

RECEIVED

Mar 16 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 18-ALJ-17-0393-CC
Appellate Case No. 2019-001831

Jack's Custom Cycles, Inc., d/b/a Jack's Motor Sports,.....Respondent,

v.

South Carolina Department of Revenue,.....Appellant.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

John A. Ecton (SC Bar 66089)
Margaret Weatherly Dukes (SC Bar 101416)
7911 Broad River Rd, Suite 100
Irmo, SC 29063
(803) 771-9800
(803) 771-9811 (fax)
jecton@ectonlawfirm.com
laurin@ectonlawfirm.com

Attorneys for Respondent
Jack's Custom Cycles, Inc., d/b/a Jack's Motor Sports

Pursuant to Rules 221(a) and 240(e) of the South Carolina Appellate Court Rules and as requested by the Appellate Court on March 6, 2023, Respondent, Jack’s Custom Cycles, Inc. d/b/a Jack’s Motor Sports (“Jack’s” or “Respondent”), responds to South Carolina Department of Revenue’s (“Department” or “Appellant”) Petition for Rehearing. The Court of Appeals decision properly considered all relevant arguments presented by the Department and did not overlook or misapprehend any of those arguments in affirming the decision of the Administrative Law Court.

INTRODUCTION

The Court of Appeals properly affirmed the Administrative Law Court’s (“ALC”) decision to reject the Department’s arguments that ATVs and UTVs are not “motor vehicles” subject to maximum sales tax as set forth in S.C. Code Ann. § 12-36-2110(A)(1). Contrary to the Petition for Rehearing, the Court’s Opinion addressed and accurately ruled on the issues and requirements of statutory construction, the legislative intent, and the agency deference arguments. While the ALC and Court of Appeals addressed every argument presented by the Department, the Department continues to push its own forced definition that a motor vehicle is not a motor vehicle unless it is licensed to operate on the highways of South Carolina. The Department’s definition is just not supported by the South Carolina statutes, legislative intent or existing case law. In fact, the Department’s position is contrary to South Carolina Supreme Court precedent as set forth in *White v. S.C. Dep’t of Parks, Recreation & Tourism*, 271 S.C. 91, 94, 245 S.E.2d 125, 127 (1978) and *Gunn v. Burnette*, 236 S.C. 496, 115 S.E.2d 171 (1960).

STANDARD OF REVIEW

The Appellate Court’s review of ALC decisions is limited. This Court “may reverse or modify the [ACL] decision only if the appellant’s substantive rights have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole

record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law.” *SGM-Moonglo, Inc. v. S.C. Dep’t of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008).

The Department requests this Court amend its Opinion “to correct certain erroneous statements or findings of fact.” (Petition for Rehearing p. 3).¹ However, this Court is limited to the record on appeal and may not substitute its judgment for the judgment of the administrative law judge as to questions of fact. S.C. Code Ann. § 1-23-610(B) (Supp. 2022). As properly noted in the Opinion, “[t]he decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law.” Citing *Original Blue Ribbon Taxi Corp. v. S.C. Dep’t of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). This Court found no error of law and the ALC decision was supported by substantial evidence.

ARGUMENT

The Department specifically asserted three issues that were overlooked or misapprehended by this Court in its Opinion. These issues are Department’s arguments regarding (1) statutory construction of the tax-exempt statute, (2) legislative intent, and (3) agency deference. This Court addressed all of these arguments and correctly determined ATVs and UTVs are motor vehicles under Section 12-36-2110(A).

