

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Opinion No. 6062 (S.C. Ct. App. filed June 12, 2024)

Lowe's Home Centers, LLC Appellant,

v.

South Carolina Department of Revenue..... Respondent.

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules (“SCACR”), Petitioner Lowe’s Home Centers, LLC (“Lowe’s”) petitions this Court to issue a writ of certiorari to review the decision of the Court of Appeals styled *Lowe’s Home Centers, LLC v. South Carolina Department of Revenue*, Op. No. 6062 (S.C. Ct. App. filed June 12, 2024), which affirmed the holdings of the Administrative Law Court (“ALC”) and ruled in favor of the South Carolina Department of Revenue (“Department”). Appendix (“App.”) pp. 2130–45.¹ For the reasons set forth below, the Court should grant this petition and reverse the Court of Appeals’ decision.

CERTIFICATE OF COUNSEL

Counsel for Lowe’s hereby certifies that a Petition for Rehearing was timely filed on July 17, 2024 (App. pp. 2146–66), and finally ruled on by the Court of Appeals on August 23, 2024 (App. p. 2167).

QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals err in holding that Lowe’s owed additional sales tax and interest related to its contracts to incorporate materials, such as flooring, cabinets, and roofing, into customers’ real property, on the basis that the contracts involved retail sales of tangible personal property by Lowe’s, in its capacity as a retailer, to customers?
- II. Did the Court of Appeals err in declining to address Lowe’s’ position that the Department erred in calculating the “fair market value” of the materials used during the performance of the contracts?
- III. Did the Court of Appeals err in rejecting Lowe’s’ position that the Department’s assessment resulted in Lowe’s, as a contractor, being treated differently from and less favorably compared to other South Carolina contractors, in violation of the Equal Protection Clause?

¹ Lowe’s Home Centers, Inc. converted to Lowe’s Home Centers, LLC, effective November 1, 2013. Lowe’s Home Centers, Inc. was the taxpayer during the tax period at issue. For all purposes, Lowe’s Home Centers, LLC, is the successor in interest to Lowe’s Home Centers, Inc.

STATEMENT OF THE CASE

A. RELEVANT FACTS

As described in the ALC's findings of fact, Lowe's operates "two categories of business." App. p. 4. First, Lowe's makes "traditional retail sales of home improvement materials" to customers. App. pp. 4-5. In addition, separate from its retailing activities, Lowe's operates a "second line of business" where Lowe's regularly enters into lump-sum contracts with customers to incorporate materials, such as flooring, cabinets, and roofing, into customers' real property (the "Contracts"). App. p. 5. Lowe's offers Contracts for a wide range of real property improvements, from built-in "appliance[s] to much more involved and complex projects like the installation of new flooring, windows, roofing, or the complete remodel of a kitchen, bathroom, or other room." *Id.* Competitors in this contractor line of business include other large home improvement companies that perform improvements to real property, as well as smaller contractors. *Id.* Like other high-volume purchasers, Lowe's receives volume discounts from vendors.

Given its two lines of business, Lowe's held itself out to the public not only as a retailer, but also as a contractor. *See, e.g.*, App. p. 615. Lowe's was licensed with the South Carolina Department of Labor, Licensing and Regulation throughout the tax period at issue as a Residential Builder and then as a General Contractor. App. pp. 890-98. Accordingly, the ALC found that "***Lowe's is both a contractor and a retailer*** based on the evidence presented[.]" App. p. 19 (emphasis added). It acknowledged "that nothing in the South Carolina statutes prohibits a retailer from also acting as a general contractor." App. p. 26. S.C. Code Ann. Regs. § 117-324 (2012) (the "Dual Business Regulation") recognizes the concept of a "dual business" that operates as a retailer and a contractor.

Lowe's' Contracts contain clear terms and conditions. The Contracts state that Lowe's is required to provide both the labor and materials it estimates will be necessary to complete the real

property improvement for one fixed, lump-sum price. App. pp. 903, 909. The fixed, lump-sum price paid by the customer does not vary based upon the actual amount of labor and materials used by Lowe's to fulfill its contractual obligations.

The Contracts state that Lowe's will serve as the general contractor and subcontract work to perform the real property improvements. *Id.* The Contracts make Lowe's responsible to customers for obtaining any licenses and building permits that are legally required to perform the Contracts. *Id.* Further, Lowe's warrants that the improvements will be performed in a good and workmanlike manner and bears the risk for the work being performed in compliance with all applicable safety rules and all existing building codes, zoning ordinances and other laws. *Id.*

Moreover, the Contracts specify that title to the materials used to perform the real property improvements does not transfer from Lowe's to the customer until *after* they are incorporated into the customers' realty and any surplus materials upon completion of the improvements shall remain the property of Lowe's. *Id.* As the final user and consumer of the materials used under the Contracts, Lowe's remitted tax on the purchase price it paid vendors to procure those materials.

Generally, contractors pay sales tax on the amount paid to acquire materials used to perform real property improvements at the time of acquisition. But in accordance with the Dual Business Regulation, Lowe's remitted tax at the time it used the material to perform the Contracts. App. p. 7.

