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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable H. W. Funderburk, Jr., Administrative Law Judge

Case No. 13-ALJ-17-0601-CC

Appellate Case No. 2016-001210

Rent-A-Center East, Inc. and Rent Way, Inc., ... Appellants,

v.

South Carolina Department of Revenue, ... Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT PROPERLY APPLY THE RULES OF STATUTORY CONSTRUCTION WHEN READING THE TEXT OF THE “IMPOSITION” AND “MEASURE OF TAX” STATUTES?
- II. DID THE ADMINISTRATIVE LAW COURT PROPERLY FIND THAT THE “IMPOSITION” STATUTE IMPOSES A SALES TAX ON THE TAXPAYERS?
- III. DID THE ADMINISTRATIVE LAW COURT PROPERLY FIND THAT THE TAXPAYERS SHOULD HAVE INCLUDED THE WAIVER PROCEEDS IN THEIR GROSS PROCEEDS OF SALES?
- IV. DID THE ADMINISTRATIVE LAW COURT PROPERLY FIND THAT THE RENTAL OF A DURABLE CONSUMER GOOD AND THE PURCHASE OF A WAIVER CONSTITUTES ONE TAXABLE TRANSACTION?

STATEMENT OF THE CASE

The South Carolina Department of Revenue (Respondent or Department) agrees with the Statement of the Case set forth in Rent-A-Center East, Inc.'s (RAC East) and Rent Way, Inc.'s (Rent Way) (collectively Appellants or Taxpayers) Initial Brief. (Initial Brief of Appellants 1 – 3.) However, the Department would add the following procedural history:

The Taxpayers each filed a request for a contested case hearing with the Administrative Law Court (ALC) on December 17, 2013. The two cases were later consolidated under docket number 13-ALJ-17-0601-CC. On August 6, 2015, the ALC sent the parties a Notice of Hearing, scheduling this matter for a hearing on September 24 – 25, 2015. On August 18, 2015, the Department filed a Motion for Summary Judgment and Memorandum in Support of Respondent's Motion for Summary Judgment. The Taxpayers filed their Response in Opposition to Respondent's Motion for Summary Judgment on September 11, 2015. The Taxpayers attached to its Motion, in relevant part, an affidavit of Richard Pomp, Mr. Pomp's Expert Reports, and the Taxpayers' current Policy Statement (Exhibit E). The Department then filed its Reply to Petitioners' Response in Opposition to Respondent's Motion for Summary Judgment and Motion to Exclude Richard Pomp's Affidavit and Reports and Exhibit E¹ Attached to Petitioners' Motion on September 23, 2015. That same day, the Department also filed a Motion *in Limine* wherein the Department moved the ALC to exclude any consideration of any and all reports, statements, or opinions, written or otherwise, prepared or given by Richard Pomp.

¹Exhibit E was a copy of the Taxpayers' Policy Statement in effect beginning in 2013, which was after the audit period. The Taxpayers' mistakenly attached the 2013 Policy Statement instead of the 2007 Policy Statement. Prior to the hearing, the Taxpayers substituted the 2013 Policy Statement with the 2007 Policy Statement. The Department then withdrew its Motion to Exclude Exhibit E.

On September 24, 2015, the ALC held a hearing in this matter. First, the ALC heard argument on the Department's Motion for Summary Judgment, which it denied. (R. p. 127; Hr'g Tr. 42, lines 3 – 5.) Next, the ALC heard argument on the Department's Motion to Exclude Richard Pomp's affidavit and reports from the record, which it granted. (R. p. 134; Hr'g Tr. 49, lines 15 – 18.) Finally, the ALC heard argument on the Department's Motion *in Limine*, which it denied. (R. p. 145; Hr'g Tr. 60:11 – 16.) Specifically, the ALC explained that while it excluded Mr. Pomp's reports from the record, it would permit Mr. Pomp to testify. (R. pp. 145 – 146; Hr'g Tr. 60:23 – 61:1.) Immediately thereafter, the ALC held a hearing on the merits, which concluded on September 25, 2015. At the conclusion of the hearing, the parties agreed to submit proposed orders in lieu of closing arguments. (R. pp. 336 – 338; Hr'g Tr. 251:7 – 253:21.) On March 30, 2016, the ALC issued its Order upholding the Department's Determinations. (R. pp. 1 – 10.)

STATEMENT OF FACTS

A. The Taxpayers' Business.

During the audit period,² the Taxpayers operated a rent-to-own business in South Carolina. (R. pp. 156, 209, 298; Hr'g Tr. 71:24 – 25, 124:7 – 10, 213:17 – 25.) They rented and sold durable consumer goods, such as electronics, televisions, furniture, and appliances. (R. pp. 154, 155, 177, 209, 298; Hr'g Tr. 69:1 – 6, 69:16 – 20, 70:1 – 23, 92:17 – 22, 124:7 – 10, 213:17 – 25.) A customer wishing to rent an item from the Taxpayers entered into a Consumer Rental-Purchase Agreement (Rental Agreement.) (R. pp. 155 – 156, 342 – 343; Hr'g Tr. 70:12 – 71:25; Hr'g Exhibits 1 – 2.) The Rental Agreement sets forth, among other things, the following: the rental term; the amount of the rental payment for the rental term; the amount of the renewal

²The Department audited RAC East's sales tax returns from April 1, 2007 – October 31, 2010 and Rent Way's sales tax returns from April 1, 2007 – December 31, 2009.

payment for subsequent rental terms; and other charges, including the fee for the Optional Liability Waiver Provision (Waiver). (R. p. 167, 342 – 343; Hr’g Tr. 82:13 – 17; Hr’g Exhibits 1 – 2.) The rental term could be monthly, semi-monthly, or weekly. (R. p. 167, 342 – 343; Hr’g Tr. 82:13 – 17; Hr’g Exhibits 1 – 2.) The Taxpayers did not require a customer who rented property from them to continue renting the property beyond the initial term. (R. pp. 178 - 181; Hr’g Tr. 93:23 – 96:5.) Instead, the Rental Agreement terminated at the end of each term, and the customer had the option to renew the Rental Agreement beyond the initial term for as many terms the customer wanted up until the customer acquired ownership of the item. (R. pp. 178 – 181, 342 – 343; Hr’g Tr. 93:23 – 96:5; Hr’g Exhibits 1 – 2.) For example, a customer with a weekly rental term had the option to renew or not renew the Rental Agreement each week. Once a customer renewed the Rental Agreement for the specified number of terms, the customer acquired ownership of the item. (R. pp. 179 – 181, 342 – 343; Hr’g Tr. 94:25 – 96:21; Hr’g Exhibits 1 – 2.)

