THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 13-ALJ-17-0218-CC
Case Tracking No. 2014-000214

Eugenia Boggero, d/b/a Boggero's Portable Toilets, Appellant,

v.

South Carolina Department of Revenue, Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. THE LOWER COURT ERRED IN FINDING THAT THE TRUE OBJECT OF APPELLANT'S BUSINESS WAS NOT A SERVICE AND THAT APPELLANT'S GROSS PROCEEDS WERE THEREFORE SUBJECT TO THE STATE SALES AND USE TAX.

STATEMENT OF THE CASE

Eugenia Boggero ("Ms. Boggero") owns and operates a portable restroom business known as Boggero's Portable Toilets (hereinafter "Boggero's") (Ms. Boggero and Boggero's collectively referred to herein as "Appellant").[1] (Transcript pp. 11-12). Appellant has not applied for a retail sales tax license, collected sales or use tax from her customers, or remitted sales or use tax to the South Carolina Department of Revenue (hereinafter "Respondent") as Appellant has always believed that the true object of her business is providing a service to her customers. (Transcript p. 83, lines 5-21). Respondent conducted a sales tax audit of Appellant for the periods of January 1, 2009 through December 31, 2011 (hereinafter the "audit period"), and thereafter on or about May 7, 2013, the Respondent's auditor issued a Notice of Assessment imposing sales tax, penalties, and interest on Appellant's gross proceeds from Boggero's (tax: $8,891.96; interest: $602.27; penalty: $3,191.36). (Order pp. 2, 4). Appellant timely protested the Proposed Assessment, and Respondent subsequently issued its Department Determination sustaining the imposition of the sales tax and related penalties and interest. (Order p. 4).

Appellant thereafter timely requested a contested case hearing before the Administrative Law Court (ALC) pursuant to S.C. Code Ann. § 12-60-470 (2000 & Supp. 2013) and S.C. Code Ann. § 1-23-310 et. seq. (2005 & Supp. 2013). A hearing was held before the ALC on September 12, 2013, wherein Appellant argued that the true object of her business was providing a service, *i.e.*, the removal and disposal of human waste, and was, therefore, not subject to the State sales and use tax. The ALC issued a

[1] Appellant's business also includes trash removal services, but Respondent did not assess sales tax on the portion of Appellant's gross proceeds allocable to the trash removal services, and thus, those are not at issue in this case. (Order p. 2, n.1).

Final Order and Decision on January 6, 2014, sustaining Respondent's Determination and thereby imposing the sales tax, penalties, and interest as provided in such Determination on Appellant's gross proceeds related to her portable restroom business. (Order pp. 1-15). On February 3, 2014, Appellant served a Notice of Appeal of the ALC's Final Order and Decision on Respondent and filed the same on February 4, 2014, with the Court of Appeals.

FACTS

Ms. Boggero testified that she has operated Boggero's as a sole proprietorship in Greenwood, South Carolina, since 2005, when she took the business over from her father. Boggero's is a family business and the portable restroom service has been in operation since 1968, when Ms. Boggero's father started the business. (Transcript pp. 11-12, 83). She testified that the equipment used in her business includes tanker trucks, holding tanks for the waste, holding tanks for fresh water, multiple pumps, hoses, valves, and gauges as well as other equipment and chemicals. (Transcript p. 15). She also stated that there are certain regulatory requirements related to the portable restroom business and those regulations limit who can operate that type of business. Ms. Boggero stated that the Department of Health and Environment Control (DHEC) governs those regulations, and that she has a DHEC license, which allows her to remove and haul human waste. She also testified that the DHEC regulations set forth minimum standards of maintenance for her tanker trucks and other standards related to the equipment associated with her business. She stated that DHEC also regulates the separation of fresh water from human waste and spills in connection with her business. (Transcript pp. 13-16). Ms. Boggero testified that a portable restroom is a restroom with a small hold tanking, which is a vessel or receptacle for human waste. (Transcript p.14, lines 3-5).

Ms. Boggero testified that she is a member of Portable Sanitation Association International (PSAI), which is a trade group dedicated to portable toilets. She stated that she has participated in PSAI training and is currently certified by PSAI. (Transcript p. 16, line 15-p.19, line14).

