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S.C. SUPREME COURT

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)

Appellate Case No. 2024-001586

Lowe's Homes Centers, LLC .... Petitioner,

v.

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

REPLY TO DEPARTMENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This appeal focuses on two issues: (1) what was the taxable retail sale of tangible personal property relating to Lowe's' contracts with customers to perform improvements to real property by incorporating building materials into customers' realty (the "Contracts"), and (2) what were the gross proceeds of that retail sale. A proper interpretation of the Sales Tax Act, applicable regulations, and terms of the Contracts prove that the taxable retail sale was the sale *to Lowe's*, as a contractor, of the building materials used under the Contracts. As such, both South Carolina law and common sense dictate that the gross proceeds of that sale were the prices Lowe's paid to acquire the materials. However, the Court of Appeals erroneously affirmed the ALC's decision that the taxable retail sale was *by Lowe's*, as a retailer, to its customers. The result of the Opinion is Lowe's is treated differently than other contractors, without a rational basis, and forced to bear a higher tax burden than high-volume contractors that buy at retail from Lowe's.

The Department's Return belabors the fact that the Dual Business Regulation compelled Lowe's (a dual retailer-contractor) to "purchase at wholesale" all materials, including those used under the Contracts, to argue Lowe's desires to maintain an economic and competitive advantage over other contractors who are allegedly unable to purchase large quantities of materials "at reduced wholesale prices." Return p. 3. However, the evidence, including the Department's own testimony, shows other contractors receive similar volume discounts. *See infra*, pp. 14–15. Further, purchasing the subject materials at wholesale did not reduce the State's sales tax revenues. *See* Return p. 3. Complying with § 117-324 merely deferred the timing of Lowe's' tax payment. Petition pp. 22–23.

For the reasons discussed in the Petition and below, the Court should grant review and reverse the Court of Appeals' Opinion.

ARGUMENTS

I. THE COURT SHOULD GRANT THIS PETITION BECAUSE THE COURT OF APPEALS ERRED IN RULING THE CONTRACTS ARE TAXABLE RETAIL SALES OF TANGIBLE PERSONAL PROPERTY BY LOWE'S TO CUSTOMERS

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

As an initial matter, the Department states that this case involves the "straightforward application" of the Sales Tax Act and regulations to Lowe's' Contracts, and it is clear the Contracts constituted retail sales of tangible personal property by Lowe's to its customers. Return pp. 1–2. Tellingly, the Department fails to mention that it has changed its position in this case at least ***four*** times. First, the Department conducted a prior audit of Lowe's for March 1, 2002 to February 28, 2005 and assessed tax against the company on the basis that the retail sale was to Lowe's and Lowe's owed tax on the retail or shelf price of the materials used to fulfill the Contracts. App. p. 29.[1] Second, for the audit at issue in this case, the Department's auditor initially determined that the Contracts involved taxable retail sales of personal property from Lowe's to its customers; the auditor reached that conclusion "without ever seeing or reviewing the contracts." App. pp. 31, 226–27, 232, 254, 817.[2] Third, in its Determination and during the contested case hearing, the Department reverted to the position that the taxable retail sale was to Lowe's. App. pp. 15, 31, 859. Finally, the Department now argues that the retail sale was to Lowe's' customers. The Department's shifting positions support the grant of this Petition in order for this Court to review the novel and "complex" issues in this case. *See* App. p. 31.

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[1] Lowe's disagreed with the assessment in the prior audit but made the business decision not to protest it. App. pp. 113-16. In any event, the prior audit is not at issue in this case.

[2] The auditor testified the facts that the Contracts were lump sum and title did not transfer to the customer until after items were incorporated into and converted to real property were "irrelevant." There was nothing that could be put in the Contracts to change her position. App. pp. 219–21, 254–56.

With respect to the applicable legal standard, the Department does not dispute that the Court of Appeals was required to consider the "nature and characteristic" of the Contracts and to determine the intention of the parties "primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument." *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945); *Springs Indus., Inc. v. S.C. Dep't of Revenue*, No. 99-ALJ-17-0153-CC, 1999 WL 1094323 (S.C. Admin. Law Ct. Nov. 9 1999), *aff'd S.C. Dep't of Revenue v. Springs Indus., Inc.*, No. 2003-UP-029, 2003 WL 27397024 (S.C. Ct. App. Feb. 28, 2003).[3] Instead, the Department claims that the Court of Appeals "did consider the nature and characteristics" of the Contracts. Return p. 10 (citing App. 2140–41, 2143) (emphasis supplied). A review of the Opinion belies the Department's assertion.