Additionally, the Taxpayers offered their customers the opportunity to add a Waiver to their rental for an additional fee, which the Taxpayers calculated based on a percentage of the rental payment. (R. p. 200; Hr’g Tr. 115:18 – 21.) A customer could add the Waiver when the customer initially entered into the Rental Agreement or when the customer renewed the Rental Agreement. (R. p. 164; Hr’g Tr. 79:13 – 17.) The customer had to pay the Waiver fee along with the rental payment – either weekly, semi-monthly, or monthly depending on the rental term the customer chose. (R. pp. 344 – 345; Hr’g Exhibit 3.) If a customer added the Waiver, “Rent-A-Center agree[d] to waive [the customer’s] liability to Rent-A-Center if the property [was] damaged, destroyed, or lost through lightening, fire, smoke, windstorm, theft, or flood.” (R. pp. 157 – 159, 344 – 345; Hr’g Tr. 72:12 – 74:11; Hr’g Exhibit 3.) In other words, according to

Hugh Tollack, the Taxpayers' Director of Tax Audits, Planning, and Research, the Taxpayers "assume[d] the risk of loss of the fair market value of that item" when a customer chose to add a Waiver to his or her rental of the item. (R. pp. 169 – 170, 342 – 343; Hr'g Tr. 84:23 – 85:3; Hr'g Exhibits 1 – 2.) However, pursuant to the explicit terms of the Waiver, the Taxpayers would waive the customer's liability only if the customer "paid all periodic rental payments including the liability waiver fee through the date of loss and . . . complied with all other terms of [the] Rental Agreement and the terms of [the] Optional Liability Waiver Provision." (R. pp. 344 – 345; Hr'g Exhibit 3.) The Waiver explicitly stated "[t]his Optional Liability Waiver Provision is an **additional part** of the Rental Agreement." (R. p. 170, 344 – 345; Hr'g Tr. 85:4 – 8; Hr'g Exhibit 3.) (Emphasis added). If a customer did not have a Waiver and returned damaged property to the Taxpayers at the end of one of the rental terms, the customer would be responsible for the fair-market value of the property. (R. pp. 157, 186, 210, 342 – 343; Hr'g Tr. 72:1 – 11, 101:9 – 15, 125:10 – 21; Hr'g Exhibits 1 – 2.)

A customer could not add a Waiver to the rental of an item from the Taxpayers without first renting an item from the Taxpayers or an affiliate of the Taxpayers. (R. pp. 191, 200; Hr'g Tr. 106:7 – 18, 115:12 – 21.) The Taxpayers do not offer Waivers on items rented from third party retailers. (R. p. 191; Hr'g Tr. 106:7 – 18.) To the contrary, the Taxpayers only offer Waivers on items rented from the Taxpayers or an affiliate of the Taxpayers. (R. pp. 191, 200; Hr'g Tr. 106:7 – 18, 115:12 – 21.) Additionally, the Taxpayers could not determine the Waiver fee without a corresponding rental because the Taxpayers calculated the Waiver fee based upon a percentage of the rental payment. (R. p. 201; Hr'g Tr. 116:8 – 12.) Moreover, if a customer stopped making his or her rental payments, the customer could not continue to submit the Waiver

fee to the Taxpayers because, according to Hugh Tollack, “[t]here is nothing for the customer or Rent-A-Center to waive at that point.” (R. p. 201; Hr’g Tr. 116:13 – 20.)

B. The Department’s Sales Tax Audit and Assessment.

The Department audited RAC East’s sales tax returns for the period April 1, 2007 – October 31, 2010, and determined that it owed \$521,694.93 in sales tax on its proceeds from the Waiver fees, plus interest in the amount of \$96,652.51.³ (R. p. 177, 398 – 407; Hr’g Tr. 92:10 – 16; RAC East Hr’g Exhibit 7.) The Department also audited Rent Way’s sales tax returns for the period April 1, 2007 – December 31, 2009, and determined that it owed \$192,158.64 in sales tax on its proceeds from the Waiver fees, plus interest in the amount of \$41,116.23.⁴ (R. p. 177, 408 – 417; Hr’g Tr. 92:10 – 16; Rent Way Hr’g Exhibit 7.) The Taxpayers collected sales tax on the proceeds of their sales/rentals of the above-mentioned durable consumer goods and remitted the sales tax to the Department. (R. pp. 177 – 178; Hr’g Tr. 92:17 – 93:1.) The Taxpayers did not include the proceeds from the Waiver fees in their gross proceeds of sales. (R. pp. 398 – 417; RAC East Hr’g Exhibit 7; Rent Way Hr’g Exhibit 7.)

After applying the plain language of the statutes at issue, applicable case law, previous administrative decisions, and longstanding administrative policy, the Department determined that the Taxpayers should have included the proceeds from their Waiver fees in their gross proceeds of sales. (R. pp. 271 – 277, 398 – 417; Hr’g Tr. 186:11 – 192:9; RAC East Hr’g Exhibit 7; Rent

³At the time of the hearing, the interest was calculated through November 30, 2013, and continued to accrue since that time. Prior to RAC East submitting its payment per the ALC’s Order, the Department updated the interest calculation through June 1, 2016. The total interest amounted to \$145,999.48.

⁴At the time of the hearing, the interest was calculated through November 30, 2013, and continued to accrue since that time. Prior to Rent Way submitting its payment per the ALC’s Order, the Department updated the interest calculation through June 1, 2016. The total interest amounted to \$59,732.50.

Way Hr'g Exhibit 7.) According to John McCormack, the General Manager of the Policy Section within the Department's Office of General Counsel, when the Department determines whether or not something should be included in a taxpayer's gross proceeds of sales, it looks at the whole transaction – the sale or rental of the item – not just the item itself. (R. pp. 271 – 272; Hr'g Tr. 186:11 – 187:2.) Additionally, when determining what is included in the gross proceeds of sales – or what constitutes value proceeding or accruing from the sale, lease, or rental of tangible personal property – the Department uses the “but for” test set forth in Meyers Arnold v. S.C. Tax Comm'n, 285 S.C. 303, 328 S.E.2d 920 (1985), and has used that test since this Court issued the Meyers Arnold decision. (R. pp. 275 – 282; Hr'g Tr. 190:22 – 197:25.)

ARGUMENTS

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review. Olson v. S.C. Dep't of Health & Env'tl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500-501 (Ct. App. 2008); Turner v. S.C. Dep't of Health & Env'tl. Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). S.C. Code Ann. § 1-23-610(B) (Supp. 2014) provides the applicable standard:

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 court of appeals 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;
- (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.

This Court may not reverse the ALC's decision unless it is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The South Carolina Supreme Court explained that in making this determination, "this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached." Barton v. S.C. Dep't of Prob. Parole & Pardon Servs., 404 S.C. 395, 401, 745 S.E.2d 110, 113 (2013) (citing Hill v. S.C. Dep't of Health and Envtl. Control, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010)). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." Original Blue Ribbon Taxi Corp. v. S.C. Dept. of Motor Vehicles, 380 S.C. 600, 605, 670 S.E.2d 674, 677 (2008) (internal citations omitted). Therefore, this Court should affirm the ALC's decision because, as will be discussed throughout this brief, it is supported by substantial evidence in the record. See Original Blue Ribbon Taxi Corp., 380 S.C. at 604, 670 S.E.2d at 676 (internal citations omitted).

