IN THE SUPREME COURT OF MISSOURI

No. SC97932

DI SUPPLY I, LLC, AND ITS INDIVIDUAL MEMBERS, APPELLANTS,

v.

DIRECTOR OF REVENUE, RESPONDENT.

ON PETITION FOR REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE SREENIVASA RAO DANDAMUDI, COMMISSIONER

REPLY BRIEF OF APPELLANT

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Transactions at Issue

As with all resale cases, this case addresses multiple sales transactions, which may have led to confusion. This case deals with four different types of transactions:

(1) Sales by various sellers to DI Supply of tangible personal property ("Room Furnishings");

(2) DI Supply's sales of Room Furnishings to the Missouri Drury Hotels;

(3) The resale of Room Furnishings by the Missouri Drury Hotels as part of the bundled transaction transferring the right to use Room Furnishings and the right to occupy a hotel room by the customers of the Missouri Drury Hotels; and

(4) The resale of Room Furnishings (such as rollaway beds) for consideration separate from the hotel room rate.

The only issue in this case is whether Group (2) sales are excluded from Missouri sales tax as sales for resale. Contrary to the misstatement in the Director's Statement of Facts, the Director did not assess tax on Group (1) sales ***to*** DI Supply. *Cf.* Resp. Br. 7. There is no dispute that both Group (3) and Group (4) sales were sales at retail and subject to tax. In fact, during the three years at issue in this case[1] the Missouri Drury Hotels collected and remitted more than $26 million in sales taxes on the hotels' retail transactions with their customers. Tr. 165-166.

[1] The tax periods at issue in this case are March 2012 through February 2015. Ex. A.

Testimony of Dr. Lisa K. Scheer

Although the Director's Statement of Facts highlights several details of Dr. Lisa K. Scheer's testimony in an apparent attempt to cast doubt on her well-reasoned conclusions, the Director does not dispute the conclusions. Nor does the Director point to any evidence in the record that controverts Dr. Scheer's testimony—since none was offered by the Director at the hearing in this case. Consequently, notwithstanding the Director's insinuations to the contrary, Dr. Scheer's testimony was found to be consistent with the Commission's "common understanding of what a customer would reasonably expect to find in a hotel room" and there is no basis for reversing this finding. L.F. 13.

REPLY TO RESPONDENT'S ARGUMENT

Introduction

As explained in DI Supply's opening brief, the elements of a resale are: "(1) a transfer, barter or exchange; (2) of the title or ownership of tangible personal property or the right to use, store or consume the same; (3) for a consideration paid or to be paid." *See Business Aviation, LLC v. Director of Revenue,* 579 S.W.3d 212, 217 (Mo. banc 2019), *quoting, Brambles Indus., Inc. v. Director of Revenue,* 981 S.W.2d 568, 570 (Mo. banc 1998). The record in this case clearly establishes that DI Supply's sales of Room Furnishings to the Missouri Drury Hotels were for resale, because the hotels transferred the right to use the Room Furnishings for consideration to their customers. The Room Furnishings were an integral part of the sales transactions between the hotels and their customers, who paid for the use of these items. The Commission's ruling to the contrary is not authorized by law. The Director's brief does not refute these key conclusions. Instead, as explained below, the Director's arguments are based on a series of misstatements and misapplications of the law. Specifically, the Director's arguments fail to recognize that: (1) the resale exclusion is not a tax exemption, but is instead an exclusion that is construed narrowly against the Director; (2) section 144.018 is in no way inconsistent with section 144.010.1(13) and is not relevant to the issues in this case; and (3) the long line of cases decided by this Court that have construed and applied the resale exclusion clearly support the conclusion that DI Supply's sales were for resale. In contrast, DI Supply's arguments are not based on a novel interpretation or application of the resale exclusion, but on settled law.

