application of section (D)(2) would lead to absurd results as it could decide to charge its managers .01 cents and then only remit tax on that amount. It contends the State of Arkansas would subsequently receive much less taxes then it would if it applied its wholesale value argument. This is true. Businesses certainly have the ability to make decisions that impact the amount of taxes the State of Arkansas collects. One only needs to consider the drastic price cuts businesses make on Black Friday. The sales tax collected is reduced when a business reduces the price of each item. This does not mean this court should attempt to regulate business or protect the state's sales tax intake through its decisions. Our role is simply to interpret the law.

[5] Per the stipulated facts of both parties, the aggregate wholesale price paid annually by Burger King to purchase all of its food and food ingredients is approximately thirty-two percent (32%) of the aggregate retail price paid annually by Burger King's customers to purchase meals.

The language of section (D)(1) clearly accounts for the goods given away in the condition they were purchased. If the language also encompassed products combined and processed subsequent to the initial purchase, the inclusion of subsection (2) would be superfluous. We do not interpret language to render one section dispensable. *Ozark Gas Pipeline Corp.*, 342 Ark. 591, 29 S.W.3d 730 (2000); Surplusage Canon, Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 174-79 (2012).

For additional support of its argument, DFA cites a previous Arkansas sales-tax case. *Tony & Susan Alamo Found., Inc. v. Ragland*, 295 Ark. 12, 746 S.W.2d 45 (1988). There, the Alamo Foundation's for-profit restaurant provided prepared meals to associates of the foundation. Although the arguments on appeal were not identical,[6] certain facts are similar enough to shed light on previous litigation involving the same subject matter. Like Burger King, the Alamo restaurant had a retail sales tax permit to sell prepared meals to customers and provided the same meals to its associates without a monetary exchange. On appeal, Alamo argued that if the foundation wants to give its goods and services away, the goods and services should not be taxed. The court disagreed. While the specific tax exemption argued by Alamo was not the "sale-for-resale" exemption, the court opined that Alamo "overlook[ed] the fact that Arkansas law exempts these organizations from paying the sales tax on their purchases, not from collecting it on their sales," and held that "all the transfers should be taxed at retail value." *Id.* at 17. Crucial basics are the same: both Alamo and Burger King elected to go

[6] As noted, the *Alamo* case was decided in 1988; however, Ark. Code Ann. § 26-52-322 was not codified until 2009.

through the process of giving away a prepared meal. These were business decisions left to their discretion. Just as the Alamo Foundation was required to pay taxes on the full retail value of the meals it provided, Burger King also should be required.

This is a case of statutory construction where the undefined term in the language of the statute led to the promulgation of the rule of an administrative agency as the statute provided. In this case, DFA's interpretation is consistent with the plain language of the agency rule. As such, it was an error for the circuit court to find that the proper assessment should be based on the wholesale value of the ingredients of the manager meals and to grant Burger King summary judgment.

As we find that DFA is correct on its first point on appeal and we reverse, we need not address the additional points on appeal.

Reversed and dismissed.

GOODSON, J., and Special Justice LEE WATSON join in this opinion.

WYNNE, J., joins in this opinion as to Part II and concurs.

WOMACK, J., joins in this opinion as to Part I and concurs in part and dissents in part.

BAKER and HART, JJ., dissent.

KEMP, C.J., not participating.

ROBIN F. Wynne, Justice, concurring. I agree with the majority that this lawsuit is not barred by sovereign immunity. I further agree with the majority that the circuit court erred in its decision and that its order should be reversed and dismissed. I write separately to explain why I would not hold that sovereign immunity is a defense that was

not preserved by appellant, but would instead hold that the state's sovereign immunity does not apply to this case.