Moreover, this Court held that whether the facts of a case are correctly applied to a statute or whether activities meet a statutorily defined term is a question of fact. See Boggero v. S.C. Dept. of Revenue, 414 S.C. 277, 280, 777 S.E.2d 842, 843 (Ct. App. 2015). Resolving many of the issues in this case involve determining whether the ALC correctly applied the facts to the statutes at issue. As will be discussed in more detail below, this Court must determine whether the ALC correctly determined, factually, whether the Taxpayers are in the business of selling tangible personal property and whether the Waiver fee constitutes value proceeding or

accruing from the Taxpayers' rental of tangible personal property. Because the ALC's decision is supported by substantial evidence in the record, this Court should affirm the decision.

Additionally, this Court should not reverse the ALC's decision unless there is an error of law. "Questions of statutory interpretation are questions of law, which [this Court is] free to decide without any deference to the court below." Centex Int'l, Inc. v. S. C. Dep't of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013), *reh'g denied* (Sept. 20, 2013). The Department submits that no questions of statutory interpretation exist. The Department maintains that the language of all of the statutes at issue in this case is plain and unambiguous. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning." Ward v. West Oil Co., Inc., 387 S.C. 268, 278, 522 S.E.2d 516, 522 (2010). Accordingly, because the language of the statutes at issue is plain and unambiguous, no need for employing the rules of statutory interpretation exists.

The Taxpayers, on the other hand, appear to assert that the language of the statutes at issue is ambiguous. When construing a statute, the cardinal rule is to ascertain the intent of the Legislature. Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Georgia-Carolina Bail Bonds, Inc., 354 S.C. at 23, 579 S.E.2d at 336. The words of the statute "must be given their plain and ordinary meaning without resort[ing] to subtle or forced construction to limit or expand [the statute's] operation." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (internal citations omitted). Finally, "[t]he construction of a statute by

the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.” Brown v. S.C. Dep’t of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting Dunton v. S.C. Bd. of Examin’rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)); see also Nucor Steel v. S.C. Pub. Serv. Comm’n, 310 S.C. 539, 543, 426 S.E.2d 319, 321 (1992) (recognizing that where an agency is charged with the execution of a statute, the agency’s interpretation should not be overruled without cogent reason). Accordingly, because the language of the taxing statutes at issue is plain and unambiguous and because the Department has been consistently applying the taxing statutes the way it applied them to the Taxpayers, this Court should affirm the ALC’s decision.

I. THE ADMINISTRATIVE LAW COURT PROPERLY APPLIED THE PLAIN MEANING RULE WHEN READING THE TEXT OF THE “IMPOSITION” AND “MEASURE OF TAX” STATUTES.

A. The ALC Properly Applied The Plain Meaning Rule When Reading The Text Of The Taxing Statutes.

“The language of a tax statute must be given its plain ordinary meaning in the absence of an ambiguity therein.” Beach v. Livingston, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1966). In other words, when a statute is unambiguous, a court must rely on the plain meaning of the words in the statute when reading said statute. This rule of statutory construction is known as the “plain meaning rule.” The ALC properly applied this rule when reading the text of S.C. Code Ann. § 12-36-910(A) (2014) (the imposition statute) and S.C. Code Ann. § 12-36-90 (2014) (the measure of tax statute). Pursuant to the imposition statute, “[a] sales tax, equal to five⁵ percent

⁵S.C. Code Ann. § 12-36-1110 (2014) imposes an additional one percent sales and use tax beginning on June 1, 2007.

of the gross proceeds of sales, **is imposed upon every person**⁶ engaged or continuing within this State in the business of selling tangible personal property⁷ at retail.” Section 12-36-910(A) (emphasis added). A plain reading of the imposition statute establishes that the tax is imposed on a person in the business of selling tangible personal property at retail. It is undisputed that the Taxpayers are in the business of renting and selling tangible personal property at retail, so the Taxpayers are subject to sales tax under § 12-36-910(A).

Next, the measure of tax statute defines “gross proceeds of sales” as follows:

[T]he 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:

* * *

(ii) the cost of materials, labor, or service

Section 12-36-90. A plain reading of the measure of tax statute demonstrates that gross proceeds of sales include (1) the proceeds from the sale of tangible personal property and (2) the value proceeding or accruing from such sale. The Taxpayers dispute whether the Waiver fees constituted value proceeding or accruing from the rental of tangible personal property, but as will be discussed later in this brief, the ALC properly concluded that the Waiver fees did constitute value proceeding or accruing from the rental of tangible personal property.

⁶For sales and use tax purposes, the term person “includes any individual, firm, partnership, limited liability company, association, corporation, receiver, trustee, any group or combination acting as a unit, the State, any state agency, any instrumentality, authority, political subdivision, or municipality.” S.C. Code Ann. § 12-36-30 (2014).

⁷Tangible personal property means “personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also means services and intangibles . . . the sale or use of which is subject to tax under this chapter” S.C. Code Ann. § 12-36-60 (2014).

While the Taxpayers claim the ALC failed to apply the plain meaning rule when reading the taxing statutes, it is actually the Taxpayers who fail to read the plain language of the statutes. First, the Taxpayers want the imposition statute to say that a sales tax is imposed on the sale of tangible personal property. Specifically, the Taxpayers complain that the ALC “fail[ed] to identify an imposition statute that imposes a tax on Waivers” (Initial Brief of Appellant 10.) Despite the imposition statute clearly imposing a sales tax on *persons*, the Taxpayers want this Court to replace the word “person” with the phrase “tangible personal property” in the imposition statute. In other words, the Taxpayers want the imposition statute to say a sales tax, equal to six percent of the gross proceeds of sales, is imposed upon every retail sale of tangible personal property. The statute does not read this way, and the plain meaning of the statute does not support the Taxpayers’ position.

Second, the Taxpayers want gross proceeds of sales to include only the amount paid for the tangible personal property. However, the measure of tax provided in § 12-36-90 is much broader than simply the amount paid for an item of tangible personal property. Section 12-36-90 explicitly includes the “value proceeding or accruing” from the sale or rental of tangible personal property. This is intentionally broad language designed to encompass the total value of a transaction and not simply the amount paid for tangible personal property. Accordingly, it is the Taxpayers, not the ALC, who failed to properly apply the plain meaning rule when reading the taxing statutes at issue.

B. The Taxpayers Abandoned Their Statutory Construction Issue.

The Taxpayers also argue that the taxing statutes at issue are ambiguous. At the outset, this Court should deem the Taxpayers’ statutory construction issue abandoned as the Taxpayers only made conclusory, unsupported statements in their attempt to argue that the ALC erred in

failing to properly apply the rules of statutory construction. In Glasscock, Inc. v. U.S. Fidelity and Guaranty Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001), this Court held that the appellant abandoned one of its issues on appeal because its argument was “conclusory and cited no authority.” The Court went on to explain that the fact the Appellant discussed the issue more thoroughly in its reply brief did not preserve the issue either, implying that an issue must be thoroughly argued in the initial brief. Id. at 81, 557 S.E.2d at 692. Similarly, in Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593 (Ct. App. 2005), this Court held the appellant abandoned one of its issues on appeal because it failed to cite any authority to support its position and all of its arguments were merely conclusory statements. Thus, if an appellant merely makes conclusory, unsupported statements in an attempt to argue an issue on appeal, that issue is deemed abandoned and should not be considered by this Court.