The Court of Appeals did not quote or analyze any language in the Contracts themselves. App. pp. 2130–45. The only reference to the Contracts in the Opinion are as follows: "although Lowe's contends the installation services contracts are lump sum contracts, the sample contract provided as an exhibit at the hearing shows separate itemized charges for materials and labor," App. p. 2140, and "we 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

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[3] The Department states *Springs Industries, Inc.*, 2003 WL 27397024, has no precedential value and should not have been cited. Return pp. 11-12. Rule 268(d)(2), SCACR, does not prevent the citation of the underlying ALC decision. The Department also states Lowe's did not cite *Hyman v. Wellman Enterprises., Inc.*, 337 S.C. 80, 522 S.E.2d 150 (Ct. App. 1999) or *Planter's Bank v. Lummus Cotton Gin Co.*, 132 S.C. 16, 129 S.E.2d 876 (1925) in its briefing below. Return p 11. Lowe's did cite *Springs Industries* and *McPherson*. *Planter's Bank* and *Hyman* are simply additional support for the proposition that the parties' intention is important in analyzing taxation. Finally, the Department claims *Springs Industries* supports the Court of Appeals' Opinion because it indicates that making separate charges for sales of personal property and labor is a factor that weighs in favor of a retail sale of personal property. Return p. 12. Although the Contracts reflect the estimated material and labor components of the real property improvement, they charge "one lump sum price" which supports an agreement with a contractor. *See* 1999 WL 1094323, at *4.

customer's home," App. p. 2143, n.3. The Court of Appeals ignored language in the Contracts that Lowe's agreed to provide the materials and services "for the stated total cash price (the 'Price')" and "[t]he Price owed by the Customer to Lowe's covers the Goods [and] Installation." App. pp. 903, 909. Additionally, without any discussion or analysis, it rejected the language relating to title, stating that "[a]ny surplus materials upon completion of the Installation Services shall remain the property of Lowe's and shall be returned to Lowe's." *Id.* Instead, the Court of Appeals quoted an unsigned preliminary estimate that was invalid. App. p. 2141. The undisputed testimony proves that document was a preprinted project estimate form that Lowe's used prior to the time it began its contractor line of business, did not relate to the Contracts, was never signed by customers, and was erroneously included in the contract file. App. pp. 402–03. The Court of Appeals erred in elevating language in an unrelated document over the language in the actual Contracts.

The Department attempts to minimize the Court of Appeals' reliance on inapposite cases and the "true object" test. Return pp. 10-11. Besides the cases it cited regarding the rules of statutory interpretation, *see* App. pp. 2137–38, the first cases the Court of Appeals relied on were *Boggero v. South Carolina Dep't of Revenue*, 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015), and *Greystone Catering Co. v. South Carolina Dep't of Revenue & Taxation*, 326 S.C. 551, 486 S.E.2d 7 (Ct. App. 1997), *see* App. pp. 2139–40. These cases admittedly "address[] other tax contexts," App. p. 2139, and offer no guidance on whether Lowe's' Contracts qualified as improvement to real property or construction contracts. *See* Petition pp. 10-12.

The Department states the Court of Appeals did not apply the "true object" test but held that substantial evidence existed to support the ALC's ruling that the primary or true object of the Contracts was to facilitate a retail sale to customers. Return pp. 10–11; App. pp. 21–22. The Department does not deny the true object test "suffers from serious weaknesses in principle and in

practice" and introduces difficult line-drawing problems. *Compare* Petition p. 11 (citing Hellerstein & Hellerstein, State Taxation, ¶ 12.08[2]) *with* Return pp. 10–11. For these reasons, the Court of Appeals erred in affirming the ALC's application of the flawed test.

The Court should grant review because the Court of Appeals applied the wrong standard.