The majority essentially holds that appellant waived the defense of sovereign immunity by failing to raise it below. The ink just dried on an opinion from this court holding that a legislative waiver of sovereign immunity violates the Arkansas Constitution. *Bd. of Trs. v. Andrews*, 2018 Ark. 12, __ S.W.3d __. At its core, our decision in *Andrews* rests on the principle that the state's constitutional immunity cannot be waived, as no arm

of the state has the authority to override a constitutional provision.[7] That authority lies exclusively with the citizenry through an amendment to the constitution. The sovereign immunity enshrined in our constitution belongs to the state; it does not belong to the director of the Department of Finance and Administration any more than it belongs to the legislature. To say, as the majority does, that a state agency may waive that immunity, even through inaction, is fundamentally inconsistent with the holding in *Andrews*. In my view, sovereign immunity is not a defense that can be waived; otherwise, the statute at issue in *Andrews* would have been constitutionally permitted as a waiver of that defense by the legislature.

Article 5, section 20 of the Arkansas Constitution provides that "the State of Arkansas shall never be made defendant in any of her courts." It is the duty of this court to determine the circumstances under which the state is made a defendant in a court action. Obviously, the bar applies when the state is named as a defendant. Additionally,

[7] This court has stated previously that sovereign immunity, unlike subject-matter jurisdiction, may be waived. *See, e.g., Grine v. Bd. of Trs.*, 338 Ark. 791, 2 S.W.3d 54 (1999). But it is important to note that the line of cases so stating largely arose after our decisions in *Ark. Dep't of Fin. & Admin. v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996) and *Ark. Dep't of Fin. & Admin. v. Tedder*, 326 Ark. 495, 932 S.W.2d 755 (1996). In *Staton*, *Tedder*, *Grine*, and related cases, this court simply recognized the existence of the waivers of immunity enacted by the legislature. The constitutionality of those waivers was not challenged prior to *Andrews*. To the extent those decisions can be said to have *permitted* a waiver of the state's immunity, they were overruled by *Andrews*. In addition to legislative waivers, this court recognized two other instances in which it stated sovereign immunity could be "waived," where the state is the moving party seeking affirmative relief and where the state agency is acting illegally or if a state agency officer refuses to do a purely ministerial action required by statute. *See Smith v. Daniel*, 2014 Ark. 519, 452 S.W.3d 575. These two instances are, in truth, not waivers; instead, they are instances in which the state's immunity does not apply.

we have held that when the state, though not a party of record, is the real party in interest so that a judgment for the plaintiff would operate to control the action of the state or subject the state to liability, the action is, in effect, one against the state and is prohibited by the constitutional bar. *Ark. Pub. Def. Comm'n v. Burnett*, 340 Ark. 233, 12 S.W.3d 191 (2000).

Here, the state is not named as a defendant. The question to be answered, then, is whether the state is the real party in interest, as defined by this court. I submit that it is not. It is true that appellee seeks a refund of taxes remitted to the Department of Finance and Administration. But this alone does not submit the state to liability under the circumstances of this case. Appellee paid the disputed tax amount under protest. At that point, appellee was officially on notice that the state's entitlement to the funds was in dispute. This court recognized that a suit to recover taxes paid under protest is not barred by sovereign immunity in *McCain v. Crossett Lumber Co.*, 206 Ark. 51, 174 S.W.2d 114 (1943). In that case, this court held that a suit seeking a refund of unemployment compensation taxes paid under protest was not a suit against the state because the money never became part of the state's funds, but were held in trust or escrow until the dispute was resolved.

Although in *McCain* there was an agreement between the parties to hold the disputed funds in trust that is absent from the record in this case, the fundamental concept remains the same. Tax assessments paid under protest cannot legally be made part of the

state's treasury pending a determination that the state is entitled to the funds, as the collector of the funds is placed on notice at the time the funds are remitted that the state's entitlement to the funds is contested. For these reasons, I believe that the state's sovereign immunity does not apply to this lawsuit.

SHAWN A. WOMACK, Justice, concurring in part and dissenting in part. It is often said that timing is everything. This premise is especially true when it comes to recognition of taxable events. While I join the majority as to Part 1 in holding that sovereign immunity is to be applied as an affirmative defense that must be raised by the parties below, I dissent on the merits in Part 2 with respect to which regulation applies and, therefore, as to the value of the items withdrawn from stock for tax purposes.

