

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-08-00562-CV

Jerman Cookie Company, Appellant

v.

**Susan Combs, Comptroller of Public Accounts of the State of Texas,
and Greg Abbott, Attorney General of the State of Texas, Appellees**

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 126TH JUDICIAL DISTRICT
NO. D-1-GN-01-001492, HONORABLE GUS J. STRAUSS, JR., JUDGE PRESIDING**

CONCURRING OPINION

I concur in the majority’s judgment reversing and remanding this case to the district court for further proceedings. I write separately because I disagree with the majority’s analysis of the Comptroller’s rule and the district court’s interpretation and application thereof.

This case turns on the interpretation and application of the Comptroller’s former rule, 34 Tex. Admin. Code § 3.293(a)(9). The basic dispute is whether cookies sold by a retailer in quantities of five or less are subject to sales tax. As the majority acknowledges, the Comptroller conceded at oral argument that she interprets and applies her rule to mean that cookies sold in quantities of five or less are “ready for immediate consumption” within the meaning of the rule—and, therefore, subject to sales tax—only if they are sold by a retailer who provides eating facilities, but that cookies sold in quantities of five or less are not “ready for immediate consumption” within the meaning of the former rule—and, therefore, are *exempt* from sales tax—if

they are sold by a retailer who *does not* provide eating facilities. The Comptroller's interpretation and application of her rule is consistent with the plain language of the rule and therefore entitled to deference.

The district court, however, refused to consider and apply the entire rule to the facts of this case and, thus, improperly granted summary judgment in favor of the Comptroller. Because the record reflects that the district court considered only one portion of the rule in isolation, and not the entire rule, when it granted summary judgment in favor of the Comptroller, I disagree with the majority's conclusion that the language of the rule supports the district court's interpretation.

Jan P. Patterson, Justice

Before Justices Patterson, Pemberton and Waldrop

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