B. The Court of Appeals Mischaracterized the Contracts and Lowe's' Status

The ALC's decision acknowledges that it is important to ascertain not only the type of sale but also the identity of the party involved in the sale in determining when and how sales tax should be assessed. App. p. 9. Therefore, whether the Contracts are properly construed as real property improvement or construction contracts and whether Lowe's qualifies as a contractor for the transactions are pivotal questions.

A "retail sale" requires "a transfer of title or possession" of tangible personal property. S.C. Code Ann. §§ 12-36-100, 12-36-110. Contractors who enter into real property improvement or construction contracts are the last user of the tangible personal property while it maintains its character as "personal property."[4] As a result, 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.* §§ 12-36-110(1)(a), (e); S.C. Code Ann. Regs. § 117-314.

South Carolina law broadly defines a contractor to include "an entity which performs or supervises … general construction" and "any person, firm, association or corporation making repairs, or additions to real property." S.C. Code Ann. §§ 40-11-20(4), (8), (9); S.C. Code Ann. Regs. § 117-314.2. The Department has conceded that nothing in South Carolina law says a retailer

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[4] A contractor is considered the final consumer of the tangible personal property because the personal property is converted to real property once it is installed. *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).

cannot be a contractor as defined under these provisions. App. p. 262; *see also* App. p. 1746. It has even conceded Lowe's "fits within th[ese] definitions" when it installs real property improvements at customers' homes. App. pp. 198–99.

The Court of Appeals erred in its ruling because the Contracts demonstrate the parties intended to enter into agreements for real property improvements by Lowe's in its capacity as a contractor. As detailed in the Petition, the Contracts provide that Lowe's (i) is the prime contractor and will subcontract the installation services; (ii) is responsible for performing tasks typically performed by a contractor, including "obtaining any and all licenses and building permits;" and (iii) "warrant[s] that the Installation Services will be performed . . . in a good and workmanlike manner" and "bears the risk" for the contract being performed to the customer's satisfaction. App. 903, 909. And, as noted, the Contracts are lump sum agreements that state Lowe's is required to provide both the materials ***and*** labor necessary to complete the real property improvement for one fixed price. *Id*. Further, the Contracts provide that Lowe's retains title to all materials used for the real property improvements until after they are incorporated into the customers' real property. *Id*.

The Department contends that the Contracts do not use the term "title." Return p. 14. However, the Contracts state that "[a]ny surplus materials upon completion of the Installation Services shall remain the property of Lowe's." App. pp. 903, 909. Other evidence, including testimony from not only Lowe's but also the Department, establishes that title to the materials remains with Lowe's until after they are incorporated into a customer's realty. Lowe's' witness testified that customers who enter into an agreement for a real property improvement obtain only a "contractual right to receive the home improvement that he's negotiated for;" the customer does not gain title or possession of personal property. App. p. 76. He also testified that "if the installer is walking into the customer's house and drops a box of tile and breaks every one, he's got to come

back to the Lowe's store and get more tile. The customer bought a tile floor, not tangible personal property." App. pp. 78–79, 81–82. This undisputed evidence shows a difference in the risk of loss between a traditional retail sale and a Contract under which Lowe's retains title and bears the risk until the customer accepts the improvement. Additionally, the Department's own witness, who previously entered into a Contract with Lowe's, testified he "was buying [an] improvement to real property." App. pp. 76, 382, 899-911. This testimony contradicts the ALC's assertion that there was no evidence that a customer who enters into a Contract might view the purchase "as anything other than a retail purchase." App. p. 22. Based on the above, the Court of Appeals erred in joining the ALC in rejecting Lowe's' argument that under the terms of its Contracts, title does not transfer to the customer until after the materials are converted to real property.

The Department's assertion that the following "evidence" supports the Opinion, *see* Return pp. 12–13, lacks merit:

- The retail price of the merchandise is the same, regardless of whether Lowe's subsequently installs it. (App. pp. 84, 130–32).

  RESPONSE: The Department misstates the evidence of record. The undisputed testimony proves that the estimated price shown on the Contracts for the materials component of the project is not necessarily the retail price; "it can be any price [Lowe's] deem[s]." App. p. 123. Also, the estimated price for the materials is not necessarily higher than Lowe's cost. App. pp. 123–24.

- Lowe's purchased all of the materials at wholesale, tax free, which Lowe's admits only retailers—but not contractors—can do. (App. p. 24).