Ms. Boggero testified that approximately 80% of her business is related to servicing portable restroom units at construction sites and approximately 20% is related to servicing units, including toilet units and sink units, at special events, such as weddings and festivals. She testified that Boggero's provides services to people or companies who have their own permanent toilets as well as providing services to those who do not own their units but use her units on a temporary basis. (Transcript p. 20). She stated that PSAI requires a portable restroom to be serviced at a minimum threshold, which is one service every week per unit. (Transcript p. 21, lines 18-22). She testified that even if she knows the unit does not need to be serviced because it has not been used frequently, she still services the unit according to PSAI standards. (Transcript p. 21, line 23-p.-22, line 4).

Ms. Boggero testified that to service a portable restroom, her tanker truck pulls up to a job site and the pump is turned on. A wand is inserted into the holding tank for the restroom. The wand is then removed and the suction pulls the waste out of the unit. At that time, the wand is turned off as well as the pump and the wand is replaced. Then a bucket is filled with fresh water and deodorizer is added, and it is placed back in the unit. The entire unit is then sanitized with soap and water. (Transcript p. 22, line 19-p. 23, line 8). She affirmed that this servicing process is according to PSAI standards. (Transcript p. 23, lines 9-10).

Ms. Boggero testified that she has new customers sign a Service Agreement. (Transcript pp. 23-24; Appellant's Exhibit 5-A Service Agreement). She testified that she does not call it a rental agreement "[b]ecause we do not, never have, rented anything." (Transcript p. 29, line 15). She further testified that she has never rented a portable toilet per day, per week, or per month. (Transcript p. 29, lines 16-22). She testified that the Service Agreement provides that the customer is responsible for paying for service payments. (Transcript p. 29, line 23-p.30, line2). Specifically, the Service Agreement provides, in relevant part:

> 2. The Customer will be responsible for the following service payments:
>
> # of Portable Toilets___ Cleaned # of Times per Week___ Price__
>
> . . .
>
> 3. Services will be invoiced every 4 weeks (28 days), and the Customer will make payments within 15 days of being invoiced.
>
> . . .
>
> 6. The Customer understands that the services fees for the use of portable toilets and or dumpsters may increase in the future. . . .
>
> 9. The duration of the service period is determined from the date of shipment on our part as indicated on this service agreement until date of pick up order. . . . (Appellant's Exhibit 5-A).

She stated that if a customer requested a unit be cleaned more often than required by PSAI standards, then she would charge the customer for an extra service. (Transcript p. 31, lines 8-12). The Service Agreement further states that if the customer does not timely pay the invoice, then its service will be terminated. (Transcript p. 32, lines 15-16;

Appellant's Exhibit 5-A). She testified that the units stay in place as long as the customer wants and that she continues to service the unit as long as it stays in that location. There is no term or time period set forth in the Service Agreement. (Transcript p. 49, line 14-p.50, line 3).

Ms. Boggero testified that in general she charges a service fee of $20 per service for customers on a construction job in Greenwood County and $22 per service for customers on a construction job outside Greenwood County. (Transcript p. 30, line 20-p. 31, line 4). She stated that she bills on a 28-day billing cycle for this type of customer. (Transcript p. 31, lines 13-17; p. 35 line 25-p. 36, line 5). Ms. Boggero testified that she charges a different rate for special events than for her weekly customers, such as construction sites. She testified that more people generally use the special event units than the weekly units and that there is therefore more waste. She incurs greater service charges at the disposal plant because of the greater amount of waste, which consequently is a large portion of the reason she charges more for special events than for weekly jobs. (Transcript p. 88, line 25-p.90, line 6).

Appellant introduced into evidence copies of several invoices during the audit period. (Transcript p. 36, lines 6-10; Appellant's Exhibits 6 through 18). Ms. Boggero identified Appellant's Exhibit 6 as an invoice for Eighteen Mill Construction Company for the service period of January 19, 2009 through February 15, 2009, which is 28 days. This customer had one restroom, and it was serviced once a week on a 28-day billing cycle, for a total of $80. However, Ms. Boggero testified that this particular customer was a preferred customer and received a 10% discount, which resulted in a total balance due of $72 for the 28-day billing cycle. The invoice specifically states that the charge is