Here, the Taxpayers state that the ALC failed to properly construe the taxing statutes at issue in their favor. (Initial Brief of Appellants 11.) The Taxpayers appear to argue that all taxing statutes are to be construed in favor of the taxpayer. Specifically, the Taxpayers assert that “[t]he law is clear that where there is a question of imposition of tax (or coverage) and not one of exemption, the taxing statutes should be construed in favor of the taxpayer and against the imposition of tax” (Initial Brief of Appellants 11.) However, the Taxpayers cite no authority that supports their assertion. Moreover, the authority the Taxpayers did cite demonstrates that a court must first determine whether a taxing statute is ambiguous. (Initial Brief of Appellants 11.) If the court determines the taxing statute is ambiguous, *then* it should resolve that ambiguity in favor of the taxpayer. See e.g. United States v. Merriam, 263 U.S. 179, 188 (1923). Thus, while the Taxpayers cited some authority generally, they cited no authority that supports their position. Accordingly, since the Taxpayers failed to cite any authority to

support their position that all taxing statutes should be construed in favor of the taxpayer, this Court should deem this issue abandoned.

Next, the Taxpayers correctly explain that that the Department asserted, and the ALC agreed, that the taxing statutes at issue are not ambiguous. (Initial Brief of Appellants 12.) The Taxpayers even state that they “agree that the taxing statutes at issue are unambiguous.” (Initial Brief of Appellants 12.) However, the Taxpayers then contradict themselves and argue, without citing any legal authority, that the fact the Department and the ALC read the taxing statutes differently than the Taxpayers renders the taxing statutes ambiguous. (Initial Brief of Appellants 12.) In other words, the Taxpayers assert that the fact that the ALC did not rule in their favor means the statutes are ambiguous and should be construed in their favor. (Initial Brief of Appellants 12.) Again, the Taxpayers cite no legal authority for their argument that merely different readings of a statute render the statute ambiguous and instead make conclusory statements. Therefore, the Taxpayers abandoned their statutory construction issue.

C. The ALC Properly Concluded That The Taxing Statutes At Issue Are Unambiguous.

Assuming this Court finds the Taxpayers did not abandon their statutory construction issue, it still must affirm the ALC’s ruling that the taxing statutes at issue are not ambiguous for the reasons set forth below. (R. p. 13; Order Den. Pet’rs’ Mot. Recons. 2.) When determining whether a statute is ambiguous, courts look at whether the language in the statute can have more than one *reasonable* interpretation. See Kennedy v. S.C. Retirement System, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001). Thus, if the language of a statute only has one reasonable interpretation, then the statute is unambiguous and the court need not apply any rules of statutory construction.

Two statutes, primarily, are at issue in this case – § 12-36-910 (the imposition statute) and § 12-36-90 (the measure of tax statute). Neither statute is capable of having more than one *reasonable* interpretation. The imposition statute imposes a sales tax on persons engaged in the business of selling tangible personal property at retail. See § 12-36-910(A). The only reasonable interpretation of § 12-36-910(A) is that all persons engaged in the sale of tangible personal property at retail are liable for sales tax. While the Taxpayers argue that the statute should be read to mean sales tax is imposed on the sale of tangible personal property, such is not how the statute is written.⁸ An interpretation of a statute that requires eliminating words within the statute is not a reasonable interpretation. Because the Taxpayers' interpretation requires the deletion of the words "persons engaged in the business of," such is not a reasonable interpretation.

Notably, this Court in Meyers Arnold did not find the imposition statute ambiguous. Specifically, this Court stated:

The sales tax is imposed under Section 12-35-510⁹ as a tax levied on persons engaged in selling tangible personal property at retail with the tax being a percentage of the gross proceeds of sales of the business. It is undisputed that Meyers Arnold is in the business of making retail sales of tangible personal property when it sells to

⁸The Taxpayers rely on the heading of the imposition statute to support its narrow interpretation. However, S.C. Code Ann. § 2-13-175 (2005) provides:

The catch line heading or caption which immediately follows the section number of any section of the Code of Laws must not be deemed to be part of the section and **must not be used to construe the section more broadly or narrowly than the text of the section would indicate.**

(emphasis added). Thus, the Taxpayers use of the heading to narrowly interpret the statute is improper.

⁹S.C. Code Ann. § 12-35-510 (2014) is the version of § 12-36-910 that existed prior to the recodification of South Carolina's sales and use tax law. No substantive changes were made. See S.C. Info. Ltr. #90-25.

a customer under the lay away plan. The question which must be resolved is whether the lay away fee charged is part of the gross proceeds of sales.

Meyers Arnold, 285 S.C. at 307, 328 S.E.2d at 923. Accordingly, because this Court determined the imposition statute imposed a tax on persons in the business of selling tangible personal property and Meyers Arnold was in that business, it determined that Meyers Arnold's business was subject to sales tax. Similarly here, the ALC correctly relied on the plain meaning of the language in the statute and determined that the Taxpayers were in the business of renting and selling tangible personal property at retail. (R. p. 2; Order 2.) Accordingly, the ALC properly found that a sales tax was imposed on the Taxpayers and turned to the question of what the Taxpayers should include in their gross proceeds of sales. (R. pp. 5 – 10; Order 5 – 10.) Thus, because the ALC properly determined the imposition statute was unambiguous, this Court should affirm the ALC's reading of the imposition statute.

Similarly, the measure of tax statute can only have one *reasonable* interpretation. The measure of tax statute describes what is included in the tax base. See §§ 12-36-90 & 12-36-910(A). Specifically, the measure of tax statute provides that gross proceeds of sales include "the value proceeding or accruing from the sale, lease, or rental of tangible personal property." Section 12-36-90. The dictionary defines "proceed" as "to come forth from a source" and "accruing" as "to come as a direct result of some state or action." See Proceed, Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/proceed> (last visited Sept. 26, 2016) and Accruing, Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/accruing> (last visited Sept. 26, 2016). Thus, gross proceeds of sales include the value that comes from or is a direct result of the sale, lease, or rental of tangible personal property.

Moreover, this Court in Meyers Arnold did not find the measure of tax statute ambiguous. In applying the facts in Meyers Arnold to the measure of tax statute, this Court explained as follows:

But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds of sales and subject to the sales tax.

285 S.C. at 307, 328 S.E.2d at 923.¹⁰ This Court found that the lay away fees were a direct result of the sale of tangible personal property – but for the sale of the tangible personal property, Meyers Arnold would not have received the lay away fee. Similarly here, the ALC plainly read the measure of tax statute and properly found that the Taxpayers’ gross proceeds of sale includes the proceeds from the sale of tangible personal property *and* the proceeds from any other value proceeding or accruing from such sale. In other words, the value proceeding or accruing from the sale of tangible personal property includes the price paid for the tangible personal property (the rental fee) and any other value proceeding or accruing from the sale of the tangible personal property, such as incidental fees (the Waiver fee). Accordingly, this Court should affirm the ALC’s reading of the measure of tax statute.

