

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

THE HONORABLE S. PHILLIP LENSKI, ADMINISTRATIVE LAW JUDGE

Case No. 14-ALJ-17-0552-CC
Appellate Case No. 2021-000031

Lowe's Homes Centers, LLC Appellant,

v.

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

APPELLANT'S PETITION FOR REHEARING

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INTRODUCTION

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant Lowe's Homes Centers, LLC ("Lowe's") seeks a rehearing of the Court of Appeals' order filed on June 12, 2024. The Court incorrectly held that Lowe's' Installation Contracts (defined below) involved retail sales of tangible personal property by Lowe's, in its capacity as a retailer, to customers. The Court relied on inapposite caselaw, which was not discussed by either party, and it misapprehended or overlooked key points about the nature of Lowe's' Installation Contracts and Lowe's' status as a contractor. Also, the Court erred in rejecting Lowe's' arguments regarding the fair market value of the materials used to perform the Installation Contracts and the Equal Protection Clause.

BRIEF FACTUAL AND PROCEDURAL SUMMARY

Lowe's operates a real property improvement line of business whereby, acting as a general contractor, Lowe's enters into contracts with customers to permanently affix items of tangible personal property, such as flooring, cabinets, and roofing, to customers' real property (the "Installation Contracts"). Items installed pursuant to Installation Contracts lose their character as tangible personal property when they become affixed to customers' realty. Title to the materials does not pass from Lowe's to the customer until the real property improvement is completed. Thus, as the end-user of the tangible personal property used to perform the Installation Contracts, Lowe's remitted South Carolina sales or use tax on the purchase price it paid to procure those materials.

The South Carolina Department of Revenue (the "Department") asserted that Lowe's did not pay the correct amount of tax on the materials used in fulfilling the Installation Contracts. It contended that Lowe's was required to remit additional sales tax based on a 40% mark-up from Lowe's' purchase price to the "retail pricing," which is the price the Department determined Lowe's would have charged had it sold each item in a retail sale to a customer outside of an Installation Contract. The Department assessed sales tax (and interest) against Lowe's, and Lowe's

challenged the assessment in a contested case hearing before the Administrative Law Court (“ALC”).

The ALC found that Lowe’s initially acts as a retailer and the Installation Contracts involved retail sales of tangible personal property by Lowe’s to customers. In addition, the ALC rejected Lowe’s’ contention that the Department erred in calculating the fair market value of the materials used in the Installation Contracts, and it denied as moot Lowe’s’ claim that imposing sales tax on these transactions impermissibly treats Lowe’s differently from other contractors in violation of the Equal Protection Clause.

Lowe’s appealed, and this Court affirmed. *See Lowe’s Home Centers, LLC v. S.C. Dep’t of Revenue*, Op. No. 6062, 2024 WL 2947802 (S.C. Ct. App. filed June 12, 2024). The Court held that Lowe’s was liable for additional sales tax based on the “retail prices” customers paid for materials purchased pursuant to the Installation Contracts. *Id.* at *6. Further, the Court rejected Lowe’s’ fair market value arguments. *Id.* at *7. The Court also rejected Lowe’s’ equal protection argument on the ground that Lowe’s is not similarly situated to other contractors. *Id.*

ARGUMENT

I. The Installation Contracts Did Not Involve Lowe’s Acting as Retailer Who Makes Retail Sales of Tangible Personal Property to Customers

The Court incorrectly found that Lowe’s’ Installation Contracts involved retail sales of tangible personal property by Lowe’s, in its capacity as a retailer, to customers. The Court made errors of at least three types: (1) disregarding the relevant legal standard in favor of cases that applied different legal tests that are not at issue here, (2) ignoring the plain language and misunderstanding the nature of the Installation Contracts, and (3) misunderstanding Lowe’s’ status as a contractor for purposes of the Installation Contracts.