for "restroom weekly service." (Transcript pp. 37-38; Appellant's Exhibit 6). Ms. Boggero stated that this invoice was representative of approximately 80% of her business. (Transcript p. 38, lines 13-16). As to Appellant's Exhibit 13, Ms. Boggero stated that this was an invoice to a construction company and that the original charge was for $80, but this unit was only serviced 3 times instead of 4 times during the 28-day billing cycle, so the invoice reflects a balance due of $60. She stated that she charged that customer less because she serviced the unit 3 times instead of 4 times. That invoice also reflects a charge for an "extra service" because the customer requested an additional service and she performed that additional service for an additional fee. (Transcript p. 40, line 22-p. 42, line 24; Appellant's Exhibit 13). Ms. Boggero testified that Appellant's Exhibit 14 was an invoice to Spann Church[2], which owns its own portable restroom unit and calls her occasionally to service the unit. That invoice reflects a one-time charge for "extra service" in the amount of $35. She testified that she charged Spann Church $35 for the one-time service because Spann Church allows the unit to sit up for several months, which causes more waste than usual to build up, and she charges a higher rate for a higher level of service or removal of a greater amount of waste. Ms. Boggero specifically testified that the difference in charges did not have anything to do with Spann Church owning its own unit. (Transcript p. 42, line 25-p. 44, line 1). Ms. Boggero testified that Appellant's Exhibit 16 was an invoice to a customer who owns its own units and she charged them $20 per unit for a one-time charge, which is the same charge as if Boggero's had owned the units. (Transcript p. 46, line 16-p. 47, line 8).

[2] The Transcript states that Appellant's Exhibit 13 is an invoice to Stand Church, but the actual Exhibit reflects that it is an invoice to Spann Church and the Brief therefore refers to Spann Church. (Transcript pp. 42-44; Appellant's Exhibit 13).

Ms. Boggero testified that she dumps the waste removed from the portable restroom units at Greenwood Metro District (GMD). She averred that in order to engage in the activity of dumping waste at GMD, she had to have a DHEC license, which she does, and that this is another limitation that prohibits any individual or entity from providing the service that Boggero's does. (Transcript p. 27, line 13-p. 28, line 19). Ms. Boggero testified that when she services a unit that has accumulated more than average waste, she charges a high rate for a higher level of service because she is, in turn, charged more at GMD for the greater amount of waste. (Transcript p. 43, lines 10-23; p. 89, line 17-p. 90, line 6).

Ms. Boggero testified that if there is a long-term placement of a unit, then she does not charge for the extra time or months of placement, but only for the servicing of the unit. (Transcript p. 45, line 6-p. 46, line 14). She also testified that she charges the same price for customers who use her units and for customers who own their own units. She stated that the reason for this is because she charges for the removal of waste and not for the use of the restroom. (Transcript p. 47, lines 11-19). She reiterated that she only charges for the service and that she has only ever charged for the service. She testified that her customers will not use the portable unit unless she is there to service the unit. She views the portable units as vessels or receptacles for collecting human waste and that she services the human waste. (Transcript p. 48, line 1-p. 49, line 13).

Ms. Boggero testified that the true object of her business is to remove waste and that is a service. (Transcript p. 50, lines 18-21). She stated that she was raised to earn someone's money and that is why she does not charge rent. She earns her client's money by providing a service and giving the best service. (Transcript p. 58, lines 6-11).

STANDARD OF REVIEW

An appellate court's review of the ALC's order must be confined to the record. S.C. Code Ann. § 1-23-610(B). Tax appeals to the ALC are subject to the Administrative Procedures Act. Long Cove Home Owners' Ass'n v. Beaufort Cnty. Tax Equalization Bd., 327 S.C. 135, 139, 488 S.E.2d 857, 860 (1997). Accordingly, review of the ALC decision is governed by S.C. Code Ann. § 1-23-380(5), which states:

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> * * *
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See also id. § 1-23-610(B). As the South Carolina Supreme Court stated in Media General Communications v. South Carolina Department of Revenue, 388 S.C. 138, 144, 694 S.E.2d 525, 527-28 (2010): "A reviewing court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law. S.C. Code Ann. § 1-23-610(B)(a), (d) (2009)."

Questions of statutory interpretation are questions of law, which the appellate court may decide without any deference to the court below. CFRE, LLC v. Greenville Co. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (citing City of Rock Hill v. Harris, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011)). In addition, except for the deletion of one sentence and the addition of a sentence, the ALC adopted Respondent's proposed

order practically verbatim. Compare Respondent's Proposed Order with ALC Order. When a lower court adopts the prevailing party's proposed order verbatim, that order is entitled to lower deference and may be subjected to increased scrutiny on appeal. See Anderson v. City of Bessemer, 470 U.S. 564, 572-73 (1985); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 615, n.13 (1974); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1284 (7th Cir. 1977); Holsey v. Armour & Co., 683 F.2d 864, 866 (4th Cir. 1982); Bright v. Westmoreland Cnty., 380 F.3d 729, 731-2 (3d Cir. 2004).

