



SUPREME COURT OF MISSOURI

en banc

JOHN CHARLES GOTT,
D/B/A GOTT’S TO GO,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

Opinion issued December 22, 2020

No. SC98444

PETITION FOR REVIEW OF A DECISION OF THE ADMINISTRATIVE HEARING COMMISSION

The Honorable Audrey Hanson McIntosh, Commissioner

John Charles Gott (hereinafter, “Owner”) owns and operates a sole proprietorship that provides portable toilets to customers. Owner petitions this Court for review of the administrative hearing commission’s (hereinafter, “AHC”) decision, which determined he was liable for unpaid sales tax, use tax, as well as additions to tax and statutory interest as assessed by the director of revenue (hereinafter, “the director”), for the period of April 1, 2012, through March 31, 2017. This Court has exclusive appellate jurisdiction in all cases involving the construction of Missouri's revenue laws. Mo. Const. art. V, sec. 3. The AHC’s decision is affirmed.

Factual and Procedural History

In 1984, Owner began operating Gott's To Go (hereinafter, "Gott's"), a business engaged in providing portable toilet services.¹ Gott's serves customers in multiple counties in southwestern Missouri. Owner advertises Gott's as a portable toilet rental company.

Owner purchased portable toilets, mobile office trailers, and handwashing stations from a Michigan business. Owner also maintains three trucks for delivering and picking up portable toilets. The trucks perform ancillary services during the rental period, including cleaning the portable toilets and delivering the waste to a sewage treatment facility.

When a customer contracts with Gott's for portable toilets, Gott's delivers the portable toilets in the truck and prepares them for use on the customer's site. Gott's adds toilet paper, urinal blocks, and chemicals to control the odor in the portable toilet. Gott's returns to clean the portable toilets on an as-needed basis or if a customer calls requesting service. When a portable toilet is rented on a short-term basis, Gott's does not necessarily clean the portable toilet on site. Further, Gott's does not monitor the portable toilets at the customer's location.

When renting the portable toilets, Gott's invoices contain two charges: one for the rental and services for the portable toilets and one for the delivery fee. Gott's does not collect sales tax when it rents a portable toilet. However, if a customer decides to

¹ Owner's business was also known as "Gott's Pots" and "Gotts Rent A Pots."

purchase the portable toilet, sales tax is collected on that purchase. There is no written rental agreement or contract when a portable toilet is rented or sold.

The director initiated an audit of Gott's sales tax records from January 1, 2014, through December 31, 2016, and an audit of Gott's use tax records from April 1, 2012, through March 31, 2017. Following the audit, the director determined there was a net difference of sales tax between the audited tax and filed tax in the amount of \$56,905.51, based upon its reconciliation of the sales records to the sales tax returns due to Owner's failure to collect and remit sales tax on the rentals of tangible personal property. The director also determined there was a net difference of use tax between the audited tax and filed tax in the amount of \$891.18, based upon the purchase of taxable goods from an out-of-state vendor on which no Missouri use tax was charged or self-accrued. The director found there was full compliance with the withholding tax and, therefore, no liability. The director determined Gott's had a net tax liability of \$57,796.69.

Owner filed a petition for review with the AHC challenging whether the portable toilet service and materials are exempt from sales tax under sections 144.030.2(15) and 144.030.2(16), RSMo 2016.² The AHC held an evidentiary hearing and determined Owner was liable for \$56,905.27 in unpaid sales tax and \$201.23 in unpaid use tax. The AHC found Owner liable for statutory interest and determined additions to tax were appropriate. The AHC believed Owner should have been aware he was required to remit sales tax on the portable toilet rentals because he remitted sales tax on his mobile office

² All further statutory references are to RSMo 2016.

rentals, both of which are tangible personal property. Accordingly, the AHC found Owner was subject to addition to tax because he willfully neglected to collect sales tax on the portable toilet rentals and did not file his tax returns in good faith. Owner seeks judicial review of the AHC's decision.

Standard of Review

“This Court will affirm a decision of the AHC if it: (1) is authorized by law; (2) is supported by competent and substantial evidence on the whole record; (3) does not violate mandatory procedural safeguards; and (4) is not clearly contrary to the General Assembly's reasonable expectations.” *Bus. Aviation, LLC v. Dir. of Revenue*, 579 S.W.3d 212, 215 (Mo. banc 2019); section 621.193, RSMo 2016; Mo. Const. art. V, § 18. This Court will not uphold a decision of the AHC if it is “arbitrary, capricious, unreasonable, unlawful, or in excess of jurisdiction.” *Myron Green Corp. v. Dir. of Revenue*, 567 S.W.3d 161, 164 (Mo. banc 2019). “This Court reviews the [AHC]'s legal decisions *de novo*.” *Id.* “This Court is not bound by the [AHC]'s interpretation and application of the law.” *Gervich v. Condaire, Inc.*, 370 S.W.3d 617, 620 (Mo. banc 2012).

