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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

Case No. 17-ALJ-17-0060-CC
Appellant Case No. 2019-001933
Opinion No. 5972 (S.C. Ct. App. filed March 1, 2013)

McEntire Produce, Inc. ..... Petitioner,

v.

South Carolina Department of Revenue, ... Respondent.

RESPONDENT'S RETURN TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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Columbia, South Carolina
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INTRODUCTION

Pursuant to Rule 242(f), SCACR, Respondent South Carolina Department of Revenue ("Department") hereby submits this Return to McEntire Produce, Inc.'s ("McEntire") Petition for Writ of Certiorari ("Petition").

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. The Court considers a number of reasons in determining whether to exercise its discretion to grant review in general, including: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. See Rule 242(b), SCACR.

There are no special or important reasons in this case that warrant granting a writ of certiorari, nor does this case present any of the above "character of reasons" that the Court typically considers. Id. The Court of Appeals correctly reversed the Administrative Law Court's ("ALC") decision because the ALC erroneously broadened the scope of the sales and use tax exemption sought by McEntire beyond the plain meaning of the statute and regulations. The Court of Appeals was correcting an error of law— the ALC's incorrect construction of a statute and related regulations— which is subject to *de novo* review without any deference to the ALC's legal conclusions. This case does not present a novel question of law simply because of the unique nature of McEntire's facility as a food processor. If that were the standard, every appeal would constitute a novel question of law because every case has a distinct set of factual circumstances to which the courts are applying a specific statute. Consequently, for the reasons discussed below, this Court should deny McEntire's Petition.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Does the Court of Appeals' interpretation of the sales and use tax exemptions found in S.C. Code Ann. § 12-36-2120(17) (Supp. 2020) present a novel question of law simply because the Court of Appeals applied the plain language of the exemptions to a unique factual scenario?

II. Did the Court of Appeals correctly review the ALC's decision under a *de novo* standard without deference to the ALC's conclusions, when interpreting sales and use tax exemptions and regulations are questions of law, not questions of fact?

III. Did the Court of Appeals correctly find that maintenance tools and ethylene generators used by McEntire on an "as needed" basis are not machines that are integral and necessary to the processing of fresh produce?

STATEMENT OF THE CASE

The Department does not take exception to the Statement of the Case set forth in McEntire's Petition.

STATEMENT OF FACTS

McEntire operates a fresh produce processing facility in Columbia, South Carolina, for processing lettuce, onions, cabbage, tomatoes, and other vegetables (hereinafter "produce") for sale. (R. 2, 6). McEntire's produce processing includes washing, sorting, cutting, mixing, and packaging the fresh produce at the facility. (R. 2). The majority of McEntire's facility is divided into two climate-controlled areas: the "high-care" and "low-care" areas. (R. 6, 500-02). The high-care area, or the cutting room, is where produce is cut into smaller pieces and packaged. (R. 6). The low-care areas are generally storage areas. On the front end, low-care areas are where produce is received, ripened, and sorted (including defect removal) before it moves into the high-care area to be cut, chopped, washed, weighed, and bagged. (R. 6). On the back end, the low-care areas are where the processed produce is then boxed, labeled, and stored until it is shipped from the facility. (R. 6). McEntire does not cut any produce within the low-care areas. (R. 6).

After the Department audited McEntire's sales and use tax account for tax periods October 1, 2012 through September 30, 2015 ("Audit Period"), McEntire claimed a sales and use tax exemption

on certain supplies and items it purchased during the Audit Period. Those are generally categorized as (1) items that McEntire uses on the front and back end of its operations (in the low-care areas); and (2) items that McEntire uses throughout its operations (in both the low-care and high-care areas), but are not used for washing, sorting, cutting, mixing, or packaging the produce.

In the front and back end of its operations, McEntire uses warehouse racks for storing produce in raw coolers in a low-care area prior to entering the cutting room, as well as storing produce in the finished goods storage coolers (also in a low-care area) once the produce leaves the cutting room. (R. 194, 211, 500-501). The racks have pallet flow brakes, which slow down the pallets as they move through the flow-through pallet system, which are in coolers found within the low-care areas of the facility. (R. 213). McEntire uses forklifts (along with their respective parts and batteries), pallet jacks, and hand trucks to move produce from place to place within the facility. (R. 209, 218, 254, 1217). For the most part, McEntire uses these supplies in the palletizing, shipping, finished storage, raw storage, tomato repack, and receiving dock areas of the facility. (R. 219, 1217). However, McEntire does not use any forklifts in the high-care area. (R. 209, 255, 1217).