  RESPONSE: The Department's assertion is false. Lowe's has not admitted that only retailers—but not contractors—can purchase materials at wholesale. In fact, the ALC's decision proves the opposite: "Lowe's insists that ***as a contractor*** it was required to purchase special order materials at wholesale using its resale certificate." App. p. 24 (emphasis added). Furthermore, the Dual Business Regulation compelled Lowe's to purchase all materials as if they were at wholesale. Lowe's' adherence to the regulation does not show that it acted as a retailer for purposes of the Contracts or that the Contracts were retail sales of tangible personal property to its customers. Adherence to the regulation merely shows that Lowe's is a dual business: a retailer and a contractor.

- [T]he Installation Contract is an agreement "between Customer and Lowe's concerning this <u>sale of Goods</u> and Installation Services." (App. pp. 903, 909) (emphasis added). The Installation Contract contains a "Merchandise Summary" with materials costs and an "Installation Summary" that identifies labor costs. (App. pp. 74–76, 900–04).

  <u>RESPONSE</u>: The Department's assertion ignores key terms providing that the Contracts charged one lump sum amount for both estimated materials *and* labor necessary to complete the real property improvement. App. 903, 909 (requiring Lowe's to provide the materials and services "for the stated total cash price (the 'Price')" and "[t]he Price owed by the Customer to Lowe's covers the Goods [and] Installation.").

- The materials are sold to the customer, not to Lowe's (as a contractor) or the 3rd party installer. (App. pp. 5, 143–44, 901, 914). Lowe's own expert testified that the "buyer" in the Installation Contract is the Lowe's retail customer. (App. pp. 179).

  <u>RESPONSE</u>: The Department's assertion is wrong and misrepresents the testimony. The Department's representative with more than 35 years of sales tax experience admitted that the materials are sold to and used by Lowe's. *See* Petition pp. 13–14. Further, Lowe's' expert did not admit Lowe's' customers buy personal property. To the contrary, he testified that the customer is the buyer of the home improvement contract.[5]

- During the audit period, certain Installation Contracts were accompanied by a project estimate form in which Lowe's told the customer ". . . LOWES DOES NOT ENGAGE IN THE PRACTICE OF ENGINEERING, ARCHITECTURE, OR GENERAL CONTRACTING." (App. pp. 166-67, 905–11) (emphasis added).

  <u>RESPONSE</u>: The Department's reliance on this form is misplaced. As discussed above, this form was invalid and does not relate to Lowe's' Contracts. *See supra*, p. 4. Therefore, it is irrelevant.

- Lowe's could not have acted as a "general contractor" with respect to the majority of Installation Contracts because it was not licensed as a General Contractor in South Carolina until the last two months of the 36-month audit period. (App. pp. 891).

  <u>RESPONSE</u>: The Department's contention ignores the fact Lowe's held licenses throughout the entire audit period. Prior to holding the General Contractor license, Lowe's held a Residential Builder license all other months in the relevant period. App. pp. 892–98. Therefore, Lowe's could and did act as the prime or general contractor for the Contracts throughout the audit period. Furthermore, a General Contractor license is only required for certain work that exceeds a specific threshold. "[T]here [were] a lot of the installed sales that [Lowe's] d[id]n't even require a license." App. p. 142.

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[5] *See* App. pp. 179–80 ("Q: Just one final question. The buyer in these installed sales contracts, they're a retail customer to Lowe's, correct? They are not another retailer? A: The buyer is – I guess so. I mean, I've been one of them so I guess I'm a buyer, in that sense. . . . I purchased that contract from Lowe's to come and fix that problem for me and I was willing to pay for that.")

- In its annual Form 10-K, Lowe's describes this aspect of its business as "Installed Sales" and "installation services," not general contracting or real property improvement. (App. p. 615).

  RESPONSE: The Department's argument that the Form 10-K refers to "installation services" in discussing Lowe's' contractor line of business is irrelevant. "General construction" includes "the ***installation***, replacement, or repair of a building, structure, highway, sewer, grading, asphalt or concrete paving, or improvement of any kind to real property." S.C. Code Ann. § 40-11-20(8); *see also* S.C. Code Ann. Regs. § 117-314.7 ("A contractor who ***installs*** a pump … is required to pay tax on his purchase of the pump. The pump is in the same category as any other building materials which become affixed to realty.")