A. The Court Overlooked the Applicable Legal Standard and Erroneously Relied on Irrelevant Caselaw

The Court erred by relying on irrelevant precedent, which neither the Department nor Lowe's had cited, rather than applying the correct legal framework to determine whether the Installation Contracts constituted a retailer making retail sales of tangible personal property to customers or a contractor performing construction contracts/real property improvements. As explained below, the Court should have assessed whether the items of tangible personal property installed pursuant to the Installation Contracts become part of real property or retain their character as tangible personal property when transferred to customers. However, the Court relied on caselaw concerning the "true object" test, which only applies for purposes of distinguishing sales of goods from sales of services, and also relied on an inapposite case related to the accommodations tax.

Sales or use tax is triggered when a company "sell[s] tangible personal property at retail." *See* S.C. Code Ann. § 12-36-910(A) (2014). For transactions involving construction 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) (2014). Rather, the retail sale occurs upon the "sale[] of building materials to construction contractors, builders, or landowners for resale or use in the form of real estate" or the "sale[] to contractors for use in the performance of construction contracts." *Id.* Sales tax applies to sales of tangible personal property but not sales of real estate 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 (Ct. App. 1984).

Tangible personal property loses its "personal" nature and is converted to real property once it is installed into real estate. The contractor is the last user of the property while it maintains its "personal" character and thus is responsible for sales or use tax on its cost of materials to be used in performing the construction contract. *See* S.C. Code Ann. § 12-36-110(1)(a), (e) (2014).

To determine whether Lowe's needed to collect and remit sales tax from its customers on the Installation Contracts or to pay sales or use tax on its own cost of materials to be used in performing such contracts, the operative question is whether the Installation Contracts are construction contracts performed by Lowe's as a contractor. While the terms "contractor" and "construction contract" are not defined in the Sales and Use Tax Act, the Court should have relied on the definitions found in Title 40 of the South Carolina Code ("Professions and Occupations"), which defines a "contractor" as a "general or mechanical contractor regulated under [the contractor licensing chapter of the Code]." S.C. Code Ann. § 40-11-20(4) (2011).¹ In turn, a "general contractor" is defined as "an entity which performs or supervises or offers to perform or supervise general construction," which includes the "improvement of any kind to real property." *Id.* § 40-11-20(8)–(9) (2011). The Department provides, by regulation, that a contractor includes "any person, firm, association or corporation making repairs, or additions to real property." S.C. Code Ann. Regs. § 117-314.2 (2012). In addition, the regulation defines "building materials" as "any material used in making repairs, alterations or additions to real property" and all "tangible personal property which becomes a part of real property." *Id.* operative

In sum, the relevant inquiry required the Court to assess whether the Installation Contracts were contracts for real property improvements. To do so, the Court should have looked to the nature and characteristics of the contracts. *See Springs Indus., Inc. v. S.C. Dep't of Revenue*, 99-ALJ-17-0153-CC (S.C. Admin. Law Ct. Nov. 9, 1999), *aff'd* No. 2003-UP-029 (Ct. App. 2003). The intent of the parties, as expressed or implied in a contract, is a key factor in determining

¹ See ALC Order p. 10, R. p. 11 (stating 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") (citing *City of Camden v. Fairfield Elec. Co-op., Inc.*, 372 S.C. 543, 548, 643 S.E.2d 687 (2007)).

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 (1925) (illustrating that a contract can specify whether an item should be regarded as a fixture or retains its character as personal property); *Lane v. Bell Lumber Co.*, 122 S.C. 140, 146–47, 115 S.E. 207 (1922) (stating that the question of whether an item should be regarded as a fixture can be controlled by agreement between the parties).

Instead of assessing the nature of the Installation Contracts, the Court 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). *See Lowe’s*, 2024 WL 2947802 at *5. Neither case addresses the distinction between sales of tangible personal property and real property improvements.

Boggero concerned whether the gross proceeds earned by a portable toilet business were proceeds from the rental of tangible personal property, which would be subject to sales and use tax, or proceeds from a service (waste removal), which would not be. 414 S.C. at 283. The court applied the “true object” test. *Id.* at 284–86. 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. *See* 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 “true object” test has nothing to do with the question at issue here: whether the installed items were permanently incorporated into real property, thus losing their character as tangible personal property, when Lowe’s transferred the items to its customers. By focusing on the “true

object” test, the Court erroneously imported the test for distinguishing between goods and services in lieu of the test for distinguishing between tangible personal property and real property. In holding that “the installation services [we]re incidental to th[e] retail transaction[s],” *Lowe’s*, 2024 WL 2947802 at *6, the Court placed undue emphasis on the undisputedly nontaxable service charges. In doing so, it overlooked the contested question of whether the transactions at issue involved sales of real property improvements or sales of tangible personal property.

