STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod
Administrative Law Judge

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

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

v.

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

INITIAL BRIEF OF RESPONDENT

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A. Is The Lower Court's Application Of The True Object Test Based On Facts Found On The Substantial Evidence On The Record As A Whole Correct?

B. Because The Appellant Failed To Raise The Issues Of Ambiguity In The Statute, "Contrived" Evidence, Misapplication of the LZM Case, South Carolina Department Of Revenue Policy Documents And Information From Other Jurisdictions To The Lower Court, Are Such Issues Barred From Review By This Court?

STATEMENT OF THE CASE

Procedural History
1. Respondent Audit and Administrative Protest

The South Carolina Department of Revenue (Respondent) conducted a sales and use tax audit of Appellant's business, Eugenia Boggero, d/b/a Boggero's Portable Toilets, for the periods January 1, 2009 through December 31, 2011 (audit periods) (Administrative Law Court Final Order and Decision, "Order" January 6, 2014; p. 4). The Respondent issued a Proposed Notice of Adjustment (Notice) on April 12, 2012 (Order, p. 4; Respondent Exhibit 1, 103:24-104:14). Appellant timely protested the Notice. (Order 4; Tr., 105:7). On May 7, 2013 the Respondent issued a Department Determination (Order 4; Respondent's Exhibit 3, Tr. 106:12-17; 182:5). Such Determination found that the "true object" of the Appellant's business was the provision of portable toilets and other tangible personal property for use by the customer. (Order 4; Respondent's Exhibit 3, p. 1). The Determination further determined that the gross proceeds from such business were subject to South Carolina sales and use tax after applying the seventy-percent (70%) exemption provided at S.C. Code Ann. § 12-36-2120(62) (Supp. 2009). The Determination also sought to impose penalties and interest thereon (Order 4, Respondent's Exhibit 3).

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2. Administrative Appeal – Contested Case

On May 16, 2013, the Appellant filed a Request for a Contested Case Hearing with the Administrative Law Court (ALC)[1] challenging the imposition of sales tax on the business's gross proceeds (Order 4, ALC Notice of Assignment).

3. ALC – Contested Case Issues

On September 12, 2013 the contested case was heard before the Honorable John D. McLeod, Administrative Law Judge. The issues presented were:

1. Are the Petitioner's gross proceeds from the rental and servicing of portable toilets subject to sales tax?

2. If such gross proceeds are subject to the sales tax is the Petitioner liable for the failure to file and failure to pay penalties in addition to the sales tax?

(Order 5; Tr. 112:3-17; Respondent's Exhibit 3). At the hearing of the contested case Appellant phrased the issue before the ALC as:

> **A.** [Mr. Hemphill]: -- it is our position that when the facts are heard in this case that the department Is, for lack of a better term, trying to put a square peg in a round hole. It doesn't meet the definition of a tangible piece of personal property being either sold or rented, that being these portable toilets. These portable toilets are incidental to a very unique, very specialized service that she provides, and that is the hauling off in a safe manner, human waste. For that reason, she provides a service and what she does as a business providing this service and her gross sales are not subject to the sales tax statute. That is our position in this case and that is what we look to prove as we go through this day.

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[1]The Appellant requested a contested case hearing pursuant to S.C. Code Ann. § 12-60-460 (Supp. 2013). Appellant's reference to S.C. Code Ann. § 12-60-470 in its Initial Brief at p. 2 is misplaced. This latter section applies to "Taxpayer Refund Claims" – such is not at issue in this case because the Appellant here paid no tax prior to the appeal in this case. Appellant paid the sales tax determined to be due by the Respondent on February 27, 2014 (interest was paid on March 28, 2014).

(Tr. 6:1-7:25).

> **Q.** [The Court] Thank you. But it seems to me, and correct if I'm wrong, but this boils down to a matter of law or statutory construction. Am I in error?
> **A.** [Mr. Hemphill] Your Honor, we certainly feel like the facts, that are coming from the witnesses do play and important role.

(Tr. 8:9-11).

At the conclusion of the contested case hearing on September 12, 2014, the ALC requested that both parties file briefs in the form of proposed orders (Tr.183:6-11) The ALC indicated that he had not yet made a decision as to the prevailing party. (Tr. 183:6-11)[2] The ALC requested that both parties submit authority from other jurisdictions regarding the application of the "true object" test. (Emails dated December 13, 2013). On December 13, 2013 both parties submitted to the ALC and to each other, proposed orders by email, including electronic copies of information from other jurisdictions. (Emails dated December 13, 2013; Respondent's Proposed Order; Appellant's Proposed Order).

4. ALC Final Order and Decision

On January 6, 2014, the ALC issued an Order on the contested case (Order). Such Order found that "Petitioner's 'gross proceeds' from the rental/lease of portable toilets is subject to the sales tax based on the application of the 'true object' test." (Order 10, "Conclusion of Law" No. 8).

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[2]Although it is not reflected in the transcript of the hearing, after the ALC requested briefs from both parties in the form of proposed orders (Tr. 183), the ALC requested that both parties provide authority from other jurisdictions on the issue of the taxability of the gross proceeds from portable toilet businesses. Thus, at the time the proposed orders were emailed to the ALC, both parties submitted information from other jurisdictions.

Neither party filed a Motion for Reconsideration nor a Rule 59(e), SCRCP, motion.

5. Appeal to the South Carolina Court of Appeals

The Respondent received the Appellant's Notice of Appeal to this Court dated February 3, 2014 on February 8, 2014. The Respondent received Appellant's Initial Brief dated March 4, 2014 on March 6, 2014.

STATEMENT OF FACTS

The Respondent audited the Appellant for sales and use tax for the tax periods January 1, 2009 through December 31, 2011 (Order 4; Tr. 25:7-10; 100-:25 - 102:13). As a result of this audit the Respondent imposed sales taxes, penalties, and interest on Appellant's "gross proceeds" from its portable toilet business. (Order 4; Respondent's Exhibit 3). Ultimately the taxability of such gross proceeds came to be heard by the ALC (Order 5, Tr. 1-183). On January 6, 2014, the ALC issued its Order. The ALC applied the "true object" test to conclude that the "gross proceeds" from the business were subject to sales tax after applying the sales tax exemption at § 12-36-2120 (62). (Order 6-15).

