BEFORE THE
SUPREME COURT OF MISSOURI

JOHN CHARLES GOTT, D/B/A GOTT'S TO GO,	)	
Appellant,	)	
v.	)	Case No. SC98444
DIRECTOR OF REVENUE,	)	
Respondent.	)	

APPELLANT'S BRIEF

Law Office of B. Edwin Bloomfield, LC

B. Edwin Bloomfield
Missouri Bar No. 36528
300 S. John Q. Hammons Parkway
Suite 103
Springfield, MO 65806-2521
Phone: 417-886-3100
Fax: 417-319-3045
E-Mail: ed@trust-law.us

Attorney for Petitioner, John Charles Gott, dba Gott's to Go

TABLE OF CONTENTS

TABLE OF CITATIONS TO CASES

TABLE OF CITATIONS TO STATUTES

TABLE OF CITATIONS TO OTHER AUTHORITY

[1] Statutory references are to RSMo 2016, unless otherwise noted.

JURISDICTION

This cause involves the construction of the Missouri Sales Tax Law as it applies to the provision of portable toilet services in the State of Missouri. In addition, if reached, this case involves the interpretation of the recently adopted provision of the Missouri Constitution at Article X, Section 26. App at 44. The Missouri Constitution provides this Court "exclusive appellate jurisdiction in all cases involving … a statute or provision of the constitution of this state, the construction of the revenue laws of this state … ." Mo. Const. Art. V, §3. App at 43-44.

STATEMENT OF FACTS

Appellant resides in Springfield, Missouri, where, since 1984 he has operated a business known as Gotts-to-Go serving customers in the Missouri counties of Greene, Christian, Taney and Stone. Appellant relies on professionals to prepare his income tax returns and sales and use tax returns to report and tax his business operations. Tr. at 89.

During the audit period, Appellant derived his revenue from two lines of business. Most of his revenue is from the provision of portable toilet services, and to a lesser extent, the rental of mobile office trailers. Ex. I, at 1, Ex. J, at 1, Ex. K at 1.

Appellant has grown his business since 1984 to accommodate 200 of portable toilets in service to 200 by beginning of the sales tax audit period. Tr. at 99.

Appellant has purchased the portable toilet devices, supplies and chemicals used in its business from out-of-state vendors. Appellant has paid neither sales nor use tax on device and chemical purchases. Tr. at 70.

The last purchase of multiple devices before the audit period was made in 2000. The most recent purchases in 2017 and 2018 show the devices cost $500 to $550. Appellant has used the same devices for over 20 years and only purchased one portable toilet device between 2000 and 2017. Tr. at 69-70.

In providing portable toilet services, it is essential to use a portable toilet device to collect human waste product in a manner that affords the user privacy, to capture the odors, and to store the effluent. Tr. at 89.

Appellant advertises his portable toilet service in the yellow pages, on its website, and on Facebook. Ex. 8. Signage on the portable toilet devices, and on the trucks used to transport the devices and the effluent removed from the devices, advertise the services as "porta potty rental." Ex. 15.

Appellant's invoices for portable toilet services contain the phrase "chemical toilet" pre-printed on them as the first item; however, the word "rent", or "rental" does not appear on the invoice. Ex. 6.

Customers generally contact Appellant by phone to obtain portable toilet service and ask to "rent a portable toilet." Tr. at 88. When prospective customers ask if he has portable toilets for rent, Appellant responds "Yes, we have [portable toilets.]" Tr. at 106.

Appellant uses no written contract for the provision of portable toilet services. Tr. at 66-67. Appellant charges no sales tax on the receipts derived from providing those services. Tr. at 68.

Appellant bears the risk of physical loss to the portable toilets, whether the damage to the unit is caused by vandalism or a weather event, and replaces the damaged device at the customer's location at no additional charge. Tr. at 67.

If a customer intentionally damages a portable toilet device, Appellant testified he thinks the customer should pay for that damage and he probably would ask them to do so but would not push the subject. Tr. at 108.

Appellant transports the portable toilet device to the customer's chosen location and sets it up to perform its function. Tr. at 66.

To set up the device, Appellant locates the device in a level, safe place, adds non-potable water and odor-controlling chemicals to the collection tank, and stocks the toilet paper dispenser. Tr. at 66.