ARGUMENT

I. THE LOWER COURT ERRED IN FINDING THAT THE TRUE OBJECT OF APPELLANT'S BUSINESS WAS NOT A SERVICE AND THUS FINDING THAT APPELLANT'S GROSS PROCEEDS WERE SUBJECT TO THE STATE SALES AND USE TAX.

Appellant contends that the true object of her business is the removal and disposal of human waste and thus, the gross proceeds from her business are not subject to the State sales and use tax. The ALC found that the true object of Appellant's business was the use of tangible personal property, portable restrooms, and therefore subject to the State sales and use tax. The record in this matter is replete with evidence that the portable restrooms have no value to Appellant's customers except as a result of the service of removing and disposing of human waste provided by Appellant.

While it is cannon law that tax exemption statutes are strictly against the taxpayer, e.g., CFRE, LLC, 395 S.C. at 67, 716 S.E.2d at 877, ambiguity in tax exemption statutes is resolved against the government. See Ryder Truck Lines, Inc. v. S.C. Tax Comm'n, 248 S.C. 148, 152, 149 S.E.2d 435, 437 (1966); see also Alltel Comm., Inc. v. S.C. Dep't of Rev., 399 S.C. 313, 318, 731 S.E.2d 869, 872 (2012) (noting general rule that where

substantial doubt exists as to the construction of tax statutes, the doubt must be resolved against the government) (internal citations omitted); Southeastern Fire Ins. Co. v. S.C. Tax Comm., 253 S.C. 407, 410, 171 S.E.2d 355, 356 (1969). South Carolina Code Section 12-36-910(A) and Section 12-36-1110 impose a sale tax on the gross proceeds of sales of tangible personal property at retail in this State. The term "sale" is defined in South Carolina Code Section 12-36-100 to include "any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration including...a rental, lease, or other form of agreement...." South Carolina Code Section 12-36-60 defines the term "tangible personal property" as something that can "be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses."

In South Carolina, proceeds derived from services are not generally subject to the sales and use tax, except when the sales and use tax is specifically imposed on such services by statute (i.e., accommodation services, communication services). S.C. Code Ann. Regs. 117-308 (2012 & Supp. 2013); see also id. 117-308.1-.16 (providing that the following services are not subject to the State sales and use tax: professional services, dentists, doctors, lawyers, architects, ophthalmologists, oculists, optometrists, hospitals, nursing homes, advertising agencies, bookbinders, paper cutters, jewelry repairman, shoe repairman, barbers, beauty shops, taxidermists, auto painters, and painters).

Whether a given transaction is the furnishing of a service or the sale or lease of tangible personal property is determined by the "true object" test. See Fraternal Order of Police v. S.C. Dep't of Rev., 332 S.C. 496, 506 S.E.2d 495 (1998) (referencing the application of the true object test in determining whether a transaction is subject to the sales tax); S.C. Code Ann. Regs. 117-308 ("The receipts from services, when the services

are the true object of the transaction, are not subject to the sales and use tax. . . ."). The Respondent has relied on the "true object" test in a number of policy documents and private rulings. See South Carolina Sales and Use Tax Manual Chapter 7, p. 1-3 (2013 Edition); see also S.C. Rev. Advisory Bulletin #01-5 (June 25, 2001); S.C. Rev. Rul. #09-5 (May 19, 2009); S.C. Rev. Rul. #04-8 (May 13, 2004); S.C. Rev. Rul. #04-5 (Mar. 30, 2004); S.C. Rev. Rul. #98-16 (July 8, 1998); S.C. P.L.R. #12-2 (June 11, 2012); S.C. P.L.R. #07-6 (Nov. 16, 2007); S.C. P.L.R. #07-3 (Mar. 20, 2007); S.C. P.L.R. #05-5 (Oct. 31, 2005); S.C. P.L.R. #05-2 (Apr. 15, 2005); S.C. P.L.R. #04-2 (Jan. 12, 2004); S.C. P.L.R. #97-4 (Sept. 18, 1997); S.C. P.L.R. #92-5 (June 1, 1992); S.C. Private Rev. Op. #01-5 (Dec. 7, 2001); S.C. Tech. Adv. Mem. # 95-1 (May 23, 1995) (all applying true object test in connection with the application of the State sales and use tax).