In *Greystone Catering*, the court rejected a challenge to sales tax on food and beverages that were associated with a hotel room package. 326 S.C. at 554–55. 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. The court rejected this challenge to the sales tax 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. But *Greystone Catering* merely applies Department guidance related to hotel billing practices. *Id.* at 554. It offers no guidance on whether Lowe’s Installation Contracts qualified as improvements to real property. 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) (2014). Therefore, it was erroneous for this Court to rely on *Greystone Catering*.

The Court should grant rehearing to apply the correct legal standard for distinguishing between sales of real property improvements and sales of tangible personal property. This correction alone would require reversal of the ALC’s decision against Lowe’s.

B. The Court Should Correct Its Errors Concerning the Contract Terms

The Court committed multiple errors in ruling that “the sale of materials to the contracting customer is the last [taxable retail] sale in the chain of transactions” and, therefore, “the ALC did not err in upholding SCDOR’s determination.” *Lowe’s*, 2024 WL 2947802 at *5. The sale made to customers was a real property improvement, not a taxable retail sale of tangible personal property. No retail sale can occur, and no sales tax can apply, unless a transfer of tangible personal property takes place. *See* S.C. Code Ann. § 12-36-100 (2014) (stating “sale” means “any *transfer*, exchange, or barter, conditional or otherwise, *of tangible personal property* for a consideration” (emphasis added)); S.C. Code Ann. § 12-36-110 (2014) (stating “[s]ale at retail and retail sale mean all sales of tangible personal property”). The Court’s ruling that “a customer purchases the necessary materials—tangible personal property—from Lowe’s as a separate item delineated in the contract,” *see* 2024 WL 2947802 at *5, suffers from many fatal flaws. Namely, the ruling (i) ignores language in the Installation Contracts; (ii) places undue emphasis on the fact that the Installation Contracts show the estimated amounts associated with the materials and labor components of the real property improvements; (iii) ignores the Department’s own admissions that the Installation Contracts are not sales of tangible personal property; and (iv) makes South Carolina an outlier among other states that have recognized Lowe’s’ Installation Contracts as lump-sum real property improvement contracts.

1. The Court Ignored the Installation Contract Language

First, the Court committed legal error by not examining the “nature and characteristics” of the Installation Contracts. *See Springs Indus.*, 99-ALJ-17-0153-CC. Instead, the Court relied on language in an unsigned preliminary estimate (*see* Joint Ex. 35, R. p. 911 (stating the estimate is not valid without manager’s signature)). *See Lowe’s*, 2024 WL 2947802 at *6. 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. Sirrine & 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.” (Joint Ex. 63, Chapter 16, p. 6, R. p. 1745).

Yet the Court ignored the terms and conditions in the Installation Contracts. The Installation Contracts provide that Lowe’s will serve as the general contractor and warrant the installation services performed. (Joint Ex. 34 p. 4, R. p. 903; Joint Ex. 35 p. 4, R. p. 909). They also state that Lowe’s retains title to all materials used to perform the real property improvements until after they become incorporated into the customers’ real property: “[a]ny surplus materials upon completion of the Installation Services shall remain the property of Lowe’s and shall be returned to Lowe’s by the Installer.” (Joint Ex. 34 p. 4, R. p. 903; Joint Ex. 35 p. 4, R. p. 909; *see also* 4/20/16 T. p. 41 lines 2–9 & p. 45 line 9 – p. 46 line 20, R. pp. 76, 80–81). Thus, customers were not purchasing tangible personal property, and neither title to nor ownership of the materials was transferred to customers until after they had been converted to real property. The Court disregarded these terms and failed to address undisputed testimony that, unlike a traditional retail sale, Lowe’s’ customers leave without the purchased material in hand and do not even obtain title to the property until after installation is complete and it becomes real property. (4/20/16 T. p. 38 line 23 – p. 41 line 9 & p. 45 line 9 – p. 46 line 20, R. pp. 73–76 & 80–81).