Sixty percent of the materials used in the Contracts were "Special Order Materials." App. pp. 6-7. Special Order Materials, such as cabinets, "are not found in the existing inventory of Lowe's and must be ordered from a vendor to fit the specific needs of a particular customer." *Id.* Special Order Materials are not purchased for resale. *Id.* The other forty percent were "Stock Materials" that are kept in inventory and may be resold in a traditional retail sale. App. p. 6.

B. PROCEDURAL HISTORY

The Department audited Lowe's' Contracts for the tax period beginning August 1, 2008 and ending July 31, 2011. App. p. 425. In its final determination, the Department admitted that Lowe's was the final consumer and user of the building materials used in fulfilling the Contracts. App. p. 859. Thus, the Contracts were not retail sales of tangible personal property by Lowe's. However, the Department contended Lowe's did not pay the correct amount of tax. It claimed Lowe's was required to remit tax based on the "fair market value" of the materials as measured by a 40% markup from the purchase price Lowe's paid to the "retailing price" Lowe's would have charged had it sold the materials in a traditional retail sale outside of a Contract. App. p. 862. The final determination assessed Lowe's \$2,206,054.28 in additional sales tax, \$360,580.69 in interest, and \$290,593.35 in penalties. App. p. 857.

The Department issued its final determination on October 24, 2014 (App. pp. 856-67), and Lowe's timely appealed to the ALC (App. pp. 835-89). A contested case hearing was held on April 20, 2016, which was continued and completed on June 7, 2016. App. pp. 34-423. The primary issue for the ALC to determine was the amount of gross proceeds subject to tax.

On December 11, 2020, the ALC issued its Order, which rejected the Department's interpretation in the final determination, but upheld the assessment of sales tax and interest on an independent basis. App. pp. 1-33. The ALC separated the Contract into two parts: (1) a taxable retail sale of tangible personal property by Lowe's, where it initially acted as a retailer, followed by (2) a nontaxable sale of installation services by Lowe's, where it acted as a contractor. App. pp. 26-27. The ALC rejected Lowe's' contention that the Department erred in calculating the fair market value of the materials used in the Contracts (App. p. 28), and denied as moot Lowe's' claim that imposing sales tax on the transactions violated the Equal Protection Clause (App. p. 29). The ALC declined to uphold penalties due to the complexity of the issues. App. p. 31.

Lowe's timely appealed, and the Court of Appeals affirmed the ALC's rulings. App. pp. 2130–45. Lowe's then filed its Petition for Rehearing (App. pp. 2146–66), which the Court of Appeals denied on August 23, 2024 (App. p. 2167).

SUMMARY OF ARGUMENTS

SCACR Rule 242 lists circumstances that weigh in favor of this Court issuing a writ of certiorari. Among the reasons listed in the Rule are where there are novel questions of law at issue and where substantial constitutional issues are directly involved. SCACR Rule 242(b)(1) & (4).

This case involves a novel question of law regarding what sales or use tax responsibility did Lowe's—a dual business that is both a retailer and a contractor—have related to its Contracts with customers for improvements to real property. This issue includes determining whether the Contracts constitute (1) nontaxable construction contracts/real property improvements by Lowe's, as a contractor, or (2) taxable retail sales of tangible personal property by Lowe's, as a retailer. It also includes assessing the gross proceeds subject to tax.

The Court of Appeals acknowledged that prior to its Opinion, “no South Carolina appellate decision [had] consider[ed] the specific question before [the court].” App. p. 2139. Lowe's is aware of only one unpublished Court of Appeals decision that addresses whether agreements entered into by the taxpayer were construction contracts or retail sales of tangible personal property. *See S.C. Dep't of Revenue v. Springs Indus., Inc.*, No. 2003-UP-029, 2003 WL 27397024, at *1 (S.C. Ct. App. Feb. 28, 2003). In that case, the court focused on the “nature and characteristics” of the agreements and affirmed that there was substantial evidence supporting the ALC's ruling that the agreements were nontaxable construction contracts, not retail sales of personal property. The Court of Appeals failed to even cite *Springs Industries* in its decision. While that case addresses a similar issue, it does not involve a dual business; therefore, it does not discuss how the Dual Business Regulation, § 117-324, affects the analysis of taxability. The unique nature of Lowe's' status as a

business that was required to comply with § 117-324 further compels this Court to review the Court of Appeals' decision.

As discussed below, the Court of Appeals committed several errors in ruling that Lowe's' Contracts involve retail sales of tangible personal property by Lowe's, operating as a retailer. For instance, the court rejected the traditional analysis of focusing on the nature and characteristics of the Contracts and instead supported its ruling with the seriously flawed "true object" test. Although there are numerous cases that address the true object test, Lowe's did not find any decisions where a South Carolina court applied this test to determine the proper taxation of a real property improvement contract. Also, the court concluded that the Contracts involved a retail sale (namely, a transfer of title or possession) of personal property, despite clear language in the Contracts and uncontroverted evidence demonstrating that customers who enter into an agreement with Lowe's for an improvement to realty do not obtain title or possession of personal property. The Department itself made multiple admissions that the Contracts are not retail sales of personal property. Also, departments of revenue, tribunals, and courts for at least six other states have analyzed Lowe's' Contracts and concluded that Lowe's' acts as a contractor for these transactions, and the Contracts are sales of real property improvements, rather than retail sales of personal property. The Court of Appeals' decision is wrong and makes South Carolina an outlier.