This dispute is based on a disagreement as to whether items withdrawn from stock by FLIS Enterprises, Inc. ("Burger King"), should be taxed at the actual wholesale cost—original purchase price—or at the advertised retail price. Pursuant to their statutory authority, the Arkansas Department of Finance and Administration ("DFA") promulgated rules to determine the value that applies to items that have been withdrawn from stock. The regulations provide:

> 1. Withdrawal of purchased goods.
>
> If a seller has a retail permit and purchases goods from its suppliers without paying tax to those suppliers claiming the "sale for resale" exemption and the seller withdraws the merchandise from stock and gives the merchandise to customers or other third parties, or uses the merchandise itself, then the value of

> this merchandise is a part of the seller's gross receipts or gross proceeds and the seller must remit the tax on the purchase price of the goods paid by the seller.
>
> 2. Withdrawal of manufactured or processed goods.
>
> a. A business that manufactures or produces products and sells the products to third parties or at retail may at times transfer title to certain of those products to itself or give the products to another person or entity. The business should report and remit tax on the sales price of the products rather than the value of the raw materials used to manufacture or produce the products.

Ark. Admin. Code 006.05.212-GR-18(D)(1), (2) (Westlaw 2017).

In providing the analysis of this case, it is helpful to understand the purpose and function of the "sale for resale" exemption, as well as what benefit the taxpayer receives from it and what detriment the state endures from it. In the ordinary course of business, when a taxable item is sold, a gross-receipts tax is paid by the purchaser, collected by the seller, and remitted to the state. This tax is based on the actual purchase price of the item sold. Under the "sale for resale" exemption, if the described purchase is made by a person or entity in the business of reselling the purchased item, then the purchase is exempt from tax with the premise that the item will later be resold and the tax will attach at the time of the resale as applied to the price of the item at the time of that sale. The purpose of this exemption is to avoid multiple taxations of the same item at various points in the stream of commerce. *See Arkansas Glass Container Corp. v. Pledger*, 320 Ark. 10, 12, 894 S.W.2d 599, 600 (1995). The benefit received by the purchaser for

resale, in this case Burger King, is that it did not have to pay the tax on the original purchase price at the time of purchase. The detriment to the state is that it, temporarily, forgoes the collection of a tax at the time of the original purchase on the original purchase price.

In applying section (D)(1), as we should do in this case, when the purchased item is withdrawn from the stock of the taxpayer, a taxable event is triggered, and the taxpayer is responsible for paying the tax that would have been paid, based on the original purchase price of the item. This withdrawal from stock triggers a taxable event because it eliminates the possibility of the item being resold with a tax collection in the future. This application restores both parties to the position they would have been in had the exemption never been applied to the original purchase. It requires the taxpayer to pay the tax on the item that was purchased based on the price that was paid. It also makes the state whole, with no loss of revenue on the transaction.

The appellant argues, and the majority embraces, the idea that the benefit the managers receive is not a collection of ingredients, but rather a processed and complete "managers meal." This statement is both true and wholly irrelevant. If the question before us were a matter of determining the value of the manager's meal for the purpose of defining his or her compensation within the income tax system, then the description and characterization of the fully processed meals and their valuation at retail levels would be appropriate.

However, this is not an income tax case, and the subjects of taxation are not the managers. Therefore, what, if any, value the managers received in the form of a meal during their shifts is of no consequence to the issue before us. Rather, this is a gross-receipts-tax issue, and the target for the imposition of the tax is the appellee. As such, we should not focus on the value of the benefit received by the manager but rather on the actions taken by Burger King and the costs incurred by it.

This is where understanding the timing of the events becomes important. The items subject to taxation on the withdrawal from stock are the very items for which Burger King received a tax exemption when it purchased them. When Burger King purchases them, individually as ingredients, those items are placed into stock from which they are ordinarily pulled out as needed and placed into a process to create a Whopper or other menu item that is sold to a consumer at a marked-up retail price, at which time a tax is paid, collected, and remitted based on that sale. This process is what has caught the attention of the majority.