I. Rules of Statutory Construction and Agency Deference were Properly Considered

In arriving at its Opinion, this Court methodically analyzed South Carolina statutes, South Carolina case law, relevant treatises, and other supporting material as addressed by the ALC. The Department continues to assert its limited and restrictive definition of “motor vehicle” requires

¹ As noted by the Department in its Petition, Respondent acknowledges the scrivener’s error in the Court’s Opinion mistakenly referring to SCDOR as SCDOT and does not dispute any correction to that minor error.

that it be licensed for use on South Carolina highways before it can be considered a motor vehicle under the tax-exempt statute. While acknowledging the tax-exempt statute does not define “motor vehicle” and that statutory construction must be utilized, the Department asserts for the first time on appeal that the ALC did not consider other statutes.² The issue of whether these additional statutes should be considered or even have any relevance to the tax-exempt statute or deference argument was never raised to the ALC. Respondent does not believe this issue was preserved for appeal and thus should not be considered.

Notwithstanding the Department’s failure to present the issue of whether these three statutes have any relevance to the tax-exempt statute and definition of “motor vehicle” under that statute, these statutes do not provide any new guidance on determining whether an ATV or UTV must be licensed for use on the highway before it can be considered a motor vehicle. This Court addressed those statutes in footnote 8 of the Opinion. Section 12-54-122(A)(3) relates to the uniform method of collection and enforcement of taxes and tax liens against property. The definitions under that section relate to enforcement of a lien against motor vehicles defined as “a self-propelled vehicle which is registered for highway use under the laws of any state or foreign country.” This section is limited to the collection and enforcement of tax liens against individuals that owe taxes to the Department. Importantly, that section does not limit the registration of the motor vehicle to just South Carolina, but to “any state.” The ALC factually found that ATVs and UTVs are actually being registered for highway use in other states. (See Amended Final Order p. 5 – “Some ATVs and UTVs come with turn signals and mirrors and are lawfully operated upon the highways in

² Department cites three new statutes as having relevance. S.C. Code Ann. § 12-54-122(A)(3)(2014); S.C. Code Ann. §12-37-2810(B), (C), & (D) (Supp. 2022); and S.C. Code Ann. §12-28-110(41)(2104 & Supp. 2022).

other states.”)³ Thus, this definition actually supports the finding that motor vehicles are not just limited to those that are registered for use on South Carolina highways.

The Department next cites Article 23, Chapter 37 of Title 12 applying to commercial motor carriers as relevant to the definition of motor vehicles for purposes of the tax-exempt statute at issue. See S.C. Code Ann. §12-37-2810(B)(C) and (D). As noted, that article relates strictly to commercial motor vehicles, whether large or small, for the purpose of transporting property. This section is distinguished by its application to taxation of Commercial Motor Carrier’s property. These vehicles could be either registered under the International Registration Plan OR used on a highway for transportation of property. (emphasis added). The Department’s restricted and forced definition does not apply with this section and is not relevant to the issue of the tax-exempt statute.

Finally, Section 12-28-110 as cited by the Department relates to the establishment of motor fuel tax collection and enforcement, and conforming South Carolina excise tax on motor fuel to federal law. This section does not necessarily restrict the definition of motor vehicle as the Department suggests and desires. Section 12-28-110(41) indicates for fuel fee purposes that motor vehicle means a vehicle with a motor “designed to permit the vehicle’s mobile use on highways” and does not include machinery designed for off-road use. ALC’s finding of facts show ATVs and UTVs reach speeds of between 65-110mph, have headlights, taillights, seatbelts, turn signals, mirrors, and some individuals purchase them with the intent to operate them on the highways whether in South Carolina or not. (Amended Final Order p.2-5). As found by the ALC, some ATVs and UTVs “are lawfully operated upon the highways in other states.” (Amended Final Order

³ The SC Legislature actually introduced House Bill 3600 on January 12, 2021 to add Section 56-2-140 in order to define UTVs more specifically (“a motor vehicle of at least four hundred and fifty cubic centimeters . . .”) and provide for the registration and operation of them on the streets of South Carolina. The Bill was last seen residing in the Senate Committee on Transportation. SC General Assembly 124th Session, 2021-2022.

– Finding of Fact p. 5). Thus, while these motor vehicles may be primarily intended for off-road use, they have been designed to permit the vehicles use on a highway.

