SC97932

IN THE SUPREME COURT OF MISSOURI

DI SUPPLY I, LLC, AND ITS INDIVIDUAL MEMBERS,

Appellants,

v.

DIRECTOR OF REVENUE,

Respondent.

Appeal from the Administrative Hearing Commission of Missouri,
The Honorable Sreenivasa Rao Dandamudi, Commissioner

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

This case concerns a hotel supplier's sales tax liability for reusable items that it purchased for hotel rooms, including furniture, mattresses, sheets, and towels.

DI Supply is part of the Drury Hotels corporate family. Drury Hotels Company, LLC ("Drury Hotels"), owns DI Supply, LLC ("DI Supply"). TR at 49, l. 17-14; App. A3 (Vol. III LF 125 ¶1). DI Supply is a disregarded entity of Drury Hotels for federal tax purposes. TR at 61, l. 2-7; App. A3 (Vol. III LF 125 ¶2). DI Supply was once named DI Supply I, LLC. TR at 49, l. 10-24. DI Supply has the same tax ID number that it had when it was named DI Supply I, LLC. TR at 49, l. 25 through p. 50, l. 3.

DI Supply was formed to buy products for individual hotels that are under the umbrella of Drury Hotels (App. A3 (Vol. III LF 125 ¶3)), ensure product consistency, and obtain better pricing of products through its superior buying power. TR at 52, l. 13-24. Drury Hotels "manages 37 hotels in Missouri on behalf of its owners, Drury Development Company and Drury Southwest." App. A3 (Vol. III LF 125 ¶1). Drury Development Company owns "approximately 30" of those hotels. TR at 119, l. 11-14, p. 119, l. 25 through p. 120, l. 3. Most of the individual Drury hotels in Missouri are owned by Drury Development Company or Drury Southwest. TR at 51, l. 1-15.

The Missouri Department of Revenue conducted a sales tax audit of DI Supply for the time period between March 2012 and February 2015. App. A4 (Vol. III LF 126 ¶7). The Director found that DI Supply had failed to pay sales tax on a wide variety of taxable purchases. See App. A6-A7 (Vol. III LF 128-29 ¶¶19, 21-23). The Director determined that DI Supply failed to remit sales tax on $11,735,107.72 in taxable sales. App. A6 (Vol. III LF 128 ¶20). The Director

assessed DI Supply $613,159.38 in sales tax and $56,175.98 in interest as of April 27, 2017. App. A6 (Vol. III LF 128 ¶20).

DI Supply's Exhibit 8 is a spreadsheet that Drury Hotels' Accounts Payable Manager, Mark Ahlvin, Jr. (TR at 160-61) created from DI Supply's accounting records (TR at 171, l. 15-22). "It shows all the items that were included in the audit findings during the audit period." TR at 171, l. 24-25. It lists a total of 1,556 types of items (see Ex. 8, pp. 1, 34), with descriptions of the items, the total amount of taxable sales for the item (TR at 172, l. 1-14), and a "generic" description of where in a hotel the item is used (TR at 173, l. 19 through p. 174, l. 2). Exhibit 9 shows the items that Drury Hotels, Drury Development Company (see TR at 119, l. 10-14), and Drury Southwest "upon the discussion internally as we went through the information… reached a conclusion that these items, we're not collectively accounting for as tangible personal property; therefore, we have decided to concede these items." TR at 124, l. 9 through 15; see TR at 122, l. 25 through p. 123, l. 6; p. 123, l. 9 through p. 124, l. 8. Ahlvin created Exhibit 9 by copying from Exhibit 8 the items conceded by DI Supply. TR at 174, l. 20 through p. 175, l. 2. The "treatment" columns in the far right of Exhibits 8 and 9 show whether Drury considered an item tangible personal property for accounting purposes. See TR at 174, l. 3-6; see Ex. 9; see TR at 122, l. 25 through p. 124, l. 15.

The first 526 items listed in Exhibit 8 are items that DI Supply conceded. TR at 174, l. 20 through p. 75, l. 2; see Ex. 9; see Ex. 8, pp. 1-12. "The conceded sales totaled $1,375,747.14, and amounted to $71,882.79 in sales tax liability." App. A6 (LF 128 ¶21). In Exhibit 8, Ahlvin designated the conceded items by inserting the word "remove" in a column to the right of the total amount of taxable sales of the item. TR at 171, l. 14-17, p. 172, l. 5-20; Ex. 8, pp. 1-12. DI Supply conceded that some items did not fall under the resale

exemption because they were fixtures (App. A7 (LF 129 ¶22)), "existed in common spaces or were otherwise not resold for use in a hotel room…" (App. A7 (LF 129 ¶23)).

Proceedings at the Administrative Hearing Commission

DI Supply's sales tax liability for the remaining 1,036 types of items listed in Exhibit 8[1] was contested before the Administrative Hearing Commission. TR at 174, l. 7-19. During his testimony, Ahlvin stated that he should have also removed line item 1146 on page 25 of Exhibit 8. TR at 182, l. 5-18. The total taxable amount for that item is $145.14. Ex. 8, p. 25.