McEntire also uses a number of items throughout its operations, but those items are not used as part of the washing, sorting, cutting, mixing, or packaging of fresh produce. This includes items like recordkeeping materials (bar code scanners, black ink aerosol cans, and mobile computer stands), floor drain covers, water storage tanks, floor treatment chemicals, cleaning machines called "foamers" used to clean other machines, stacking containers, blower fans, and protective clothing (gloves, aprons, hairnets, coveralls, and eyewear). McEntire uses general maintenance tools to maintain, repair, install, and uninstall equipment. (R. 13, 23, 235, 1226). McEntire uses these tools on an "as-needed" basis (e.g. to fix a machine that breaks down from water intrusion) when a machine breaks or requires care

in any part of the facility. (R. 235, 1226).[1] McEntire also rents ethylene generators when they are needed to speed up the ripening process of tomatoes. (R. 14, 24, 216-17, 257, 1227-28).

RELEVANT LAW

The South Carolina Sales and Use Tax Act (Act) imposes a sales tax on "every person engaged or continuing within this State in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-910 (2014). The use tax is imposed on "the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State . . .:" S.C. Code Ann. § 12-36-1310(A) (2014). The Act provides a sales and use tax exemption for "machines used in manufacturing, processing . . . recycling, compounding, mining, or quarrying tangible personal property for sale." S.C. Code Ann. § 12-36-2120(17) (Supp. 2020) ("Machine Exemption").[2] In addition, the Act provides a sales and use tax exemption for machines that are "necessary to comply with the order of an agency of the United States or of this State for the prevention or abatement of pollution of air, water, or noise that is caused or threatened by any machine used as provided in this section." S.C. Code Ann. § 12-36-2120(17)(b) (Supp. 2020).

Regulation 117-302, which was promulgated by the Department and approved by the General Assembly, explains the sales and use tax exemptions enjoyed by manufacturers and processors, including the machine exemptions found in section 12-36-2120(17). See S.C. Code Ann. Regs. 117-302.5 (2012) ("Regulation"). The Regulation provides a definition for "machine" for purposes of the

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[1]Contrary to McEntire's assertions in its Petition, the record does not establish that McEntire's employees are "working continuously" to repair and maintain equipment using these maintenance tools. (Petition p. 17). The ALC noted that McEntire's employees are "constantly" working on repairing machines within McEntire's facility, but it is clear from the context that the ALC meant this colloquially— not literally. (R. 13, 23). The testimony presented only established that McEntire's machines have a "fair amount" of break downs and "many other issues." (R. 236).

[2]As noted by the ALC, the legislature added to the list of exempt uses found in the Machine Exemption the term "agricultural packaging" in July 1, 2016, which was after the Audit Period. (R. 19). The above quote of section 12-36-2120(17) is a reflection of the Machine Exemption as it was written during the Audit Period.

Machine Exemption: "[a] machine . . . includes every mechanical device or combination of mechanical powers, parts, attachments and devices to perform some function and produce a certain effect or result . . . ." Id.

The Regulation further states that a "machine qualifies for the [Machine Exemption] if the machine is integral and necessary to the manufacturing[3] process . . . ." Regulation 117-302.5(B)(1). A machine is "integral and necessary" to the manufacturing process if the machine "is used on an ongoing and continuous basis during the manufacturing process." Regulation 117-302.5(B)(1)(b). However, "[a] machine is not part of the manufacturing process merely because it is integral and necessary to the manufacturer." Id. "For example, machines used for warehouse, distribution, or administrative purposes are integral and necessary to the manufacturer, but not part of the manufacturing process." Id. The Regulation provides that, in order to be deemed "integral and necessary," the machine "must be substantially 'used in manufacturing . . . tangible personal property for sale,'" meaning more than one-third of the machine's use must be for manufacturing tangible personal property for sale. Regulation 117-302.5(B)(1)(c) (emphasis added).

The Regulation also provides specific guidance regarding instances when the Machine Exemption would or would not apply. For example, items that do not qualify for the exemptions under section 12-36-2120(17) include recordkeeping items, protective clothing, chemicals used to clean floors within the manufacturing facility, and maintenance machines. See Regulation 117-302.5(B)(5), (6), (9) and (10). The Regulation also specifically provides that machines used for storage, including racks used to store raw materials, storage tanks used to store water, and racks used to store a finished product while it cures, do not qualify for the exemptions under section 12-36-2120(17). See Regulation 117-302.5(B)(7).