Section 144.210.1 places the burden of proof on the taxpayer to demonstrate a sale was not a sale at retail because it was exempt. Section 144.210.1 also requires the taxpayer to “obtain and maintain exemption certificates signed by the purchaser or his agent as evidence for any exempt sales claimed.” The taxpayer also “may prove [a] sale is exempt from tax under this chapter in accordance with proof admissible under the applicable rules of evidence.” *Id.* “Taxing statutes must be strictly construed in favor of

the taxpayer and against the taxing authority.” *Bartlett Int’l, Inc. v. Dir. of Revenue*, 487 S.W.3d 470, 472 (Mo. banc 2016); *see also* section 136.300.1. “An exemption is allowed only upon clear and unequivocal proof, and any doubts are resolved against the party claiming it.” *Bartlett*, 487 S.W.3d at 472.

Portable Toilet Rental Is Taxable

Owner asserts the AHC impermissibly extended the reach of the sales tax law to include its portable toilet service. Owner argues his entire portable toilet business is a service. Because portable toilet services are not listed as a taxable service in section 144.020, Owner believes the legislature did not intend to impose sales tax on them. Accordingly, Owner asserts any receipts attributable to providing a portable toilet device are excluded from the definition of taxable receipts because it was a part of the overall service provided.

Section 144.020.1 imposes a tax “upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state.” Section 144.020.1(8) sets forth the amount charged for rental or lease of tangible personal property when the purchaser of the tangible personal property did not pay tax at the time of the purchase of the tangible personal property.³

³ Gott’s did not pay use tax upon the purchase of the portable toilets. Gott’s additionally failed to collect sales tax upon the rental of its portable toilets to its customers. *Cf. Westwood Country Club v. Dir. of Revenue*, 6 S.W.3d 885, 888-89 (Mo. banc 1999) (finding country club that paid sales tax upon purchase of golf carts not required to remit sales tax upon their rental pursuant to section 144.020.1(8)). By failing to pay tax upon the purchase or the rental of the portable toilets, Owner is attempting to avoid paying *any* state tax.

Owner does not dispute the portable toilets are tangible personal property; rather, he disputes whether the fees received for Gott's services are taxable. The issue to be resolved is whether the portable toilets are rented or whether they are a "necessary or mandatory part of the service transaction." Owner references 12 C.S.R. § 10-108.700(2)(A) to support his argument the portable toilets are only an intrinsic part of Gott's service; hence, its fees should not be taxable.

[I]f 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 a part of the service transaction is not a lease or rental of the property.

12 C.S.R. § 10-108.700(2)(A).

Gott's holds itself out as a portable toilet rental service. Without providing the portable toilets to its customers, Gott's has no service to provide. This is the exact inverse of the situation contemplated by 12 C.S.R. § 10-108.700(2)(A); hence, it does not apply.

Gross receipts that are subject to sales taxes are "the total amount of the sale price of the sales at retail including any services" Section 144.010.1(4). This includes the rental of tangible personal property when there is "consideration" and "the right to continuous possession or use of any article of tangible personal property." *Id.*

Gott's charges its customers a fee for their use of its portable toilets based upon the number of portable toilets and the duration of use, which includes any ancillary services needed. Once a portable toilet is in a customer's possession, that customer has its continuous use during the entire rental period. Gott's does not monitor the customer's

use or possession of the portable toilet and cleans it when the customer requests. Gott's provides the customer with a fixed price depending upon the number of portable toilets desired. Gott's does not separate any amount representing its cleaning or servicing from the rental of the portable toilet. Because Gott's fails to separate amounts representing its cleaning or servicing from its rentals, it is impossible for this Court to determine whether a portion of Gott's receipts should be excluded from taxation. *See Bartlett*, 487 S.W.3d at 473; *Alberici Constructors, Inc. v. Dir. of Revenue*, 452 S.W.3d 632, 639 (Mo. banc 2015); *Brinson Appliance, Inc. v. Dir. of Revenue*, 843 S.W.2d 350, 352 (Mo. banc 1992). Owner fails to meet his burden demonstrating Gott's is exempt from sales taxation. Accordingly, Gott's gross receipts are subject to sales tax.

“True Object” Test

Owner urges this Court to apply the “true object” test and find Gott's only provides a nontaxable service. Owner believes application of the “true object” test will reveal that customers actually were seeking waste removal services and not portable toilet rentals.

This Court developed the “true object” test, which subsequently was codified in 12 C.S.R. § 10-103.600. This test establishes “whether to treat a transaction as a taxable transfer of tangible personal property or the nontaxable performance of a service.” *Sneary v. Dir. of Revenue*, 865 S.W.2d 342, 345 (Mo. banc 1993). This test is applied “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.” *Bartlett*, 487 S.W.3d at 475.

Section 144.010's plain language is clear and resolves this dispute without having to resort to the "true object" test. By its terms, sales tax is to be levied upon the total sale price, including the rental of tangible personal property. Section 144.010.1(4). Gott's intended the delivery, rental, labor, and supplies to be a part of a single sales transaction, which is subject to sales tax.

Constitutional Authority

Owner believes the AHC's decision imposing sales tax on Gott's violated article X, section 26 of the Missouri Constitution. Owner asserts the director impermissibly expanded the reach of the sales tax law to include a service, and the AHC's decision should be reversed.

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, sec. 26. The AHC did not violate this constitutional provision because Gott's never was engaged in a service or transaction not subject to sales, use, or transaction-based taxation.

Conclusion

The AHC's decision is affirmed.

GEORGE W. DRAPER III, CHIEF JUSTICE

All concur.