The Director determined that DI Supply failed to pay sales tax on taxable sales of numerous items located or used in hotel rooms (App. A6 (LF 128 ¶19)) ranging from furniture and appliances to window treatments, fixtures, linens, parts, and other items, including "TV armoires, pillow/blanket storage bags, trash bags, towel bars, bed bases, hair dryer baskets, bath mats, rollaway beds, bedspreads, luggage benches, blankets, ironing boards, box springs, blinds, ice buckets, light bulbs, chairs, desks, TV chests… remote controls, power cords… mattress covers, shower curtains, doors, drapes, dressers… hair dryers… fixtures, bed frames, coat hangers, headboards, hinges," irons, "lamps, mattresses, microwaves, mirrors… nightstands, ottomans, phones, pictures, pillows, pillowcases, DVD players, … clock radios, refrigerators…" screws, "sheets, sofas, tables, tablecloths, throws, nightstands, towels, trays, TVs, val[e]nces, vanities, wardrobes, washcloths, [and] wastebaskets…" (App. A6 (LF 128 ¶19)). DI Supply refers to the contested items, including things like lightbulbs, hangers, and irons, as "Room Furnishings." App.'s Br. at 3-4.

[1] Exhibit 8 breaks the disputed property into separate line items according to color, size, style, and so on. See e.g., descriptions of linens (Ex. 8 at 12-15), ottomans (Ex. 8 at 19-20), and lightbulbs (Ex. 8 at 34).

The Commission tried to group the sales at issue into larger categories, e.g., "Bedding Sales" (App. A8 (LF 130)) and "Living Furniture Sales" (App. A9 (LF 131)). Beneath those headings, the Commission stated total dollar amounts for subcategories of sales, e.g., "$529,932.50 in sales of beds," (App. A8 (LF 130 ¶26)) and "$910,569.24 in sales of chairs.[2]"

The evidence presented at the hearing included the testimony of a marketing professor, Dr. Lisa K. Scheer. TR at 65, l. 9 through p. 66, l. 2. She conducted an on-line survey (see TR at 71, l. 23 through p. 72, l. 20).

Drury Hotels' customer database contained information for 2.8 million customers, of whom 244,000 had stayed at a Drury hotel in Missouri since 2012. TR at 116, l. 13-16. Drury Hotels' marketing director provided the e-mail addresses of a random sample of 5,000 customers from the 244,000 who had stayed at a Drury in Missouri since 2012 to Dr. Scheer. TR at 115, l. 15 through p. 116, l. 20. Dr. Scheer invited all 5,000 customers to take her survey, and "31 customer responses were obtained that passed the qualification and attention-screening questions." Ex. 6 at 4 (report p. 2). Two additional customers in the sample of 5,000 may have responded, but Dr. Scheer eliminated their results. TR at 100, l. 1-7. Fewer than 1 in 150 people in the sample of customers provided by Drury responded to Dr. Scheer's survey. See Ex. 6 at 4; see TR at 100, l. 1-7.

Dr. Scheer also surveyed a sample of customers that she obtained from Qualtrics, the survey platform that she used. Ex. 6 at 4 (report p. 2). The size of the sample provided by Qualtrics is not in the record, but 205 persons from that sample responded (Ex. 6 at 4).

The survey questions are set out in Dr. Scheer's report, beginning at Ex. 6 at 29 (report p. 26). The first question that survey respondents were asked to

[2] App. A8 (LF 131 ¶46)

answer, by clicking on boxes below the question, was "[p]lease click on **all** of the following that you expect to find in a standard hotel room and use **at no extra charge**." Ex. 6 at 29 (report p. 27) (emphasis in original).

The survey questions include a scenario where "two hotel rooms are identical in every way except for the following ***differences:***

> Room 1 has a double bed, a comfortable chair, a small table, and a 36-inch flat screen TV.
>
> Room 2 has a king bed, a comfortable couch, a larger table, and a 42-inch flat screen TV.

If Room 1 is $99 per night, what would the price of Room 2 be?

We're not asking which room you'd choose, but simply what price you'd expect for Room 2. Please move the slider below to indicate your estimate of the price for Room 2." Ex. 6 at 32 (report p. 30) (emphasis in original).

A hearing took place before Commissioner Berri on April 13, 2018. TR at 1, p. 10, l. 24 through p. 11, l. 6. Commissioner Dandamudi did not preside over the hearing (App. A3 (LF 125); see TR), but rendered a decision after reading the full record. App. A3 (LF 125). The Commission concluded that "DI Supply has not presented clear, unequivocal evidence that would entitle it to a resale exemption." App. A19 (LF 141). The Commission found DI Supply liable for unpaid sales tax in the principal amount of $613,159.38 "plus statutory interest." App. A24 (LF 146).