The alternative track that those items take creates a subtle but important distinction with respect to manager meals. On this track, which is at the heart of this case, Burger King acts as follows: (1) Burger King buys the individual ingredients; (2) Burger King places the individual ingredients into stock; (3) Burger King withdraws the individual ingredients from stock for a purpose other than creating an item to be sold at retail, in this case the manager meal. This is the moment, at the completion of step 3, when the timing

and actions that create the taxable event are critical to understanding which section of the regulation applies. At this moment, when Burger King, as the taxpayer who received the tax exemption on the individual ingredients, withdraws these individual ingredients from stock for some purpose other than reselling them, the taxable event has occurred. Everything that comes after that is irrelevant to the determination of the taxable value. It doesn't matter to what extent Burger King manufactures, produces, or processes the items *after* they have been withdrawn from stock because at the moment the taxable event is triggered section (D)(1) has already applied. No amount of action taken after the taxable event can reopen the process to allow the state to pursue the application of section (D)(2).

While its analysis is flawed, the majority does get some key facts right when it correctly states that "Burger King *purchases individual food ingredients* used to create its menu items from third-party suppliers. *The ingredients are stored separately and utilized only as needed to complete specific orders*." When reading that sentence, the word "withdrawn" can be used interchangeably with "utilized" to understand the tax implications based on the state of the ingredients at the time of utilization or withdrawal which triggers the tax. The opinion goes on to quote Burger King's complaint: "Similarly, when a manager meal is consumed by a manager, *[Burger King] withdraws the necessary ingredients from its stock* and uses them to create the manager meal."

Finally, the majority incorrectly states that "section (2) specifies that if the goods withdrawn from stock and given away were 'manufactured or produced' by the seller,

then the tax assessed is based on *what would have been the sales price of the goods*." What section (D)(2)(a) actually states with respect to manufactured or process goods is that "the business should report and remit tax *on the sales prices of the products* rather than the value of the raw materials used to manufacture or produce the products." Therefore, if an application of section (D)(2) were to prevail, when using the actual language rather than paraphrasing the language, the tax would be placed on the "sales price" not on what the majority erroneously paraphrases as "what would have been the sales price." If section (D)(2) applies, and if Burger King gives the manager a meal at a cost of zero, then the tax rate is applied to the sales price of zero and the tax to be paid is zero. But, because section (D)(1) applies, the correct application of the tax is to the original price of the goods paid by the seller, the wholesale price.

KAREN R. BAKER, Justice, dissenting. The decision today demonstrates the breadth of this court's holding in *Board of Trustees v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616, and the aftermath of uncertainty that lies in the wake of that decision as to the status of Arkansas law on the doctrine of sovereign immunity. Prior to *Andrews*, through *Arkansas Department of Finance & Administration v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996) and *Arkansas Department of Finance & Administration v. Tedder*, 326 Ark. 495, 932 S.W.2d 755 (1996), this court had established well-defined parameters for the doctrine of sovereign immunity. In fact, in *Andrews*, the majority recognized that this

> court has held that the doctrine of sovereign immunity is rigid but that it may be waived in limited circumstances. This court has recognized that a claim of sovereign immunity may be surmounted in the following three instances: (1) when the State is the moving party seeking specific relief; (2) when an act of the legislature has created a specific waiver of sovereign immunity; and (3) when the state agency is acting illegally or if a state agency officer refuses to do a purely ministerial action required by statute.

2018 Ark. 12, at 5–6 (internal citations omitted). However, in *Andrews*, by holding that legislative waivers of sovereign immunity are unconstitutional, the court wholly eradicated these established parameters for sovereign immunity. As predicted in my dissent in *Andrews* and as confirmed through the parties' briefs, the oral arguments, and today's opinion, the status of the law regarding sovereign immunity is in complete disarray.

The majority states "[w]hile one could contend that requiring a specific ruling gives us appellate jurisdiction over interlocutory appeals, if one also accepted the proposition that sovereign immunity deprives the circuit court of subject-matter jurisdiction, remanding cases for sovereign immunity rulings would be illogical." However, it was equally illogical for this court to order supplemental briefing on the issue of sovereign immunity in this case. On January 26, 2018, I dissented from the majority's order that sua sponte ordered supplemental briefing to address the following questions:

> 1. Can the State raise a sovereign immunity defense on appeal when it was not raised at the trial court level?

