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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

CASE NO. 2021-CP-32-02753
Appellate Case No. 2023-000318

KCI USA, Inc., ... Respondent,

v.

South Carolina Department of Revenue, ... Appellant.

SOUTH CAROLINA DEPARTMENT OF REVENUE'S REPLY BRIEF

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Columbia, South Carolina
June 12, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENTS

I. THE CIRCUIT COURT ERRED BY FINDING RESPONDENT OVERCAME THE PRESUMPTION THAT THE DURABLE MEDICAL EQUIPMENT EXEMPTION IS CONSTITUTIONAL.

The United States Supreme Court recognized "that the States have broad discretion to configure their systems of taxation as they deem appropriate." *Oregon Waste Sys., Inc. v. Dep't of Env't Quality of State of Or.*, 511 U.S. 93, 108 (1994). Further, the United States Supreme Court has held "that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 271 (1984). "[A] State's power to regulate... for the purpose of protecting the health of its citizens... is at the core of its police power." *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 956 (1982). The DME Exemption falls within the State's broad discretion to configure its system of taxation and effects constitutionally permissible purposes.

Respondent erroneously equates the DME Exemption to a tariff. *Black's Law Dictionary* defines a tariff as a "schedule or system of duties imposed by a government on imported or exported goods." TARIFF, *Black's Law Dictionary* (11th ed. 2019). Nothing in South Carolina's undisputedly constitutional sales tax[1] or the DME Exemption results in duties imposed on imported or exported goods. The origin of the durable medical equipment is irrelevant. A taxpayer whose principal place of business is in South Carolina could import from other states or even foreign countries the durable medical equipment it sells in South Carolina. Similarly, a taxpayer whose principal place of business is outside of South Carolina could locally acquire or manufacture the durable medical equipment it sells in South Carolina. The durable medical equipment's origin has no effect on a taxpayer's eligibility for

[1] "We are not here challenging the sales tax... " Hrg. Tr. 4:10-11. (**R. p. ----**).

the DME Exemption. For this reason, the DME Exemption has no or at most an incidental effect on interstate commerce.

Respondent attempts to flip the well-established presumption of a statute's constitutionality and shift the burden to the Department. However, the bulk of Respondent's burden shifting argument relies on *Oregon Waste*, where the law facially discriminated based on the **origin** of solid waste. *See* 511 U.S. 93, 107, ("As we held more than a century ago, 'if the State, under the guise of exerting its police powers, should [impose a burden] ... applicable solely to articles [of commerce] ... produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States.'"). Indeed, the shippers of Oregon waste who benefited from the lower fee may have been entities with their principal place of business in other states. Because any effects on interstate commerce in this case would be merely incidental, the burden of overcoming the presumption of the DME Exemption's constitutionality remains on Respondent.

Even if the Court were to find the DME Exemption to be facially discriminatory, the Department offered non-exhaustive examples of legitimate local purposes that cannot be adequately served by reasonable nondiscriminatory alternatives. One such example is the constitutionally permissible promotion of economic development. A taxpayer that comes to South Carolina is not saddled with additional sales tax burdens nor does it have its tax bill go up by not directing additional business activity into the State. Another example is the health and safety reasons for ensuring local access to durable medical equipment. Contrast this to *Oregon Waste* where the state had "not offered any safety or health reason unique to nonhazardous waste from other States for discouraging the flow of such waste into Oregon." 511 U.S. at 101, 114 S. Ct. at 1351, 128 L. Ed. 2d 13 (1994). Therefore, South Carolina has legitimate reasons to offer the DME Exemption to taxpayers with their principal place of business in this State.

II. THE CIRCUIT COURT ERRED BY SEVERING THE "PRINCIPAL PLACE OF BUSINESS" ELEMENT AND EXPANDING THE DURABLE MEDICAL EXEMPTION INSTEAD OF DECLARING THE ENTIRE DURABLE MEDICAL EQUIPMENT EXEMPTION VOID.