Additionally, the Court of Appeals incorrectly rejected Lowe's' challenge to the Department's calculation of the "fair market value" of the materials Lowe's used to fulfill the Contracts. App. p. 2143. The Department relied on two provisions to support its position. *See* S.C. Code Ann. § 12-36-90(1)(c) (2014) and S.C. Code Ann. Regs. § 117-309.17 (2012). But those provisions do not apply to the majority of the materials at issue. Moreover, they do not support the Department's position. Imposing a 40% mark-up on materials that are used by Lowe's in its

contractor line of business that is subject to its own competitive pressures, including pricing pressures, is not what was contemplated by the legislature.

Finally, this case raises important constitutional issues related to the Equal Protection Clause. The assessment of additional sales tax on the Contracts improperly divides contractors operating in South Carolina into two categories: those that also conduct retail sales and those that do not. The legislature did not anticipate an application of the Sales and Use Tax Act and regulations that would result in radically disparate treatment of contractors. The Court of Appeals asserted that Lowe's is not similarly situated to other contractors because Lowe's was permitted to purchase materials at wholesale. App. p. 2144. Although the Dual Business Regulation *required* Lowe's to purchase the materials used in the Contracts as if they were at wholesale (*i.e.*, by using a resale certificate), § 117-324 creates a mere difference in timing as to when Lowe's remits the tax. If Lowe's had not used a resale certificate, it would have purchased identical materials for its Contracts at the same price and paid the same amount of tax to the state.

In sum, important reasons exist for this Court to issue a writ of certiorari and review the Court of Appeals' decision in this matter.

ARGUMENTS

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS ERRED IN RULING THAT THE CONTRACTS INVOLVED LOWE'S ACTING AS A RETAILER WHO MAKES RETAIL SALES OF TANGIBLE PERSONAL PROPERTY TO CUSTOMERS

A. The Court of Appeals Ignored the Applicable Legal Standard and Relied on Inapposite Case Law

The Court of Appeals erred by relying on irrelevant cases from "other tax contexts," *see* App. p. 2139, rather than applying the correct legal framework to determine Lowe's' sales tax responsibility related to the Contracts.

S.C. Code Ann. § 12-36-910(A) (2014) provides that “[a] sales tax, equal to five percent of the gross proceeds of sales, is imposed on every person engaged or continuing within this State in the business of selling tangible personal property at retail.”² No “sale at retail” or “retail sale” can occur, and no sales tax can apply, unless “a transfer of title or possession” of tangible personal property takes place.” S.C. Code Ann. § 12-36-110 (2014) provides that the terms “sale at retail and retail sale mean all sales of tangible personal property.” S.C. Code Ann. § 12-36-100 (2014) defines a “sale” as “any transfer . . . of tangible personal property for a consideration including . . . a transfer of title or possession. A “retailer” is defined as “every person selling or auctioning tangible personal property[.]” S.C. Code Ann. § 12-36-70(1)(a) (2014):

For transactions involving contractors, a taxable retail sale of tangible personal property does *not* occur when the contractor uses materials to improve a customer’s real property. *See* S.C. Code Ann. § 12-36-110(1)(a), (e). Tangible personal property loses its character as “personal property” and is converted to real property once it is incorporated into real estate. The contractor is the last user of the tangible personal property while it maintains its character as “personal property.” Thus, the retail sale occurs upon the “sale[] to contractors for use in the performance of construction contracts” or the “sale[] of building materials to construction contractors, builders, or landowners for resale or use in the form of real estate.” *Id.*³ Contractors do not collect sales tax from customers with whom they enter into construction contracts or otherwise perform improvements to realty because the customer receives a nontaxable improvement, not tangible personal property. Sales tax applies to sales of tangible personal property but not sales of real estate

² “Tangible personal property” means personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses.” S.C. Code Ann. § 12-36-60 (2014).

³ “Building materials” is broadly defined to include all “tangible personal property which becomes part of real property.” S.C. Code. Ann. Regs. § 117-314.2 (2012); *see also* 27 S.C. Code Ann. Regs. § 117-174.45 (1976) (defining the term as “any material used in making repairs, alterations or additions to real property”).

or improvements to real estate. *See Hercules Contractors & Eng'rs, Inc. v. S.C. Tax Comm'n*, 280 S.C. 426, 435, 313 S.E.2d 300, 306 (Ct. App. 1984).

While the Sales and Use Tax Act does not provide a definition for the term “contractor,” the accompanying regulation defines a “contractor” as “any person, firm, association or corporation making repairs, or additions to real property.” S.C. Code Ann. Regs. § 117-314.2. Similarly, Title 40 of the South Carolina Code defines a “contractor” as a “general or mechanical contractor.” S.C. Code Ann. § 40-11-20(4) (2011).⁴ A “general contractor” is further defined as “an entity which performs or supervises or offers to perform or supervise general construction,” including the “improvement of any kind to real property.” *Id.* § 40-11-20 (8) & (9).