Appellant also services customer-owned devices for approximately the same price as he charges to service his own devices. Tr. at 68.

The device is used to collect, and store human waste deposited there by customer and others (known or unknown to the customer) at the location who require the immediate relief the device affords. Storage of the material requires the use of odor-controlling chemicals to make it tolerable for users to enter the device and obtain relief.

Tr. at 82-83. The chemicals abate the noxious odor emanating from the stored materials. Tr. at 78.

Appellant has modified three trucks not previously used for hauling wastewater to repurpose them for his needs by adding a tank and hoses. Each truck has a large tank with a section for fresh non-potable water and a section for the effluent removed from the device. Each truck also has pumps and hoses for removing effluent and restocking the device with water. Tr. at 72.

On a weekly-, or as-needed, basis Appellant uses his truck to visit the device at the customer's location to clean the device, remove the accumulated waste, and restock the device with water, chemicals and toilet paper. Tr. at 67.

Appellant relies on his customer to request more frequent service if weekly service is not often enough. At the end of the engagement, the customer advises Appellant to pick up the device that is no longer needed and at that time a final cleanout is made to the device. Tr. at 72.

The chemicals used in providing the service are specifically designed to contain the odor emanating from the material collected in the devices. The chemicals are mixed with the water added to the device and eventually are mixed with the waste to control the odor. Tr. at 81.

Chemicals are also used to clean up the device and remove graffiti from the device as it is being serviced. Tr. at 73-81; Ex. A, B and C.

All chemicals used have Safety Data Sheets instructing the user how to use them and avoid injury from using them. Ex. D, E and F.

The material removed from several devices is accumulated in the truck's effluent tank and eventually hauled to the Springfield Municipal Water Treatment Plant to deposit it for further processing. Tr. 83.

Appellant has City of Springfield Hauled Wastewater Permit, No. 011 which was in effect during the period of the audit. That permit requires Appellant to comply with environmental regulations governing the deposit of wastewater. City environmental workers occasionally check the safety of the wastewater being deposited. Ex. G, Tr. at 83-86.

The Safety Data Sheets are required by the City of Springfield to comply with its Hauled Wastewater Permit. Tr. at 86.

The mobile office is an 8 x 20 or 8 x 25-foot trailer manufactured such that a construction site office could be housed within it. Appellant uses a written contract for renting mobile offices, pays no sales tax on the purchase of mobile offices, but charges sales tax on the rental of the mobile offices. When Appellant purchases a mobile office, the manufacturer's certificate of origin is held until it is delivered to a buyer when the mobile office is sold. The buyer then pays sales tax on its purchase of the mobile office. Tr. at 64-65.

Appellant does not maintain a General Ledger but records its daily receipts in spreadsheets, and records disbursements by sorting the paid vendor receipts in a file.

Appellant's income tax preparation process requires the summing of the paid vendor receipts annually. Appellant accumulates sales receipts daily and ties them to the deposit slip, while accumulating disbursements annually for the year-end process. Tr. at 125-128.

On audit, the Director determined Sales Tax was due in the amount of $56,905.27 and Use Tax was due from Appellant in the amount of $201.23. The Director also included interest and additions to tax in his sales and use tax assessments. Ex. 3.

The audit was supervised by the Director's area manager offices in Springfield, Joplin and Cape Girardeau, Missouri, Mrs. Nancy McKay. She also reviewed the audit on request by Appellant's representative at the time and determined that the audit should stand as performed. When asked at the hearing whether any other portable toilet businesses were being audited, she stated she did not have other such cases pending. Tr. at 51-52.

The Director of Revenue determined that the provision of portable toilet services and accompanying devices is subject to Sales Tax under §144.020.1(8) RSMo (App at 29) and assessed tax, penalty, and interest based upon that determination. Ex. 3. Appellant was adversely affected by that determination and duly filed his appeal therefrom to the Administrative Hearing Commission pursuant to §621.050 RSMo. App at 40-42, LF at 1-128.

Appellant filed his appeal before The Administrative Hearing Commission and therein raised first the construction of the Missouri Sales Tax Law, a revenue law of this state, as it applies to the provision of portable toilet services in Missouri, and second, the

applicability of Mo. Const. Art. X, §26 (App at 44) as it applies to limit the expansion of the Sales Tax law to include taxation of portable toilet services in Missouri. LF at 1-4

The Administrative Hearing Commission heard Appellant's case in due course, determined the Director of Revenue was correct, and sustained the tax, penalties and interest assessed by the Director. Appellant was adversely affected by that determination and filed this appeal pursuant to §621.189 RSMo. App at 43, LF at 131-144.