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[3]For purposes of the Regulation, "manufacturing" also includes "processing." Regulation 117-302.5(B)(1).

Finally, the Regulation provides that the following conveyances fall within the Machine Exemption: (1) conveyance machines[4] which feed the first processing machine; (2) conveyance machines which transport in-process materials from one process stage to another; and (3) conveyance machines discharging the finished product from the last processing machine. See Regulation 117-302.5(B)(4)(a). However, "[w]arehouse machinery used only for warehouse purposes, loading and unloading, storing, transporting raw materials and finished products, etc., is subject to tax . . . ." Id.

ARGUMENT

McEntire has identified only one of the character of reasons under Rule 242, SCACR, that it believes warrants the Court granting the Petition: that this appeal presents a novel question of law. None of the other reasons in Rule 242 are present in this case. There was no dissent at the Court of Appeals, the Court of Appeals' decision does not conflict with a prior decision of the Court, and there are no constitutional or federal questions.

I. THE COURT OF APPEALS' INTERPRETATION OF THE SALES AND USE TAX EXEMPTIONS FOUND IN § 12-36-2120(17) DOES NOT PRESENT A NOVEL QUESTION OF LAW.

McEntire claims that there is a novel question of law because the exemptions in section 12-36-2120(17) have not been applied by South Carolina appellate courts to the particular type of manufacturer presented in this case. (Petition pp. 3-4). Specifically, McEntire claims that, because its "processing requirements are more expansive than those of a traditional manufacturer," this creates a novel question of law because South Carolina appellate courts have only analyzed and applied the Machine Exemption to "pure" manufacturers. (Id.)

Neither a manufacturer nor a processor may qualify for the exemption under section 12-36-2120(17) unless it brings itself squarely within the parameters of the exemption. The determination of

[4]Any item must still meet the basic test of being a "machine" in order to qualify for the exemptions under section 12-36-2120(17).

whether certain facts satisfy the language of a statute or a regulation is a question of law. See S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 725 S.E.2d 480, 483 (2012). This does not mean that applying the plain language of a statute or regulation to a different set of facts creates a *novel* question of law worthy of this Court's discretionary review.[5]

A. The Court of Appeals applied the Machine Exemption consistent with precedent related to the Machine Exemption and tax exemption statutes in general.

It is axiomatic that "[t]he language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed *against* the claimed exemption." TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E. 471, 476 (1998) (emphasis added). The taxpayer bears the burden to "prove their right to an exemption by bringing themselves clearly within the conditions imposed by the statute." Id. at 618, 503 S.E.2d at 475.

In the appellate cases addressing the application of the Machine Exemption, the Supreme Court and Court of Appeals have acknowledged this accepted rule that tax exemption statutes are to be strictly construed against the claimed exemption. See Southeastern-Kusan, Inc. v. S.C. Tax Comm'n, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981); Hercules Contractors & Engineers, Inc. v. S.C. Tax Comm'n, 280 S.C. 426, 435, 313 S.E.2d 300, 306 (Ct. App. 1984).

The Court of Appeals correctly framed its analysis of the Machine Exemption within these general parameters of strict construction. Even if "McEntire's processing requirements are more expansive than those of a traditional manufacture," (Petition p. 5), it does not follow that the Machine Exemption should therefore be construed expansively. Moreover, if the plain language of the Machine

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[5]In its Petition, McEntire repeatedly characterizes its operations as unique and distinct from other manufacturers. (Petition pp. 3–6). If the nuances of McEntire's business are so unique, query whether this case presents a "special and important reason" worthy of this Court's discretionary review. See Rule 242 ("A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons"). The application of a statute to a narrow and limited segment of the manufacturing industry may not rise to the level of important public interest that generally supports granting a writ of certioari.

Exemption does not apply to the facts found by the ALC, it would be inconsistent with established precedent for the Court of Appeals to liberally construe or strain the plain language of the Machine Exemption to carve out an exception for McEntire's "specialized and highly-regulated arena of fresh food processing." (See Petition p. 4).

B. The Court of Appeals correctly interpreted and applied the Machine Exemption consistent with the plain language of Regulation 117-302.

The Court of Appeals correctly applied the Machine Exemption to McEntire's food processing operations consistent with the explanations and examples provided in the Regulation. The Regulation makes clear that not every "machine" used by a manufacturer is integral and necessary to the manufacturing process, and it establishes clear limits to what is considered "processing" for purposes of qualifying for the Machine Exemption.