2. If the State can raise it now, what is the impact of *Andrews*, 2018 Ark. 12, and *Koonce*, 341 Ark. 716 (2000), on this specific case?

The issue of sovereign immunity was not raised before the circuit court below. Therefore, the majority's decision to sua sponte order supplemental briefing on this issue was improvident. However, as a result of the majority's improvidence, the issue is now squarely before this court. Further, despite the majority's decision to sua sponte order supplemental briefing on the above issues, the majority now avoids answering the question altogether by stating that because "the parties did not raise the issue below, it is not proper for us to address it further in this case." The majority's decision to now avoid answering the very issue that the majority ordered to be briefed leads to even more confusion rather than clarity as to the status of the law on sovereign immunity.

Next, I disagree with the majority's decision to treat sovereign immunity like an affirmative defense. Specifically, the majority states that "[a]lthough sovereign immunity certainly has jurisdictional qualities, this court historically has treated it like an affirmative defense that must be preserved. *See Ark. Lottery Comm'n v. Alpha Mktg*., 2012 Ark. 23, at 6, 386 S.W.3d 400, 404 (concluding that the trial court's failure to rule on sovereign immunity prevented appellate review)." Following the majority's decision in *Andrews*, saying that sovereign immunity is like an affirmative defense is akin to saying a Bengal tiger is like a house cat. Further, I disagree because this position yields the nonsensical result that in each lawsuit against the State, trial counsel for a State entity

may waive sovereign immunity—either as a result of poor lawyering skills, negligent omission, or even as a matter of trial strategy. This is fundamentally unfair to the citizens of Arkansas and completely absurd. Again, as stated in my dissent in *Andrews*, the decision to hold that the legislature may no longer waive sovereign immunity necessarily means that the executive and judicial branches likewise may not waive sovereign immunity because any other interpretation would result in treating the legislature differently from the executive and judicial branches. For each branch to operate as envisioned by the constitution, one branch must not be subordinated to either or both of the other branches, and one branch must not take control of one or both of the other branches. *City of Lowell v. M & N Mobile Home Park, Inc*., 323 Ark. 332, 916 S.W.2d 95 (1996).

In sum, prior to *Andrews*, the law on sovereign immunity was clear and could only be surmounted in three distinct circumstances. After *Andrews*, the status of the law on sovereign immunity was left uncertain. However, after today's opinion—in which the majority sua sponte ordered supplemental briefing on sovereign immunity and then declined to address the issue—the majority has compounded the problem, and the status of the law on sovereign immunity is incomprehensible. Accordingly, I must dissent.

JOSEPHINE LINKER HART, Justice, dissenting. I joined Justice Baker's dissent in *Board of Trustees v. Andrews*, 2018 Ark. 12, ___ S.W.3d ___ (Baker, J., dissenting). Accordingly, while I should welcome any effort to walk back the unreasonably broad

pronouncements in *Andrews*, I cannot do so in this case. As Justice Wynne noted in the latter half of his concurring opinion, even if the issue had been raised and ruled on by the circuit court—which, as Justice Baker ably notes, it was not—sovereign immunity is not implicated in a tax case where payments are made under protest. I am troubled that the majority saw fit to essentially create this issue, order briefing by the parties only to knock it down like it was a straw man. The majority opinion is a unique example of an advisory opinion; the only legal controversy it resolves is the legal controversy that the majority created. I agree with Justice Baker's assessment that it was improvident to address *Andrews* in this appeal.

On the merits, I write separately because, in my view, the majority has misconstrued Arkansas Code Annotated section 26-52-322. The full text states:

> (a) As used in this section, "withdrawal from stock" means the withdrawal or use of goods, wares, merchandise, or tangible personal property from an established business or from the stock in trade of the established reserves of an established business for consumption or use in the established business or by any other person.
>
> (b)(1) The gross receipts tax levied by this chapter and the compensating use tax levied by the Arkansas Compensating Tax Act of 1949, § 26-53-101 et seq., are levied on a withdrawal from stock.
>
> (2) For purposes of calculating the gross receipts tax or the compensating use tax under subdivision (b)(1) of this section, the gross receipts or gross proceeds for a withdrawal from stock is the value of any goods, wares, merchandise, or tangible personal property withdrawn.
>
> (c) The Director of the Department of Finance and Administration may promulgate rules to implement this section.