Standard of Review

The Director Misstates the Standard of Review by Confusing the Resale Exclusion with a Tax Exemption

Throughout his brief, the Director asserts that the "resale exemption" should be strictly construed against the taxpayer in this case. *See* Resp. Br. 12, 15, 28. In so doing, the Director ignores the critical distinction between exemptions and exclusions from tax. The practical consequence of the distinction between these two types of provisions was explained by this Court in *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885, 887 (Mo. banc 1999):

> Westwood here claims the benefit of two statutory provisions: (1) that its purchases were for resale, and (2) that its purchases were of materials used in processing goods into new personal property for final use and consumption. ***The first is an exclusion, and . . . the question is whether, by ordinary principles of statutory construction the sales tax law excludes from its definitions the transactions involved here.***[2] The second point claims the benefit of a specific statutory exemption. Exemptions from taxation must be strictly construed, and, as such, it is the burden of the taxpayer claiming the exemption to show that it fits the statutory language exactly (internal citation omitted).

The definition of "sale at retail" in section 144.010.1(13) excludes from its ambit transfers of tangible personal property "for resale." Section 144.020 imposes Missouri sales tax on retail sales of tangible personal property. These statutes ***impose*** the Missouri

[2] Emphasis added here and throughout unless otherwise noted.

sales tax.[3] Foremost among the "ordinary principles of statutory construction" that apply to the resale exclusion is the maxim that taxing statutes are to be strictly construed ***against the Director and in favor of the taxpayer***. *Moore Leasing, Inc. v. Director of Revenue*, 869 S.W.2d 760 (Mo. banc 1994); *see also Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526, 529 (Mo. banc 2003) (Section 144.010.1(8) providing taxpayers the option to claim the resale exclusion on purchases of tangible personal property that will be subsequently rented as a taxable retail sale is a statute that "imposes a tax liability" and must be "strictly construed against the taxing authority and in favor of the taxpayer.").

This misstatement in the Director's brief is particularly surprising in light of the following discussion, which can be found on the Director's website, distinguishing exemptions from exclusions:

> Generally, Missouri taxes all retail sales of tangible personal property and certain taxable services. However, there are a number of exemptions and exclusions from Missouri's sales and use tax laws. Although exemptions and exclusions both result in an item not being taxed, they operate differently.

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[3] Property purchased or held for resale is also ***excluded*** from the Missouri use tax. Section 144.610 imposes the use tax upon the storage, use or consumption of tangible personal property in Missouri. The statutory definitions of "storage" and "use" exclude property held for sale. *See* Sections 144.605(10) and 144.605(13). While there is no statutory definition of "consumption" it is obvious that property sold by a taxpayer may not be consumed by the taxpayer.

> Exemptions: Exemptions are specific provisions of law eliminating the tax due on an item ordinarily subject to tax. Exemptions represent a legislative decision that a taxable item should not be taxed in certain instances.
>
> Exclusions: By contrast, exclusions concern items that are never subject to tax because they are outside the intended scope and authority of Missouri's sales and use tax laws.

https://dor.mo.gov/business/sales/sales-use-exemptions.php. Accordingly, the Director's assertion that the "resale exemption" must be strictly construed against the taxpayer is fundamentally wrong.

I. Section 144.018 Is Not Inconsistent with Section 144.010 and is Not Relevant to the Issues in this Case

The Director asserts in his brief before this Court, for the first time in this case, that section 144.018 "overrides" the definition of a taxable "sale at retail" found in section 144.010.1(13), and that DI Supply has waived any "claim" that its sales were for resale.[4] This argument misstates the meaning and purpose of section 144.018. Moreover, the provisions of section 144.018 are simply not relevant to the issue of whether DI Supply's sales of Room Furnishings to the Missouri Drury Hotels were for resale.

Section 144.018 did not "override" section 144.010.1(13) because the two statutes are not inconsistent, and in fact, the Legislature intended section 144.018 to return the

[4] Petitioner notes without further comment the irony of the Director asserting that the taxpayer has waived an argument after not making this argument at the hearing in this case before the Commission or in any briefs filed therewith.

state of the law to the existing interpretation of the resale exclusion prior to this Court's decisions in *ICC Management, Inc. v. Director of Revenue*, 290 S.W.3d 699 (Mo. banc 2009) and *Music City Centre Management, LLC v. Director of Revenue*, 295 S.W.3d 465 (Mo. banc 2009).