2. The Itemization of Labor and Materials Costs Is Irrelevant

The Court instead focused on the “separate itemized charges for materials and labor” in the Installation Contracts. *Lowe’s*, 2024 WL 2947802 at *6. It incorrectly concluded that these itemized amounts supported the ALC’s finding that the main purpose of the transaction is the sale

of tangible personal property. *Id.* But the Court did not cite any authority stating that merely showing separate costs for materials and labor converts a real property improvement contract into a retail sale of tangible personal property. Nor did the Court cite any authority to suggest that “itemized charges” can serve as proof that the purpose of a transaction was to sell tangible personal property and not to incorporate the property into realty. Lowe’s is not aware of any such authority.

3. The Court Ignored the Department’s Multiple Admissions that the Installation Contracts Are Not Retail Sales of Tangible Personal Property

The Court ignored the Department’s many admissions that the Installation Contracts did not constitute sales of tangible personal property to customers. These admissions were numerous:

- John McCormack was the General Manager for the Policy Section in the Department’s Office of General Counsel; for over 30 years, his work with the Department focused on sales tax. He testified on behalf of the Department that Lowe’s’ installation contracts were different from traditional retail sales. (6/7/16 T. p. 5 line 11 – p. 10 line 12 & p. 15 line 2 – p. 17 line 15, R. pp. 372–375).
- He testified that Lowe’s was “making improvement[s] to real property”. (6/7/16 T. p. 41 line 13 – p. 42 line 4, R. 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.” (6/7/16 T. p. 65 line 25 – p. 67 line 1, R. p. 387).
- Mr. McCormack testified as follows about his own Installation 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 deemed sale to Lowe’s itself” because “they’re the last consumers of the tangible personal property.” (6/7/16 T. p. 45 lines 12–15, p. 46 lines 10 – p. 48 line 21, R. p. 382).
- He further testified that the Department’s original position taken in the proposed assessment that an Installation Contract “was a sale and installation and not a withdrawal for use is – is incorrect” and wrong “as a matter of law.” (6/7/16 T. p. 52 line 22 – p. 53 line 22 & p. 63 lines 15– 19, R. pp. 383–384, 386).
- He agreed that “[a]ll the building materials on the installation contracts become part and parcel of the customer’s real property”. (6/7/16 T. p. 111 lines 16–23, R. p. 398).
- The Department’s field auditor, Paulette Crawford, testified that the items consumed in the course of the Installation Contracts were within the definition of “building materials” for sales tax purposes. (4/20/16 T. p. 224 lines 3–23, R. p. 259).

The Court's failure to accept the Department's admissions compounds its errors in ignoring the language of the Installation Contracts and applying the wrong legal test for taxability.

4. The Court's Characterization of the Installation Contracts Makes South Carolina an Outlier Among Other States That Have Addressed the Issue

By affirming the ALC decision, the Court makes South Carolina an outlier among other states that have determined the Installation Contracts constitute real property improvements, that Lowe's acts as a contractor for purposes of the contracts, and that Lowe's properly paid tax on its cost of materials used to perform the contracts. For instance, the Court failed to address the undisputed testimony that, early in the history of Lowe's' contractor business, the Maryland Department of Revenue sent Lowe's "notice that in the state of Maryland [on] these transactions, you're serving as a contractor." (4/20/16 T. p. 75 line 19 – p. 76 line 3, R. pp. 110–11). Ohio and Utah sent similar notices. (4/20/16 T. p. 76 lines 4–7, R. p. 111).

The Court also ignored Oklahoma's ruling in favor of Lowe's.² *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 found that Lowe's, as a contractor, was the final consumer or user of the materials incorporated into the customer's real property, pursuant to the terms of the Installation Contracts. *See id.* Oklahoma also concluded that treating Lowe's differently from other contractors would be an equal protection violation. *See id.* at pp. 49–50.

² The Department moved to strike the copy of the Oklahoma decision attached to Lowe's' Opening Brief. The Court did not rule on the motion. Even if the Court did strike the decision, there is testimony in the record establishing that Oklahoma ruled in favor of Lowe's regarding its status as a contractor and the equal protection issue. (4/20/16 T. p. 83 line 7 – p. 85 line 3, R. pp. 118–20).