POINTS RELIED ON

I

The Commission erred in failing to find the provision of portable toilet services is exempt from tax under the Missouri Sales Tax Law. The nature of the services provided by Appellant in servicing portable toilet devices according to their natural and intended purposes is the true object of the transaction between Appellant and his customer. The Commission held that the true object was to rent the device utilized as a portable toilet, whereas Appellant provides the device as a medium to conduct the true object of the transaction and that is to remove human waste from the premises of the customer. This service should have been held a non-taxable service. This Court has authority to review the Commission's determination as the case presents an issue as to how this State's revenue laws are construed and applied, pursuant to Article V, Section 3 of the Missouri Constitution (App at 43-44) and this matter is properly before the court pursuant to the process required by §621.189 RSMo. App at 43. This Court is called upon to determine the gross receipts derived from providing the exempt service are not subject to Missouri

Sales Tax and the decision of the Commission should be reversed and remanded for further proceedings consistent with this Court's determination.

Appellant relies on §136.300 RSMo (App at 17) and the logic expressed in *Western Blue Print Co. v. Dir. of Revenue*, 311 S.W.3d 789 (Mo. banc 2010); *James v. TRES Computer Sys., Inc.*, 642 S.W.2d 347 (Mo. banc 1982); *K & A Litho Process, Inc. v. Director of Revenue*, 653 S.W.2d 195 (Mo. banc 1983); and *Sneary v. Director of Revenue*, 865 S.W.2d 342 (Mo. banc 1993), as applied to §144.020 RSMo, App at 26, 12 CSR 10-108.700 (2) (A), App at 48, and §144.018.1 RSMo, App at 24.

II

The Commission erred by failing to consider the Director's attempt to expand the reach of the Missouri Sales Tax Law to cover exempt services prohibited by the Missouri Constitution. Article X, §26 of the Missouri Constitution (App at 44) prohibits the expansion of revenue laws to cover that which was not taxable as of January 1, 2015. This presents a novel point of law to be decided by the Court should it decide to reach this question. The Director of Revenue, by holding the provision of portable toilet services taxable for purposes of the Missouri Sales Tax Law, has expanded the definition of taxable receipts. The Commission erred by including the receipts derived from providing a non-taxable service in the receipts subject to taxation under §144.020.1(8) RSMo. App at 29. This Court is called upon to review this matter in that the Commission failed to consider the expansion so prohibited and this case involves the construction and application of a revenue law of this State. Mo. Const. Art. V, §3, App at 43-44, §621.189

RSMo, App at 43. In that this expansion is generally prohibited by the Mo. Const. Art. X, §26 (App at 44), the decision of the Commission should be reversed and remanded for further proceedings consistent with this Court's determination.

Appellant relies on the plain meaning of Mo. Const. Art. X, §26. App at 44.

ARGUMENT

Appellant relies on two principal arguments that Commissioner erred below to permit the Director of Revenue to improperly expand the reach of the sales tax law to include the services Appellant provides. First, Appellant argues that the entire portable toilet business is a service and any revenue attributable to the provision of the portable toilet device as part of the service should be excluded from the definition of taxable receipts. Second, Appellant urges this Court to hold the Missouri Constitution does not allow the Director of Revenue to expand the law to include a service not previously taxable under the law as it existed on January 1, 2015.

I

The entire portable toilet business is the provision of a service and any receipts attributable to the provision of the portable toilet device are excluded from the definition of taxable receipts.

The purpose and intent of §§144.010 to 144.510 RSMo is to impose a tax upon the privilege of engaging in the business, in this state, of selling tangible personal property and those services listed in §144.020, App at 26. §144.021.1 RSMo, App at 31.

The sales tax is intended to reach certain defined transactions and impose a tax on the transfer of tangible personal property for valuable consideration in cash or having a value measurable in cash. §144.010.1 (12) RSMo, App at 20-21.