In *ICC*, this Court ruled that a taxpayer could not claim a resale exclusion on purchases of items because the taxpayer's customer was exempt from tax. 290 S.W.3d at 702. In *Music City*, the Court reiterated this conclusion and addressed an issue involving the taxation of tickets sold by a place of amusement.

The holding in *ICC* constituted a significant change in the interpretation of the resale exclusion. While it was not surprising that the taxpayer in *ICC* filed a motion for rehearing, it is notable that the Director took the unusual step of asking that the ruling be modified to state that the resale exclusion did not apply in the case—not because a taxable sale at retail did not occur, but rather because the taxpayer did not sell tangible personal property to the municipalities, but instead consumed it in providing a nontaxable service. *See* Respondent Director of Revenue's Response to Appellant's Motion for Rehearing and Suggestion for Modification, Case No. SC89559 (filed July 10, 2009) (suggesting line by line changes to the *ICC* opinion).

After this Court denied the motion for rehearing and suggestions for modification, the General Assembly enacted section 144.018 in 2010. Section 144.018.1 provides:

> Notwithstanding any other provision of the 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 be either exempt or excluded under this chapter if the subsequent sale is:
>
> (1) Subject to a tax in this or any other state;
>
> (2) For resale;
>
> (3) Excluded from tax under this chapter;
>
> (4) Subject to tax but exempt under this chapter; or
>
> (5) Exempt from the sales tax laws of another state, if the subsequent sale is in such other state.
>
> The purchase of tangible personal property by a taxpayer shall not be deemed to be for resale if such property is used or consumed by the taxpayer in providing a service on which tax is not imposed by subsection 1 of section 144.020….[5]

To the extent that there were any doubt that the Legislature intended to return the law to the way it was before *ICC* and *Music City* (and consistent with the Director's suggestions to modify the *ICC* decision), section 144.018.4 provides:

> The provisions of this section are intended to reject and abrogate earlier case law interpretations of the state's sales and use tax law with regard to sales for resale as extended in *Music City Centre Management, LLC v. Director of Revenue*, 295 S.W.3d 465 (Mo. 2009) and *ICC Management, Inc. v.* ***Director of Revenue,*** 290 S.W.3d 699 (Mo. 2009). The provisions of this section are intended to ***clarify*** the exemption or exclusion of purchases for resale from sales and use taxes ***as originally enacted in this chapter***.

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[5] Unlike the private for-profit jail facility in *ICC*, this provision does not apply to the Missouri Drury Hotels because the hotels' sales are subject to tax under section 144.020.1.

Notwithstanding the clarity of the Legislature that section 144.018.4 was intended to restore the resale exclusion as originally enacted in Chapter 144, the Director asserts that the Legislature actually intended to "override" prior statutes based upon an erroneous interpretation of *Kidde America, Inc. v. Director of Revenue*, 242 S.W.3d 709 (Mo. banc 2008). In that case, this Court held that ***where two statutes conflict***, a statute that provides "notwithstanding any other provision of law to the contrary" eliminates the conflict. However, the *Kidde America* court went on to state there was no conflict at all between the two statutes at issue in the case, and that therefore the "notwithstanding any other provision" statute must be read in *para materia* with the other. *Id.* at 712. Similarly in this case, the Director has failed to identify any provision of law that is inconsistent with section 144.018. *See also Earth Island Institute v. Union Electric Company*, 456 S.W.3d 27, 34 (Mo. banc 2015) (explaining if a "later-adopted statute contains the 'notwithstanding any other provision of law' language, it clearly indicates an intent for that later-adopted statute to prevail ***to the extent that the two statutes are inconsistent***.").

The Director also discusses subsections 2 and 3 of section 144.018, but fails to show how these provisions apply to the issues in this case. *See* Resp. Br. 18. These subsections address the issue decided by this Court in *Music City*. Subsection 3 of section 144.018 provides:

> For purposes of subdivision (6) of subsection 1 of section 144.020, a hotel, . . . restaurant, . . . or other place in which rooms, meals, or drinks are regularly served to the public shall remit tax on the amount of sales or

> charges for all rooms, meals, and drinks furnished at such hotel, . . . restaurant, . . . or other place in which rooms, meals, or drinks are regularly served to the public. Any ***subsequent sale*** of such rooms, meals, or drinks shall not be subject to tax if the initial sale was an arms length transaction for fair market value with an unaffiliated entity. If the sale of such rooms, meals, or drinks is exempt or excluded from payment of sales and use taxes, the provisions of this subsection shall not require the hotel, . . . restaurant, . . . or other place in which rooms, meals, or drinks are regularly served to the public to remit tax on that sale.