- Lowe's complied with the Dual Business Regulation, which only applies to "those who actually carry on a retail business having a substantial number of retails sales and **does not apply to contractors** ... and others ... who have not set themselves up as being engaged in selling." S.C. Code Ann. Regs. 117-324 (emphasis added); (App. pp. 25–26).

  RESPONSE: The Department's position stands the Dual Business Regulation on its head. The regulation states that it "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 (2012) (emphasis added). The plain text shows it ***does apply*** to contractors who make more than isolated or accommodation sales and are engaged in selling.[6]

- Lowe's does not provide installation services unless the customer purchases the materials from Lowe's. (App. pp. 6, 142–43, 297).

  RESPONSE: This assertion presumes the Contracts involve sales of materials to Lowe's' customers. The fact that Lowe's only performs improvements to real property using materials sourced from its vendors is not relevant. Lowe's is not aware of any provision in the Sales Tax Act or regulations, or case law that lists this as a factor to consider when determining whether a person is a contractor making improvements to real property.

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[6] The Department asserts that the test set forth in its Sales and Use Tax Manual supports the Court of Appeals' ruling. Return p. 12, n.7. The Department fails to quote the part of its policy that states "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. After ignoring the part of the policy that is most favorable to Lowe's, the Department erroneously concludes that the factors weigh against Lowe's' position.

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

Kansas, Indiana, and Oklahoma all ruled that (i) Lowe's' Contracts do not involve "retail sales" of tangible personal property from Lowe's to its customers; and (ii) Lowe's acts as a contractor for purposes of the transactions. *See* Petition pp. 18–19.[7] The Court of Appeals' rulings to the contrary makes South Carolina an outsider on these two key issues.

The Department is wrong that the Court of Appeals rightly considered these cases to be unpersuasive because the statutory scheme in each of the other states is "materially different from the Sales Tax Act." Return p. 15. The laws in these jurisdictions are similar on these two specific issues. For instance, South Carolina, Kansas, Indiana, and Oklahoma all impose sales tax on "sales at retail" and "retail sales" of tangible personal property. App. pp. 18–19. And, each state has similar definitions that limit "sales at retail" and "retail sales" to transfers of title or possession of tangible personal property. *Id.*

The alleged points of distinction identified in the Department's Return are completely unrelated to the above-stated issues. For example, the Department asserts that "Indiana imposes the sales tax liability on purchasers—not retailers, like South Carolina." Return p. 16. Lowe's does not cite the Indiana decision regarding who bears the incidence of tax or whether Lowe's should somehow be able to pass on tax to its customers. The Department also asserts that the Indiana code "required Lowe's to remit '<u>use</u> tax'" (not a sales tax) "on the construction materials at issue." *Id.* Regardless of whether Lowe's was required to remit use tax in Indiana, the decision is nonetheless persuasive on the two issues for which Lowe's cited the decision. Likewise, the fact that Kansas

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[7] The Department's argument that the "findings and conclusions from the Oklahoma case . . . had never been presented to or ruled upon by the ALC," Return p. 16, n.8, is incorrect. Lowe's' witness testified about the favorable result during the contested case hearing. App. pp. 118–19 (testifying that the Oklahoma Tax Commission ruled "Lowe's was, indeed, a contractor and should not be charging sales tax to its customers").

has a specific statute that allowed dual businesses like Lowe's to remit a tax based on the wholesale price it paid for the materials is an immaterial distinction. That provision relates to the tax base or gross proceeds of sale, not the issues of whether the Contracts are "retail sales" of personal property and whether Lowe's acts in its capacity as a contractor.

Books-A-Million, Inc. v. South Carolina Dep't of Revenue, 437 S.C. 640, 880 S.E.2d 476 (2022), is distinguishable. The case involved a different issue: whether funds from a taxpayer's sales of discount club memberships for its bookstore were the "gross proceeds of sales" subject to tax. 437 S.C. at 642-43, 880 S.E.2d at 477. The Court analyzed whether South Carolina's definition of the "gross proceeds of sales" was similar to Tennessee's definition of "sales price" and found significant differences that supported different results in the two states. *Id.* Lowe's does not cite to any other state regarding the meaning of the "gross proceeds of sales." The Department has not identified any differences between the definitions of "sale at retail"/"retail sale" or "contractor."