Against this backdrop, to determine whether Lowe’s had a responsibility to collect and remit sales tax from its customers on the Contracts or remit sales or use tax on its own purchase price for the materials used in performing the Contracts, the Court of Appeals was required to assess whether the Contracts constituted (1) retail sales of tangible personal property by Lowe’s, as a retailer, or (2) construction contracts/improvements to real property by Lowe’s, as a contractor. To do so, the Court should have considered the “nature and characteristics of the agreements.” *Springs Indus., Inc.*, 2003 WL 27397024, at *4 (noting the ALC “made detailed findings regarding the nature and characteristics of the agreements”; holding that there was substantial evidence to support the court’s finding that the agreements to install items in the taxpayer’s plant “constituted construction contracts rather than sales . . . of personal property,” including “a lump sum price was charged by the contractor” and “numerous references in the

⁴ The ALC stated that the definitions provided in Title 40 “provide guidance and are not in conflict with the definition of ‘contractor’ found in Regulation 117-314.2 of the South Carolina Code of Regulations (2012).” App. p. 11 (citing *City of Camden v. Fairfield Elec. Co-op., Inc.*, 372 S.C. 543, 548, 643 S.E.2d 687, 690 (2007) holding that where a term was not defined in the applicable title, the court properly applied the definition provided in another title of the code)).

agreements to ‘contracts’ and ‘contractors’”). The intent of the parties, as expressed or implied in a contract, is a key factor in determining whether an item is considered tangible personal property or real property. *See Hyman v. Wellman Enters., Inc.*, 337 S.C. 80, 84-85, 522 S.E.2d 150 (Ct. App. 1999) (noting that the intention of the parties is crucial in determining whether an article is considered a fixture (*i.e.*, real property) or remains personal property); *Planter’s Bank v. Lummus Cotton Gin Co.*, 132 S.C. 16, 29–30, 128 S.E. 876, 881 (1925) (illustrating that a contract can specify whether an item should be regarded as a fixture or retains its character as personal property).

The Court of Appeals’ decision does not even discuss *Springs Indus., Inc.*, 2003 WL 27397024, or the other cases cited above, nor does it address the nature and characteristics of the Contracts. Instead, the Court of Appeals wrongly relied on *Boggero v. South Carolina Department of Revenue*, 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015) and *Greystone Catering Co. v. South Carolina Department of Revenue & Taxation*, 326 S.C. 551, 486 S.E.2d 7 (Ct. App. 1997). App. pp. 2139–2140. Neither relates to whether an agreement constitutes a real property improvement nor a retail sale of tangible personal property. *Id.* (acknowledging that the cases address “other tax contexts”).

In *Boggero*, the court applied the “true object” test to determine whether the gross proceeds earned by a toilet business were proceeds from a service (waste removal), which would not be subject to sales or use tax, or proceeds from the rental of tangible personal property, which would be taxable. *See* 414 S.C. at 284–86, 777 S.E.2d at 845–46. The “true object” test is used to determine whether a transaction is treated as the sale of services or the sale (or rental) of goods for sales tax purposes. S.C. Code Ann. Regs. § 117-308 (2012) (“The receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax . . .”).

The Court of Appeals' decision notes: "The [*Boggero*] court stated, '[T]he true object test focuses on factual questions; namely, whether the customer's purpose for entering the transaction was to procure a good or a service.'" App. p. 2139 (citing 414 S.C. at 285, 777 S.E.2d at 846). The court's decision is the first time a South Carolina court has relied upon the "true object" test to determine whether a transaction constitutes a construction contract/real property improvement or a retail sale of personal property. By departing from the traditional analysis to support its holding with the "true object" test, the Court of Appeals erroneously imported a test that "suffers from serious weaknesses in principle and in practice." Hellerstein & Hellerstein, *State Taxation*, ¶ 12.08[2] (noting, *inter alia*, the "lack of any tax policy justification for the [test]"). Furthermore, the court's reliance on this test introduces difficult line-drawing problems that could apply to any dual business. *See id.* (stating the attempt to identify the services or the goods "as the 'true object' or the 'dominant purpose' of the purchaser is folly").

Greystone Catering concerned a challenge to sales tax assessed on food and beverages that were associated with a hotel room package. 326 S.C. at 554–55, 486 S.E.2d at 8–9. The hotel paid an accommodations tax on its revenue from room rentals and argued that paying an additional sales tax on food and beverages, which were already included in the cost of the room, resulted in double taxation of the same goods. *Id.* at 555, 486 S.E.2d at 8–9. The court rejected this challenge because "there is no per se prohibition on double taxation," and because the food and beverage charges were separately stated on guests' hotel bills. *Id.* at 554–56, 486 S.E.2d at 8–9. But *Greystone Catering* merely applies Department guidance related to hotel billing practices. *Id.* at 554, 486 S.E.2d at 8. It offers no guidance on whether Lowe's' Contracts qualified as construction contracts. Unlike hotel charges, conveyances of real property improvements are *per se* nontaxable. Separately estimated amounts for materials and labor are irrelevant if there is no transfer of

tangible personal property to Lowe's' customers. See S.C. Code Ann. § 12-36-110(1)(a), (e).

Therefore, it was erroneous for the Court of Appeals to rely on *Greystone Catering*.