D. The Taxpayers’ Interpretation Of The Rules Of Statutory Construction Is Flawed.

The Taxpayers argue that all taxing statutes are to be construed in favor of the taxpayer. (Initial Brief of Appellants 11.) The Taxpayers also argue that the taxing statutes at issue are ambiguous because their reading of the statutes differ from the reading used by both the

¹⁰The Taxpayers argue that the Department’s use of the “but for” test set forth by this Court in Meyers Arnold renders the statute ambiguous. (Initial Brief of Appellants 13.) However, as discussed above, the “but for” test is merely another way of saying “value proceeding or accruing.” Accordingly, the “but for” test is a direct result of plainly reading the measure of tax statute.

Department and the ALC. However, the Taxpayers' interpretation of the rules of statutory construction is flawed. Not only does no authority exist that supports the Taxpayers' argument, but the Taxpayers' unsupported interpretation would lead to absurd results. First, if all taxing statutes are to be construed in favor of the taxpayer, regardless of whether they are ambiguous, the Department's ability to enforce the tax laws would be crippled. Furthermore, the South Carolina Supreme Court clearly explained that the rules of statutory interpretation are applied to resolve *ambiguities* in the language of a statute. See Alltel Communications, Inc. v. S.C. Dept. of Rev., 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012). Accordingly, not all taxing statutes are to be construed in favor of the taxpayer, only those that are ambiguous. Second, if a taxpayer can simply read a statute differently than a taxing authority and cause the statute to become ambiguous, every taxpayer could assert that a statute is ambiguous. Once the statute is rendered ambiguous, the court would have to construe that statute in favor of the taxpayer and, once again, no taxpayer would be subject to tax in South Carolina. As discussed above, the different possible readings of a statute must be *reasonable* to render it ambiguous. See supra, §I.C. Thus, the Taxpayers' interpretation of the rules of statutory construction is flawed and should be disregarded by this Court.

II. THE ADMINISTRATIVE LAW COURT PROPERLY FOUND THAT THE "IMPOSITION" STATUTE IMPOSES A SALES TAX ON THE TAXPAYERS.

Section 12-36-910(A) (the imposition statute) imposes a sales tax on "every **person** engaged or continuing within this State in the business of selling tangible personal property at retail." Section 12-36-910(A) (emphasis added). As discussed above, a plain reading of the imposition statute demonstrates that a sales tax is imposed on every *person* in the business of selling tangible personal property at retail. See supra, §I.A. The ALC correctly found that the Taxpayers are persons in the business of renting and selling tangible personal property at retail in

South Carolina. (R. p. 2; Order 2.) The evidence in the record supports the ALC's finding that the Taxpayers are in the business of renting and selling tangible personal property at retail. Specifically, the Taxpayers rent and sell durable consumer goods. (R. pp. 154 – 156; Hr'g Tr. 69:1 – 71:25). Moreover, the Taxpayers' own witness, Hugh Tollack, admitted the Taxpayers are in the rent-to-own business. (R. pp. 154 – 156; Hr'g Tr. 69:1 – 71:25). Therefore, in viewing all the evidence in the record, sufficient evidence exists that would cause reasonable minds to reach the same conclusion that the ALC reached. See Barton, 404 S.C. at 401, 745 S.E.2d at 113. Accordingly, this Court should affirm the ALC's finding that a sales tax is imposed on the Taxpayers.

The Taxpayers, however, assert that the ALC erred in finding the Waivers are subject to the sales tax because the ALC did not apply any imposition statute. (Initial Brief of Appellant 14.) As explained above, the Taxpayers' argument is based on their misreading of § 12-36-910(A). If the Taxpayers read the imposition statute correctly, like the ALC did in this case, then the Taxpayers would understand that the sales tax is imposed on their *business*, not what they sell. Once the Department or a court determines that a taxpayer is subject to the sales tax pursuant to the imposition statute, then the Department or the court must look to the measure of tax statute to determine what proceeds are includable in the taxpayer's gross proceeds of sales. That is exactly what the ALC did here. First the ALC found that the Taxpayers were in the business of renting and selling tangible personal property at retail. (R. p. 2; Order 2.) Then the ALC found that the single transaction at issue involved the rental of tangible personal property with the addition of a Waiver. (R. p. 4; Order 4.) Finally, the ALC found that the proceeds from the Waiver proceeded or accrued from the sale, lease, or rental of tangible personal property. (R.

pp. 8, 10; Order 8, 10.) Accordingly, the ALC properly applied the imposition statute to the facts in this case.

Furthermore, despite the plain language in the imposition statute, the Taxpayers continue to rely on the ALC's incorrect decision in Alltel v. S.C. Dept. of Rev., 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015),¹¹ for the proposition that the imposition statute does not impose a sales tax on Waivers. (Initial Brief of Appellants 16 – 17.) In Alltel, the ALC misread the imposition statute just like the Taxpayers misread the imposition statute here. Specifically, the ALC in Alltel examined whether § 12-36-910(A) imposed a sales tax on the indemnification coverage instead of Alltel's business. A plain reading of the imposition statute demonstrates that a sales tax is imposed on persons in the business of renting or selling tangible personal property at retail, not the sale of tangible personal property. Thus, the Taxpayers' reliance on the Alltel decision is misplaced because the ALC in Alltel failed to read the plain language of the imposition statute.¹² Accordingly, this Court should disregard the Alltel decision and affirm the ALC's finding that a sales tax is imposed on the Taxpayers because they are persons in the business of renting and selling tangible personal property at retail.

III. THE ADMINISTRATIVE LAW COURT PROPERLY FOUND THAT THE TAXPAYERS SHOULD HAVE INCLUDED THE WAIVER PROCEEDS IN THEIR GROSS PROCEEDS OF SALES.

Once the ALC correctly determined that a sales tax was imposed on the Taxpayers, it then correctly found that “the Waiver fees are part of the ‘value proceeding or accruing from the sale, lease, or rental of tangible personal property’ and . . . become part of the income on which

¹¹The Department appealed the ALC's decision in Alltel; subsequent to filing the appeal, the parties resolved the matter and the Department withdrew the appeal.

¹²Despite the ALC misreading of the imposition statute, it appears from the order that the ALC correctly concluded Alltel was in the business of selling tangible personal property at retail and, thus, subject to sales tax.