As discussed above, "[a] machine is not a part of the manufacturing process merely because it is integral and necessary to the manufacturer. For example, machines used for warehouse, distribution, or administrative purposes are integral and necessary to the manufacturer, but not part of the manufacturing process." Regulation 117-302.5(B)(1)(b) (emphasis added). As discussed at length in the Department's briefing and the Court of Appeals' opinion, the Regulation illustrates the distinction between a broad version of an integrated plant concept and South Carolina's more limited integrated plant concept. The ALC improperly utilized the broad approach and found that certain machines qualified for the exemption because they were indispensable to the manufacturing operations as a whole. However, South Carolina uses the latter approach, which qualifies machines for the Machine Exemption only if they are integral and necessary to the manufacturing process. Although a machine may be integral and necessary to McEntire's operations as a fresh food processor (e.g. bar code scanners or black ink aerosol cans), the Regulation makes it clear these same machines are not integral and necessary to the manufacturing process (i.e. processing the fresh produce).

Further, the ALC ignored or overlooked the straightforward application of the Regulation to

such items as conveyances/material handling machines,[6] chemicals, maintenance machines, storage machines, administrative machines, and protective clothing. Under the plain terms of the Regulation, these items are not integral and necessary to processing tangible personal property for sale. See Regulation 117-302.5(B). According to the Regulation, "processing" does not include moving raw or finished product; cleaning the processing area; maintenance; storage[7]; or administrative activities. Thus, the Regulation provides a framework for understanding when "processing" occurs in this case: only while the produce is being sorted, cut, washed, mixed, and packaged, not while it is being stored or transported throughout the storage areas of the plant.

The Court of Appeals correctly set aside the ALC's erroneous application of the broader integrated plant concept and applied the framework of the Machine Exemption as explained in the Regulation. In doing so, the Court of Appeals did not disregard the ALC's factual findings; rather, it applied a correct interpretation of the Machine Exemption to the facts to determine which items qualified for the exemption and which did not. The Court of Appeals correctly concluded that many of the items were not "machines used in processing tangible personal property for sale."

C. The Court of Appeals properly deferred to the Department's longstanding interpretation of the Machine Exemption.

McEntire asserts that the Court of Appeals incorrectly gave deference to the Department's interpretation of the statutes and regulations involved, but it does not articulate the basis for this

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[6]An exemption specific to material handling machines used in the operation of a manufacturing facility, as opposed to in processing tangible personal property for sale, can be found in S.C. Code Ann. § 12-36-2120(51) (2014). The existence of and the language used in subsection (51) demonstrates there is a difference between a machine being *used in the operation of a manufacturing facility* to support the overall manufacturing operation and a machine being *used in manufacturing tangible personal property for sale*.

[7]The Regulation narrows the meaning of processing even further when it explains that "[r]acks and tanks used to store a finished product while it cures" are not integral and necessary to processing. Regulation 117-302.5(B)(7)(c). The logical inference to be drawn from this example is that while an item is sitting on a storage rack waiting to become marketable, that item is not being processed and, thus, the storage rack is not being used in processing.

assertion. (Petition pp. 20-21). Although McEntire relies on case law for the uncontroversial proposition that courts should reject an agency's interpretation if it runs afoul of the plain language of the statute, McEntire never identifies a specific reason why the Department's interpretation conflicts with the plain language of the Machine Exemption.

In South Carolina Revenue Ruling # 04-7, the Department published guidance to clarify what constitutes "machines used in manufacturing" in light of two recently decided court cases. See Anonymous Corporation v. S.C. Dep't of Revenue, 02 -ALJ-17-0350-CC (S.C. Admin. L. Judge Div. July 8, 2003); Anonymous Corporation v. S.C. Dep't of Revenue, 99-ALJ-17-0153-CC (S.C. Admin. L. Judge Div. Nov., 9, 1999), aff'd, S.C. Dep't of Revenue v. Springs Industries, Inc., 2003-UP-029 (Ct. App. Feb. 28, 2003). The Department's guidance made clear the exemption is limited to machines that are integral and necessary to the manufacturing process, but "does not encompass all items useful to a manufacturer." Revenue Ruling # 04-7 at 3. Specifically, machines used for warehouse, distribution, or administrative purposes do not come within the Machine Exemption. Id. Thus, the Department's interpretation harmonizes, rather than conflicts with, the plain language of the Machine Exemption and the Regulation.