It is undisputed that at least 13 other states allow dual businesses to purchase materials "at wholesale" and pay sales or use tax on the cost price upon using the materials to perform real property improvements. Lowe's does not contend that the laws of those states are identical to South Carolina's statutes and regulations. Nevertheless, these states show Lowe's' interpretation (*i.e.*, purchasing all items as if they were at wholesale and then paying tax on the cost price upon use) is not "unreasonable." The Department is wrong that, unlike South Carolina, all the states referenced allow retailers-contractors to remit use tax (not sales tax) based on cost based on their specific statutes and regulations. *See* App. pp. 2118–21. *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 151, 750 S.E.2d 65, 75 (2013), is of no help. It stands for the unremarkable position that the legislature is authorized to structure South Carolina's sale tax scheme.

II. THIS PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRED IN REJECTING LOWE'S' FAIR MARKET VALUE ARGUMENTS

The Court of Appeals committed legal error in asserting the "fair market value" of the materials used to fulfill the Contracts equals the retail price Lowe's would have charged customers for the same materials in an over-the-counter retail sale. *See* App. p. 2143.

As noted, the Department's Determination concluded that the taxable retail sale was "the withdrawal, use or consumption" of the materials by Lowe's in making the improvements to real property for its customers under S.C. Code Ann. § 12-36-110(1)(c). App. p. 859. The Determination relied on S.C. Code Ann. § 12-36-90(1)(c) and S.C. Code Ann. Regs.§ 117-309.17 in arguing the "gross proceeds of sales" subject to tax is the fair market value of the materials, measured by a 40% markup from Lowe's' acquisition cost to the "retailing price" customers would have paid in an over-the-counter retail sale. App. p. 2143. This interpretation does not apply to the majority of materials used to perform the Contracts. Further, the interpretation lacks merit.

First, the Department does not and cannot refute that Special Order Materials fall outside the scope of S.C. Code Ann. § 12-36-90(1)(c) and S.C. Code Ann. Regs. § 117-309.17. Section 12-36-90(1)(c) defines "gross proceeds of sales" to 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 … by any person withdrawing it." Section 117-309.17 provides that "gross proceeds of sales" includes "the money value of property ***purchased at wholesale for resale purposes and subsequently withdrawn from stock*** for use or consumption by the purchaser." The provisions' plain language shows that they apply only to personal property purchased at wholesale for resale that is withdrawn from stock. It is undisputed that 60% of the materials used in the Contracts are Special Order Materials. App. p. 6. It is also undisputed that "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. Hence, the Department's calculations of fair market value do not apply to 60% of the materials at issue.

Second, the Department's fair market value theory is contrary to South Carolina law. Lowe's detailed in both its opening and final briefs to the Court of Appeals that the Department's reliance on S.C. Code Ann. Regs.§ 117-309.17 is misplaced because: (i) section 117-309.17 is not a contemporaneous interpretation of section 12-36-90(1)(c); and (ii) section 117-309.17 applies only to retailers and, thus, is irrelevant to the valuation of building materials used by Lowe's (as contractor) to perform real property improvements. App. pp. 2028–29. It is well-settled that "[f]air market value is that price which a willing buyer will pay a willing seller" and "comparable sales" that "are similar in character, location, and physical characteristics" must be used "[t]o determine a fair market price." App. p. 862 (citing *Hous. Auth. of City of Charleston v. Olasov*, 282 S.C. 603, 608, 320 S.E.2d 478,481 (Ct. App. 1984); App. pp. 2032–33 (citing same and *Hendrix v. Lexington Cty. Assessor*, No. 03-ALJ-17-0475-CC (S.C. Admin. Law Div. July 20, 2005)).

The Department's Return is incorrect in stating the price a willing buyer will pay a willing seller for the materials is the undiscounted retail price for which Lowe's sells them in an ordinary, over-the-counter sale. Return p. 20. But the comparable sales are sales to Lowe's and similar contractors who buy in bulk. Thus, the price a willing buyer will pay a willing seller for the materials is the price Lowe's and such contractors pay based on the volume discounts they receive.