The Appellant owns and operates[3] Boggero's Portable Toilets in Greenwood, South Carolina as a sole proprietor (Order 2, Tr. 101:25). It is a family business, started and developed by her father (Order. 2; Tr. 12:15). The Appellant acquired the business from her father in 2005 (Order 2; Tr. 12). The Appellant has never applied for a retail sales tax license; collected sales or use tax from her customers, or remitted sales or use tax to the Respondent. (Order 2-15; Tr. 83:9-17).

[3]The Appellant's Exhibit 1 is a license from the South Carolina Department of Health and Environmental Control (DHEC) for the hauling of waste. This is a license issued in the name of the Appellant's father.

The Appellant provides and installs portable toilets, sinks, pick-up, and subsequent waste removal for temporary use. The Appellant also provides holding tanks, trash containers, delivery, and servicing (Order 2; Tr. 13, 53-55, and 101). In providing these portable toilets she also provides soap, toilet paper, towels, and other toiletries as her customers may request. (Order 2; Tr. 13, 53, 101, 105).[4]

The Respondent calculated the Appellant's gross proceeds (the taxable base for the imposition of the State sales and use tax) from the rental of portable toilets to be $128,901.15 for the audit period. This figure was derived from total gross proceeds ($429,670.49) minus gross proceeds from trash collection services ($59,660.47) minus out-of-state sales, multiplied by 30%. (Order 2; Tr. 108-111; Respondent's Exhibit 4 (Appellant invoices); Respondent's Exhibit 5 (Schedule of Sales Invoices); Respondent's Exhibit 6 (Schedule of All Trash Pickup Sales); and Respondent's Exhibit 7 (Summary Schedule of Invoices Reflecting Various Units Invoiced and "New Delivery").

When a customer contacts the Appellant and requests delivery of a portable unit, the Appellant calculates the number of units that she believes the customer may need

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[4]On direct examination Wes Butler, the Respondent's auditor stated: (Tr. 101:10-17):

> So the Boggero's – and just from going out there and meeting with Ms. Boggero and discussing it with her, Boggero's provide portable toilets for their customers. They usually provide the service of cleaning the portable toilets, of taking the waste out of the portable toilets and that type of a thing.

based on the number of individuals using the unit(s), her experience, and other guidelines.[5]

The Appellant testified that she and the customer sign what she has entitled a "Service Agreement" (Agreement) (Order 3-4; Petitioner's Exhibits 5 and 5A; Tr. 63, 64, 65). This Agreement (Order 3-4; Appellant's Exhibits 5 and 5A)[6] reflects the following terms, among others:

1. The customer requests delivery and **use** of portable toilet(s) and or dumpsters from Boggero's Portable Toilets.
2. The customer will be responsible for the following service payments:

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[5]During the audit period the Appellant operated and maintained a website at www.boggerotoilet.com, for Boggero's Portable Toilets. This website provides a number of rental options for portable restrooms, including: VIP Units, Special Event Units, Wedding Units, Handicap Units, and Hand Washing Units (as noted specifically on taxpayer invoices submitted into evidence Bates Nos. 2 through 4449). (Tr. 59:23; 67:25; 71:21; 75:6-13; 80:3; Respondent's Exhibit 2; Tr. 105-106). In describing Boggero's website where the business is advertised Mr. Butler testified:

> **A.** [Mr. Butler] So this is just various screenshots from the Boggero's website.
> **Q.** [Ms. Thompson] Okay. When did you first see that?
> **A.** [Mr. Butler] I saw this during the – as I was conducting the audit.
> **Q.** [Ms. Thompson] and did you rely on that in any way in determining the outcome of your audit.
> **A.** [Mr. Butler] In some ways. So this basically reflects that they are renting portable toilets. That they have various units that they are providing to their customers for their customers to use. And so it's something where the customer is using and is interested in the product of the – tangible personal product of the portable toilet.

Appellant testified that she hired someone to set up the website, paid for it, it was in existence during the audit period and to date and she has not requested that any changes be made to it. (Order 3, fn 3; Tr. 52:11, 18, 22; 53:2, 4; 54:1; 105:9; 130:2).

[6]The agreement in Appellant's Exhibit 5A is outside the audit period of January 1, 2009 through December 31, 2011.

# of Portable Toilets _____ Cleaned # of Times per Week_____

Price _____.

* * * *

4. From the date of this agreement, portable toilets and or dumpsters will be delivered for use by the customer upon request without the signing of another agreement. It is intended that this agreement will cover ongoing and future portable toilets and/or dumpsters deliver and use.

* * * *

6. The Customer understands that service fees **for the use of portable toilets** and or dumpsters may increase in the future, and the undersigned will be responsible for the increased payment without the signing of another agreement . . . .

* * * *

8. The equipment is the property of Boggero's Portable Toilet, and is provided to the customer for his exclusive use on the job site listed on delivery ticket or future delivery tickets.

9. The duration of the service period is determined from date of shipment on our part as indicated on this service agreement until date of pick up order.

10. Carefully check equipment upon unloading a destination. All claims for shortages and damaged equipment must be noted on the delivery ticket.

11. The Customer agrees to be present when equipment is returned so that any shortages or damage or equipment will be noted on return report and acknowledged. It is expressly understood and agreed that the Customer shall pay for any parts which are lost or damaged beyond normal wear and tear.

12. Proper placing of the equipment on job location is the sole responsibility of customer with the assistance of Boggero's Portable Toilets. Access to toilets &.or dumpsters for servicing will be the Customers responsibility.

13. The Customer agrees to hold harmless Boggero's Portable Toilets for any and all damages to property

> and persons not caused by the negligence of Boggero's Portable Toilets while this equipment is being used under this service agreement or future delivery tickets.