B. The Court of Appeals Disregarded the Contract Language and Mischaracterized the Nature of the Contracts

The Court of Appeals ignored the terms and conditions in the Contracts. Instead, it focused on language in an unsigned preliminary estimate that was invalid. App. p. 2141. This is contrary to South Carolina precedent requiring courts to determine the meaning of contracts based on the "four corners of the instrument." *McPherson v. J.E. Serrine & Co.*, 206 S.C. 183, 204, 33 S.E.2d 501 (1945). When a contract is unambiguous, "its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed." *Id.* Even the Department's Sales and Use Tax Manual states that "the determination as to whether a person is a retailer making sales and installations or a contractor may require a review of the various agreements or contracts between the taxpayer and his customers." App. p. 1745.

Nonetheless, the Court of Appeals disregarded key terms and conditions establishing that the Contracts were construction contracts/real property improvements by Lowe's, operating as a contractor. For instance, the Contracts specify that Lowe's is required to provide **both** labor and materials necessary to complete the real property improvement for one fixed, lump-sum price. They also provide that Lowe's is the general contractor and will work with subcontractors to perform the improvements, is responsible for obtaining any and all licenses and building permits that are legally required, warrants the improvements will be completed in a good and workmanlike manner, and bears the risk for the contract being performed to the customer's satisfaction. More importantly, the Contracts explicitly provide that Lowe's retains title to all materials used to perform the real property improvements until **after** they are incorporated into the customers' real estate and have been converted to real property.

The Court of Appeals disregarded the language stating the Contracts are lump-sum agreements, and focused instead on the fact that the agreements show the estimated amounts associated with the materials and labor components of the real property improvements. App. p. 2140. The court did not cite any authority which holds that merely listing amounts associated with estimated materials and labor on the face of a construction contract somehow converts it into a retail sale of personal property. Lowe's is not aware of any.

With respect to the key terms in the Contract regarding the passage of title, the court made the following erroneous assertion in a footnote:

[W]e reject Lowe's' argument that under the terms of its contract, title to the materials purchased remains with Lowe's until after the materials have been installed in a customer's home. . . . Whether the customer leaves the store with the items or has them installed later pursuant to their instruction in an installation contract . . . makes no difference to our analysis.

App. p. 2143 n.3. As discussed above, a retail sale of tangible personal property requires a transfer of title or possession of personal property. *See supra* ___. When a customer leaves the store after entering into a Contract, he neither possesses the items nor holds title to them. This certainly makes a difference to the analysis.

In addition, the Court of Appeals inexplicably ignored the Department's numerous admissions that the Contracts did not involve sales of tangible personal property by Lowe's to customers. Significantly, these admissions were made by John McCormack who was the General Manager for the Policy Section in the Department's Office of General Counsel and had more than 30 years of experience focusing on sales tax:

- John McCormack testified on behalf of the Department that Lowe's' contracts were different from traditional retail sales. App. pp. 372-75.
- He testified that Lowe's was "making improvement[s] to real property". App. p. 381.

- He conceded that Lowe's "[was] the final user – consumer of the building materials." "There's no resale to a retail customer that's contemplated." And "no further markup [wa]s contemplated." App. p. 387.
- Mr. McCormack testified as follows about his own Contract for a built-in dishwasher in his home: "I was buying improvement to real property"; the transaction "[wa]s not considered a sale to me. It's considered a . . . sale to Lowe's itself" because "they're the last consumers of the tangible personal property." App. p. 382.
- He further testified that the position that a Contract was a retail sale of tangible personal property and sale of installation services "is incorrect" and wrong "as a matter of law." App. pp. 383–84, 386.
- He agreed that "[a]ll the building materials on the installation contracts become part and parcel of the customer's real property". App. p. 398.

The Court of Appeals' failure to accept the Department's admissions compounded its errors in ignoring the language of the Contracts.

C. The Court of Appeals Misapprehended Lowe's Status for Purposes of the Contracts

The Court of Appeals wrongly held that Lowe's acts as a retailer for purposes of the Contracts. App. pp. 2139–42. The plain language of the applicable statutes and regulation and the undisputed evidence establish that although Lowe's is both a retailer and a contractor, it operates exclusively as a contractor for purposes of its Contracts.

The "cardinal rule" of statutory interpretation "is to ascertain and effectuate the intent of the legislature." *Grant v. City of Folly Beach*, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001). Where "a statute's language is plain and unambiguous, and conveys a clear and definite meaning," there is nothing to interpret, "and the court has no right to look for or impose another meaning." *Id.* Moreover, statutes should be construed so as to avoid absurd results. *Carolina Power & Light v. Town of Pageland*, 321 S.C. 538, 471 S.E.2d 137 (1996).

As noted above, S.C. Code Ann. § 12-36-70(1)(a) defines a "retailer" as every person selling tangible personal property. And a sale of tangible personal property requires a transfer of

title or possession. S.C. Code Ann. § 12-36-100. The term contractor is broadly defined as “any person, firm, association or corporation making repairs, or additions to real property” and “an entity which performs or supervises or offers to perform or supervise general construction,” including the “improvement of any kind to real property.” S.C. Code Ann. § 40-11-20(4), (8) & (9); S.C. Code Ann. Regs. § 117-314.2.

Based on the above language and the undisputed evidence, the ALC properly concluded that Lowe’s qualifies as a “contractor” under these provisions. The ALC’s Order states:

By contracting with customers to install home improvements, including repairs and additions to real property, Lowe’s qualifies as a contractor under Regulation 117-314.2. Pursuant to Title 40, the supervision of third-party installers or subcontractors during construction projects predicated upon the installation contracts at issue also qualifies Lowe’s as a contractor under the statutory definition.