[the Taxpayers] pay tax.” (R. pp. 8, 10; Order 8, 10.) The evidence in the record establishes that the Waiver is derived from and merely incidental to the Taxpayers’ rental of tangible personal property. Moreover, the Waiver is entirely dependent upon the rental of tangible personal property and cannot exist without such rental. Specifically, the Taxpayers’ customers could not and did not add a Waiver to the rental without first renting an item from one of the Taxpayers (R. pp. 191, 200; Hr’g Tr. 106:7 – 18, 115:12 – 21). A customer could not walk into one of the Taxpayers’ stores and just purchase a Waiver. The Taxpayers do not offer just Waivers; they only make Waivers available to customers who are renting an item from them. Accordingly, the Waiver cannot and does not exist without a corresponding rental. Additionally, the Taxpayers calculated the Waiver fee based on a percentage of the rental fee, demonstrating the inextricable link between the rental and the Waiver (R. p. 201; Hr’g Tr. 116:8 – 12). Other facts that demonstrate the inextricable link between the rental and Waiver include the fact that if a customer added a Waiver, the Taxpayers agreed to waive the customer’s liability for the fair-market value of the rented item to the Taxpayers (R. pp. 157 – 159, 344 – 345; Hr’g Tr. 72:12 – 74:11; Hr’g Exhibit 3). This change in liability constitutes a material change in the terms of the Rental-Purchase Agreement, which otherwise placed liability on the customer. Moreover, the Taxpayers agreed to waive the customer’s liability only if the customer was current on his or her rental payments, and a customer could not continue submitting the Waiver fee to the Taxpayers if the customer stopped making his or her rental payments (R. pp. 344 - 345; Hr’g Exhibit 3). Clearly, the Waiver and the rental are so interconnected that they cannot be separated – the Waiver is derived from and cannot exist without a corresponding rental. Finally, the Rental Agreement included the Waiver fee, and the Waiver agreement specifically stated that it was an additional part of the Rental Agreement. (R. pp. 167, 170, 342 – 345; Hr’g Tr. 82:13 – 17, 85:4 –

8; Hr'g Exhibits 1 – 3). This further demonstrates the inextricable relationship that exists between the rental and the Waiver.

As the evidence demonstrates, the Waivers are a direct result of the rental of tangible personal property. But for the rental of tangible personal property, the Taxpayers would not receive the Waiver fees. Moreover, the Waiver has no value on its own because there is no fair market value to waive without the rental of the tangible personal property. These facts demonstrate that the Waiver cannot exist and, thus, is worthless without a corresponding rental of tangible personal property. Clearly, the Waiver and the rental of the tangible personal property are inextricably linked such that the Waiver is includable in the Taxpayers' gross proceeds of sales. Therefore, in viewing all the evidence in the record, evidence from which reasonable minds could reach the same conclusion that the ALC reached clearly exists. See Barton, 404 S.C. at 401, 745 S.E.2d at 113. Accordingly, this Court should affirm the ALC's finding that the Taxpayers should have included the proceeds from the Waiver fees in their gross proceeds of sales.

Additionally, several South Carolina cases and Department policy documents support the finding that the Taxpayers should have included the proceeds from the Waiver fees in their gross proceeds of sales. In the Meyers Arnold decision, this Court held that the proceeds from the lay away fees were includable in the taxpayer's gross proceeds of sales. 285 S.C. at 307, 328 S.E.2d at 923. First, this Court noted that it was "undisputed that Meyers Arnold is in the business of making retail sales of tangible personal property" Id. Then this Court examined whether the proceeds from the lay away fees were includable in the taxpayer's gross proceeds of sales. In doing so, this Court held that the lay away fees were part of the gross proceeds of sales because "but for the lay away sales, Meyers Arnold would not receive the lay away fees." Id. Thus, when

applying the analysis this Court used in Meyers Arnold to the facts in this case, this Court should find that but for the rental of tangible personal property, the Taxpayers would not receive the Waiver fees.

Our Supreme Court also addressed an issue involving the inclusion of associated fees in gross proceeds of sales in Travelscape, LLC v. S.C. Dept. of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011), which is instructive here. One of the issues in Travelscape involved whether the facilitation fee and service fee that the taxpayer added to the net rate of the room being rented were includable in the taxpayer's gross proceeds of sales. Id. "The facilitation and service fees are retained by Travelscape as compensation for its role in the transaction. . . . The sum of the net room rate, facilitation fee, service fee, and tax recovery charge is the actual price listed for the room on Expedia." Id. at 95, 705 S.E.2d at 31. Thus, the taxpayer's customers were paying for a hotel room, and the fee for the taxpayer's reservation service was merely incidental to the purchase of the hotel room. The Supreme Court concluded that "the fees charged by Travelscape **for its services** are subject to sales tax under the plain language of section 12-36-920(A)¹³ as gross proceeds." Id. at 98, 705 S.E.2d at 33 (emphasis added). Thus, even though the fees at issue in Travelscape were for services not tangible personal property, the Supreme Court still concluded the proceeds from those fees were includable in the taxpayer's gross proceeds of sales. Similarly here, the ALC found that the Waiver fees were merely incidental to the rental of tangible personal property. (R. p. 10; Order 10.) Accordingly, under the plain language of § 12-36-90, the Waiver fees are subject to sales tax.

The Department addressed similar issues in Commission Decision S-D-174 (1986) and South Carolina Revenue Ruling #93-1. In the Commission Decision, the Department addressed

¹³Even though this statute only said "gross proceeds," the Court used the definition of "gross proceeds of sales" found in § 12-36-90 when interpreting this statute.

whether fees paid for damage waivers are subject to sales tax. The taxpayer in that matter, just like the taxpayer in this matter, was in the business of renting tangible personal property. That taxpayer charged a 5% fee for a property damage waiver for the property it rented. The Department determined that the value accruing from the rental included the rental fee and the damage waiver fee. Because gross proceeds of sales include the value proceeding or accruing from the rental of tangible personal property, the Department concluded that the damage waiver fee is included in the gross proceeds of sales. Citing the Meyers Arnold decision, the Department reasoned that but for the lease of tangible personal property the taxpayer would not receive the damage waiver fees, therefore those fees are part of the gross proceeds of sales and subject to sales tax.

In South Carolina Revenue Ruling #93-1, the Department addressed whether collision damage waivers offered by an automobile rental company were subject to the sales tax. Just like the taxpayer here, the automobile rental company offered customers the opportunity to buy a waiver whereby the customer was released from liability for any damage occurring during the use of the car. Citing Meyers Arnold and Commission Decision S-D-174, the Department determined that the collision damage waivers were taxable. The Department based its determination upon the fact that but for the rental of the tangible personal property, the taxpayer would not have received the waiver fee. The damage waiver fee is part of the rental transaction and must be included in the gross proceeds of sales subject to sales tax.

Furthermore, other states with similar taxing statutes have reached the same conclusion as the Department and the ALC here. For example, the Louisiana Court of Appeals addressed this very same issue with RAC East and held that the proceeds from the Waiver fees were subject to tax. Rent-A-Center East, Inc., v. Lincoln Parish Sales & Use Tax Comm'n, 60 So.3d

95, (La. App. 2 Cir. 2011), *writ denied*, 63 So.3d 985 (La. 2011). Louisiana's relevant taxing statute reads:

B. There is hereby levied a tax upon the lease or rental within this state of each item or article of tangible personal property, as defined herein; the levy of said tax to be as follows:

(1) At the rate of two per centum (2%) of **the gross proceeds derived from the lease or rental of tangible personal property**, as defined herein, where the lease or rental of such property is an established business, or part of an established business, or the same is incidental or germane to said business.