ARGUMENT

Standard of Review

A decision of the Administrative Hearing Commission must be affirmed if "(1) it is authorized by law; (2) it is supported by competent and substantial evidence on the whole record; (3) mandatory procedural safeguards are not violated; and (4) it is not clearly contrary to the reasonable expectations of the General Assembly." *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 435-36 (Mo. banc 2010); Section 621.193, RSMo. The Commission's factual determinations "will be upheld if supported by substantial evidence based on review of the whole record." *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 121 (Mo. banc 2014).

This Court reviews the Commission's interpretation of revenue statutes de novo. *Brinker Mo., Inc.*, 433 S.W.3d at 435. Exemptions are strictly construed against the taxpayer, "and any doubt must be resolved in favor of application of the tax." *Bartlett Int'l, Inc. v. Dir. of Revenue*, 487 S.W.3d 470, 472 (Mo. banc 2016). "An exemption is allowed only upon clear and unequivocal proof, and any doubts are resolved against the party claiming it." *Id.*

I. DI Supply has waived any claim that its sales qualify for an exemption under Section 144.018. (Responds to Point I)

DI Supply has waived any claim it may have made that its sales qualified for an exemption in Section 144.018. Section 144.018 overrides the resale exemption in §144.010.1(13). DI Supply is thus not eligible for any exemption.

Below, DI Supply contended that the sales that are the subject of this appeal qualify for a "resale exemption" in §144.010.1(13). But DI Supply did not claim that an exemption in Section 144.018 applies. DI Supply did not reference Section 144.018 in its Complaint (LF 1 through LF 7), its Petition for Review, or its Point Relied On (see App.'s Br. at 13).

Now, DI Supply mentions Section 144.018 in one sentence of its brief, solely for the proposition that "[t]he fact that a small percentage of the room rentals were to customers claiming an exemption from sales tax does not undermine DI Supply's claim" because §144.018.1 provides that a purchase for resale may be "excluded from tax" if the subsequent sale is "exempt under Chapter 144." See App.'s Br. at 16, n. 4.

DI Supply has waived any claim it may have made that its sales qualified for an exemption in Section 144.018, *see Berry v. State*, 908 S.W.2d 682, 684 (Mo. banc 1995), or, at a minimum, has failed to meet its burden of showing that an exemption or exclusion in Section 144.018 applies, *Bartlett Int'l, Inc.*, 487 S.W.3d at 474.

The legislature's enactment of Section 144.018 raises the question whether a taxpayer who, like DI Supply, has not made a claim or argument that it qualifies for an exemption in Section 144.018 may still obtain a resale exemption in §144.010.1(13). This Court has neither applied the resale exemption in §144.010.1(13), nor granted a sales tax exemption under that provision, since *Music City Centre Management, LLC v. Dir. of Revenue*, 295 S.W.3d 465 (Mo. banc 2009). In response to *Music City* and *ICC Management, Inc. v. Dir. of Revenue*, 290 S.W.3d 699 (Mo. banc 2009), the General Assembly enacted Section 144.018, of which "[t]he provisions… are intended to reject and abrogate earlier case law interpretations of the state's sale and use tax law with regard to sales for resale as extended" in those two cases. Section 144.018.4, RSMo.

Subsection four also states that Section 144.018 was "intended to clarify the exemption or exclusion of purchases for resale from sales and use taxes as originally enacted in" chapter 144. Section 144.018.4, RSMo. But Section 144.018 begins with the language:

> **Notwithstanding any other provision of law to the contrary**, except as provided under subsection 2 or 3 of this section, when a purchase of tangible personal property or service subject to tax is made for the purpose of resale, such purchase shall either be exempt or excluded under this chapter if the subsequent sale is…

Section 144.018.1, RSMo (emphasis added). The phrase "[n]otwithstanding any other provision of law to the contrary" means that Section 144.018 "overrides" the "resale exemption" in §144.010.1(13). *Kidde America, Inc. v. Dir. of Revenue*, 242 S.W.3d 709, 711-12 (Mo. banc 2008).

Section 144.018 was enacted much later than Section 144.010, so the "[n]otwithstanding any other provision of law to the contrary" language in §144.018.1 "clearly indicates an intent for that later-adopted statute to prevail to the extent that" Section 144.018 is inconsistent with §144.010.1(13). *Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 34 (Mo. banc 2015).

II. DI Supply failed to establish that its sales of reusable tangible personal property qualify for a resale exemption in §144.010.1(13), RSMo. (Responds to Point I)

DI Supply argues that numerous types of items of tangible personal property that Drury placed in hotel rooms qualify for a resale exemption in §144.010.1(13). Even if Section 144.018 did not abrogate the resale exemption in §144.010.1(13), by its plain language, that exemption does not apply if tangible personal property purchased by a business is not resold "as tangible personal property," §144.010.1(13), RSMo.