Additionally, this appeal is the first time the Department has looked to this statutory section to define a motor vehicle. The Department through all the erroneous bulletins and official guidance material stating that a motor vehicle must be licensed for highway before it is a “motor vehicle” has always cited Title 56 as its authority, not this new statute. Title 56 is and has always been the Department’s claim for deference. However, when it is proven Title 56 does not incorporate the Department’s restricted and forced definition, it pivots its deference claim by asserting long-time reliance on a new section never cited before.⁴ The Department’s asserted reliance and claim of deference based on this new statute was not preserved for appeal.

II. Legislative Intent was Not Overlooked or Misapprehended

This Court cited the most relevant and direct statutes, case law and supporting material to affirm the ACL decision that the legislative intent was not to limit the definition of motor vehicle to only those licensed to operate on South Carolina highways. The Court thoroughly analyzed several sections of Title 56 to determine it did not limit motor vehicles to a subset of vehicles driven only on public highways. The All-Terrain Vehicle Safety Act (“Chandler’s Law”) was found to define ATVs specifically as “motorized vehicles” and entitled to maximum tax-exemption.⁵ Two Supreme Court cases were cited as support for the ALC decision. In fact, the Supreme Court decision in *White v. S.C. Dep’t of Parks, Recreation & Tourism*, directly supported the ALC decision that there are motor vehicles that are not operated on highways. *See White*, 271

⁴ The ALC cannot rule on a deference issue relating to Department’s asserted reliance on and interpretation of a statute that was never raised to the ALC at any time.

⁵ The Department attempts to argue that this Court overlooked the difference between ATVs and UTVs in applying the tax-exemption. (Petition for Rehearing p. 8). The ALC addressed this in Footnote 5 of the Amended Final Order and based on the parties’ presentation treated both ATVs and UTVs the same, without any Department objection.

S.C. 91, 94, 245 S.E.2d 125, 127 (1978) (citing *Gunn v. Burnette*, 236 S.C. 496, 115 S.E.2d 171 (1960) and 60 C.J.S. Motor Vehicles §1, p. 118-119 (2012)). Most importantly, these SC Supreme Court decisions directly contradict the Department's position limiting the definition of motor vehicle to only those licensed for public highways. In *White*, the Supreme Court rejected the Department's argument limiting the definition of a "motor vehicle" to be operated on a highway. *Id.* 236 S.C. at 93, 245 S.E.2d at 126. Additionally, in *Gunn*, the Supreme Court said "the term "motor vehicle" ordinarily means a vehicle which is self-propelled and is designed primarily for travel on the public highway even though *the vehicle is not one which may legally be self-propelled or operated upon a highway . . .*" *Gunn*, 236 S.C. at 499, 115 S.E.2d at 172 (emphasis added). The Court went on to add support for the decision through several dictionary definitions. Nothing was overlooked or misapprehended.

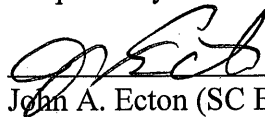
Moreover, as noted by the ACL, the Department's position that a motor vehicle is strictly something that licensed for use on public highways is flawed in application of significant equal protection concerns regarding the treatment of off-road motorcycles. In Section 12-36-2110(A), the legislature made no distinction between off-road non-licensed motorcycles nor motor vehicles. However, the Department tries to place the limitation only on motor vehicles. Additionally, Section 12-36-2120(25) provides an exemption from taxes on gross proceeds of "motor vehicles (excluding trucks) or motorcycles, which are required to be licensed to be used on the highways, sold to a resident of another state, but who is located in South Carolina by reason of order of the United States Armed Forces. S.C. Code Ann. §12-36-2120(25)(Supp. 2018). As correctly noted by the ALC, since this section identifies motor vehicles used on public highways, the inference

drawn by the legislature is that “motor vehicles exist that are not used on public highways, such as ATVs, UTVs and off-road motorcycles.” Amended Final Order, p. 18.⁶

CONCLUSION

This Court applied the proper standard of review, properly addressed the Department’s positions and correctly found substantial evidence supporting the ALC decision. For these reasons, the Department’s Petition for Rehearing should be denied.