The Department's construction of the Machine Exemption should be afforded the "most respectful consideration" absent compelling reasons— and any compelling reasons are absent from this case. Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002).

II. THE COURT OF APPEALS CORRECTLY REVIEWED THE ALC'S DECISION UNDER A *DE NOVO* STANDARD WITHOUT DEFERENCE TO THE ALC'S CONCLUSIONS BECAUSE INTERPRETING SALES TAX EXEMPTIONS AND REGULATIONS ARE QUESTIONS OF LAW, NOT QUESTIONS OF FACT.

McEntire contends the Court of Appeals disregarded the evidence in the Record on Appeal in this case and instead inserted its own factual determinations, warranting this Court's review. (Petition p. 11). This argument is flawed because the questions presented to the Court of Appeals

were not questions of fact, but questions of law, and as such the Court of Appeals correctly reviewed the facts and evidence presented under a *de novo* standard.[8]

Under the Administrative Procedures Act, the Court of Appeals may properly reverse the ALC if it determines any ALC finding, conclusion, or decision violates statutory provisions or is affected by error of law. See S.C. Code Ann. § 1-23-610(D) (Supp. 2020); see also Petition p. 9. The interpretation of a statute or construction of a regulation is a question of law for the Court of Appeals to decide. See S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 725 S.E.2d 480, 483 (2012) (holding that the determination of whether certain facts satisfy the language of a Department regulation is a question of law). "Questions of statutory interpretation are questions of law, which are subject to *de novo* review and which [the appellate court] is free to decide without any deference to the court below." See State v. Whitner, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012) (citing Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010)). Interpreting sales tax exemptions and accompanying regulations is no different— it is a question of law subject to *de novo* review by the Court of Appeals without any deference to the ALC's conclusions. If the Court of Appeals finds the ALC's conclusions were controlled by an error of law, it should reverse the ALC.

Whether certain facts satisfy the plain language of the exemptions in section 12-36-2120(17) and the Regulation are questions of law. As discussed above, the ALC incorrectly applied the law when it concluded that items integral to the manufacturing operation as a whole could qualify for the exemptions. (See R. 18-40). This erroneous application of the exemptions was the result of the ALC misapplying the plain language of the Machine Exemption and its misplaced reliance on another jurisdiction's broader version of the integrated plant concept, which is contrary to South Carolina's

[8]It is worth noting that in this portion of its Petition, McEntire essentially argues that the application of the relevant tax exemption statutes to such a "fact-intensive" case is a question of *fact*, but argues earlier in its Petition that the same application is a novel question of *law*.

limited integrated plant concept as explained in the Regulation. See Final Order p. 21 (relying on test derived from Niagara Mohawk Power Corp. v. Wannamaker, 144 N.Y.S.2d 458 (N.Y. App. Div. 1955)).

In Niagara Mohawk, the New York court determined that certain items (e.g. the structures and supports that house and steady the machinery and were physically annexed to the machinery) were essential to production and necessary to the functioning of the plant as a whole. Thus, the court held that machinery is eligible for an exemption if it performs an essential or indispensable function in the taxpayer's overall manufacturing operations.

By relying on the Niagara Mohawk case, the ALC improperly expanded the scope of the Machine Exemption to include elements of McEntire's operations that go well beyond the washing, cutting, mixing, sorting, and packaging of produce. The ALC concluded that without these activities that occur prior to and after processing the fresh produce, McEntire would not have a marketable product. (R. 22-23). However, that is not the test as explained at length in the Regulation.

The Court of Appeals properly corrected this fundamental misapplication of the Machine Exemption, which warranted a reversal of the ALC's decision.

A. The Court of Appeals' *de novo* review of the facts and evidence regarding the items in dispute warranted reversal of the ALC's findings based on the plain language of the Machine Exemption and Regulation.

The ALC incorrectly applied the Machine Exemption to a number of items used in McEntire's overall processing operations, notwithstanding McEntire's claims to the contrary. (Petition pp. 11-20). The Court of Appeals correctly applied the boundaries of the Machine Exemption and Regulation and rightly concluded the following disputed items are subject to tax.

i. Protective Clothing.

The ALC incorrectly granted the exemption for McEntire's protective clothing. These items were at the heart of McEntire's exemption claim, and included gloves, aprons, hairnets, coveralls, and eyewear.

The Regulation specifically addresses protective clothing, and provides that protective clothing worn by an employee working in the area in which the manufacturing process occurs does not qualify as a machine and is not exempt from the tax as a machine used in manufacturing tangible personal property for sale under section 12-36-2120(17). S.C. Regulation 117-302.5(B)(10).[9] It is difficult to imagine a more straightforward explanation.