App. p. 11. Because Lowe’s falls within these unambiguous definitions, the analysis ends there. *See Paschal v. State Election Comm’n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995) (stating when a statute has “clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning”).

The Court of Appeals did not even cite, much less analyze these definitions. Instead, it focused on the volume of Lowe’s’ traditional retail sales versus the volume of the company’s contract sales. App. p. 2141. The court did not cite any authority indicating that the percentage of sales under Lowe’s’ retailer business versus the percentage of sales under its contractor business proves whether Lowe’s acted as a retailer or contractor for purposes of the Contracts.

Also, the Court of Appeals asserted that evidence supporting the ALC’s ruling that Lowe’s acts as a retailer in connection with the Contracts is found in Lowe’s’ financial documents in which Lowe’s advertises itself as a retailer. *Id.* The court ignored statements in the same documents

advertising Lowe's as a contractor. App. p. 615. In addition to its financials, Lowe's also advertised itself as a contractor throughout its website.

Moreover, the Court of Appeals wrongly ruled that, although Lowe's held a "contractor's license for a short time during the audit period, it did not have this license for most of the installed sales." App. p. 2141. This is not true. The undisputed evidence shows that Lowe's was licensed as a contractor throughout the entire audit period: first as a Residential Builder and then a General Contractor. A "residential builder" is defined to include "one who constructs, superintends, or offers to construct or superintend the construction, repair, improvement, or reimprovement of a residential building or structure." S.C. Code Ann. § 40-59-20(6) (2011). This is similar to the definition of a contractor which includes "any person, firm, association or corporation making repairs, or additions to real property." S.C. Code Ann. Regs. § 117-314.2.

D. The Court of Appeals Erred in Interpreting the Impact of the Dual Business Regulation

The Court of Appeals erred in determining that Lowe's' position that it was required to pay tax on its purchase prices "would require a forced construction of the applicable statutes and regulatory provisions." App. p. 2140.

As noted, contractors are required to pay tax on the materials they use during the performance of construction contracts or improvements to real property pursuant to section 12-36-110(1)(a) or (e). *See supra*, p. ___. Contractors generally pay sales tax on the amount paid to acquire tangible personal property at the time of acquisition. *See* S.C. Code Ann. Regs. § 117-314, 117-314.1 & 117-314.2 (2012). However, the Dual Business Regulation *requires* "dual businesses" to purchase all tangible personal property as if it were at wholesale (namely, by using a resale certificate) and without paying the sales tax upon acquisition:

Operators of businesses who are both making retail sales and withdrawing for use *from the same stock of goods are to purchase*

at wholesale all of the goods so sold or used and report both retail sales and withdrawals for use under the sales tax law. This ruling applies only to those who actually carry on a retail business having a substantial number of retail sales and does not apply to contractors, plumbers, repairmen, and others who make isolated or accommodation sales and who have not set themselves up as being engaged in selling.

S.C. Code Ann. Regs. § 117-324 (emphasis added). As such, this regulation required Lowe's to purchase all materials with a resale certificate and then remit tax on its purchase price at the time Lowe's used and consumed them in the course of performing the Contracts.

Lowe's' position that it was required to purchase the items using a resale certificate and then pay tax upon use is a reasonable interpretation of the Dual Business Regulation and other applicable provisions. Indeed, the Department itself testified that "if you're a retailer and you make more than isolated sales, you're required by th[e Dual Business R]egulation, even if you do construction contracts, to purchase pursuant to a resale certificate." App. p. 260. Also, the Department has promulgated a different regulation which confirms that companies making both retail sales and withdrawing for use from the same stock of goods should use their resale certificates to comply with the Dual Business Regulation: "Educational and medical institutions and food service companies should not provide their suppliers a resale certificate, Form ST-8A, unless they will be re-selling the product *or are doing so to comply with the provisions of SC Regulation 117-324.*" S.C. Code Ann. Regs. § 117-305.4 (2017) (emphasis added).

Furthermore, like South Carolina, at least 13 other states have statutory or regulatory authority or guidance that allow dual businesses to purchase materials at wholesale and pay tax on the cost price of materials upon withdrawal and use to perform improvements to real property. See App. pp. 2118 –21. For example, North Carolina law provides:

A retailer-contractor that purchases tangible personal property . . . to be installed or applied to real property to fulfill the contract may purchase those items exempt

from tax under a certificate of exemption pursuant to G.S. 105-164.28 provided the retailer-contractor also purchases inventory or services from the seller for resale.

N.C. Gen. Stat. § 105-164.4H(b)(1) (emphasis added). Other states with similar provisions include Alabama, Arkansas, Colorado, Idaho, Iowa, Kansas, Michigan, Minnesota, Missouri, North Dakota, Virginia, and Wisconsin. *See* App. pp. 2118–21 (quoting the relevant provisions from each state).

Based on the foregoing, Lowe's' position did not require a forced interpretation.