The true object test is described in 9 Vanderbilt Law Review 231 (1956) as follows:

> The true test then is one of basic purpose of the buyer. When the product of the service is not of value to anyone other than the purchaser, either because of the confidential character of the product, or because it is prepared to fit the purchaser's special need – a contract or will prepared by a lawyer, or the accident investigation report prepared for an insurance company – this fact is evidence tending to show that the service is the real purpose of the contract. When the purpose of a contract is to produce an article which is the true object of the agreement, the final transfer of the product should be a sale, regardless of the fact that special skills and knowledge go into its production. Under this analysis, printing work, done on special order and of significant value only to the particular customer, is still a sale. The purchaser is interested in the product of the services of the printer, not in the services per se. Similarly, it would seem that contracts for custom-produced articles, be they intrinsically valuable or not, should be classified as sales when the product of the contact is transferred.

Clyde L. Ball, What is a Sale for Sales Tax Purposes, 9 Vand. L. Rev. 231 (1956). In addition, the Vanderbilt Law Review article sets forth the following general rule:

> If the article sold has no value to the purchaser except as a result of services rendered by the vendor, and the transfer of the article to the purchaser is an actual and necessary part of the services rendered, then the vendor is engaged in the business of rendering service, and not in the business of selling at retail. If the article sold is the substance of the transaction and the service rendered is merely incident to and an inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail, and the tax which he pays...[is measured by the total costs of article and services]. If the service rendered in connection with an article does not enhance its value and there is a fixed or ascertainable relation between the value of the article and the value of the service rendered in connection therewith, then the vendor is engaged in the business of selling at retail, and also engaged in the business of furnishing service, and is subject to tax as to the one business and tax exempt as to the other. (quoting Snite v. Dep't of Rev., 74 N.E.2d 877 (Ill. 1947)).

Id.

Respondent's witness, James L. McCutchen, conceded at the ALC hearing that every matter must be evaluated on a transaction-by-transaction basis to determine if the imposition of the sales tax is appropriate. (Transcript p. 150, line 23-p. 151, line 3). Reviewing the evidence in the record and applying the true object test to this matter, the true object of Appellant's business is the providing of a service. Appellant's customers are hiring Appellant to haul away and dispose of human waste. Compare S.C. P.L.R. #04-2 (finding that charges by company for delivering a garbage container to a construction site and disposing of construction wasted placed in the container were not subject to the sales and use tax because "[c]ustomers are hiring the taxpayer to haul away and dispose of construction waste"). But for the removal and disposal of human waste,

Appellant's customers would not have hired her business to provide them with a sanitation service. As evidence of the true object of the transaction, Appellant enters into a Service Agreement with her customers.

Although Appellant typically charges more for the special event services than for construction unit or weekly services, Ms. Boggero testified that is largely because there is more waste generated with the special events than the construction sites and that more waste has to be removed and disposed. Also, Appellant incurs a greater service charge at GMD, the disposal plant, for the special event services because of the greater amount of waste accumulated at a special event. This testimony supports Appellant's contention that the true object of her business is to provide a service; otherwise, her charges would not be related to the amount of waste that she removes and disposes of at GMD. Also, Ms. Boggero testified that she charges the same fee for customers who own their own portable restroom units and for customers who use her portable restroom units because she only charges customers for the services that she provides.

Ms. Boggero also testified that she views the portable restroom units and sink units as receptacles for holding waste. Although she may provide the restroom and sink units for her customers, her customers would not use them but for the services that she provides in conjunction with such units. Even Respondent's field auditor, John Wesley Butler, testified that if Appellant did not provide services to her customers, then it would be objectionable to the customer. (Transcript p. 121, lines 18-25).

Ms. Boggero testified that she would charge the same fee if she was servicing a restroom unit that she provided for a customer or if she was servicing a customer's 5 gallon bucket because the unit or the bucket is a vessel or receptacle for collecting human

waste and Ms. Boggero testified that she services human waste. (Transcript p. 45, line 17-p. 49, line 3). When asked what the true object of her business was, Ms. Boggero testified that "[w]e remove waste". (Transcript p. 50, lines 18-19).

Mr. Butler, Respondent's field auditor who originally audited Appellant, testified that the customer's ultimate interest is "to get rid of human waste" and that Appellant's customers are not qualified to take the waste to the disposal center, but Appellant is qualified to do so. (Transcript pp. 119, lines 4-7; p. 120, lines 15-20). Mr. Butler also testified that Appellant "provide[s] the service of cleaning the portable toilets, of taking the waste out of the portable toilets, and that type of thing" and that her weekly billing is "for the service that she is providing." (Transcript p. 101, lines 12-17; p.135, line 25-p.136, line 1).