Drury hotels render a taxable service to guests—furnishing hotel rooms for a charge, *see* §144.020.1(6), RSMo. TR at 127-28, 165-66, 184. Drury Hotels charges sales tax "on the sleeping rooms" that it furnishes to guests for a charge. TR at 184; see TR at 165-66. The legislature did not intend §144.010.1(13) to exempt reusable items of tangible personal property located

in hotel rooms furnished to guests when the guests are charged for the rooms. DI Supply's sales of tangible personal property to Drury do not qualify for the resale exemption in §144.010.1(13), RSMo.

The resale exemption in §144.010.1(13), like other exemptions, is to be strictly construed. *See President Casino, Inc. v. Dir. of Revenue*, 219 S.W.3d 235, 238-39 (Mo. banc 2007).

> **"Sale at retail"** means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption **and** *not for resale* in any form *as tangible personal property*, for a valuable consideration; … . Where necessary to conform to the context of sections 144.010 to 144.525 and the tax imposed thereby, the term sale at resale shall be construed to embrace:
>
> * * *
>
> (e) Sales or charges for all rooms, meals and drinks furnished at any hotel, motel, tavern, inn, restaurant, … or other place in which rooms, meals or drinks are regularly served to the public[.]

Section 144.010.1(13), RSMo (emphasis added).

Under the plain language of the first sentence of subparagraph 13, in order for tangible personal property purchased by a business to qualify for the "resale exemption" in §144.010.1(13), the property must be resold "as tangible personal property." The phrase "in any form" should be applied to the immediately preceding words "not for resale." *See Rothschild v. State Tax Comm'n of Missouri*, 762 S.W.2d 35, 37 (Mo. banc 1988). " '… [R]elative and qualifying words, phrases, or clauses are to be applied to the words or phrase immediately preceding and are not to be construed as extending to or including others more remote.' " *Id.* at 37, *quoting Citizens Bank & Trust Co. v. Dir. of Revenue*, 639 S.W.2d 832, 835 (Mo. 1982).

The Sales Tax Law distinguishes between "selling tangible personal property" and "rendering taxable service at retail." *See* Section 144.020.1,

RSMo; *see Tatson, LLC v. Dir. of Revenue*, 456 S.W.3d 43, 45 (Mo. banc 2015). A hotel room is not an item of tangible personal property.

The Sales Tax Law does not define the term "tangible personal property." *See* §144.010, RSMo. But the sales tax definition of "sale" differentiates the rendering or furnishing of a taxable service from a "transfer" of tangible personal property:

> **"Sale"** … means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for valuable consideration *and* the rendering, *furnishing*, or selling for a valuable consideration any of the substances, things, and *services herein designated and defined as taxable under the terms of sections 144.010 to 144.525*[.]

Section 144.010.1(12) (emphasis added). Rendering the taxable service of furnishing a hotel room for a charge, §144.020.1(6), does not constitute a sale or "transfer" of tangible personal property. *See* §144.010.1(12), RSMo.

The dictionary definitions of the words "room" and "furnish" also support the conclusion that furnishing a hotel room to a guest for a charge is not a sale of tangible personal property. Webster's Third International Dictionary defines a "room" as "a part of the inside of a building, shelter or dwelling usually set off by a partition." *WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY* at 1972 (unabridged ed. 1993). A room, in its plain and ordinary meaning, is part of a building or other real estate. A room is not an item of tangible personal property.

"The standard definition of the word 'furnish' is 'to provide or supply with what is needed, useful, or desirable." *Mendenhall v. Prop. & Cas. Ins. Co. of Hartford*, 375 S.W.3d 90, 93 (Mo. banc 2012), *quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY* at 923.[3] A hotel guest relies on the

[3] The same definition of "furnish" appears on page 923 of the 1993 edition of *Webster's Third International Dictionary*.

innkeeper "to provide a place of safety." *Stafford v. Drury Inns, Inc.*, 165 S.W.3d 494, 496 (Mo. App. E.D. 2005). The taxable service that a hotel guest receives when a room is furnished to him or her for a charge is permission to access the room—a place of safe shelter—and remain there overnight, or for a few nights. The average length of a stay "at a Missouri Drury Hotel" for the audited period was 1.8 days. TR at 115, l. 5-14; see App. A4 (LF 126 ¶7).

A. The "resale exemption" in §144.010.1(13), RSMo, does not apply "equally" to the taxable service of furnishing a hotel room to a guest for a charge. (Responds to Point I.B)

The next question is how to read and apply the final sentence of §144.010.1(13). The legislature abrogated this Court's interpretation of sales and use tax law applicable to sales for resale "as extended in *Music City*… ." Section 144.018.4, RSMo. In *Music City*, this Court relied on the final sentence of the sales tax definition of "sale at retail," currently codified at §144.010.1(13), as the basis for its conclusion that "the resale exemption, inherent in the definition of 'sale at retail,' applies equally to the sale of admissions," 295 S.W.3d at 468, the taxable service of amusement, *id.* at 468 n. 2.

> The language of section 144.010.1(10) providing the basis for the resale exemption is stated in terms of "tangible personal property," and the resale exemption would be limited to "tangible personal property" if subparagraph (10) did not go on to say that "[w]here necessary to conform to the context of sections 144.010 to 144.525 and the tax imposed thereby, the term 'sale at retail' shall be construed to embrace: (a) Sales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events[.]" Section 144.010.1(10)(a).