Emphasis added. (Order 3-4; Tr. 63:18; 64:12, 17, 20, 21; 65:4, 14; Appellant's Exhibits 5 and 5A). The Appellant discussed at length the various tangible personal property provided by her to her customers (Tr. 54-56).

The Respondent conducted a sales tax audit of the Appellant's business for the audit periods. After a review of the information provided by the Appellant for the relevant periods, the auditor issued a Notice imposing sales tax, penalties, and interest on the taxpayer's gross proceeds from the taxpayer's portable toilet business ($8,891.96; interest: $602.27; penalty: $3,191.36). (Order 2; Respondent's Exhibit 1).

In response to the Appellant's timely protest of the Notice, the Respondent issued its Department Determination sustaining the imposition of the sales tax, penalties, and interest. (Order 4; Respondent's Exhibit 3). Respondent Auditor, Wes Butler, conducted the sales tax audit. He also prepared summaries of the invoices provided as follows:

1. Gross Sales Per Month From Invoices[7]
2. Nontaxable Trash Sales[8]
3. Specific Invoice Analysis[9]

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[7]This summary indicates the calculation for determining the amount subject to the State sales and use tax by deducting from the total gross receipts, the total gross receipts for out of state sales, total gross receipts for trash collection services, and multiplying the tax base by 30% to account for the 70% exemption found in § 12-36-2120 (62). (Order 5, Fn 7; Tr. 110:12 – 111:11).

[8]See fn. 7.

[9]The Summary of "Specific Invoice Analysis" listed all invoices showing "new delivery," specific unit(s) listed, and the charges for same. These charges comprised approximately 28% of the taxpayer's total gross proceeds for all periods at issue (after removing the charges for trash removal and out of state sales). (Order 4-5; Respondent's Exhibit 7; Tr. 110-111). Appellant testified that the term "new delivery" meant that the

(Order 4-5; Respondent's Exhibits 5, 6, 7; Tr. 108-111). In addressing the "true object" of the transactions at issue, Mr. Butler stated: "ultimately you have to look at what's the customer's ultimate interest. (Tr. 119:1-3). He goes on to address what he found during the audit regarding the "true object" of the transactions here as follows:

> **A.** [Mr. Butler] I would say the customer is interested in a portable toilet and using the portable toilet. They're interested in the privacy of the portable toilet. She has various special units that she's using. VIP units, for her for the summer months, for those couple of days that she'll provide those. Those customers – you can't just put anything out there for the customer. They desire privacy they desire specific things within the portable toilet.

(Tr. 119:22-25; 120:7).

When asked again regarding the purpose "true object" of the transaction, Mr. Butler again testified:

> Well, I guess that I would think of it this way. She couldn't just put a holding tank out there with nothing around it. She could not just set a hold tank for somebody to use the restroom in.

(Tr. 121:10-14).

James McCutchen, Esquire, Revenue Law Advisor for the Respondent, testified that he co-authored the Respondent's 2012-2013 Sales and Use Tax Manual (Respondent's Exhibit 8). This manual includes a summary of the South Carolina Sales and Use Tax Law (available in Chapter 36 of Title 12 of the South Carolina Code), South Carolina Regulations, Department Advisory Opinions, and practical examples for tax

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Appellant had delivered the portable toilets and/or other tangible personal property to the customer for use and this was consistent through the invoices (Tr. 79:4-21).

practitioners and taxpayers. Mr. McCutchen testified that it is the Respondent's longstanding administrative policy that charges for the rental of portable restrooms are subject to the State sales and use tax. He testified about a 1977 South Carolina Tax Commission Decision, Opinion No. S-D-115, in which the Commission found that charges for the rental of portable restrooms are subject to the State sales and use tax, notwithstanding the fact that such charges were also for the servicing of those portable restrooms. He testified that the Respondent has issued two Advisory Opinions (S.C. Rev. Rul. #09-5 and S.C. Rev. Proc. #1-5) in which the Respondent provided guidance to taxpayers and tax practitioners regarding the imposition of sales and use tax on charges for the use of portable restrooms. He further testified that these documents are available in hard copy upon request and also available at the Respondent's website. (Order 5; Tr. 148; 155; 156; 160; 164; Respondent's Exhibits 8, 9, and 10). The Respondent provides these documents on its website www.sctax.org. (Order 5). He also provided practical testimony regarding the imposition of the sales tax (Tr. 142-143) by way of the statutory framework of Title 12, Chapter 36, South Carolina Code of Laws. He testified that in looking at what is the "true object" of a transaction, you look at what the customer is paying for. (Tr. 151:15-16). He testified in this case the customer is paying for the restroom, the four walls, ceiling, etc. (Tr. 151:16-18; 152:2-13). He stated that despite the Appellant's labeling her agreement as a "service" agreement (Appellant's Exhibits 5 and 5A), the true object looks at the substance of the agreement/transaction (Tr. 152:19 – 153:15). In this regard, he testified that during his time at the Respondent he had never seen a contract that was not entitled as a "service" agreement. (Tr. 152:21-22).[10]

[10] On cross-examination by Mr. Hemphill, Mr. McCutchen testified:

Based on the testimony provided at the hearing (Tr., pp 1-183), the Appellant's invoices and other exhibits entered into evidence the ALC applied the "true object" test to impose the sales tax and penalties and interest thereon on Appellant's "gross proceeds" from its portable toilet business because the "true object" sought by the customer was the use of the portable toilets and other tangible personal property (Order 6, 7, 8, 11).

ARGUMENT

THE LOWER COURT CORRECTLY FOUND THAT THE TRUE OBJECT OF THE APPELLANT'S BUSINESS WAS THE PROVISION OF PORTABLE TOILETS SUCH THAT THE GROSS PROCEEDS FROM THE BUSINESS WERE SUBJECT TO THE STATE SALES AND USE TAX.

A. The Lower Court's Application Of The True Object Test Is Based On Facts Found On The Substantial Evidence On The Record As A Whole.

The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact.