The ALC attempted to draw a distinction between protective clothing designed to protect an employee from the product being manufactured versus protective clothing meant to protect a product from the employee. McEntire argues this same distinction in its Petition. (Petition pp. 18-20). However, the Regulation does not determine the exemption status based on the use of the protective clothing. Instead, the Regulation explains that protective clothing is not exempt because it cannot be considered a "machine" within the plain reading of section 12-36-2120(17).[10] Thus, the Court of

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[9]The Regulation provides one exception, that "clothing and other attire required for working in a Class 100 or better as defined in Federal Standard 209E clean room environment" is exempt under the provisions of section 12-36-2120(54). McEntire concedes that this exception is not applicable here.

[10]During the pendency of this litigation, the legislature included in the 2020-2021 General Appropriations Bill a temporary proviso that specifically exempts protective clothing from sales and use tax. The proviso applies to the very same protective clothing that McEntire contends is already exempt under the Machine Exemption. But this appears to be strong evidence the legislature never intended the Machine Exemption to apply to this type of protective clothing; otherwise, there would have been no need for the proviso. Notably, the proviso was vetoed for the current budget year. See S.C. Budget Bill H.4100, Part IB, Section 109.12 (DOR: Food Manufacturing Equipment) ("Clothing required by Current Good Manufacturing Practices pursuant to 21 C.F.R Section 111.10, as it may be amended, at perishable prepared food manufacturing facilities . . . to prevent health hazards, including outer garments, gloves . . ., hairnets, headbands, beard covers, caps, hair covers . . ., and other attire required . . . for persons working in direct contact with food . . . to protect against contamination of

Appeals correctly reversed the ALC's error of law in finding that protective clothing is not a "machine" for purposes of the Machine Exemption.

ii. Conveyances (forklifts, hand trucks, pallet jacks, and oil lubricants used therein).

Under the Regulation, conveyances serve as an essential and indispensable component part of processing (and are exempt from taxes) if they are (1) conveyance machines feeding the first processing machine; (2) conveyance machines moving in-process materials; and (3) conveyance machines discharging the finished product from the last processing machine. See Regulation 117-302.5(B)(4)(a). In other words, conveyances, such as warehouse machines (e.g. forklifts), that are used only for loading, unloading, storing, and transporting raw materials from the warehouse to the manufacturing area or transporting finished product to the warehouse are generally taxable. S.C. Regulation 117-302.5(B)(4); Revenue Ruling # 04-7 at 10. If, in addition to these purposes, the forklift also is used substantially to feed the raw material into or onto the first processing machine in the manufacturing process area, only then is the forklift exempt. Id.

This distinction makes logical sense: processing machines could not perform their intended functions without machines that feed materials into the processing machines, move in-process materials from one processing machine to another, and discharge the finished product. But the processing machines could continue to perform their intended functions in the absence of forklifts that move materials around a storage area.

The record evidence demonstrates that the forklifts are not used substantially for feeding the first processing machine, which is located in the high-care area. Instead they are used to "feed" the bin-dumping system, which then feeds the conveying system and moves the produce into the high-

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food in perishable prepared food manufacturing facilities shall be exempt from all sales and use taxes").

care area, where it is sorted, trimmed, and any defects are removed. (R. 189, 252-53). From there, the produce continues on the conveyor to a cutting area. (Id.).[11]

The evidence further demonstrates that the remaining conveyance machines are used in the "palletizing, shipping, finished storage, raw storage, tomato repack area, and receiving dock." (R. 219). In other words, McEntire's remaining conveyances are not used for transport in-process material,[12] but instead are used within McEntire's low-care areas to transport finished product to the warehouse for storage and loading for shipment.

The ALC erroneously concluded the forklifts and McEntire's other conveyances were exempt because they "constitute[d] an indispensable component part of the manufacturing process." (R. 24). The Court of Appeals was right to correct this error.

iii. Floor Drain Covers and Recordkeeping Items

The ALC also wrongly expanded the Machine Exemption by concluding that stainless steel floor drain covers were exempt. McEntire uses these items to keep debris and product from entering its floor drain system. (See R. 28, 239). To qualify for the exemption, an item must be a "machine," which is defined as a "mechanical device or combination of mechanical powers, parts, attachments and devices . . . ." See Regulation 117-302.5(B)(1). The Court of Appeals rightly concluded that a floor drain cover that keeps debris and produce from entering into the floor drain system is not[13] a

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[11]The ALC concluded that "75-80% of the forklift usage can be attributed to dumping the product directly onto the conveying system." (R. 23-24). However, the testimony regarding the percentage of McEntire's forklift fleet which is used strictly for transferring product into the bin-dumping system was only "roughly 25%." (R. 256).