The transfer of tangible personal property may occur as a sale and purchase of tangible personal property, or in certain cases, lease or rental of tangible personal property where "continuous possession or use of the tangible personal property is transferred under lease or contract and such transfer of possession would be taxable if outright sale were made and, in such cases, the same shall be taxable as if outright sale were made and considered as a sale of such article and the tax shall be computed and paid by the lessee upon the rentals paid." §144.010.1 (4) RSMo, App at 18-19.

The foregoing sections of the Revised Missouri Statutes establish the foregoing principles:

A. If a service is listed as taxable in §144.020 RSMo (App at 26), then it is taxable.

B. The corollary of A is that if a service is not listed in §144.020 RSMo (App at 26), then it is excluded as the legislature does not intend such receipts to be subject to taxation.

C. If the transfer of continuous possession or use, under lease or contract, would have been taxable had there been a sale of the same item, then such transfer is subject to tax; and,

D. The corollary of C is that if no transfer of continuous possession or use, under lease or contract occurs, then the lack of a transfer renders the receipts derived from the transaction excludable from receipts subject to tax.

Providing portable toilet services is not listed as a taxable service in §144.020 RSMo, App at 26. By implication, the omission of such services among those that are taxable should mean the legislature did not intend to impose the sales tax on such receipts.

The device remains the property of Appellant and Appellant retains risk of loss should the device be damaged by negligence, an intentional act of vandalism or by a natural event such as the wind blowing the device over. While Appellant may hope his customer reimburses him for the device if the customer intentionally damages the device, and he may even ask to be reimbursed, he does not push the subject. In a rental arrangement, the party possessing and using an item is usually burdened by the risk of loss to the rented item. Here, all the risk is absorbed by Appellant. Tr. at 90.

The customer does not have continuous possession and use of the portable toilet device as the customer does not control who is able to use it and does not attend to the services Appellant renders to the device. In fact, no one can use it when Appellant is on site cleaning the device. The truck, cleaning supplies and labor necessary to service the device all remain in Appellant's possession and control. The device itself is only temporarily in the customer's possession, subject to Appellant's possession when it is

being serviced and subject to Appellant's obligation to service it any time the customer requests service.

Additionally, Appellant does not use a written agreement to define the rights of the parties. It is understood that the customer and others will use the device and consume the consumables in using the device. Appellant will clean out the device weekly or more often if the customer requests. The ongoing needs of the engagement will determine how often those services are provided.

Appellant computes the fee based on his sense of fairness and how competitors are charging. He considers the distance to deliver the portable toilet and to travel for the cleaning services on a once-per-week or twice-per-week basis and whether he can economize on any of the aspects of the service because perhaps another customer is in the vicinity and Appellant may service two or more portable toilets in the same trip. He also considers the normal use of materials and supplies. The average monthly service fee ranges from $83 to $90. He then quotes the fee and does not deviate from it.

All these features are included in the price charged for the service, which Appellant establishes at the beginning of the relationship with the customer. Appellant collects its service fees after the services are provided. Tr. at 65.

Most rental or lease agreements provide rents or lease payments are due in advance and not in arrears, even with respect to the rental of tangible personal property. A security deposit is often required to reimburse the lessor for damage to the item rented or leased while using the item. Also, there are provisions for penalties on default, late

payment, and damages in a lease or rental agreement. All these terms usually appear in a writing signed by both parties. This is not the case with respect to Appellant's provision of the portable toilet device. Instead, the price is set for the service and the service is rendered using the device and related supplies of chemicals, water, and toilet paper as essential parts of providing the service. Tr. at 65. Payment is collected after the service is rendered.

The Director and the Commission have placed considerable weight on the use of the terms "rent" and "rental" in describing the service provided by Appellant. The reliance placed on the form of the transaction over the function of what happens throughout the transaction is misplaced. The Director, under his own rulemaking authority under §144.270 RSMo (App at 32-33), has answered the question whether the designation of a service as "rent", or "rental" controls the outcome at 12 CSR 10-108.700 (2) (A) (App at 48) which defines a Lease as follows:

> Lease—any transfer of the right to possess or use tangible personal property for a term in exchange for consideration. This includes a rental. However, if tangible personal property is used to provide a service to a customer and the use of the property is a necessary or mandatory part of the service transaction, then any temporary transfer of the property to the customer as part of the service transaction is not a lease or rental of the property.