> The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;

> If there is an agreement to use tangible personal property pursuant to the South Carolina law, and there are charges to use that tangible personal property, then that transaction – if the true object is – for the customer is for the use of that tangible personal property, that transaction would be subject to the South Carolina sales tax unless there is an exemption or exclusion b. Because there are several – over 80 exemptions.

(Tr. 162:5-15).

(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.

S.C. Code Ann. § 1-23-610(D) (Supp. 2013), See, Travelscape, LLC, v. South Carolina Dept. of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011).

> The decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct.App.2008); see Media Gen. Communications, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 144, 694 S.E.2d 525, 528 (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." (citing S. C. Code Ann. § 1–23–610(B)(a), (d) (Supp.2009)). However, "[q]uestions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." CFRE, 395 S.C. at 74, 716 S.E.2d at 881.

Centex Intl. Inc. v. S.C. Department of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 68, 69 (2013).

As provided in the foregoing "[t]he review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." Travelscape at 97.

Here, the ALC applied the "true object" test based on the factual determinations laid out in its Findings of Fact (Order 2-5). The ALC's Factual Findings were based on the substantial evidence on the record as a whole and the ALC has committed no error of

law.[11] Substantial evidence is defined as:

> Substantial evidence is evidence which would allow reasonable minds to reach the conclusion the administrative agency reached. Carroll v. Gaddy, 295 S.C. 426, 368 S.E.2d 909 (1988). The Department is the fact-finder for purposes of judicial review. Lindsey v. S.C. Tax Commission, 302 S.C. 504, 397 S.E.2d 95 (1990).

See, Long Cove Home Owners' Ass'n. Inc. v. Beaufort County Tax Equalization Bd., 327 S.C. 135, 488 S.E. 2d 857 (1997).

Most relevant to the inquiry here, is that the South Carolina General Assembly has carved out a partial exemption for portable toilet businesses. This exemption

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[11]Appellant provides that the ALC Order in this case should be given lower deference because the ALC's Order was adopted in part from the Respondent's proposed order; (Appellant's Initial Brief p. 10). First, the cases cited by Appellant do not provide for such a lower deferential standard. Second, as is more fully discussed herein, the ALC's Findings of Fact and Conclusions of Law are based on substantial evidence on the whole record and the ALC committed no error of law. To reiterate, in South Carolina, Section 1-23-610(B) provides the appropriate standard of review; "[t]he review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." Appellant's citation to the cases of Anderson v. City of Bessemer, 470 U.S. 564, (1985); U.S. v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); Flowers v. Crouch-Walker Corp, 552 F. 2d 1277 (7th Cir. 1977); Holsey v. Armour &Co., 683 F. 2d 864 (4th Cir. 1982); Bright v. Westmoreland Cnty., 380 F.3d. 729 (3rd Cir. 2004) are entirely misplaced and misstate the dicta of those cases. In Anderson, the Court discussed its concerns with the practice of the court requiring the prevailing party to submit a proposed order and then the court's adoption of same without more, p. 572. Nevertheless, in that case the Court found the order at issue to be based on the evidence on the record. Similarly, in all of the other cases cited by Appellant in this regard, the reviewing courts were concerned with, again, the trial courts' adoption without change of the prevailing party's proposed order – an order requested by those courts in each case after a ruling from the bench or a conference as to who prevailed and then requesting a proposed order solely from that party. Those courts declined to follow Anderson on state law grounds. In the instant case the ALC requested proposed orders of **both** parties at the conclusion of the hearing (Tr. 183). As the ALC pointed out at that time he had not made a decision but was going to consider both proposals. Further the ALC required both parties to submit authority from other jurisdictions (Appellant and Respondent Emails dated 12/13/2013).

recognizes that a portable toilet business is labor intensive. That is, the business consists in large part of the service of hauling off and disposing of human waste. The partial exemption is found at § 12-36-2120 (62) and provides:

> **12-36-2120. Exemptions from sales tax.**
> Exempted from the taxes imposed by this chapter are the gross proceeds of sales, or sales price of:
> ***
> (62) seventy percent of the gross proceeds of the rental or lease of portable toilets.[12]

The Respondent's auditor in this case applied this exemption provision to the Appellant's "gross proceeds" from her portable toilet business. That is, he first calculated the "gross proceeds" subject to sales and use tax by including all invoices then he deducted from total gross receipts, the total gross receipts for out of state sales, total gross receipts for trash collection services, and multiplying the tax base by 30% to account for the 70% exemption found in § 12-36-2120 (62). (Order, p. 4; Tr. 110:12 -111:17).[13]

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[12]This exemption was effective July 1, 2003, SB 274, 2003.

[13]Generally, tax exemption statutes must be given their plain and ordinary meaning to effectuate the intent of the General Assembly. Furthermore the language should not be read to effectuate a futile act on the part of the General Assembly. TNS Mills v. S.C. Dept. of Revenue, 331 S.C. 611, 619, 503 S.E.2d 471 (1998) ("The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964). The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption. John D. Hollingsworth On Wheels, Inc. v. Greenville County Treasurer, 276 S.C. 314, 278 S.E.2d 340 (1981)"). See also Home Medical System Inc. v. S.C. Dept. of Revenue, 382 S.C. 556, 566, 677 S.E. 2d 582, 588 (2012) ("In our opinion, however, the current statutory language-"medicine ... sold by prescription"-clearly evidences a legislative intent that the exemption be only for those medicines requiring a prescription."). As to the meaning and application of a statutory provision, recognizing and giving full effect to the General Assembly's intent is the Court's ultimate goal. Sonoco v. South Carolina Dep't of Revenue, 378 S.C. 285, 662 S.E.2d 599 (2008), A Court cannot apply nor construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. Berkebile v. Outen,

Why did the auditor tax such gross receipts in the first place? As the ALC determined the "true object" of the Appellant's transactions was the use of the portable toilets by the customer. South Carolina's sales and use tax statutory framework provides for such an application of the true object test.