E. The Court of Appeals' Ruling Makes South Carolina an Outlier

By affirming the ALC decision, the Court of Appeals makes South Carolina an outlier among other states that have determined Lowe's Contracts constitute real property improvements and that Lowe's acts as a contractor for purposes of the transactions. The court ignored the undisputed evidence that Lowe's received correspondence from the departments of revenue of Maryland, Ohio, and Utah putting it on notice that it served as a contractor for purposes of the Contracts and should not charge customers sales tax. It also ignored evidence that the Oklahoma Tax Commission ruled that Lowe's, as a contractor, was the final consumer or user of the materials incorporated into the customers' real property under the terms of its Contracts. *See In the Matter of the Sales Tax and Use Tax Protest of Lowe's Home Ctrs., LLC a/k/a Lowe's Home Ctrs., Inc.*, Okla. Tax Comm'n Order, Case No. P-09-195-H, p. 45 (Feb. 26, 2015), *aff'g In the Matter of the Sales Tax and Use Tax Protest of Lowe's Home Ctrs., LLC a/k/a Lowe's Home Ctrs., Inc.*, A.L.J. Findings, Conclusions and Recommendations, Case No. P-09-195-H (July 7, 2014). Oklahoma also concluded that treating Lowe's differently from other contractors would be an equal protection violation. *See id.* at pp. 49–50.

The Court of Appeals asserted that the Indiana Tax Court's decision in favor of Lowe's in *Lowe's Home Centers, LLC v. Indiana Department of State Revenue*, 23 N.E.3d 52, 55 (Ind. T.C.

2014), was distinguishable. *See* App. p. 2142 n.2. However, the Court of Appeals failed to articulate a reason why it was inapposite. It made passing reference to regulations cited in favor of the Indiana Department of Revenue's position, which was ultimately rejected. *See id.* Those regulations stated that "[a] contractor *may* function as a retail merchant (having all duties and responsibility as such) with respect to construction material, and then function as an installer or 'converter' of such property which will be treated as having been furnished by the customer." 45 Ind. Admin. Code 2.2-3-11(c). But the court failed to explain how this provision supports its conclusion, and it failed to acknowledge that the Indiana Tax Court rejected the Department of Revenue's position because the Tax Court found that "Lowe[']s did not transfer tangible personal property to its installation contract customers." *Compare* App. p. 2142 n.2 with 23 N.E.3d at 55–56.

The Court of Appeals also attempted to distinguish the ruling in favor of Lowe's from the Kansas Court of Appeals, *In re Lowe's Home Centers, L.L.C.*, 394 P.3d 149 at *2 (Kan. Ct. App. 2017) (table), on the basis that the Kansas decision addressed whether sales tax applies to installation charges and services. *See* App. p. 2142 n.2. Nevertheless, that case involved the same issue of whether Lowe's acts as a retailer who makes retail sales of tangible personal property or a contractor who performs real property improvements for purposes of its Contracts. Nor does the Kansas Court of Appeals' citation of a statute exempting services to real property create a distinction. *See id.* (citing Kan. Stat. Ann. 79-3603(p)). The Kansas Department of Revenue had also assessed tax on Lowe's' charges to customers for materials used in Contracts, and the court rejected this assessment, explaining that Lowe's was a contractor selling real property improvements under another statutory provision, Kan. Stat. Ann. 79-3603(l). *See Lowe's*, 394 P.3d at *18, 21.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS INCORRECTLY REJECTED LOWE'S' FAIR MARKET VALUE ARGUMENTS

The Court of Appeals incorrectly rejected Lowe's' challenge to the Department's calculation of the "fair market value" of the materials used to perform the Contracts. Without engaging Lowe's' arguments, the court erroneously asserted that the fair market value of materials is equal to the retail price that Lowe's would have charged customers for the same materials in an over-the-counter retail sale. App. p. 2143.

In its final determination, the Department asserted that the retail sale occurred under S.C. Code 12-36-110(1)(c), which defines a retail sale as the withdrawal, use, or consumption of tangible personal property by anyone who purchases it at wholesale. The Department relied on S.C. Code Ann. § 12-36-90(1)(c) and S.C. Code Ann. Regs. § 117-309.17 to support its position that the gross proceeds subject to tax should be the fair market value of the materials used in the Contracts as measured by the "retailing price" customers would have paid in an over-the-counter retail sale. S.C. Code Ann. § 12-36-90(1)(c) states that the term "[g]ross proceeds of sale" includes "the fair market value of tangible personal property previously *purchased at wholesale* which is withdrawn from the business or stock and used or consumed in connection with the business or used or consumed by any person withdrawing it." *Id.* (emphasis added); *accord* S.C. Code Ann. Regs. § 117-309.17.

As the Court of Appeals acknowledged, "[w]holesales do not include sales to users or consumers who purchase for their own use, not for resale." *Lowe's*, 2024 WL 2947802 at *6 (citing S.C. Code Ann. § 12-36-120(1) (2014)). The ALC found that, "[u]nlike stock items, *Lowe's does not purchase special order materials for resale* and the items are never placed into any store inventory [physically or for accounting purposes] for traditional retail purchases." App. p. 7 (emphasis added). The ALC also found that 60% of the materials used in the Contracts are Special

Order Materials that are expressly purchased to meet a customer's specific needs. App. p. 6. Thus, although the Dual Business Regulation required Lowe's to purchase the Special Order Materials by extending a resale certificate, such materials were not actually purchased at wholesale as a matter of law. Accordingly, the Special Order Materials are not subject to the fair market value provisions of S.C. Code Ann. § 12-36-90(1)(c) and S.C. Code Ann. Regs. § 117-309.17.