Appellant's rationale for exclusion of any receipts for the provision of the device in taxable receipts is supported by 12 CSR 10-108.700 (2) (A) (App at 48), as the provision of portable toilet service necessarily includes the provision of a portable toilet device (unless the customer supplies his or her own portable toilet device). Even when

the customer supplies an owned device, Appellant does not significantly modify his pricing for his services. Tr. at 68.

The legislature is clear in its intent to make the provision of a service exempt unless otherwise clearly identified as taxable in §144.020 RSMo, App at 26. The legislature has recently made clear at §136.300 RSMo (App at 17) that it intends

> With respect to any issue relevant to ascertaining the tax liability of a taxpayer all laws of the state imposing a tax shall be strictly construed against the taxing authority in favor of the taxpayer.

The issue whether to classify the service provided by Appellant in providing portable toilet services as a taxable service is one for which narrow construction of the tax law against the taxing authority should result in excluding all receipts from the provision of such service from receipts subject to tax through outright exclusion.

In addition, this Court established the "true object" test which was later codified after a fashion in 12 CSR 10–103.600. App at 45-47. The Court has recognized that the "true object" or "essence of the transaction" determines whether to treat a transaction as a taxable transfer of tangible personal property or the nontaxable performance of a service. The test focuses on the essentials of the transaction to determine the real object the buyer seeks. *James v. TRES Computer Sys., Inc.*, 642 S.W.2d 347 (Mo. banc 1982); *K & A Litho Process, Inc. v. Director of Revenue*, 653 S.W.2d 195 (Mo. banc 1983).

Under the true object test, this Court has recognized a class of transactions in which tangible personal property serves exclusively as the medium of transmission for an intangible product or service. The intangible component is the true object of the sale; the

tangible component is of little utility and may even be discarded after the buyer has used it to obtain access to the intangible component. In such transactions, the intangible object of the sale does not assume the taxable character of the tangible medium, *TRES Computer*, at 349, or the tangible medium is inconsequential and nontaxable, *K & A Litho*, at 197; *Sneary v. Director of Revenue*, 865 S.W.2d 342 (Mo. banc 1993).

The "true object" test determines "whether to treat a transaction as a taxable transfer of tangible personal property or the nontaxable performance of a service." *Sneary,* at 345. The Court has applied this test only in cases in which the intangible element of the transaction is accompanied by or transferred through an item of tangible personal property that has relatively little value on its own. See, e.g., *id.*; see also, *Western Blue Print Co. v. Dir. of Revenue*, 311 S.W.3d 789 (Mo. banc 2010); *James v. TRES Computer Serv., Inc.*, 642 S.W.2d 347 (Mo. banc 1982); and *Bartlett Int'l, Inc. v. Dir. of Revenue*, 487 S.W.3d 470 (Mo. banc 2016).

The Commissioner in the case below follows the Director's position by placing great reliance on the Court's interpretation of whether services accompanying tangible personal property are taxable as set out in *Bartlett*, but such reliance is in error. In *Bartlett*, the tangible personal property was materials necessary to construct a grain bin that accompanied the service of building and installing a grain elevator. *Bartlett* at 471. While the *Bartlett* Court held that both the tangible personal property and the services were subject to use tax because §144.610.1 RSMo (App 38-39) imposes that tax on tangible personal property stored, used or consumed in this state based on its sales price,

and §144.605(8) RSMo (App at 36) defines "sales price" as "the consideration including the charges for services … paid or given or contracted to be paid or given by the purchaser to the vendor for the tangible personal property, including any services that are a part of the sale…." *Id.* at 472, the case at bar does not involve a "sale" within the definition of §144.010.1 (4) RSMo (App at 18-19), which provides in pertinent part in defining "gross receipts" subject to tax:

> It shall also include the lease or rental consideration where the right to continuous possession or use of any article of tangible personal property is granted under a lease or contract and such transfer of possession would be taxable if outright sale were made and, in such cases, the same shall be taxable as if outright sale were made and considered as a sale of such article, and the tax shall be computed and paid by the lessee upon the rentals paid.