Music City, 295 S.W.3d at 468. The final sentence of the definition of sale at retail included "charges for all rooms furnished… at any hotel" in

subparagraph (e), §144.010.1(10), RSMo (2005), just as it does today, §144.010.1(13).

The legislature's later enactment of Section 144.018 abrogated this Court's determination that the resale exemption in §144.010.1(13) "applies equally" to the service of amusement because of the final sentence of §144.010.1(13). Section 144.018.1, .2, and .4. Instead, Section 144.018 enables a "subsequent sale" of "admissions or seating accommodations" to qualify as a resale if it satisfies the criteria in the second sentence of §144.018.2. Section 144.018.1, .2, RSMo.

Though *Music City* did not involve the taxable service of furnishing hotel rooms, the enactment of §144.018.3 shows that the legislature did not intend the resale exemption in §144.010.1(13) to apply "equally" to that taxable service either. Subsection 3 of Section 144.018, similarly to §144.018.2, enables a "subsequent sale" of a hotel room furnished or served to a guest for a charge to constitute a resale, but requires the "initial sale" of the room to meet criteria in the second sentence of §144.018.3. Section 144.018.1, .3, RSMo. Section 144.018.3, read in context with the other subsections of Section 144.018, shows that the legislature did not intend the resale exemption in §144.010.1(13) to apply "equally" to the taxable service of furnishing a hotel room for a charge. The final sentence of §144.010.1(13) does not authorize a resale exemption for tangible personal property based on a subsequent furnishing or "sale" of a hotel room to a guest for a charge.

Moreover, §144.010.1(13)(e) cannot be construed to eliminate the requirement that a transfer of tangible personal property be "for resale… as tangible personal property," §144.010.1(13), to qualify for a resale exemption in §144.010.1(13). Such a reading would render the phrase "as tangible personal property" "mere surplusage." *See Farish v. Mo. Dep't of Corrections*,

416 S.W.3d 293, 296 (Mo. banc 2013). DI Supply's sales of tangible personal property do not qualify the resale exemption in §144.010.1(13).

B. The Commission's decision does not defeat the goal of avoiding double taxation of the same property. (Responds to Point I.A)

The goal of avoiding double taxation of the same property is not defeated by the result that DI Supply's sales do not qualify for the resale exemption in §144.010.1(13). A hotel guest is not purchasing "the same property" sold by DI Supply when the guest pays a charge for a Drury hotel room. *Cf. Sipco, Inc. v. Dir. of Revenue*, 875 S.W.2d 539, 541 (Mo. banc 1994). Rather, the hotel guest is purchasing a service that is taxable under §144.020.1(6).

DI Supply references the discussion in *President Casino, Inc. v. Dir. of Revenue*, 219 S.W.3d 235 (Mo. banc 2007), of "situations in which a business provides goods to its customers free of charge and factors the goods into the price of other items subject to sales tax, …" *id.* at 243-44, like the paper grocery bags in *King v. Nat'l Super Markets, Inc.*, 653 S.W.2d 220, 221-22 (Mo. banc 1983). App.'s Br. at 16. In *State ex rel. Denny's Inc. v. Goldberg*, 578 S.W.2d 925 (Mo. banc 1979), this Court declined to decide the question whether free meals provided to employees who worked a certain number of hours per day constituted taxable sales at retail. *Id.* at 927. In *Weather Guard, Inc. v. Dir. of Revenue*, 746 S.W.2d 657 (Mo. App. E.D. 1988), insulation purchasers effectively rented the "free" insulation machines, *id.* at 657-58, by paying a higher cost for the insulation in comparison with customers who either "bought the machines outright[,]" or already owned their own machines and simply bought insulation, *Brinker*, 319 S.W.3d at 440. Each of those cases involved one or more items of tangible personal property factored into the purchase price of other tangible personal property.

In *Ronnoco Coffee Co., Inc. v. Dir. of Revenue*, 185 S.W.3d 676 (Mo. banc 2006), where the taxpayer sought a use tax exemption under §144.615(6), grocery stores could either pay the regular (lower) price for coffee beans, or chose to pay "a $1 loan fee for use" of coffee equipment plus a higher price for coffee beans. *Brinker*, 319 S.W.3d at 440; *Ronnoco* at 677-78. " 'This Court held that Ronnoco's charge of separate consideration for the "loan agreement" of the equipment constituted a transfer for consideration.' " *Brinker* at 440, *citing Ronnoco* at 677-79.