In S.C. Revenue Ruling #09-5 and S.C. Revenue Advisory Bulletin #01-5, Respondent concluded that, based on the circumstances before Respondent in those cases, a charge by a business temporarily providing portable toilets to another person is a rental of tangible personal property subject to the sales and use tax. Respondent utilized the true object test in both Revenue Ruling #09-5 and Revenue Advisory Bulletin #01-5. The facts in Revenue Ruling #09-5 and Revenue Advisory Bulletin #01-5 are silent as to whether the taxpayer provides an itemized invoice with separate fees for rental of the toilet unit and for servicing of the unit or if the taxpayer provides an invoice with a flat fee. Instead, Respondent summarily finds that the fee for providing portable toilets is a rental of tangible personal property and thus subject to sales tax and then finds that charges for servicing of the portable toilets (whether optional or mandatory) are taxable because they are part of the gross sales proceeds from the rental.

In contrast to the Respondent's above policy documents, Appellant d oes not charge a fee for providing a portable toilet. Appellant's fees are for services only and do not include any fees for use of the units or for rent. In this case, Appellant clearly could not have been renting tangible personal property to her customers that own their own portable restroom units and her fees to those customers cannot be subject to the sales and use tax. Further, Ms. Boggero testified that she did not charge her customers rent and her invoices and Service Agreement reflect a service fee only, which are the same whether it is for the first service date including delivery of a unit, second service date, or the last service date. Her invoices do not reflect a separate rental fee and she charges the same weekly service fee to customers who use her units and to customers who own their own units. Although Courts give great weight to an agency's long-standing construction of a statute, such a construction is not dispositive, and as evidenced above, the nature of Appellant's business is different than those businesses contemplated in Revenue Ruling #09-5 and Advisory Bulletin #01-5. Plyler v. Evatt, 313 S.C. 405, 408, 438 S.E.2d 244, 246 (1993); Gilstrap v. S.C. Budget and Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992).

Similarly, the ALC's and Respondent's reliance on the South Carolina Tax Commission Decision S-D-115 (1977) is erroneous. In that case, the Tax Commission specifically identified two types of charges at issue: (1) "placing of a portable toilet" and (2) "furnishing of necessary servicing of the toilet." The Commission then found that "[u]nder the circumstances in this case we are satisfied that the charge [for] placing of a portable toilet is a rental charge that is taxable under the provisions of the Sales and Use Tax Act" (emphasis added).

First, the decision in the Commission case is limited to the facts before the Commission, which are scant and not sufficient to provide guidance to Appellant or the Court. More importantly, the Commission never ruled on the services related to the "furnishing of necessary servicing of the toilet." These are the types of charges at issue in this case. Also in this case, Appellant did not charge her customers for placement of a portable toilet. She only charged her customers for servicing the portable restroom units.

The ALC relied on Respondent's summary of specific invoices listing all of Appellant's invoices showing "new-delivery" in determining that these charges were for "use" or "rental" and comprised approximately 28% of Appellant's total gross proceeds for the audit period. (Order p.2, n.7; p. 14). This is a contrived analysis to support Respondent's position and is contradicted by Ms. Boggero's testimony as well as Appellant's invoices and Service Agreement. When questioned by Respondent, Ms. Boggero testified specifically that the new delivery notation on the invoice "lets the customer know that this will be the first service deal, and it will have the delivery date on it showing when it was delivered." (Transcript p. 72, lines 8-14; emphasis added). She also testified that she does not generally charge for delivery except for special events and even then, this is included in her service fee. (Transcript pp. 72-73).

As to a business similar to the portable restroom business, Respondent, in S.C. Private Letter Ruling #04-2, concluded that a charge by a business for delivering a garbage container to a construction site and disposing of construction debris placed in the container is not subject to the sales and use tax. Respondent in that Private Letter Ruling also utilized the true object test and determined that customers are hiring the business to haul away and dispose of construction waste and that any containers used in that

transaction were being used and consumed in providing a service. Respondent in Private Letter Ruling #04-2 specifically noted that if the business was only providing the container and not also providing the service of hauling away and disposing of the waste, then the charge for the container would be subject to the sales and use tax as a rental of tangible personal property. Respondent further noted that as the sales and use taxes are transaction taxes, if the taxpayer changed its method of operating, then the application of the sales and use tax to the taxpayer's business may also change.

In S.C. Private Letter Ruling #97-4, a business provided electronic monitoring services for customer's homes for burglary and fire protection. The business charged its customers a monthly fee for the standard security package, which included equipment and monitoring services, but the business did not itemize such charges. With the standard security package, the title to the equipment did not pass to the customer but remained with the business and the customer only had the right to use the equipment during the service period. In applying the true object test to this transaction, Respondent determined that the business was using and consuming equipment in providing a nontaxable monitoring service and the monthly fee was not subject to the sales and use tax.