Ark. Code Ann. § 26-52-322. The majority is simply wrong when it asserts that "because there is nothing in the language of the statute to indicate whether the 'value' refers to the wholesale value or the resale value, we turn to the rule promulgated by DFA since the General Assembly expressly provides it with the authority to promulgate rules."

In the first place, interpretation of a statute should never be done in a vacuum. In construing any statute, we must place it beside other statutes relevant to the subject matter in question and ascribe meaning and effect to be derived from the whole. *State v. Colvin*, 2013 Ark. 203, 427 S.W.3d 635. Statutes relating to the same subject must be construed together and in harmony, if possible. *Id*. Accordingly, because section 26-52-322 deals with goods that avoided sales tax under the purchase-for-resale exemption, "value" necessarily refers to the purchase price of the goods. Accordingly the wholesale versus retail conundrum that the majority cites is of no moment.

Secondly, assuming, *arguendo*, that there was some deficiency of substantive law in section 26-52-322, that deficiency may *never* be validly provided by a regulation. The majority fails to apprehend that DF&A is an executive agency. Under the separation-of-powers clauses in the Arkansas Constitution,[1] this would constitute an unconstitutional

[1] § 1. The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.

delegation of legislative authority. *Hobbs v. Jones*, 2012 Ark. 293, 412 S.W.3d 844. Simply stated, the legislative branch of the state government has the power and responsibility to proclaim the law through statutory enactments, and the executive branch has the power and responsibility to enforce the laws as enacted by the legislative branch and interpreted by the judicial branch. *Id*. The functions of the legislature must be exercised by it alone and cannot be delegated. *Id*.

While I am mindful that section 26-52-322(b)(2)(c) authorizes DF&A to "promulgate rules to implement this section," it is apparent that the majority has simply confounded the authority of two co-equal branches of government. As the *Hobbs* court stated,

We have held that "[t]he true distinction is between the delegation of power to make the law, which necessarily involves the discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made."

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§ 2. No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Ark. Const. art. 4, §§ 1, 2.

2012 Ark. at 293, 412 S.W.3d at 851 (quoting *Terrell v. Loomis*, 218 Ark. 296, 300, 235 S.W.2d 961, 963 (1951)). While the constitutionality of Arkansas Administrative Code 006.05.212-GR-18(D)(1) and (2), is not an issue in this case, because statutes are presumed constitutional, we are obligated to construe a statute in a way that will uphold its constitutionality, if possible. *Landers v. Stone*, 2016 Ark. 272, 496 S.W.3d 370. Accordingly, we must construe section 26-52-322 in such a way that it does not unconstitutionally delegate its legislative authority to an executive agency.

Thus, because section 26-52-322 does not authorize DF&A to impose a greater value on exempt material simply because the goods were "processed," the circuit court did not clearly err when it found that Flis should not be taxed in accordance with GR-18(D)(2). Under section 26-52-322, the recaptured sales tax can only be on the purchase price of the raw materials. The meals provided to managers are on the same footing as the french fries that are discarded at closing time, the hamburgers that are dropped on the floor, and the soda that spills when a worker is filling a cup. In my view, the provision of a "free" meal to a manager is a sound business practice because it ensures that there will be some quality control of the food that is served during every shift. It is only when the finished food is provided to a customer should it be taxed at the retail price. In oral argument, DF&A conceded that basis for taxation of goods actually sold was appropriate whether it was menu price or deeply discounted.

The majority seems to ignore that in any "processing" there is a certain amount of waste. Some of the wood purchased by a furniture maker becomes sawdust. By the

majority's reasoning, that sawdust should be taxed at the same rate as a finished table! Is that not the truly "absurd" result that the majority contends it is attempting to avoid?

I dissent.

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