S.C. Code Ann. § 12-36-910 (Supp. 2009) provides for the imposition of a sales tax on the gross proceeds of tangible personal property sold at retail. The rental of portable toilets at issue is included in the definition of "tangible personal property."[14]

To that end, S.C. Code Ann. § 12-36-90 provides:

> Gross proceeds of sales, or any similar term, means the value proceeding or accruing from the sale, lease, or rental of tangible personal property.
>
> (1) The term includes:
>
> * * *
>
> (b) the proceeds from the sale of tangible personal property without any deduction for:
>
> (i) the cost of goods sold
> (ii) the cost of materials, labor, or service;
> (v) transportation costs;
> (vii) any other expenses

S.C. Code Ann. § 12-36-100 (Supp. 2009) goes on to provide that a "sale" or

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311 S.C. 50, 426 S.E.2d 760 (1993).

Here however, the Appellant is not challenging the exemption but arguing that neither the tax nor the partial exemption provided by § 12-36-2120 (62) apply to her business because "all that she provides is a service." The Appellant argues her service is specialized. However, the Department of Health and Environmental Control (DHEC) license entered below, Appellant Exhibit 1, was issued to her father. The Appellant does not have a DHEC license in her name. (Tr. 62:3-19).

[14]See S.C. Code Ann. §§ 12-36-60 (2000) ('tangible personal property [includes] personal property which may be seen, weighed, measured, felt, touched or which is in any other manner perceptible to the senses. S.C. Code Ann. § 12-36-70 (1)(c) (2000) (a "retailer" or "seller" includes a person operating a "renting, leasing, or otherwise furnishing tangible personal property for a consideration. . .").

"purchase" means any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration including "2) a rental, lease or other form of agreement."

As required by the General Assembly's statutory framework, the Respondent's auditor first calculated the total gross proceeds from the rental of the portable toilets to include all servicing charges (Section 12-36-90 (1)(b)(i) and (ii)); after subtracting nontaxable trash receipts and out of state sales, the auditor then reduced this amount by seventy percent to recognize the statutory exemption. (Order 4-5; Respondent's Exhibits 5, 6, and 7; Tr. 108-111). The Respondent's auditor testified that the Appellants sinks, toilets, delivery, pickup comprise approximately 28% of her gross sales. [15]

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[15]The Appellant argues in its Initial Brief that such summary, Respondent's Exhibit 7 before the ALC, is "contrived." However as discussed more thoroughly below, this issue was not raised and it was not ruled on, as such, it is not subject to review by this Court. More importantly however, Respondent's Exhibit 7 is based on the Appellant's invoices. Respondent's Exhibit 7 shows that the Appellant's tangible personal property comprises approximately 28% of its business. The Respondent's auditor describes the basis and results of Respondent's Exhibit 7 as:

> **Q:** [Ms. Thompson] I am going to show you Respondent's Exhibit Number Seven.
> **A:** [Mr. Butler] Okay.
> **Q.** [Ms. Thompson] Did you prepare this as well?
> **A.** [Mr. Butler] I did.
> **Q.** [Ms. Thompson] And what is that?
> **A.** [Mr. Butler] So, this was something that I generated just in going through the sales invoices. Again, it has date, invoice number, Bates numbers, vendor or who her customer was. I put vendor, that's supposed to be customer name. And then the sales amount. And so what these sales represent were sales as reflected on her invoice for things such as standard units, the VIP uinits, hand wash stations, the handicap units, and then also was to highlight any invoices that specifically stated something about a new deliver or pickup of the portable toilet.

The ALC also noted (Order 11) that the South Carolina Supreme Court has recognized the application of the "true object" test to determine appropriate application of the sales tax. Fraternal Order of Police v. South Carolina Dept. of Revenue, 352 S.C. 420, 574 S.E.2d 717 (2002) ("According to the 'true object test' sales which are merely incidental to the transaction and not its true object are not exempt from the retail sales tax. See Journal of Multistate Taxation, Vol. 5, No. 6, pp. 244-253 (Jan./Feb. 1996.)"). In that case, the Court found that if the refund issue had been preserved, applying the "true object" test, as between the retailer of the cards and the operation, the sale of the bingo cards were merely incidental to the transaction, the wager.[16]

> **Q.** [Ms. Thompson] What do you think of those numbers - those totals mean to you?
> **A.** [Mr. Butler] So basically this – so I had a monthly total and at the end of it I totaled it out just to get and idea of how much in sales that would be. And roughly – I mean roughly it was close – it was probably about 28 percent of what her gross overall sales were.

(Tr. 110:9-111:14).

[16]Additionally, 27 S.C. Code Ann. Regs. 117-308 provides for the application of the "true object" test to determine the application of the sales tax on certain services.

> **Regulation 117-308. Professional, Personal, and Other Services.**
>
> The receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax, unless the sales and use tax is specifically imposed by statute on such services (i.e. accommodation services, communication services). The following subsections of this regulation will discuss various types of services. It should also be **noted that several businesses, in addition to selling nontaxable services, also sell tangible personal property and should be licensed to report the tax.**
>
> This list is not all-inclusive as to services offered in South

As correctly noted by the ALC the "true object test" is best described in 9 Vanderbilt Law Review 231 (1956). It states:

> 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 contract is transferred.

The Vanderbilt Law Review article, in quoting Snite v Department of Revenue, 398 Ill. 41, 74 N.E.2d. 877 (1947), also establishes 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 incidental 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 cost of article and services]. If the service rendered in connection with an article does not enhance its

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> Carolina, as to services offered by a particular profession, or as to sales made by a particular profession.

(Emphasis added).

> 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.