C. The elements of the "resale exemption" in §144.010.1(13), RSMo, should be taken from the Sales Tax Law. (Responds to Point I.B)

DI Supply relies on use tax cases *e.g.*, *Aladdin's Castle, Inc. v. Dir. of Revenue*, 916 S.W.2d 196 (Mo. banc 1996); *Sipco, Inc. v. Dir. of Revenue*, 875 S.W.2d 539 (Mo. banc 1994); and *Kansas City Royals Baseball Corp. v. Dir. of Revenue*, 32 S.W.3d 560 (Mo. banc 2000), for the elements of a "sale," and quotes the use tax definition of sale in §144.605(7). The Director acknowledges that, long ago, this Court extended the analysis in *Sipco*, a use tax case, to sales tax cases. *See Brambles Indus., Inc. v. Dir. of Revenue*, 981 S.W.3d 568, 570 n. 5 (Mo. banc 1998). But there is, and was at the time of the opinions listed in footnote 5 of *Brambles*, a definition of "sale" in the Sales Tax Law. Section 144.010.1(12), RSMo; §144.010.1(7), RSMo (Supp. 1994); *see Dean Mach. Co. v. Dir. of Revenue*, 918 S.W.2d 244, 245 (Mo. banc 1996).

The current sales tax definition of "sale" is virtually identical to the 1989 definition of that term. *Cf.* §144.010.1(12), RSMo; §144.010.1(7), RSMo (1989 Supp). The sales tax and the use tax "definitions of 'sale,' though similar, have different requirements." *Bus. Aviation, LLC*, 579 S.W.3d 212, 217, n. 8 (Mo. banc 2019). The elements of a resale exemption under the Sales Tax Law

should be taken from the exemption in the applicable sales tax statute, not from the use tax definition of "sale."

D. Reusable tangible personal property in hotel rooms was not transferred to the guests to whom Drury furnished hotel rooms for a charge. (Responds to Point I.B.1)

The question is whether DI Supply has met its burden of satisfying the elements of the "resale exemption" in §144.010.1(13), if that exemption is potentially available under the circumstances of this case.

Under the sales tax definition of "sale," "the transfer can be 'in any manner and by any means whatsoever,' " *Bus. Aviation, LLC*, 579 S.W.3d at 217, *quoting* Section 144.010.1(9) RSMo (Supp. 2010); *see* §144.010.1(12), RSMo. "Transfer" means " 'to cause to pass from one person or place to another: transmit.' " *State v. Stallings*, 158 S.W.3d 310, 313-14 (Mo. App. W.D. 2005), *quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY* at 2427 (1993).

The items of reusable tangible personal property that Drury situated in its hotel rooms were not really transferred to the guests to whom Drury furnished those rooms for a charge. See App. A19. Drury hotel rooms are furnished to one guest or party after another. See TR at 134, l. 22 through p. 135, l. 2. Per Drury Hotels' marketing director (TR at 110, l. 6-9), the customer database showed that 244,000 customers had stayed at Missouri Drury hotels since 2012 (TR at 116, l. 1-20; see App.'s Br. at 7). And the sales tax definition of "sale" differentiates between transfers of tangible personal property "and the rendering" of a taxable service such as "furnishing," *see* §144.010.1(12), a room in a hotel for a charge, *see* §144.020.1(6).

In *Brinker*, this Court determined that the *de minimis* control that restaurant customers had while using furniture such as tables, chairs, benches, and high chairs, as well as glassware, dishes, and eating utensils, did

"not rise to the level of an actual transfer of a right to use." 319 S.W.3d at 439. DI Supply notes that hotel guests may use items in their rooms such as towels, a television, and the bed, for their intended purpose. App.'s Br. at 22. That was also true of the reusable items of tangible personal property in *Brinker*.

Because of §144.020.1(8), the rentals in *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 179 S.W.3d 266 (Mo. banc 2005); *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 102 S.W.3d 526 (Mo. banc 2003); *Westwood Country Club v. Dir. of Revenue*, 6 S.W.3d 885 (Mo. banc 1999); and *PF Golf, LLC v. Dir. of Revenue*, 404 S.W.3d 888 (Mo. banc 2013) were not subject to tax. 179 S.W.3d at 268-69; 102 S.W.3d at 529-30; 6 S.W.3d at 888-89; 404 S.W.3d at 890-91. DI Supply acknowledges that in a footnote. See App.'s Br. at 21, n. 6. Contrary to DI Supply's suggestion on page 22 of its brief, in each of these cases, this Court did not decide whether the resale exemption in the definition of "sale at retail" in Section 144.010 applied to the rentals of inner tubes, video game machines, or golf carts. 179 S.W.3d at 268-69; 102 S.W.3d at 529-30; 6 S.W.3d at 888-89; 404 S.W.3d at 890-91. For example, in *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 102 S.W.3d 526 (Mo. banc 2003), the taxpayer had paid sales tax on the video game machines when it purchased them, and merely sought, under §144.020.1(8), to avoid paying sales tax upon its receipts from later rentals of the machines to persons playing them. *Id.* at 529-30.