La. Stat. Ann. § 47:302(B)(1) (West 2016) (emphasis added). Consistent with the logic utilized by the South Carolina authorities cited above and the ALC decision here, in making its ruling the Louisiana court focused upon the fact the waivers do not exist without the renting of tangible personal property and are merely incidental to the rental of tangible personal property. Lincoln Parish, 60 So.3d at 99.

The Rhode Island Division of Taxation (Division) also addressed this same issue with RAC East and held that the Waiver fees were subject to sales tax. In the Matter of: ***, Taxpayers, 2008 WL 5582992 *10 (R.I.Div.Tax. May 16, 2008). Specifically, the Division held that "the Damage Waiver is taxable as a service incidental to the rental of an item." Id. Rhode Island's relevant taxing statute at the time provided:¹⁴

"Sale price" defined. — (a) "Sale price" means the total amount for which tangible personal property is sold or leased or rented . . . including all of the following:

¹⁴On January 1, 2007, after the periods at issue in the In the Matter of: ***, Taxpayers decision, Rhode Island adopted the streamlined sales and use tax. In adopting the streamlined sales and use tax, Rhode Island amended the definition of "sale price" as set forth in R.I. Gen. Laws § 44-18-12. The amended definition, in relevant part, changed the phrase "any services that are part of the sale" to "any services **necessary** to complete the sale." R.I. Gen. Laws § 44-18-12 (emphasis added).

- (1) Any services that are a part of the sale, valued in money, whether paid in money or otherwise.

Id. at 5 (citing R.I. Gen. Laws § 44-18-12 prior to the 2007 amendment). Similar to South Carolina, Rhode Island included anything incidental to the rental of tangible personal property in the tax base. In determining whether the Waivers were incidental to the rental of tangible personal property, the Division focused on the fact that the Waiver has no value unless it is purchased in conjunction with renting an item and the fact that a customer could not purchase a Waiver without renting an item. 2008 WL 5582992 *9. Again, this logic is consistent with the South Carolina authorities cited above and the ALC's logic in this case that the Waivers constitute value proceeding or accruing from the rental of tangible personal property.

Despite the above, the Taxpayers continue to rely on the ALC's incorrect and distinguishable decision in Alltel. Specifically, the Taxpayers seem to rely heavily on the ALC's conclusion in Alltel that because the indemnification coverage at issue was not tangible personal property, then proceeds from the sale of the indemnification coverage do not proceed or accrue from the sale of tangible personal property.¹⁵ (Initial Brief of Appellant 30.) In other words, the Taxpayers and the ALC in Alltel read § 12-36-90 to apply only to the amount paid for tangible personal property (and certain enumerated services).¹⁶ Specifically, the ALC in Alltel incorrectly focused on whether the indemnification coverage met the definition of tangible personal property. 2015 WL 7681302 *12. However, the measure of tax statute does not define gross proceeds of sales as only the amount paid for tangible personal property. Rather, gross

¹⁵The ALC in Alltel misunderstood the transaction at issue – the sale of wireless communication services and devices, which falls under the definition of tangible personal property, with the addition of insurance/indemnification coverage. 2015 WL 7681302 *1.

¹⁶See Appellants' Initial Brief on page 8 wherein the Appellant states that § 12-36-910 "imposes sales tax on tangible personal property and certain enumerated services."

proceeds of sales include the proceeds from the sale of tangible personal property as well as the value proceeding or accruing from such sale. See § 12-36-90. If the ALC in Alltel properly read the law, as the ALC did here, it would have asked whether the indemnification coverage itself constituted tangible personal property *or* whether it constituted value proceeding or accruing from the sale of tangible personal property (the wireless communication services and/or devices). This analysis is supported by the numerous other ALC decisions and Court of Appeals decisions that correctly read the taxing statutes at issue in this case. See e.g., Travelscape, 391 S.C. at 98, 705 S.E.2d at 33 (finding the Department properly included the taxpayer's service fees in the taxpayer's gross proceeds of sales); Meyers Arnold, 285 S.C. at 307, 328 S.E.2d at 923 (finding the Department properly included the lay away fees in the taxpayer's gross proceeds of sales); Textile Restoration Services, Inc. v. S.C. Dept. of Rev., 2015 WL 7443800 *4 (S.C. Admin. Law Ct. Nov. 12, 2015) (finding the Department properly included the charges incident to the dry cleaning service in the taxpayer's gross proceeds of sales); and Tronco's Catering, Inc. v. S.C. Dept. of Rev., 2010 WL 5781622 *3 (S.C. Admin. Law Ct. Apr. 12, 2010) (finding "the value of the sale of catered meals includes service, labor, and room charges. Such charges are incidental to and merely enhance the value of the sale of catered meals.").

Moreover, the reading of § 12-36-90 by the ALC in Alltel and the Taxpayers here is absurd, and our Supreme Court will reject an interpretation that leads to an absurd result. See Lancaster Cnty. Bar Ass'n. v. S.C. Comm'n on Indigent Defense, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008). Under the Taxpayers' reading of § 12-36-90, the words "value proceeding or accruing" are ignored and the sole focus is on just the price of the tangible personal property. As our Supreme Court has held, "a statute should be construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous" Matter of Decker, 322 S.C.

215, 219, 471 S.E.2d 462, 463 (1995). Therefore, the Taxpayers' reading of § 12-36-90 must fail as it renders the "value proceeding or accruing" language meaningless.

If the General Assembly intended for the measure of tax statute to be as narrow as the Taxpayers here and the ALC in Alltel read the statute, they would have drafted the statute to simply provide that gross proceeds of sales include proceeds from the sale of tangible personal property and certain enumerated services.¹⁷ However, the General Assembly chose to use the phrase "value proceeding or accruing," which, as the ALC correctly pointed out, is much broader. Accordingly, the measure of tax statute includes the amount paid for the tangible personal property as well as all value proceeding or accruing from the sale or rental of said tangible personal property. In this case, the gross proceeds of sales include the rental payment (the amount paid for the tangible personal property) and the Waiver fee (value proceeding or accruing from the rental). Because the law is clear and the substantial evidence in the record supports the finding that the Waiver fee proceeds or accrues from the Taxpayers' rental of tangible personal property, this Court should affirm the ALC's finding.

IV. THE ADMINISTRATIVE LAW COURT PROPERLY FOUND THAT THE RENTAL OF A DURABLE CONSUMER GOOD AND THE PURCHASE OF A WAIVER CONSTITUTES ONE TAXABLE TRANSACTION.

After examining all of the facts in this case, the ALC correctly found that the Taxpayers' rental of tangible personal property and its incidental sale of the Waiver constituted one taxable transaction. (R. pp. 3 – 4, 7; Order 3 – 4, 7.) First, the evidence establishes that only one transaction exists. Specifically, the Waiver explicitly stated "[t]his Optional Liability Waiver Provision is an additional part of the Rental Agreement." (R. p. 170, 344 – 345; Hr'g Tr. 85:4 –

¹⁷The General Assembly even could have drafted the measure of tax statute similar to Utah's statute, for example, which limits the tax base to "amounts paid or charged for the following transactions" Utah Code section 59-12-103(1)(k) (West 2016); see also Rent-A-Center West, Inc. v. Utah State Tax Comm'n, No. 20140129 (Utah Jan. 5, 2016).