The Court rejected as distinguishable 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). *See Lowe's*, 2024 WL 2947802, at *6. However, the Court failed to articulate a reason why this case was distinguishable. The Court 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 this Court never explained how this provision supports its conclusion, and the Court failed to acknowledge that the Indiana Tax Court rejected the Department of Revenue's position because the court found that "Lowe[']s did not transfer tangible personal property to its installation contract customers." *Lowe's*, 23 N.E.3d at 57.

The Court 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 Lowe's*, 2024 WL 2947802 at *6. However, that case still 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 Installation Contracts. Nor does the Kansas Court of Appeals' citation of a statute exempting services to real property create a distinction. *See id.* at *6 n.2 (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 Installation 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.

C. The Court Misconstrued Record Evidence Related to Lowe's' Status as a Contractor

The Court wrongly affirmed the ALC's finding that Lowe's initially acts as a retailer in selling the customer the materials pursuant to the Installation Contracts and later acts as a contractor in overseeing their installation. This finding ignores the Department's testimony that a company cannot act as both a retailer and a contractor for the same transaction. Ms. Crawford testified that a retailer can hold a contractor's license, but cannot "act as both during the same transaction." (4/20/16 T. p. 202 lines 5–11, R. p. 237).

The Court also relied on out-of-context statements in Lowe's' annual financial statements, "in which Lowe's advertises itself as a retailer." *Lowe's*, 2024 WL 2947802 at *6. The Court ignored that the same financial documentation also advertises Lowe's as a contractor. (Joint Ex. 20 (Lowe's 2011 10-K) p. 7, R. p. 615).

Additionally, the "About Lowe's" section of Lowe's' website advertises its contractor activities, stating "Lowe's offers more than 50 interior and exterior installation services, such as appliances, flooring and blinds." (Joint Ex. 22, R. p. 723). The website also provides a list of project types for which Lowe's would act as a general contractor, including "Installation services provided through independent contractors, primarily in Flooring, Kitchens & Appliances and Millwork." (Joint Ex. 23, R. p. 726). Another page on the website discusses the Lowe's Installation Team and lists the license numbers and certifications held by or on behalf of Lowe's in multiple states, including South Carolina. (Joint Ex. 24, R. pp. 728–29).

The Court also incorrectly 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."

Lowe's, 2024 WL 2947802 at *6. This is not true. The evidence shows that Lowe's was licensed as a contractor with the South Carolina Department of Labor, Licensing and Regulation throughout the entire audit period of August 1, 2008 through July 31, 2011. Lowe's produced copies of (i) residential builder licenses that covered November 9, 2001 through June 30, 2003, June 9, 2004 through June 30, 2005, and July 15, 2005 through June 30, 2010 and (ii) a general contractor license that covered June 23, 2011 through October 31, 2014. (Joint Ex. 33 (Contractor Licenses), R. pp. 890–898). Lowe's also testified that it was licensed throughout the audit period. (4/20/16 T. p. 44 line 12 – p. 45 line 5 & p. 117 lines 5–11, R. pp. 79–80, 152.)

The Court ignored the residential builder licenses and related testimony. This was error. 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 (2012). In any case, no license is required for a person to be a “contractor” under S.C. Code Ann. § 40-11-20 (2011). Even if no license had been in place, this would not be determinative of whether Lowe's was, in fact, acting as a contractor.

II. The Court Erred in Ignoring Lowe's' Fair Market Value Arguments

The Court incorrectly rejected Lowe's' challenge to the Department's calculation of the “fair market value” of the materials used to perform the Installation Contracts. Without engaging Lowe's' arguments, the Court erroneously asserted that the fair market value of materials at the time Lowe's withdraws them from inventory for an installation project is equal to the retail price that Lowe's would have charged customers for the same materials in an over-the-counter retail sale. *See Lowe's*, 2024 WL 2947802 at *7.