(Order 10). As provided in the foregoing, the "true object test" focuses on what the "customer" or "buyer" is paying for. Here, the true object of Appellant's business as supported by the record is the provision of portable toilets, the privacy, four walls, ceiling, etc., purchased by the customer.[17]

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[17]At the conclusion of the contested case hearing the ALC requested authority from other jurisdictions regarding the issue in this case. (Emails dated 12/13/2013). The Respondent provided the case of LZM Inc. v. Virginia Dept. of Taxation, 606 S.E.2d 797 (January 14, 2005) where the court imposed the sales tax on a portable toilet business. The ALC Order included the reference to this citation as follows:

> This Court also finds persuasive and adopts the view of the Virginia Supreme Court as provided in LZM Inc. v. Virginia Dept. of Taxation, 606 S.E.2d 797 (January 14, 2005) where a similar issue regarding sales tax on portable toilet service and rental was addressed. The court found:
>
> > The true object test is the means by which the Department determines the dominant purpose of a mixed sales and service transaction in order to determine whether the transaction is subject to sales tax as a sale of tangible personal property or whether it is a sale of services and therefore exempt from tax. The true object test was adopted by this Court in WTAR, 217 Va. at 883, 234 S.E.2d at 249, in which we acknowledged the endorsement of the test by a preponderance of authorities.
> >
> > * * * *
> >
> > As we also noted in WTAR, the taxpayer's "manner of computing the invoice" is not determinative of either the true object of the transaction or whether the service provided is truly separate and distinct from the property leased. 217 Va. at 884, 234 S.E.2d at 249. Otherwise, a taxpayer could create its

Here, the ALC reviewed Respondent's policy documents (Respondent's Exhibits 8, 9, and 10), heard the testimony of James McCutchen and correctly concluded the Respondent had consistently applied the "true object" test to the facts of this case. (Order 5, 11, 12). Gilstrap v. South Carolina Budget & Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992). Greystone Catering, Inc. v. S.C. Dep't of Revenue, 326 S.C. 551, 486 S.E.2d 7 (Ct. App. 1997) That is, each transaction had been analyzed to determine the "true object" – a factual determination – and such true object in this case was that the customer was paying for the portable unit(s).[18]

> own tax exemption merely by altering the printing of its invoices.[17]

Appellant argues in its Initial Brief at p. 20, that the ALC should follow W. Hellerstein's view as provided in State Taxation, 3rd Edition § 12.08, fn. 165, rather than the ALC's application of this case. First it should be noted that in his article, Mr. Hellerstein initially states as to the LZM case, "although supportable"- here too, the facts of the case support the ALC's Order. However, this argument was not raised below, and as such is not subject to review by this Court. Even should the Court consider this argument it fails. In fact, Hellerstein's comments would have no application to this case. He states in his article; "A different result might obtain, for example, if pumping services were priced differently or if toilets were sold outright." Here the facts show the Appellant did not sell the toilets, but rented or provided them for use by the customer. (Appellant's Exhibit 5). Even without reference to this case, South Carolina law applying the true object test to the facts of this case support the application of the sales tax here – particularly in light of the General Assembly's exempting 70% of the gross proceeds from these businesses. Appellant also cites to various policy documents from other taxing authorities. (Initial Brief, 12; Appellant Email dated 12/13/2013) as supporting its theory of the case. However such argument again is not before this Court. The ALC did not adopt the views of these jurisdictions in its Order. As discussed more thoroughly below, as the issue was not raised and ruled on, it is not before this Court's review. Even were the Court to address this argument, it must fail. The South Carolina General Assembly has spoken to the issue here through the exemption of 70% of the gross proceeds of sale from the business through Section 12-36-2120 (62). The "information" from other jurisdictions is interesting but not South Carolina law.

[18]Appellant argues numerous policy documents not brought to the ALC's attention, that is, these documents were not raised in support of any issue below. These arguments are not now properly before this Court. Should the Court entertain these

Applying the facts of this case to the statutory framework in the foregoing well supports, by the substantial evidence on the whole record, the ALC's finding that the true

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arguments, such remain without merit. At the hearing Respondent's witness, Mr. McCutchen, testified that it is the Respondent's longstanding administrative policy that charges for the rental of portable restrooms are subject to the State sales and use tax. He testified about a 1977 South Carolina Tax Commission Decision, Opinion No. S-D-115, in which the Commission found that charges for the rental of portable restrooms are subject to the State sales and use tax, notwithstanding the fact that such charges were also for the servicing of those portable restrooms. He testified that the Respondent has issued two Advisory Opinions (S.C. Rev. Rul. #09-5 and S.C. Rev. Proc. #1-5), in which the Department provided guidance to taxpayers and tax practitioners regarding the imposition of sales and use tax on charges for the use of portable restrooms. He further testified that these documents are available in hard copy upon request and also available at the Department's website. (Order 5; Tr. 148, 155, 156, 160, 164). Respondent's Exhibits 8, 9, and 10). These are all documents applicable to Appellant's business, portable toilets. Contrarily, Appellant has provided numerous references to policy documents in its brief (Appellant's Initial Brief, 12). Each is distinguished here. As an initial note, none of the Appellant's citation of additional policy documents addresses portable toilet businesses. Second, as to the private letter rulings cited, they specifically note that the conclusions reached apply only to the specific set of facts therein. Moreover, S.C. Private Letter Ruling #05-2 finds that charges for copies of medical records are subject to the State sales and use tax – such supports the case here. S.C. Private Letter Ruling #12-2, which addresses whether a certain communications service satisfies the "data processing" exemption for the sales and use tax on communication services, is not relevant to the instant case. The rental, lease, or other form of agreement to rent or use portable restrooms is subject to the sales and use pursuant to § 12-36-910(a)(1), as the sale of tangible personal property. Such a rental, lease or other form of agreement is not subject to the sales and use tax on communications pursuant to § 12-36-910(a)(3). S.C. Private Letter Ruling #92-5 addresses the taxability of "dinner attractions" for purposes of admissions and sales and use tax; finding the meal is subject to sales tax and the entertainment is subject to admissions tax – none of which apply to the instant set of facts. S.C. Private Letter Ruling #97-3 addresses wireless communications sale and installation and concludes "XYZ" is selling tangible personal property, it is not a fixture and is subject to the tax. S.C. Private Letter Ruling #97-4 finds that security monitoring is not subject to sales tax – the true object is the monitoring for security purposes; finding the system is of no use – it is the monitoring that the customer is buying. In the current matter, but for the portable toilet there would be no waste to remove – the customer is paying for the privacy, the four walls, and amenities. S.C. Private Letter Ruling #05-5 imposes sales tax on the purchaser of the materials for use by others. Here, Appellant owns the portable toilets and other amenities, tangible personal property, and provides the same to her customers for use as shown in the invoices and agreement.

object of Appellant's business is the provision of tangible personal property. The transcript is replete with documentary evidence and testimony from Appellant and Respondent's witnesses that she provides portable toilets, tangible personal property, and other amenities for use by her customers.