By the terms of this subsection, businesses selling taxable meals, drinks, or rooms (such as the Missouri Drury Hotels) "shall remit tax" on the charges they collect—unless the sales are otherwise exempt. The Missouri Drury Hotels remit tax on their charges, and this provision is entirely consistent with sections 144.010 and 144.020. The statute also provides that any "***subsequent sale*** of rooms, meals or drinks shall not be subject to tax if the initial sale" was at arms-length, for fair market value and with an unaffiliated entity. Section 144.018.3. There are no such transactions at issue in this case, so this part of the statute has no application here.[6] The transactions at issue in this case are DI Supply's sale of Room Furnishings to the Missouri Drury Hotels, and the hotels' taxable retail sales of rooms and Room Furnishings to the hotels' customers. There is no *subsequent* sale of "rooms, meals or drinks." For the same reason, section 144.018.2, which applies

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[6] Subsection 3 may apply, for example, if an online travel company pays the Missouri Drury Hotels for hotel accommodations and then resells the accommodations to its customers. In that situation, section 144.018.3 would require the Missouri Drury Hotels to collect tax on their receipts from the online travel company, but the sale by the travel company to its customer would not be subject to tax. But that is clearly not the situation here.

the same rule to admission tickets (the factual situation in *Music City*) likewise is inapplicable in this case.

In sum, the Director fails to identify any provision of section 144.010.1(13) "***to the contrary"*** of any provision of section 144.018. There are no such inconsistencies, nor should there be, given the Legislature's explicit intent that section 144.018 be interpreted to clarify the resale exclusion as originally enacted in Chapter 144, including the definition of sale at retail under section 144.010.1(13). Consequently, the Director's novel argument that section 144.018 "overrides" existing law, including section 144.010.1(13) must be rejected.[7]

II. The Director's Arguments Concerning the Resale Exclusion Misstate and Misapply the Law

A. The Director's Assertion that the Sales and Use Tax Regimes Are Not Complementary is Without Legal or Logical Support

The Director asserts that use tax cases and the definition of "sale" found in section 144.605(7) have no application in this case. Resp. Br. 20-21. However, as this Court

[7] Furthermore, even if section 144.018 were in conflict with section 144.010.1(13), the authorities cited by the Director's brief that DI Supply "waived" any argument do not support the assertion. Resp. Br. 13. In *Berry v. State*, 908 S.W.2d 682, 684 (Mo. banc 1995), this Court held that an argument first raised in a reply brief would not be entertained. In light of the Director's admission that section 144.018 was addressed in DI Supply's brief, this case is inapplicable. In *Bartlett International, Inc. v. Director of Revenue*, 487 S.W.3d 470, 474 (Mo banc 2016), the Court held that the record created by the taxpayer was insufficient to support the elements of the exclusion. There was no discussion of waiver.

explained in *House of Lloyd v. Director of Revenue*, 884 S.W.2d 271, 273 (Mo. banc 1994):

> Missouri has adopted two complementary tax schemes that together are designed to assure that purchases of tangible personal property for valuable consideration by a Missouri purchaser receive identical tax treatment no matter what the geographic location of the seller. The two taxes work together to place both Missouri and out-of-state vendors on equal footing when consumers consider the tax liability that results from a contemplated purchase.
>
> Sales at retail within the State of Missouri are subject to Missouri ***sales*** tax. § 144.020, RSMo 1986. A "sale at retail" is "any transfer by any Person engaged in business ... of the ownership of, or title to, tangible personal property to the purchaser for use or consumption and not for resale in any form ... for valuable consideration." § 144.010.1(8), RSMo 1986. Under Section 144.610.1, RSMo 1986, the "transfer, barter or exchange of the title or ownership of tangible personal property, or the right to use, store or consume the same, for a consideration paid" to Missouri purchasers from out-of-state vendors is subject to the compensating ***use*** tax. § 144.605(6), RSMo 1986.