The Department relied on S.C. Code Ann. § 12-36-90(1)(c) (2014) to support the purported equivalency between the over-the-counter retail price and the fair market value at the time Lowe’s withdraws products from inventory for an installation project. But that provision only applies to tangible personal property purchased at “wholesale.”³ As the Court 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.” (ALC Order, p. 6, R. p. 7; *see also*; 4/20/16 T. p. 61 line 14 p. 64 line 10, R. pp. 96–99) (emphasis added). The ALC also found that 60% of the materials used in the Installation Contracts are Special Order Materials that are expressly purchased for use in performing real property improvements. (ALC Order p. 5, R. p. 6; 4/20/16 T. p. 62 lines 11–20, R. p. 97; Joint Ex. 37 (Summary of Inventory Versus Special Order Sales), R. pp. 918–919). By contrast, only 40% were Stock Materials. (*Id.*). The Court ignored or misapprehended this evidence. At the very least, the Court should correct its opinion to hold that the 60% of items that were Special Order Materials, which were not purchased for resale and were not maintained in stock or inventory, are not subject to the fair market value provision of S.C. Code Ann. § 12-36-90(1)(c) (2014) and S.C. Code Ann. Regs. § 117-309.17 (2012).

In any event, for both Special Order Materials and Stock Materials, fair market value should be determined based on the value that a similarly situated contractor of Lowe’s’ size would

³ The “[g]ross proceeds of sales” (*i.e.*, the tax base in a “retail sale”) include “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.” S.C. Code Ann. § 12-36-90(1)(c) (2014) (emphasis added); *accord* S.C. Code Ann. Regs. § 117-309.17 (2012).

pay for the materials. *See 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”). The Court should correct its opinion to hold that any tax be calculated based on the amount Lowe’s paid for the materials.

III. The Court Erred in Rejecting Lowe’s’ Equal Protection Claim

The Court incorrectly rejected Lowe’s’ argument that the Department’s assessment impermissibly distinguishes between Lowe’s and other contractors who do not also operate retail businesses. The Court reasoned that such other contractors are not permitted to purchase materials at wholesale, and thus, Lowe’s was not similarly situated to them. This is a distinction without a difference. Although the Dual Business Regulation *required* Lowe’s to purchase the materials used in its Installation 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 Installation Contracts at the same price and remitted sales tax at the time of purchase. Like other similarly situated high-volume purchasers, Lowe’s receives volume discounts from vendors. The Court cited no authority to suggest that the temporary delay in tax payment justifies the significantly higher tax burden. 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 placing a greater tax burden on Lowe’s than other contractors.

CONCLUSION

For the above reasons, Lowe’s respectfully requests that its Petition for Rehearing be granted and that the Court rehear and amend its decision affirming the ALC decision.

July 17, 2024



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Attorneys for Appellant Lowe's Home Centers, LLC

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

THE HONORABLE S. PHILLIP LENSKI, ADMINISTRATIVE LAW JUDGE

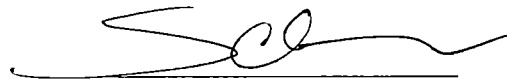
Case No. 14-ALJ-17-0552-CC
Appellate Case No. 2021-000031

Lowe's Homes Centers, LLC Appellant,
v.
South Carolina Department of Revenue..... Respondent.

PROOF OF SERVICE

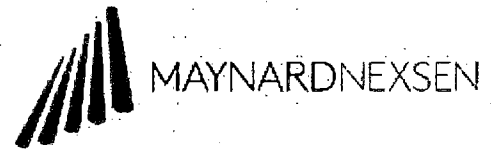
I do hereby certify that I have served on this 17th day of July, 2024 the Appellant's Petition for Rehearing in connection with the above-captioned matter by causing a copy of the same to be electronically mailed to the below undersigned counsel of record for the Respondent at the following addresses:

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July 17, 2024

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED

JUL 17 2024
SC Court of Appeals

**Re: Lowe's Homes Centers, LLC v. South Carolina Department of Revenue
Case No. 14-ALJ-17-0552-CC
Appellate Case No. 2021-000031**

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of *Appellant's Petition for Rehearing*, along with a \$50.00 filing fee. Please file the original and return one file-stamped copy to our courier. Also enclosed is a proof of service, showing that opposing counsel have been served with this petition.

Thank you for your consideration in this matter.

Very truly yours,

James P. Rourke

JPR/sp

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