DI Supply mainly relies on *Kansas City Power & Light Co. v. Dir. of Revenue*, 83 S.W.3d 548 (Mo. banc 2002) to support its claim that the right to consume and use reusable items of tangible personal property in Drury hotel rooms was transferred to the guests who stayed in those rooms. Electricity is not really intangible, *Utilicorp United, Inc. v. Dir. of Revenue*, 75 S.W.3d 725, 728 n. 6 (Mo. banc 2001), and the definition of "tangible personal property" in the Compensating Use Tax Law includes electricity, §144.605(11); *see*

§144.020.1(3) (imposing sales tax upon "all sales of electricity… "). In *Kansas City Power & Light*, no argument was raised about the meaning of the "as tangible personal property" limitation of "the resale exemption, inherent in the definition of 'sale at retail,' " *Music City*, 295 S.W.3d at 468.

Electricity is, by its nature, a non-reusable item of personal property, whether it is considered tangible or intangible. At the time of this Court's decision in *Kansas City Power & Light Co.*, the General Assembly had already exempted from the definition of "sale at retail" hotel operators' purchases "of items of a non-reusable nature which are furnished to the guests in the guests' rooms… [where] such items are included in the charge made for such accommodations." Section 144.011.1(11), RSMo (Supp. 1998). This distinguishes the sales of electricity in *Kansas City Power & Light* from DI Supply's sales of reusable tangible personal property. Moreover, *Kansas City Power & Light* predates Section 144.018, through which the legislature has limited the availability of a resale exemption where the subsequent sale is a sale of a hotel room furnished to a guest for a charge. See supra 18.

E. Items of reusable tangible personal property in Drury hotel rooms were not transferred to guests "as tangible personal property, for a valuable consideration[,]" §144.010.1(13), RSMo. (Responds to Point I.B)

Finally, the items of reusable tangible personal property in the hotel rooms were not transferred to guests "as tangible personal property," §144.010.1(13), "for valuable consideration[,]" §144.010.1(12). Drury Hotels' accounts payable manager (TR at 161, l. 10-15) admitted that Drury Hotels charges sales tax on the rooms that it furnishes to guests (TR at 165, 184, l. 15-22).

Even if a "factored in" analysis were appropriate here, Drury Hotels developed "a pricing strategy" and set its room rates by comparing its "product"

with "other hotels' products." TR at 153, l. 10-19. Drury considers its "product" to be "the guest room, the guest room furnishings, the decor package, and the amenities in the guest room." TR at 153, l. 20-24.

When Drury upgraded to high-definition television sets around 2007 (TR at 128-29), it did so to remain competitive (TR at 129, l. 5-14). "The companies initially hoped to increase room rates as a result of this improvement in the Room Furnishings. However, by the end of the three-year period, they determined that the hotel guests' expectations had changed, and the HDTVs were necessary to preserve the hotel's existing room rates and maintain their competitive position in the market. Tr. 129, 145-146." App.'s Br. at 6.

Drury aims for a certain décor and range of amenities in its hotel rooms to remain competitive in its market. See TR at 129, 145-46, 153. Reusable items of tangible personal property facilitate the hotels' furnishing of the service that they render to guests who stay in those rooms. Like the customers in *Brinker*, Drury does not charge its guests a different or additional amount depending on which or how many items in a hotel room they use or do not use. *Brinker*, 319 S.W.3d at 440. If a customer admits to damaging "a picture, or a television or a chair," in his or her hotel room, however, Drury will charge the customer for the item. TR at 158, l. 4 through l. 8.

People stay the night at a Drury in order to rest, not to pay to use a hair dryer or a microwave. *See id.* The surveys conducted by DI Supply's expert do not establish what a hotel guest who pays a charge for a hotel room is paying for.

In testifying about the survey that she had designed and conducted, DI Supply's expert opined that "it's probably best if we actually take a look at the question, rather than the results." TR at 81. The survey respondents were not asked whether they would choose or be willing to pay more for a hotel room

containing larger or "premium" furnishings (see App.'s Br. at 26). Ex. 6, p. 30. "We're not asking you which room you'd choose, but simply what price you'd expect for Room 2." Ex. 6, p. 30. Respondents were told that two rooms were "identical in every way except" that Room 2 had a king-sized bed and "comfortable couch" rather than a double bed and "comfortable chair," "a larger table" than Room 1, and a 42-inch flat-screen tv versus a 36-inch flat screen tv. *Id.*

The survey that DI Supply references asked the respondents to "[p]lease click on **all** of the following that you expect to find in a standard hotel room and use **at no extra charge**." Ex. 6, p. 27 (emphasis in original). Responses to that question do not establish whether particular items in a hotel room are essential. Nor do they answer the legal question whether items of reusable tangible personal property in the Drury hotel rooms were transferred to guests "as tangible personal property," §144.010.1(13), "for valuable consideration[,]" §144.010.1(12).

F. The availability of the "resale exemption" in §144.010.1(13) does not depend upon the essential or non-essential character of an item. (Responds to Point I.C)

Whether a majority of survey respondents expected not to pay an additional charge for various items in a hotel room does not provide a valid basis for determining whether DI Supply has met its burden of establishing that its sales of reusable tangible personal property qualify for the "resale exemption" in §144.010.1(13). The legislature did not differentiate essential or necessary items of tangible personal property and non-essential items (e.g., pictures hung on a wall). *See* §144.010.1(13).