Also in S.C. Technical Advice Memorandum #95-1, the taxpayer charged a monthly fee to its customer for electronic monitoring of homes or businesses for burglary or fire protections services. In this matter, the taxpayer provided services to customers who used the taxpayer's equipment and to customers who owned their own equipment. The taxpayer charged the same monthly monitoring fee to all of its customers, regardless of who owned the equipment. Applying the true object test, Respondent determined that the monthly fee for monitoring services was not subject to the sales and use tax if the

equipment either belonged to the taxpayer and was simply used by the customer or was previously owned by the customer prior to engaging the taxpayer. The taxpayer used its equipment in providing the nontaxable monitoring service and thus, the equipment was also not subject to the sales and use tax.

Similar to the facts in Private Letter Ruling #04-2, Private Letter Ruling #97-4, and Technical Advice Memorandum #95-1, Appellant charges a fee for the service of removing and disposing of human waste and any restroom units used in that transaction are being used and consumed in providing a nontaxable service. As Appellant testified and even Respondent's witness, Mr. Butler, agreed, her customers hire her to remove and dispose waste. This is the true object of Appellant's business, and the furnishing of a portable restroom unit or sink unit, at the request of the customer, has no value to the customer except as a result of the services of removing and disposing of waste provided by Appellant. In applying the true object test to the facts and circumstances of Appellant's business, which the Court must do, the result is that Appellant provides a service and Respondent's construction of the sales and use tax statutory provisions should not be applied in this case. Respondent admitted at the ALC hearing that the imposition of the sales tax was done on a case-by-case basis, and viewing the facts of this case, the true object of Appellant's business is providing a service.

The ALC also found persuasive the view of the Virginia Supreme Court in LZM v. Virginia Dep't of Taxation, 606 S.E.2d 797 (Va. 2005), where a similar issue regarding sales tax on portable toilet service and rental was addressed. In LZM, the taxpayer separately stated the charges for leasing the toilet units (called "lease fees for portable toilets" in the opinion) and for pumping services (called "fees received for toilet pumping

services") on a single invoice and the taxpayer did not require its customers to contract for pumping services. The taxpayer also only sold its pumping services to customers who used the taxpayer's toilet units and would not provide pumping services to entities who owned their own units. The taxpayer's pumping charges were determined on a per lease basis, rather than on the amount of waste pumped. In utilizing the true object test, the LZM Court found the true object of that particular taxpayer's business was the leasing of tangible personal property. Id. at 801-02.

As an initial matter, in his seminal state and local tax treatise, Professor Hellerstein notes that "the decision in [the LZM] case was clearly a close call, and the court left open the possibility of different results for differently structured transactions. A different result might obtain, for example, if pumping services were priced differently or if the toilets were sold outright to customers and customers separately contracted for pumping services." W. Hellerstein, State Taxation: Third Edition § 12.08, FN 165.

The facts in the case at bar can be distinguished from those in LZM in several important ways. In contrast to the taxpayer in LZM, Ms. Boggero testified that she provides services to customers who use her units and to customers who own their own units. Also, she charges the same service fee to customers who own their own units and to customers who use her units. In addition, Ms. Boggero testified that she charges customers based on the level of services she provides, and when there is a greater amount of waste, her fees are generally higher. (Transcript p. 43, lines 10-23; p. 47, lines 11-19; p.89, line 17-p.90, line 6). The nature of Appellant's business is distinguishable from the taxpayer's business in LZM, and Appellant asserts that the ALC's reliance on LZM was, therefore, erroneous. The true object of Appellant's business is providing a sanitation

service to her customers, who, without Appellant, would not be able to lawfully dispose of their human waste.

In addition to Virginia, other states have addressed the imposition of sales tax on portable restroom businesses. The Georgia Department of Revenue has issued an informational bulletin providing guidance on the application of Georgia's sales and use tax to fees charged for portable restrooms. See GA Dep't of Revenue Informational Bulletin SUT 2009-09-25 (2009). In the Informational Bulletin, the Georgia Department of Revenue found that although Georgia had not formally adopted the true object test for determining whether a transaction was a sale or lease of tangible personal property, a service, or both, it would look at the object of the transaction in question to determine the taxability for sales and use tax purposes. The Georgia Department of Revenue found that the true object of a transaction where there is a "lease of portable toilets in conjunction with mandatory services that are associated with the providing of portable toilets" is to "provide a sanitation service." Id. In making its determination, the Georgia Department of Revenue looked to "the value/cost of the tangible personal property that was being transferred as compared with the value/cost of the services that were being provided" and found that the value of the portable toilet, alone, was not significant when compared to the value and costs of the services that were being provided. Id. The Georgia Department of Revenue found that providing a portable toilet unit in conjunction with all of the associated services, including, but not limited to pumping, cleaning, deodorizing, refilling toilet paper, general maintenance, pick-up and delivery, are all part of the non-taxable sanitation services. Id.