Moreover, the Department's interpretation of "fair market value" violates South Carolina law. South Carolina law has long recognized that "[f]air market value is that price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell and both being fully informed of all uses to which the property is adopted and for which it is capable of being used." *Haus. Auth. of City of Charleston v. Olasov*, 282 S.C. 603, 608, 320 S.E.2d 478, 481 (Ct. App. 1984)). See also *Hendrix v. Lexington Cty. Assessor*, No. 03-ALJ-17-0475-CC (S.C. Admin. Law Div. July 20, 2005) (explaining that "comparable sales" that "are similar in character, location, and physical characteristics" must be used "[t]o determine a fair market price"). As such, any fair market value calculation relating to the materials at issue should be based on the price that other large contractors who buy in bulk and receive volume discounts would pay for the materials. The sale of a single item to a walk-in customer is not "comparable" to a bulk sale made to a Fortune 50 business that makes nearly a billion dollars in annual building material purchases.

In sum, the Court of Appeals committed error in rejecting Lowe's' challenge to the Department's fair market value approach.

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS INCORRECTLY REJECTED LOWE'S' EQUAL PROTECTION ARGUMENTS

The Court of Appeals incorrectly rejected Lowe's' contention that the Department's assessment impermissibly distinguishes between Lowe's and other contractors who do not also operate retail businesses.

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that no state shall “deny to any person within its jurisdiction equal protection of the laws.” U.S. CONST. AMEND. XIV, § 1. Likewise, the Equal Protection Clause of the South Carolina Constitution states that no person shall “be denied the equal protection of the laws.” S.C. CONST. ART. I, § 3. These provisions serve to protect a person “from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.” *Allegheny Pittsburgh Coal Co. v. Cty. Comm’n of Webster Cty., W. Va.*, 488 U.S. 336, 345, 109 S.Ct. 633, 639, 102 L.Ed.2d 688 (1989) (internal quotation marks and citation omitted). Thus, states must “apply each law, within its scope, equally to persons similarly situated and that any differences of application must be justified by the law’s purpose.” *Town of Iva v. Holley*, 374 S.C. 537, 541, 649 S.E.2d 108, 110 (Ct. App. 2007) (citing *Sylvia Dev. Corp. v. Calvert Cty., Md.*, 48 F.3d 810, 818 (4th Cir. 1995)). Any such classifications must not be arbitrary. *Id.* (citing *F.S. Royster Guano Co. v. Com. of Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989 (1920)).

By requiring Lowe’s to pay tax on the retailing price, the Court of Appeals’ opinion divides South Carolina contractors into two arbitrary categories – those that also make retail sales versus those that do not – and it seeks to impose different tax burdens on the two groups for engaging in the exact same activity. Nothing in the South Carolina Tax Code authorizes such a discriminatory scheme.

The Court of Appeals rejected Lowe’s’ argument on the grounds that Lowe’s is not similarly situated to other contractors because, unlike Lowe’s, such contractors are not permitted to purchase materials at wholesale. App. p. 2144. Although the Dual Business Regulation *required* Lowe’s to purchase the materials used in its Contracts as if they were at wholesale (even though, as explained above, Special Order Materials were not true wholesale purchases), that regulation

creates a mere difference in timing as to when Lowe's is required to pay tax. If Lowe's had not complied with the Dual Business Regulation, it would have purchased identical property for its Contracts at the same price and remitted sales tax at the time of purchase.

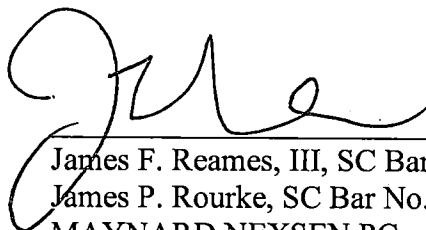
Assume Lowe's purchased flooring from a vendor for \$100. "There is a certain amount that [Lowe's] know[s] [is] going to be retail sales and a certain amount that's going to be related to real property improvements." *See* App. pp. 129:4-30:2. Because Lowe's initially did not know the specific flooring that would be sold versus used, it would have extended its resale certificate to purchase all flooring from the vendor. If Lowe's later entered into a Contract to affix flooring in a customer's home, it would pay tax on its \$100 cost at the time it used the flooring. If, however, Lowe's paid sales tax to its vendor at the time it first purchased the flooring, Lowe's would still have paid tax on the \$100 cost.

Lowe's would not have paid the vendor sales tax on \$140 (the 40% mark up to the shelf/retail price). Like other similarly situated high-volume purchasers, Lowe's receives volume discounts from vendors. The fact that Lowe's operates two separate lines of business, one as a contractor and one as a retailer, and adhered to the Dual Business Regulation does not justify imposing a significantly higher tax burden on Lowe's than other contractors.

CONCLUSION

For the above-stated reasons, Lowe's respectfully requests that this Court issue a writ of certiorari to review the Court of Appeals' Opinion No. 6062.

Dated: September 20, 2024



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