First, Appellant's agreement with her customers specifically provides the type and number of units to be provided to the customer, which Appellant retains title to the same and any damage to such tangible personal property will be borne by the customer (Order 3- 4; Appellant's Exhibits 5 and 5A; Infra, pp. 7-8).

The Appellant testified at length as to the various tangible personal property provided by her to her customers (Tr. 54-56). She testified that she offers customers' construction units, VIP units, handicap units, sink units, high rise units, and the waste tanks to accompany same. Further she provides amenities as requested by the customer. (Tr. 55-56).

Moreover, the Appellant's website advertising the rental of tangible personal property supports the ALC's Order in this case. Appellant testified that she hired someone to set up the website, paid for it, the website was in existence during the audit period and remains so to this date, and further that she has not requested that any changes be made to it. The products, toilets and other amenities are pictured and discussed on such website. Appellant described each "unit" (portable toilet) available to customers at length during the hearing. (Order 3, Fn. 3; Respondent's Exhibit 2; Tr. 34:12 – 35:10; 52:5 – 53:3; 54:17-57:14, 105:5-22).

The Appellant's invoices[19] for the periods at issue support the ALC's finding (Respondent's Exhibits 4, 5, 6, and 7). By way of example, the Appellant testified regarding Respondent's Exhibit 4, Bates No. 86: "you requested holding tank to be picked up, but I told him we would leave it there without charging because we have no immediate use for it." (Tr. 60; Respondent's Exhibit 4, 86). Appellant testified that the note on the invoice reflected no charge for "service," however the language of the invoice reflects "tank" and "it," the tangible personal property. This tangible personal property is the same equipment referenced and provided for "use" of the customer in Appellant's agreement (Appellant's Exhibits 5 and 5A).[20]

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[19]Appellant argues that Respondent's Exhibits 6-18 reflect her "business" and that such is service. (Appellant's Brief 6-7). However, as noted on Respondent's Exhibit 7, this is incorrect. Multiple invoices noted on the summary show units delivered, picked up, and various types of units – VIP, Handicap, etc. Such invoices were not reflected in Appellant's Exhibits 6-18. Appellant also argues that the Department has incorrectly imposed the sales tax on service only as some of Appellant's customers own their own toilets and Appellant merely provides a service. (Appellant's Exhibit 14, Tr. 43:1-3). First, the burden is on the Appellant to show the "gross proceeds" are not subject to tax, S.C. Code Ann. § 12-36-950 (2000). It is true that Appellant's Exhibit 14, based on Appellant's testimony, is for service provided to a customer who owns their own toilet. The invoice is for $70. Similarly, Appellant's testimony (Appellant's Exhibits 16-18; Tr. 46-47) indicates that these invoices are service for customers who own their own units. The total charges thereon are $212. As such, for these particular invoices (Appellant's Exhibits 14, 16, 17, 18), 30% of this amount was included in the tax base, thus a sales tax of $5.04 was imposed by Respondent on this amount. However, such incorrect calculation does not alter the substantial evidence on the whole record supporting the fact the true object of Appellant's business is providing portable toilets for use by the customer.

[20]Appellant testified regarding her invoices multiple times throughout the hearing indicating the provision of portable toilets and other property for use by the customer. Although her testimony indicates each time that the charge is only for "service," there is no doubt that the customer is provided the tangible personal property as noted on the invoice. (Tr. 68 – "special event standard unit" provided; Tr. 71, Bates No. 14 "new delivery;" Tr. 74, Bates 30 "recent pickup" "free pickup" - - reflecting that portable toilets are picked up or delivered). On cross-examination, the Appellant testified:

The ALC based its "true object" analysis on the testimony of Respondent's witnesses as well. Auditor Wes Butler addressed what he determined on audit. He testified the "true object" of the transactions here were as follows:

> **A.** [Mr. Butler} I would say the customer is interested in a portable toilet and using the portable toilet. They're interested in the privacy of the portable toilet. She has various special units that she's using. VIP units, for her for the summer months, for those couple of days that she'll provide those. Those customers – you can't just put anything out there for the customer. They desire privacy they desire specific things within the portable toilet.

(Tr. 119:22-120:7).

Mr. Butler reiterates the "true object" of the transaction:

> Well, I guess that I would think of it this way. She [Appellant] couldn't just put a holding tank out there with nothing around it. She could not just set a holding tank for somebody to use the restroom in.

(Tr. 121:10-14).

The testimony of the Respondent's witness, Mr. McCutchen also supports the ALC's application of the true object test here. He testified that in looking at what is the "true object" of a transaction, you look at what the customer is paying for. He testified that in this case the customer is paying for the restroom, the four walls, ceiling, etc. (Tr.

> **Q.** [Ms. McMahan] So when any invoice says restroom weekly service, new delivery prorated, that means the actual port-o-potty went out there for a number of – the number that are listed on the invoice; is that correct? They were delivered out there by y'all?
> **A:** [Ms. Boggero] If it has new delivery, yes, ma'am.

(Tr. 75:14-20). Also, invoices provided in Respondent's Exhibit No. 4, Bates 82, Bates 215 – all similar invoices reflecting tangible personal property provided for the use of the customer.

151:14-18). He further testified that despite the Appellant's agreement, Appellant's Exhibits 5 and 5A stating "service agreement," the true object looks at the substance of the agreement/transaction. (Tr. 152:21-22). He testified that during his time at the Department he had never seen a contract that was not entitled a "service" agreement. (Tr. 152:25 – 153:15).

To reiterate, as noted in the foregoing the ALC based its decision on the substantial evidence on the whole record, accordingly, the Order should be affirmed by this Court.