In response to the Director's argument (as in this case) that there is a distinction between the definitions for sales and use tax, the Court stated that the phrase in the use tax statute "tangible personal property held … solely for resale" must carry an "***identical meaning and application***" to the resale exclusion in the sales tax applying to "tangible personal property … not for resale in any form." *Id.* at 274.

Consistent with this principle, this Court has applied the same analysis, including the same definition of a "sale," in both sales and use tax cases involving sales for resale.

See Brambles Industries v. Director of Revenue, 981 S.W.2d 568, 570, n. 5 (Mo. banc 1998) (explaining that the resale analysis in the use tax case *Sipco, Inc. v. Director of Revenue*, 875 S.W.2d 539 (Mo. banc 1994), applies to sales tax cases).

The Director's brief does not dispute the holding of *House of Lloyd* or *Brambles*, but rather dismisses them as having been decided "long ago." Resp. Br. 20. But no case has overruled or even called into question the reasoning of *Brambles* or *House of Lloyd* in the years since they were decided.[8] This is unsurprising because the sales and use taxes remain complementary taxes, and there would be no logical reason to give different meanings and applications to different taxes. Tellingly, the Director does not suggest one in his brief. Consequently, the Director's suggestion that this Court ignore its precedents and apply disparate interpretations of the sales and use tax statutes is inappropriate.

B. The Missouri Drury Hotels Transferred the Right to Use the Room Furnishings in a Bundled Transaction with the Hotel Rooms

The Director apparently argues that Missouri sales and use tax interpretations are different to avoid the application of cases which recognize that tangible personal property may be resold in a bundled transaction with taxable services. *See, e.g., Kansas City Royals Baseball Corporation v. Director of Revenue*, 32 S.W.3d 560 (Mo. banc 2000)

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[8] The Director's citation of *Business Aviation, LLC*, 579 S.W.3d 212 (Mo. banc 2019) does not change this result. While the Court acknowledged that the language defining "sale" was different in 144.010.1(9) and 144.605(7), it importantly held that there was no difference in the interpretation of the term. To the extent there were any doubt, the Court's statement that the applicable standard for exemption was determined "[w]hen the definitions of 'sale' for both use tax (section 144.605(7)) and sales tax (section 144.010.1(9)) are read together." *Id.* at 217.

(admission ticket was bundled transaction including ticket to baseball game and tangible promotional item); *Aladdin's Castle, Inc. v. Director of Revenue*, 916 S.W.2d 196 (Mo. 1996) (arcade game fee transaction included right to play the game and tangible personal property prizes). Even if the Director could avoid this conclusion under his mistaken argument that sales and use tax interpretations are different, he cannot refute his own statements and this Court's decision in *Kansas City Power & Light Company v. Director of Revenue*, 83 S.W.3d 548 (Mo. banc 2002) ("*KCP&L*").

The Director's brief notes that the furnishing of a hotel room is not the transfer of tangible personal property but rather merely the permission to access a place of safe shelter for a period of time. Resp. Br. 17. The Director's statement merely bolsters the clear conclusion that the Missouri Drury Hotels were therefore reselling the Room Furnishings as part of a bundled transaction including the right to access a place of safe shelter.

The undisputed evidence in the record demonstrates that hotel customers do not simply seek "a place of safe shelter" when they rent a hotel room, but rather expect to have, among other things, a bed, a television, towels, bedding, and furniture in their hotel room, and understand they are paying for the right to possess and use of these items as part of the consideration charged by the Missouri Drury Hotels.[9] Ex. 6, p. 1. The Director's unsupported assertion that customers do not "pay to use a hair dryer or a

[9] Because a portion of the consideration paid for the hotel room constitutes consideration for the right to use the Room Furnishings, subjecting the sale of the Room Furnishings by DI Supply to the Missouri Drury Hotels would constitute double taxation of the same property, notwithstanding the Director's protestations to the contrary. Resp. Br. 19.

microwave" when they rent a hotel room is simply untrue and contrary to common sense, as acknowledged by the Commission. Resp. Br. 24; L.F. 13 To the extent the Director wanted to contradict this clear fact, he should have presented contrary evidence and/or refuted the evidence produced by DI Supply. The Director's assertions to the contrary are improper and must be rejected by this Court.