The Commissioner below reasoned that since the Court in *Brinson Appliance, Inc. v. Director of Revenue*, 843 S.W.2d 350, 352 (Mo. banc 1992), applied the definition of gross receipts found in §144.010.1 (4) RSMo (App at 18-19) to §144.021 RSMo (App at 31), thereby taxing the separately contracted delivery charges as part of the sale of appliances, the services associated with the provision of the portable toilet device should likewise be included in a transfer of the device to the customer.

Here, there is no sale involved as the tangible personal property, the portable toilet device, supplies and materials consumed in using the device, are not transferred to, nor do they become the property of the customer, but remain the property of Appellant, who remains subject to all the risks inherent in property ownership. Tr. 90-91. Unlike the transfer of nuts and bolts and construction services for a grain elevator as in *Bartlett*, or delivery charges for a refrigerator as in *Brinson*, the charges for services by Appellant are

for setting up, stocking, cleaning, restocking, taking down and removing the device, but they necessarily include disposition of the effluent, the very object the customer wants to be rid of in the overall transaction. Tr. at 66. The customer in this case does not want a yard ornament, the customer wants the noxious substances deposited and collected in the portable toilet device removed from the premises with as little involvement of the customer as possible. The portable toilet device cannot be used for anything else. Tr. at 68. The customer's involvement here is to tell Appellant where to locate the portable toilet device and advise when it needs service if service is needed more frequently than weekly. Tr. at 66-67.

The portable toilet device serves as a target to receive the effluent which is later removed from the premises and the customer retains nothing tangible. While the container is re-used by Appellant in a subsequent transaction, the customer never acquired an interest in or to the container other than the right to deposit materials there along with others over whom the customer may or may not have any control. Tr. 87-89.

The Commissioner has overlooked the motivator for the customer to contact Appellant for his service. A close review of the invoices submitted as Ex. 6 reveals there is no mention of the word "rent" in the description of charges, but there is mention of the Chemical Toilet. The chemical toilet or portable toilet device is listed as the unit for determining the price of the service to be provided rather than the unit for rent or sale.

The Commissioner also mentions that Appellant admits he may not service a unit after picking it up from a customer. That would likely be the case of a unit that was not

used by the customer at all. The charge is for setting the unit up, stocking it with supplies and materials, cleaning and disposal of the effluent as needed, and taking the unit down. Except for the supplies and materials, all these elements represent services. Tr. at 72. The chemicals used, except the urinal block, are all pumped out with the effluent, so they are consumed in the provision of the service. Tr. at 81. The urinal block is good for two weeks. Tr. 81-82. That the customer is charged but does not use the device at all only strengthens the argument that the charge is for the service rather than the use of the device.

In the case at bar, Appellant provides a portable toilet device in connection with the service of removing the human waste and reducing the noxious odor of waste collected in the device until the waste is removed. Tr. at 78. Certainly, the customer wants a place to provide necessary relief of natural human needs in a private manner, but the customer is unlikely to be interested if the portable toilet device did not control the odor and come with a service to clean it out and dispose of the human waste in an environmentally safe manner. Once the relief is afforded the user through the device, the user departs and thinks nothing further of it other than perhaps the memory of how unpleasant it was to find relief in that place despite the use of odor-controlling chemicals. Tr. at 82.

The cost of the portable toilet device is minimal in comparison to the service provided. The cost of the device as stated in the hearing, divided by the number of years the device is used in Appellant's portable toilet service business renders the cost per

month $2.29. ($550 ÷ (20 years x 12 months)). Tr. at 69-71. The average monthly service fee ranges from $83 to $90. So, the cost of the unit as related to the fee charged is 2.76% to 2.54% of the revenue and not much of a consideration for Appellant in determining the cost of the service. Tr. at 71. Appellant stated that he does not differentiate the cost of the service based on the age of the portable toilet device. Tr. at 70.

The insubstantial cost recovered through the revenue charged for the service, coupled with the true desire of the customer in seeking the service from Appellant, provide a good case for the application of the true object test and for a finding that the portable toilet device is not the true object of the transaction, the capture, containment and removal of the waste from the site is the "true object."

Appellant is aware that §144.018.1 RSMo (App at 24) provides in pertinent part:

> 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…

Thus, the chemicals consumed in the provision of portable toilet services would be subject to use tax unless some other exemption would be appropriate.