[12]Some conveyance machines appear to be used to discharge the finished product in the palletizing area or move in-process material within the tomato repack area, an area within the low-care area of McEntire's facility in which the Department determined processing occurred, but McEntire did not keep a record of how often it used these items for these exempt purposes. (R. 209, 255-56).

[13]McEntire contends the Court of Appeals determined that floor drain covers are "machines" within this definition. (R. 1321). This appears to be a scrivener's error in the Court's opinion, which inadvertently omitted the word "not." In context, the reasonable reading of the Court's conclusion is

mechanical device or a part of a mechanical device and, as such, is not a "machine" for purposes of the Machine Exemption.

The ALC also exempted various recordkeeping items, such as bar code scanners, black ink aerosol cans, and mobile computer stands, on the grounds they are all used to assist in McEntire's trace-back system in order to meet federal law requirements in case of contamination. (R. 26, 205-206, 220, 236-237). Regulation 117-302.5(B)(9) clearly provides that administrative equipment and supplies used for recordkeeping are not exempt. Even if the trace-back system is required by federal law, these are merely recordkeeping items that are not "machines used in processing tangible personal property for sale." (Id.). Although they may be necessary for McEntire to meet certain federal requirements, this makes them integral to the manufacturer's operations, but not integral and necessary to the manufacturing process itself. See Regulation 117-302.5(B)(1)(b).

iv. Storage Items (Water Storage Tanks, Warehouse Racks, Pallet Flow Brakes, and Stacking Containers) and Blower Fans.

Under the Regulation, machines used for storage, including racks used to store raw materials, storage tanks used to store water, and racks used to store a finished product while it cures, do not qualify for the exemptions in section 12-36-2120(17). See Regulation 117-302.5(B)(7). The ALC clearly erred in granting the exemption for storage items that do not qualify as machines used in processing tangible personal property for sale.

Among the storage items that McEntire claimed were exempt were water storage tanks that store water both inside and outside the facility (R. 14, 27, 214-216, 258-59); warehouse racks, pallet flow brakes (R. 12, 26, 210-213); and stacking containers, (R. 12, 26, 233-234). The warehouse racks store produce in the raw coolers prior to the produce being transferred into the high-care area. (R.

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that "Because drain covers are [not] a 'mechanical device or combination of mechanical powers, parts, attachments and devices to perform some function' as provided in Regulation 117-302.5(B)(1), we find they are not tax exempt." (R. 1321).

210-211). The stacking containers are used in the "work in progress" section of the facility to store processed produce until McEntire can combine it with other processed produce. (R. 12, 233-234). According to McEntire, these items help ensure the quality of their product.

However, the standard for the Machine Exemption and Regulation is not whether the machine ensures the quality of the product being processed; rather, it is whether the machine is "used in manufacturing tangible personal property for sale." The ALC ignored the plain language of the Regulation. The Court of Appeals correctly found that McEntire's water storage tanks, warehouse racks, pallet flow brakes, and stacking containers do not qualify for the Machine Exemption in light of the clear directives found in the Regulation. See Regulation 117-302.5(B)(7)(b).

McEntire also claimed the Machine Exemption for blower fans it uses throughout its facility to maintain the required temperature to ensure the quality of the product. (R. 13, 231-232, 249-251). The Regulation also explicitly addresses quality control items used to condition air— they are exempt only if used during the processing of tangible personal property. See Regulation 117-302.5(C)(24) ("Machines used to condition air (including humidification systems) for quality control during the manufacturing process of tangible personal property made from natural fibers and synthetic materials" are exempt) (emphasis added). Thus, any machines used to control the temperature where the produce is being processed would be exempt, but machines used outside of the fresh food processing would be taxable. Importantly, if the temperature control item is being used during storage, the temperature control item cannot be an integral part of the processing of fresh produce. The ALC chose to grant the exemption, despite there being no record evidence that McEntire's blower fans were "substantially used" in the processing of fresh produce rather than in the storage areas.

v. Cleaning Machines and Floor Treatment Chemicals

The ALC also incorrectly granted the Machine Exemption for McEntire's floor treatment chemicals. (R. 27). McEntire's witness testified that these chemicals are used "to sanitize the floor

and keep the floor clean" and that they serve no other purpose within the facility. (R. 224, 258). The Regulation specifically provides that (1) chemicals are exempt under the Machine Exemption only if they are used to clean an exempt machine, and (2) chemicals which are used to clean floors are not exempt. See Regulation 117-302.5(B)(5)(a) and (B)(5)(b)(ii). Notwithstanding this clear language, the ALC granted the exemption on the floor treatment chemicals. The Court of Appeals correctly reversed the ALC.