The Massachusetts Department of Revenue has taken the position that whether a particular transaction is a personal service transaction or a lease of tangible personal property is a question of fact. See Mass. Department of Revenue Directive 00-3: Sales Tax Treatment of Rentals of Toilets (2000). In Massachusetts, the servicing of portable restrooms is not subject to its sales tax if a transfer of a portable toilet unit occurs, the charges for the rent of the unit and for the performance of the services are not itemized, and the fair rental charge for the rental of the unit is not inconsequential as defined by the Massachusetts statutory laws. Id.

The State of Washington's Department of Revenue does not impose its sales tax on portable restroom units because their long-standing position is that the vendor is providing more than rental services. The vendor is removing waste, recharging the chemicals, cleaning, and disinfecting the unit. See WA Dep't of Rev., Tax Facts 6 (June 2006).

In this case, Ms. Boggero testified that she provided services to all customers during the audit period. Clearly, Appellant did not provide a lease of tangible personal property to any customer who owned its own restroom unit. There is no testimony in the record that Appellant provided a restroom unit without providing a service. To the contrary, Ms. Boggero testified that she always provides a service. Ms. Boggero testified that she provides services to those customers who own their own units, and thus her services are not inextricably linked to the units that she owns. Moreover, Ms. Boggero testified that her charges are based on the amount of waste serviced and she charges the same fee for customers who own their own units and for customers who use her units.

Respondent's witness, Mr. Butler, testified that Boggero's customers would find it objectionable if the units were not serviced on a timely basis. Further, the record is replete with uncontradicted testimony from Ms. Boggero that she only charges for the services provided to her customers and not for the use of the units. Ms. Boggero testified that her business principle is to earn someone's money and not to take it, which is why she does not charge rent. She earns their money by providing a service and giving the best service. As admitted by Respondent's witness, the customer would not desire a portable restroom unit but for the servicing of such unit. Appellant's customers are engaging her services in order to lawfully remove and dispose of human waste because without Appellant's services, the customers cannot lawfully dispose of the human waste.

Appellant's business model is akin to the facts and circumstances set forth in S.C. Private Letter Ruling #04-2, in which Respondent found that the sales tax did not apply to a business delivering garbage containers to a construction site and disposing of construction waste where the customer is hiring the business to haul away and dispose of human waste. Similarly, Appellant is hired to remove and dispose of waste, and Appellant may, at the request of her customers, provide a portable restroom unit or sink unit as part of her sanitation service, but such units are incidental to the actual service of removing, hauling away, and disposing of waste. The portable restroom units are used and consumed in connection with providing a nontaxable service by Appellant and as a result are not subject to the sales and use tax. See, e.g., S.C. P.L.R. #97-4; S.C. Tech. Adv. Mem. 95-1. Based on Appellant's method of operation, the true object of

Appellant's business is to provide a sanitation service to her customers.[3] See generally, Ryder Truck Lines, 248 S.C. at 152, 149 S.E.2d at 437 ("[A] taxing statute must be construed most favorably to the taxpayer, and any doubt should be resolved against the taxing authority.").

CONCLUSION

Based on the above arguments, the true object of Appellant's business is to provide a sanitation service of removing, hauling away, and disposing of human waste and that the providing of restroom or sink units are incidental to such service. The ALC's finding that the true object of Appellant's business was the rental of personal property is erroneous and the ALC's affirmance of the imposition of the sales tax on Appellant for the audit period should be reversed.

March 4, 2014

Respectfully submitted,

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[3] Appellant would note that S.C. Code Ann. § 12-36-2120(62) provides an exemption from sales tax for "seventy percent of the gross proceeds of the rental or lease of portable toilets", but Appellant contends that before the sales tax can be imposed, her business must be evaluated on a case-by-case basis to determine the true object of her business. Based on the facts and circumstances of her business, the true object of Appellant's business is the providing of a service and not the rental or lease of a portable toilet, and thus the sales tax should not be imposed at all against her gross proceeds.

March 4, 2014

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