Respectfully Submitted



John A. Ecton (SC Bar 66089)

Margaret Weatherly Dukes (SC Bar 101416)

7911 Broad River Rd, Suite 100

Irmo, SC 29063

(803) 771-9800

(803) 771-9811 (fax)

jecton@ectonlawfirm.com

laurin@ectonlawfirm.com

Attorneys for Respondent

Jack’s Custom Cycles, Inc., d/b/a Jack’s Motor Sports

March 16, 2023

⁶ Additionally, the continued inclusion of “motor vehicle” in the tax-exempt statute after the Legislature enacted the Infrastructure Maintenance Fee (S.C. Code Ann. 56-3-527) subjecting all motor vehicles that are required to be licensed to this IMF, the legislative intent was further clarified that there are motor vehicles that are not licensed for highway use.

RECEIVED

Mar 16 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 18-ALJ-17-0393-CC
Appellate Case No. 2019-001831

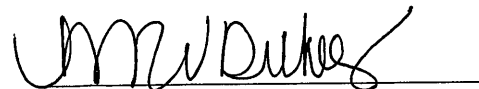
Jack's Custom Cycles, Inc., d/b/a Jack's Motor Sports,.....Respondent,

v.

South Carolina Department of Revenue,.....Appellant.

CERTIFICATE OF SERVICE

I, Margaret Dukes, hereby certify that I have caused to be mailed a copy of Respondent Jack's Custom Cycles, Inc. Return to Appellant SCDOR's Petition for Rehearing in the above-referenced matter, by causing a copy of the same to be deposited in the United States Mail, postage prepaid, on March 16, 2023, addressed to the attorney(s) of record, Nicole M. Wooten, Esquire, Marcus D. Antley, III, Esquire, and Jason P. Luther, Esquire, South Carolina Department of Revenue, 300-A Outlet Pointe Blvd, Columbia, SC 29210 and by electronic mail to Nicole.Wooten@dor.sc.gov, marcus.antley@dor.sc.gov, and jason.luther@dor.sc.gov and also via electronic mail to the Court of Appeals at ctappfilings@sccourts.org.



Margaret W. Dukes, Esq.

Nicole M. Wooten, Esquire
Marcus D. Antley, III, Esquire
Jason P. Luther, Esquire
South Carolina Department of Revenue
300-A Outlet Pointe, Blvd.
Columbia, SC 29210



ECTON LAW FIRM, PA

7911 Broad River Road, Suite 100
Irmo, South Carolina 29063
803.771.9800
803.771.9811 (facsimile)

IRS Tax Problem Resolution
www.EctonLawFirm.com

2620 W. Arrowood Road, Suite 106
Charlotte, North Carolina 28273
980.677.1099
980.677.1101 (facsimile)

March 16, 2023

VIA ELECTRONIC MAIL TO ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED

Mar 16 2023

SC Court of Appeals

RE: **Jack's Custom Cycles, Inc., d/b/a Jack's Motor Sports, Respondent, v. South Carolina Department of Revenue, Appellant**
Appellate Case No. 2019-001831
ALC Docket No. 19-ALJ-17-0393-CC

Dear Ms. Kitchings:

Please find enclosed Respondent Jack's Custom Cycles, Inc. Return to Appellant SCDOR's Petition for Rehearing in the above-referenced matter.

If you have questions or need any additional information, please do not hesitate to contact us.

Sincerely,


Margaret Weatherly Dukes

cc: Nicole M. Wooten, SCDOR Senior Counsel
Marcus D. Antley, III, SCDOR Associate Counsel
Jason P. Luther, SCDOR Chief Legal Officer

Enclosures