Next, the ALC found that McEntire's purchases of cleaning machines, known as "foamers," were exempt. McEntire used these foamers to foam and sanitize equipment in the high-care area. (R. 229). The Regulation provides that, unless a maintenance machine is used to maintain exempt machines, they are not exempt from tax as a machine used in manufacturing tangible personal property for sale. Regulation 117-302.5(B)(6).

The ALC determined that these foamers were used to "sanitize the machines and surfaces directly involved in the production line." (R. 27). This finding was unsupported by the record. There is no evidence regarding the specific equipment the foamers were used to clean. There is no evidence that the equipment or machines the foamer cleaned were machines exempt under the Machine Exemption. Even if the machines being cleaned by the foamers were exempt, there was no evidence as to whether the exempt machines would be able to process fresh produce without the cleaning conducted by the foamers. The Court of Appeals correctly reversed the ALC.

III. THE COURT OF APPEALS CORRECTLY FOUND THAT MAINTENANCE TOOLS AND GENERATOR RENTALS USED ON AN "AS-NEEDED" BASIS ARE NOT MACHINES THAT ARE INTEGRAL AND NECESSARY TO THE PROCESSING OF FRESH PRODUCE.

The Regulation provides generally that maintenance machines used at a manufacturing facility are not exempt from the tax as a machine used in manufacturing tangible personal property for sale.

See Regulation 117-302.5(B)(6). It further explains that "machines that are used to maintain non-exempt machines (machines that are not integral and necessary to the manufacturing process), or are not used on an ongoing, continuous basis to maintain exempt manufacturing machines (machines that are integral and necessary to the manufacturing process) are maintenance machines and are not exempt from the tax . . . ." (Id.). In light of this Regulation and the record evidence, the Court of Appeals concluded the maintenance tools did not qualify for the exemption because McEntire only uses these tools on an "as needed" basis.

In its Petition, McEntire contends this "as-needed" standard is unsupported by the statute and Regulation. (Petition p. 21). According to McEntire, the Court's interpretation of the Regulation "imposes a new requirement that a machine be used year-around" in order to be considered used on an "ongoing and continuous basis." (Petition p. 21). McEntire contends the ALC correctly exempted these particular items because they were used on an "ongoing and continuous basis" during the seasons in which the items were needed. (Petition p. 21).

The Court of Appeals did not create a new standard or a seasonal exception. It's finding that the maintenance tools and the ethylene generators were only used on an "as needed" basis, it was simply describing in different language that the general maintenance tools and the generators were not used "on an ongoing and continuous basis during the manufacturing process," as required by the Regulations. (See R. 235 (describing that the maintenance tools are used when a machine breaks or requires care); R. p. 257 (testimony stating that the ethylene generators are only rented when the tomato repack manager says a generator is needed)). Accordingly, the Court of Appeals properly reversed the ALC.

CONCLUSION

Certiorari is not appropriate in this case under Rule 242(b), SCACR. The Court of Appeals' decision does not raise any special and important reasons that weigh in favor of granting the writ.

Instead, the Court of Appeals correctly reversed the ALC's Order in finding that McEntire's purchases of certain items were subject to use tax and not entitled to either of the exemptions within section 12-36-2120(17). Such considerations are questions of law, not questions of fact, and as such, the Court of Appeals properly reviewed these questions of law under a *de novo* standard.

Further, the Court of Appeals properly corrected the fundamental errors of law committed by the ALC, without which the ALC would have been unable to conclude that the items in dispute were exempt from tax. Additionally, the Court of Appeals gave proper deference to the Department's interpretation of the relevant statutes and regulations because such interpretations are in line with, and not in conflict with, the plain language of the law. Finally, the Court of Appeals' conclusions regarding certain items used by McEntire on an "as-needed" basis align with the plain reading of the Regulation and they do not create a standard unsupported by the relevant laws. Consequently, this Court should deny McEntire's Petition.

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