If the DME Exemption were unconstitutional, the Court should declare it completely void instead of re-writing it. Rather than counting words to determine whether a solution is radical as Respondent suggests, the Court should look to the effect of striking those words. Respondent's solution would expand a narrow sales tax exemption to taxpayers that the Legislature explicitly excluded. The exemption that Respondent wants to broaden was not available to any taxpayers prior to July 1, 2007 and was slowly phased-in from July 1, 2007 to December 31, 2012. *See* Revenue Ruling # 11-3 at p. 13. Respondent's proposed re-writing of the DME Exemption will make previously unqualified taxpayers eligible, resulting in refunds and decreased prospective sales tax revenue unaccounted for in the State's budget. Rather than adopting Respondent's approach (which is grounded in quintessentially legislative considerations, such as what other states have done or the public policy reasons for creating a durable medical equipment exemption), the Court should eliminate the DME Exemption in its entirety. This approach is consistent with precedent and the rules of statutory construction related to the exceptional nature of tax exemptions. If the Legislature wishes to re-write the DME Exemption after taking into consideration policy concerns, that is its prerogative.

In *Shasta*, this Court chose to sever the offending provision for reasons that are absent here. Specifically, the Court held:

> It is our opinion that the General Assembly would not have intended all bottlers to return to **the antiquated use of tax crowns and lids** for the payment of their tax in the event the limitation provision is found to be invalid, and the limitation provision of this section is not "so connected with the other parts as that they mutually depend upon each other as conditions and considerations for each other."

Shasta Beverages (A Div. of Consol. Foods Corp.) v. S.C. Tax Comm'n, 280 S.C. 48, 57, 310 S.E.2d 655, 660 (1983) (emphasis added). Here, striking the DME Exemption does not return taxpayers to an antiquated taxing system (which Respondent mischaracterizes as "the general method for reporting tax"). Instead, taxpayers would have to remit sales tax on durable medical equipment under the current sales tax system. In fact, nothing would change in the way Respondent is taxed. Additionally, having one's principal place of business in this State is a required element of the DME Exemption and therefore a condition and consideration for it.

In *Thayer*, this Court severed the offending exemption. Specifically, the Court held:

> Section 12–35–550[2] enumerates independent exemptions enacted for a variety of purposes. The legislature has added and deleted items from the exemption section from time to time. We find the remaining exemptions are complete in themselves and that the legislature would have passed the **remaining exemptions** independently of section 12–35–550(7) as it pertains to religious publications. We conclude that the term "religious publications, including the Holy Bible" is severable from the remainder of the statute.

Thayer v. S.C. Tax Comm'n, 307 S.C. 6, 13, 413 S.E.2d 810, 815 (1992) (emphasis added). In other words, this Court eliminated the exemption in its entirety as to "religious publications, including the Holy Bible." Next, contrary to Respondent's argument, the Court held the taxpayer seeking the exemption

> was not entitled to an exemption in the past; nor is she entitled to an exemption now that we have severed that portion of section 12–35–550(7) relating to religious publications. This Court cannot create an exemption by reading something into the statute which the Legislature did not intend.

Id. 307 S.C. at 14, 413 S.E.2d at 815. Therefore, if found unconstitutional, this Court should strike the DME Exemption in its entirety consistent with its precedent.

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[2]S.C. Code Ann. § 12-35-550 (1976) is the predecessor to S.C. Code Ann. § 12-36-2120 (2014).

If the Court distinguishes the present case from *Thayer* such that it requires relief as a matter of federal law, the United States Supreme Court unambiguously held that "[t]he State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined." *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regul. of Fla.*, 496 U.S. 18, 51–52, (1990). In that instance, the matter should be remanded to the Department, as the executive agency created to administer and enforce the revenue laws of this State, to fashion an appropriate remedy. *See* S.C. Code Ann. § 12-4-10 (2014).

CONCLUSION

For the reasons stated above and in the Department's Brief, this Court should reverse the Circuit Court's decision because Respondent failed to overcome the presumption that the DME Exemption is constitutional and even if unconstitutional, the whole exemption must be declared void. Therefore, Respondent is not entitled to the DME Exemption.

{Signature on following page}

Respectfully Submitted,

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