For all the foregoing reasons, Appellant contends the Court should determine that the receipts derived from providing portable toilet services are neither taxable service receipts nor taxable as rents or lease payments in connection with the continuous possession or use of tangible personal property and are thus excluded from receipts subject to tax under the Missouri sales tax law.

II

The Missouri Constitution does not allow the Director of Revenue to expand the law to include a service not previously taxable prior to January 1, 2015.

Appellant acquired the portable toilet service business in 1984. Tr. at 63. His seller did not pay sales tax on the gross receipts from the service and Appellant has never paid sales tax on its portable toilet service receipts. Tr. at 63. Yet sales and use tax returns have been filed by Appellant's businesses using the same taxpayer identification number since before he acquired the portable toilet service business. Tr. at 64. If the provision of portable toilet services had become taxable during that timeframe, the Director would have had the obligation to provide notice of a change in the taxability of the service pursuant to §144.021.2 RSMo. App at 31-32.

Mrs. McKay responded in the negative when asked whether she had seen any previous portable toilet cases in her territory. Mrs. McKay had risen through the ranks from auditor to area manager for a substantial portion of the State. Tr. at 39-40. Yet she had not seen a porta potty case in her tenure with the Department. Tr. at 52. The absence of cases suggests the inclusion of portable toilet service revenue is a new venture for the Director in attempting to tax all receipts. Yet Appellant had no notice of the taxability of portable toilet service until the audit. Tr. at 63. He was quite surprised when the Director assessed tax on receipts that had been reported but adjusted off his professionally prepared sales tax returns as exempt service revenue. Tr. at 71.

Appellant contends that the Director has expanded the scope of the sales tax law to include receipts not previously subject to tax. The audit occurred in 2017, relating back to tax periods for use tax commencing as early as the second quarter of 2012 and for sales tax as early as the first quarter of 2014. However, the determination and imposition of the tax occurred when the assessment was made, in 2018. The Missouri Constitution provides:

> In order to prohibit an increase in the tax burden on the citizens of Missouri, state and local sales and use taxes (or any similar transaction-based tax) shall not be expanded to impose taxes on any service or transaction that was not subject to sales, use or similar transaction-based tax on January 1, 2015. Mo. Const. Art. X, §26, App at 44.

On these facts, it appears the Director attempts to expand the reach of the sales tax to cover the provision of portable toilet services where such receipts were not previously taxable. If so, the tax should not have been assessed as it is against the quoted provision of the Missouri State Constitution.

Therefore, the determination of the Commission should be reversed and remanded for proceedings consistent with this Court's determination that the Director has exceeded the constitutional limits imposed by Mo. Const. Art X, §26 (App at 44), and the assessments shall be reversed as improper.

STATEMENT OF THE PRECISE RELIEF SOUGHT

Appellant seeks a ruling from this court reversing the Commission's determination that he is liable for sales tax assessed on receipts derived from provision of portable toilet services, and that this Court hold that the receipts Appellant derives from providing such

services is exempt, and if necessary to reach the constitutional question presented, that such receipts are from a service that was not taxable prior to January 1, 2015, and that any additions to tax or accrued interest thereon as set forth in the Director's assessments be reversed, and an award of costs and reasonable attorney fees as deemed appropriate by the Court.

Respectfully Submitted:
Law Office of B. Edwin Bloomfield, LC

By: /s/ B. Edwin Bloomfield
B. Edwin Bloomfield
Missouri Bar No. 36528
300 S. John Q. Hammons Parkway
Suite 103
Springfield, MO 65806-2521
Phone: 417-886-3100
Fax: 417-319-3045
E-Mail: ed@trust-law.us
Attorney for Petitioner, John Charles Gott, dba Gott's to Go

CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that a copy of Appellant's Brief was served upon Respondent electronically via Missouri Case Net on July 23, 2020 to Respondent's counsel of record:

ERIC S. SCHMITT
Attorney General

Jason K. Lewis, #66725
Assistant Deputy Attorney General
for Special Litigation
P.O. Box 861
St. Louis, MO 63188
Phone: 314-340-7832
Fax: 314-340-7891
jason.lewis@ago.mo.gov

Counsel for Respondent

The undersigned further certifies that Appellant's Brief complies with the limitations set forth in Rule No. 84.06(b) and that the brief contains 6,349 words.

Law Office of B. Edwin Bloomfield, LC

By: */s/ B. Edwin Bloomfield*