B. Because The Appellant Failed To Raise The Issues Of Ambiguity In The Statute, "Contrived" Evidence, South Carolina Department Of Revenue Policy Documents, Misapplication of the LZM Case, And Information From Other Jurisdictions To The Lower Court, Such Issues Are Barred From Review By This Court.

Here, the Court's review is limited to the record below. Section 1-23-610(B). Moreover, the issue presented on appeal must have been raised and ruled on below. Post-trial motions are not necessary to preserve issues that have been raised and ruled on at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it. Elam v. S.C. Dept. of Transp.; Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998), citing Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939).

Moreover, where an issue has been raised but not ruled on, a party must file a Motion to Alter or Amend Judgment, Rule 59(e), SCRCP. In Home Medical at 586, the South Carolina Supreme Court again noted the reasons for this rule of law and that 59(e), SCRCP motions apply in practice before the ALC:

> Put simply, Rule 59(e) motions serve a vital purpose for proper issue preservation. As in other appellate matters, we require issue preservation in administrative appeals. *See,*

> *e.g.*, Brown v. South Carolina Dep't of Health and Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (issues not raised to and ruled upon by the ALC are unpreserved for appellate review); *563Carson v. South Carolina Dep't of Natural Res., 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002) (court sitting in appellate capacity may not consider issues not raised or ruled on by administrative agency); Kiawah Resort Assoc. v. South Carolina Tax Comm'n, 318 S.C. 502, 458 S.E.2d 542 (1995) (same). We therefore hold Rule 59(e), SCRCP, motions are permitted in ALC proceedings. Accordingly, the DOR's Post-Order Motion tolled the time period for filing an appeal, and the Notice of Appeal was timely served. We deny Taxpayer's motion to dismiss.

As the Supreme Court noted in Fraternal Order of Police:

> Generally, claims or defenses not presented in the pleadings will not be considered on appeal. Toal, Vafai, and Muckenfuss, Appellate Practice in South Carolina (2d. Edition 22002).(citing McNeely v. S.C. Farm Bureau Mut. Ins. Co., 259 S.C. 39, 190 S.E. 2d 4999 (1972).
>
> This rule is consistent with the concept that one cannot present one theory at trial, lose, and then attack the decision below on another theory not argued at trial.

In this case, the Appellant did not raise the issue of ambiguity of any statute during the ALC hearing. Rather, he specifically articulated to the ALC that the issue was a factual determination based on the witnesses' testimony. (Tr. 8:9-11). The transcript is devoid of the Appellant raising issues of "statutory" construction. Even were the Court to consider this issue, it has been addressed at length in the foregoing. That is, the application of the "true object" test is based on the facts found below and the facts here support the ALC's finding that the true object of the Appellant's business is the provision of portable toilets and other amenities for the customer's use.

Additionally, the Appellant argues that the Respondent's summaries provided at Respondent's 5, 6, and 7, were "contrived." In fact, the Appellant agreed to the introduction of these exhibits into evidence without objection. (Tr. 10:3-4). As the Appellant failed to challenge these summaries at trial, the ALC did not rule on this issue and it is barred from review by this Court. The only colloquy regarding the Respondent's Exhibit 7 summary between Appellant and Respondent occurred on cross-examination:

> **Q.** [Mr. Hemphill] Okay. Now, this exercise that you went through with – in compiling these exhibits – excuse me Exhibit 7, there is delivery charges, there's portable pickup charges, there's hand wash unit charges, things of that nature. Those are not rental charges are they?
> **A.** [Mr. Butler] They are charges for a – except for the standard units, the VIP units. That's for the delivery or the pickup of those standard units, the VIP units, what have you. The delivery of – the delivery charge is for – you're seeing a tangible personal product go out to the customer. For pickup you're seeing a tangible personal property come back to the owner of the equipment, which would be Boggero's in this case.

(Tr. 126:12 – 127:3). Because the Appellant failed to raise this issue it is not preserved for review. Even if this Court were to entertain this argument, as discussed infra at fn. 15, based on the testimony of Respondent's witness, Wes Butler, the summary accurately reflects references to the Appellant's tangible personal property delivered to customers for use, picked up, or specifically notes the tangible personal property delivered to the customer.

So too, various policy documents cited by Appellant in its Initial Brief at p. 12, are barred from review by this Court. Such were not argued below and cannot now be brought to this Court for review for the first time. Fraternal Order of Police at 725. However, assuming arguendo the Court entertains such documents, the additional policy

documents either support the ALC Order here or pertain to businesses and issues not relevant to this business (See fn. 18).

Because the issues enumerated above were not raised[21] or ruled on below, such cannot be argued for the first time before this Court on appeal. Fraternal Order of Police at 725. It was incumbent on the Appellant to make a Rule 59(e), SCRCP motion to preserve the issues for review by this Court. Home Medical.

CONCLUSION

Based on the foregoing, the Respondent respectfully requests this Court affirm the ALC Order in this case or affirm the Order pursuant to Rule 220(c), SCACR, for any other reasons appearing in the Record.

Respectfully Submitted,

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April 3, 2014

[21] As to the misapplication of the LZM case, because the Appellant failed to file a Rule 59(e), SCRCP Motion challenging the ALC's Order, it is not subject to review by this Court. (See discussion at fn. 17). Similarly the information from other jurisdictions raised by the Appellant was not ruled on below and as such is not subject to review by this Court.

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod
Administrative Law Judge

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

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

v.

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

PROOF OF SERVICE

I, Jean M. O'Connor, hereby certify that I have caused to be mailed, postage prepaid, a copy of the Respondent's, South Carolina Department of Revenue, Initial Brief and Designation of Matter in the above-referenced case to Burnett Maybank, III, Esquire, Nexsen Pruet, LLC, PO Drawer 2426, Columbia, SC 29201, and Hanna K. Metts, Esquire and Roy R. Hemphill, Esquire, PO Box 1547, Greenwood, SC 29648, on this 3rd of April 2014.

Jean M. O'Connor