The Department fails to explain how the sale of single item to an individual customer is "comparable" to bulk sales of materials to a Fortune 50 business or other large contractors. Also, the Department wrongly contends Lowe's was only able to negotiate its bulk prices with vendors in its capacity as a retailer and there is no evidence it could have negotiated the same bulk prices in its capacity as a contractor. Lowe's' bulk prices were based on volume, not its capacity as a

retail or contractor. The testimony establishes that the prices Lowe's paid for materials were determined by "discounts from vendors based on the volume of items that it purchases." App. p. 145. Whether Lowe's bought twenty items in its capacity as a retailer with a resale certificate or twenty items in its capacity as a contractor, the volume and thus the pricing would be the same.

III. THE COURT SHOULD GRANT THIS PETITION BECAUSE THE COURT OF APPEALS ERRED IN REJECTING LOWE'S EQUAL PROTECTION CLAIM

The Court of Appeals erred in rejecting Lowe's' Equal Protection claim. The assessment against Lowe's should be voided because it treats Lowe's (who is both a contractor and a retailer and is required to comply with the Dual Business Regulation) differently from other contractors who do not also operate retail businesses, without a rational basis. *See S. Bell Tel. & Tel. Co. v. City of Spartanburg*, 285 S.C. 495, 497, 331 S.E.2d 333, 335 (1985) (voiding local business license tax because "[t]he city has advanced no reasonable basis for the differential treatment"); *S. Bell Tel. & Tel. Co. v. City of Aiken*, 279 S.C. 269, 273, 306 S.E.2d 220, 222 (1983) (invalidating local tax under Equal Protection Clause because "the record lacks sufficient evidence that would support an express finding of a rational basis" for classification).

The Department argues that Lowe's is not treated differently than other contractors because "all other contractors [] must purchase materials at retail with sales tax due." Return pp. 22–23. This contention that all contractors pay full retail or shelf prices is contrary to the evidence. During the contested hearing, multiple witnesses, including two of the Department's own witnesses, testified that some contractors "buy at discount." App. pp. 192–93; App. p. 268 (discussing an audit meeting where it was suggested that "Lowe's deserved discounts just like other contractors received"). One Department witness even testified about having her contractor buy items at Lowe's in order to receive the benefit of his discount. App. p. 298 (stating she would have her contractor pay "because he got a … five or ten percent discount"). *See also* https://www.lowes.com/l/Pro/pro-

benefits.html (discussing Lowe's' "pro"/contractor benefits; stating "Large product inventories save you time and money, so you can get what you need all at once with volume discounts.").

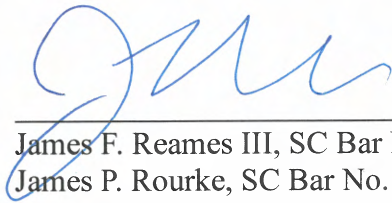
The Department also contends that Lowe's is not similarly situated to other contractors because the Dual Business Regulation required Lowe's to purchase its materials without tax at acquisition, which the Department contends other contractors cannot do. As noted, the fact that Lowe's operates two separate lines of business and adhered to the Dual Business Regulation creates a mere difference in timing as to when Lowe's is required to pay tax.

Imposing a higher tax burden on Lowe's than other contractors, including large contractors, is a classic example of treating similarly situated taxpayers differently for purposes of the tax code, and there is no rational basis to explain this disparate treatment. *See, e.g.*, *Ed Robinson Laundry & Dry Cleaning, Inc. v. S.C. Dep't of Revenue*, 356 S.C. 120, 124, 588 S.E.2d 97, 99 (2003) (applying rational basis review). This Court has made clear that "[a] cornerstone of the law is the unwavering commitment to ensure that the law is applied even handedly—similarly situated parties must be fed from the same spoon. The law abhors the dissimilar treatment of the similarly situated." *Books-A-Million*, 437 S.C. at 658, 880 S.E.2d at 485 (Kittredge, J., dissenting). With disparate treatment between contractors performing identical services to customers clearly identified, it is incumbent on this Court to "insist upon a resolution … to ensure that our taxation laws are applied equally to all similarly situated taxpayers, free from the Department's arbitrary selection of winners and losers." *Id.*

CONCLUSION

Lowe's respectfully requests that this Court issue a writ of certiorari to review the Court of Appeals' Opinion No. 6062.

Dated: November 25, 2024



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