G. Whether or not a business has the option to "expense" an item for federal tax purposes, rather than depreciate it over a multi-year period, has no bearing on the application of §144.010.1(13). (Responds to Point I.D)

Drury Southwest's "Controller" (TR at 137) testified that "there's always the potential of… some type of linen, a bed sheet or a towel being damaged and" used only once, like soap or shampoo (TR at 147, l. 10-17). There was no evidence that any of Drury's customers had damaged a brand new towel or sheet in a hotel room so that it could not be reused.

The Controller explained that "mostly on the linens" are expensed, while "the rest of the personal property[ ]" is capitalized. TR at 146, l. 18 through p. 147, l. 3. For federal income tax purposes, the option to expense rather than depreciate tangible property over a longer period is codified in 26 U.S.C. §179. Subject to the dollar limitations in 26 U.S.C. §179(b),

> [a] taxpayer may elect to treat the cost of any section 179 property as an expense which is not chargeable to capital account. Any cost so treated shall be allowed as a deduction for the taxable year in which the section 179 property is placed in service.

26 U.S.C. §179(a). "[S]ection 179 property" includes "tangible personal property (to which section 168 applies)… (C) which is acquired by purchase for use in the active conduct of a trade or business." 26 U.S.C. §179(d)(1)(A), (C). As a default, property with a "class life" of four years or less is depreciated over three tax years. 26 U.S.C. §168(c), (e)(1).

Neither the resale exemption in §144.010.1(13) nor the definition of "sale" in §144.010.1(12) reference the concepts of depreciation or expensing property. "This Court will not add words to a statute under the auspice of statutory construction." *Macon County Emergency Servs Bd. v. Macon County Comm'n*, 485 S.W.3d 353, 355 (Mo. banc 2016), *citing Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002). Drury's

option to expense, rather than depreciate, tangible personal property for federal income tax purposes does not satisfy its burden of proof.

H. The Commission's analysis of 12 CSR 10-110.220(G) is not determinative of DI Supply's tax liability. (Responds to Point I.E)

Contrary to DI Supply's assertion, the Commission did not conclude that 12 CSR 10-110.220(G) "is valid" (see App.'s Br. at 29). Rather, the Commission acknowledged that it lacks authority to "rule on the validity of agency regulations." App. A20 (Vol. III LF 142).

Neither taxing statutes, nor statutes creating tax exemptions, may be modified by regulation. *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 124-25 (Mo. banc 2014); *see id.* at 125 n. 6, *quoting Bridge Data Co. v. Dir. of Revenue*, 794 S.W.2d 204, 207 (Mo. banc 1990) ("Taxes may be authorized only by statute, and the director may not add to, subtract from, or modify the revenue statutes by regulation."), *abrogated on other grounds by Int'l Bus. Mach. Corp. v. Dir. of Revenue*, 958 S.W.2d 554, 559 (Mo. banc 1997). Statutes prevail over a regulation, *Union Elec. Co.* at 126, but this Court will interpret the Director's regulation narrowly, to be consistent with the statute under which it is promulgated, *id.* at 125. *Bridge Data* stressed that in reviewing "decisions of the Director of Revenue… the Commission must resort to the statutes… ." *Bridge Data*, 794 S.W.2d at 207.

DI Supply's sales of reusable tangible personal property do not qualify for the exemption in §144.010.1(13), so this Court need not address 12 CSR 10-110.220(G). The Commission examined the sales tax definitions of "sale at retail," §144.010.1(13), and sale, §144.010.1(12), quoted at App. A15 and A16, and pertinent cases. App. A14-A19 (Vol. III LF 136-41). Based on its interpretation of statutory provisions and relevant cases, the Commission concluded that DI Supply had failed to meet its burden of presenting clear and

unequivocal evidence "that would entitle it to a resale exemption." App. A19 (Vol. III LF 141). Nevertheless, the Commission apparently read *Bridge Data* to require it to determine whether 12 CSR 10-110.220(G) conflicted with the resale exemption. See App. A20 (Vol. III LF 142). The Commission's subsequent discussion of 12 CSR 10-110.220(G) (see App. A20-A21 (Vol. III LF 142-43)) was unnecessary dicta.

"Tax exemptions will be strictly construed against the taxpayer, and doubts as to the taxpayer's eligibility will be resolved in favor of taxation." *Union Elec. Co.*, 425 S.W.3d at 125. DI Supply failed to meet its burden of proving by clear and unequivocal proof that it was entitled to the resale exemption in §144.010.1(13) that it claimed. *Bartlett Int'l, Inc.*, 487 S.W.3d at 472; App. A19 (Vol. III LF 141).

CONCLUSION

For the reasons stated above, this Court should affirm the Commission's decision.

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I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b), and contains 7,771 words exclusive of cover, signature block, and certificates.

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