This conclusion is supported by this Court's decision in *KCP&L*. The Director concedes that electricity is tangible, and in that case, the hotel customers were purchasing a hotel room as well as the electricity in a bundled transaction. As in this case, the customers were not seeking merely a place of safe shelter, but additional amenities. The fact that this Court held that the electricity was resold as part of a bundled transaction demonstrates the error in the Director's argument. In short, the price charged to Missouri Drury Hotel customers included both the right to a place of safe shelter and the use of the Room Furnishings. Consequently, the Room Furnishings were resold to the customers, notwithstanding the Director's assertions to the contrary of the record. *See* Resp. Br. 22-24.

C. A Temporary Transfer of the Right to Use Tangible Personal Property is a Sale, Regardless of the Label Attributed to the Transfer

Another reason the Director attempts to decouple the interpretation of the sales tax and use tax is to avoid the clear import of the definition of "sale" in section 144.605(7) as encompassing any transfer of the right to use tangible personal property, including rentals, leases, bailments or loans. Contrary to the Director's arguments, section 144.020.1(8) permits taxpayers to apply the resale exclusion when purchasing property

for subsequent rental, and collect tax on the rental receipts, as the Director's regulation expressly provides. *See* 12 CSR 10-108.600(3)(A) ("When a lessor purchases tangible personal property for the purpose of leasing, the lessor may pay tax on the purchase price or claim a resale exemption based on the intended lease of the tangible personal property."). Indeed, the Director's arguments on this point ignore the import of *Business Aviation, LLC*, 579 S.W.3d 212, 217 (Mo. banc 2019) (cited by the Director for other reasons at Resp. Br. 20), in which this Court stated unequivocally that a transfer of tangible personal property "in any manner or by any means whatsoever" including a lease transaction, constitutes a "sale" for the purpose of the resale exclusion.

The Director does not seriously dispute that this is the proper application of Missouri tax law. DI Supply's opening brief noted that the Missouri Drury Hotels charge a fee for the rental of rollaway beds separate from the general room rate, and tax is collected on this separate rental charge. Tr. 183. The silence from the Director's brief addressing this example or offering any rationale for treating the rental of rollaway beds differently from the rental of Room Furnishings is telling.

D. Neither of the Director's Attempts to Distinguish *KCP&L* Are Availing

The Director makes two additional arguments to avoid the clear import of *KCP&L*. Resp. Br. 23. The first is a repetition of his argument that the decision predates section 144.018 which "overrode" prior law. As noted above, this is not accurate.

Second, the Director attempts to distinguish the sale of electricity in *KCP&L* from the sale of non-reusable tangible personal property as described by section 144.011.1(11). The Director's argument in this regard makes an unstated assumption that the express

exclusion of non-reusable items furnished by hotel operators from the definition of sale at retail in section 144.011.1(11) constitutes an implicit narrowing of the resale exclusion in section 144.010.1(13). This assumption is simply not accurate. As noted in the Director's brief, section 144.011.1(11) was enacted prior to this Court's decision in *KCP&L*. If the Director's assumption were correct, this Court would not have analyzed the resale exclusion in the case. Consequently, this basis for distinguishing *KCP&L* is erroneous.

E. The Director's Reliance on *Brinker* Is Misplaced Because the Missouri Drury Hotels Charge Different Consideration Based upon the Value of the Room Furnishings

The Director argues that in *Brinker Missouri, Inc. v. Director of Revenue*, 319 S.W.3d 433 (Mo. banc 2010), this Court denied the taxpayer the resale exclusion on the basis that the customers did not have the right to use or control the property. Resp. Br. 21. In so doing, the Director ignored the point made in DI Supply's opening brief that this Court's determination in *Brinker* was based on the ***consideration*** element of the resale exclusion rather than the ***right to use or consume*** element. As noted in DI Supply's opening brief, this Court stated:

> Here, the chairs, tables, dishes, tableware and similar items are used to serve or supply the food conveniently to Brinker's customers and allow them to have a place at which to sit to eat it. ***No additional charge is made to customers for the privilege of sitting in a chair, eating at a table, or using glasses or silverware.*** Customers are not charged different sums depending on how many of these serving items they use or at what kind of

> chair or table they sit, and 'to go' customers are charged the same price for food as are eat-in customers. ***To charge a separate fee certainly would be detrimental to Brinker's business because customers come to Brinker's restaurants to eat the food, not to rent use of bowls, cups, and tables***; the items as to which a use tax exclusion or exemption is sought are used simply as a delivery mechanism for what customers are buying—the food and beverages.

Brinker, 319 S.W.3d at 440.

The Director indirectly addresses the actual holding in *Brinker* by asserting that the Missouri Drury Hotels charge the same amount regardless of the type of Room Furnishings to which the customer has access. Resp. Br. 24-25. Once again, the Director makes an argument contrary to the record. In fact, as noted in the record, hotel customers expected to pay more for the right to use or consume premium furnishings including larger beds, televisions, tables and couches.[10] Ex. 6; App. A38. The facts demonstrate that, unlike the taxpayer in *Brinker*, the Missouri Drury Hotels charge additional consideration based upon the value of the Room Furnishings. In some instances, such as when the Missouri Drury Hotels upgraded guest room televisions, the hotels are not able to charge as much as they expect as a result of upgrading Room Furnishings. Tr. 129. But even when an upgrade is required to maintain the hotels' existing room rates, any increased costs attributable to the Room Furnishings are taken into account in

[10] The fact that the Missouri Drury Hotels charges a customer that damages property that it has rented does not alter the rental relationship any more than the fact that a tenant in an apartment building is liable for damages made to the walls as apparently implied by the Director. Resp. Br. 24.

establishing the hotels' room rates. Tr. 127-129, 144-145. Consequently, the Director's reliance on *Brinker* does not alter the conclusion that DI Supply's sales to the Missouri Drury Hotels qualify for the resale exclusion.

CONCLUSION

The Director's brief presents a series of unfounded arguments that are inconsistent with well-settled law. The "long line of cases" interpreting and applying the resale exclusion cited in DI Supply's opening brief demonstrate that the Commission's decision should be reversed. *See President Casino v. Director of Revenue*, 219 S.W.3d 235, 243-244 (Mo. banc 2007). Under Missouri law, DI Supply's sales of Room Furnishings are sales for resale and excluded from tax. To impose tax on DI Supply's sales would subject the Room Furnishings to the double taxation the General Assembly intended to avoid, since the Missouri Drury Hotels collected tax on the transfer of the right to use the Room Furnishings to the hotels' customers as a part of the rental of furnished hotel rooms. Tr. 165-166. Regardless of whether these transactions are called rentals, leases, or transfers of the right to use the Room Furnishings, they qualify as "sales" for the purpose of the resale exclusion. The Director has not shown otherwise.

For all of the foregoing reasons, this Court should reverse the decision of the Commission and remand with instructions to allow the resale exclusion for all of DI Supply's sales of Room Furnishings to the Missouri Drury Hotels included in the assessments issued by the Director, except as conceded by DI Supply at trial.

In the alternative, as explained in DI Supply's opening brief, this Court should reverse the decision of the Commission and remand with instructions to abate the

assessments on DI Supply's sales of: 1) the Missouri Drury Hotels' essential furnishings, including beds, televisions, chairs, clocks, desks, lamps, microwaves, pictures, refrigerators, tables, towels, and wall mirrors; and 2) all nondurable items that are expensed by the Missouri Drury Hotels for accounting purposes and replaced frequently including towels, bed linens, washcloths, pillows, shower curtains, bath mats, and pens.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that the foregoing was electronically mailed to Emily A. Dodge, Assistant Attorney General, Missouri Attorney General's Office, Supreme Court Building at emily.dodge@ago.mo.gov on October 18, 2019.

I also hereby certify that the foregoing brief complies with Rule 55.03 and with the limitations in Rule 84.06(b) in that it contains 5902 words.

/s/ Carole L. Iles