8; Hr’g Exhibit 3.) Additionally, the Waiver fee is based on a percentage of the rental payment. (R. p. 201; Hr’g Tr. 116:8 – 12.) Moreover, if a customer stopped making his or her rental payments, the customer could not continue to submit the Waiver fee to the Taxpayers because, according to Hugh Tollack, “[t]here is nothing for the customer or Rent-A-Center to waive at that point.” (R. p. 201; Hr’g Tr. 116:13 – 20.) Finally, the Waiver could only be enforced if the customer paid all of its rental payments and Waiver fees up through the date of loss. (R. pp. 344 – 345; Hr’g Exhibit 3.) Based on those facts, the ALC concluded that only a single transaction was at issue.

The single transaction at issue combines the rental of tangible personal property with the charge for a service. In those instances, South Carolina law provides for the application of the “true object” test in order to determine whether the transaction *as a whole* constitutes a service or the sale/rental of tangible personal property. See S.C. Code Ann. Regs. 117-308 (2012). The “true object” test is best described in 9 Vanderbilt Law Review 231 (1956), wherein it is stated that “[t]he true test then is one of the basic purpose of the **buyer**” (emphasis added). The Vanderbilt Law Review article, in quoting Snite v. Ill. Dept. of Rev., 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 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.

Pursuant to South Carolina law, the ALC applied the true object test to evaluate the transaction at issue and determined that the true object of the transaction was “to obtain the use of an item while minimizing the financial risk for its damage, loss, or destruction.” (R. p. 8; Order 8.) In other words, the true object was the rental of tangible personal property. The protection afforded by the Waiver was merely incidental to the rental. Accordingly, the ALC properly found that the rental proceeds and the incidental Waiver proceeds were includable in the Taxpayers’ gross proceeds of sales.

The Taxpayers, however, argue that this Court should not focus on the clear evidence that demonstrates the Rental Agreement and Waiver are inextricably linked, but instead should focus on the reasons why they assert the Rental Agreement and Waiver are separate agreements and, thus, separate transactions. (Initial Brief of Appellants 35 – 37.) The Taxpayers ask this Court to focus on individual portions of the transaction and treat such as though the other parts of the transaction did not occur simultaneously. However, this Court should disregard this form over substance argument and look at the transaction for what it truly is – one transaction wherein a customer chooses to rent a durable consumer good free from liability in certain situations. Despite the ALC’s proper analysis, the Taxpayers are asking this Court to find that the Waiver provides a completely separate benefit than the Rental Agreement and, therefore, the sale of the Waiver constitutes a separate transaction from the rental of tangible personal property. Such argument requires the Court to disregard the fact that no Waiver can exist without the underlying Rental Agreement as there is no liability to waive without the Rental Agreement. The benefits associated with the Waiver only exist if a Rental Agreement is in place. The undisputed evidence shows that a customer cannot come into one of the Taxpayers’ stores and purchase a

Waiver unless the customer also enters into a Rental Agreement. (R. pp. 191, 200; Hr’g Tr. 106:7 – 18, 115:12 – 21.) Furthermore, there can be no price on the Waiver as the price set forth in the Rental Agreement determines the price of the Waiver. (R. p. 201; Hr’g Tr. 116:8 – 12.)

Similarly, the Taxpayers want this Court to find that the Waiver has a value separate from the Rental Agreement and, therefore, its sale constitutes an independent transaction. (Initial Brief of Appellants 36.) The value of the Waiver is that it shifts the liability set forth in the Rental Agreement from the customer to the Taxpayers. (R. pp. 342, 344 – 345; Hr’g Exhibits 1 and 3.) There is no liability to shift if there is no Rental Agreement as there is nothing subject to being damaged. Here again, the Waiver cannot and does not exist without the Rental Agreement. Despite asserting the Waiver has its own value, the Taxpayers have not explained what the value of the Waiver is when there is no Rental Agreement. The Taxpayers have not done this because there is no value to the Waiver unless there is a Rental Agreement. As the evidence in this matter demonstrates, the Waiver is dependent upon the Rental Agreement, and the Rental Agreement and the Waiver are inextricably linked. That link supports the ALC’s ruling in this matter.

Despite the above, the Taxpayers argue that the ALC should have found that two separate transactions were at issue. (Initial Brief of Appellant 36.) Contrary to the Taxpayers’ assertions, the facts in this case do not support the conclusion that two separate transactions were at issue. Moreover, the ALC determined that, when viewing all the facts, only a single transaction was at issue – the rental of tangible personal property with the addition of a Waiver. This 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.” Section 1-23-610(B). Moreover, when this Court looks at the entire record, it is clear that reasonable minds could reach the same conclusion as the ALC. See

Barton, 404 S.C. at 401, 745 S.E.2d at 113. Accordingly, this Court should affirm the ALC's finding that the rental of tangible personal property and its incidental sale of a Waiver constitute a single transaction.

The Taxpayers also argue that even if the ALC correctly found that only a single transaction exists, it erred in failing to determine whether each component of the transaction was subject to the sales tax. (Initial Brief of Appellants 33.) However, as explained above, the ALC properly applied the true object test to the transaction as a whole to determine whether the transaction was subject to the sales tax. Despite the ALC properly applying South Carolina law, the Taxpayers cite various unsupportive cases in its attempt to argue that "[w]here a taxpayer sells both tangible personal property and a service or intangible, the service or intangible does not become taxable merely because it is sold in conjunction with tangible personal property." (Initial Brief of Appellants 33.) As will be explained more fully herein, the cases cited by the Taxpayers are either clearly distinguishable from the present matter or simply do not support the Taxpayers' assertions. To the contrary, some of the cases cited by the Taxpayers actually support the ALC's decision.

First, the Taxpayers cite Alltel, which as the Department has explained throughout this brief, is incorrect and should not be relied upon by this Court. Moreover, even if the ALC decided Alltel correctly, the facts are distinguishable. Specifically, unlike the Taxpayers who retained the Waiver fee, Alltel did not retain the fees for the indemnification coverage. Alltel, 2015 WL 7681302 *15. Because Alltel did not retain the fees, they received nothing from the transaction. Thus, because the proceeds from the fees passed through to a third party, those proceeds did not become part of the value proceeding or accruing from the sale of tangible personal property. The Taxpayers also cite Rent-A-Center West, Inc. v. Utah State Tax Comm'n

which also is easily distinguishable because, as discussed above, Utah's sales tax statute is much narrower than South Carolina's. See supra, §III. Because Utah's sales tax base is limited to "amounts paid or charged for the following transactions," the Utah Court had to separate out the various components and search only for amounts paid for the tangible personal property. Utah Code Section 59-12-103(1)(k). South Carolina's statutes are far broader than Utah's though, rendering the Utah decision irrelevant to the present matter.

The Taxpayers also cite several cases that actually support the Department's arguments and the ALC's decision. Specifically, the Taxpayers cite Southeastern Cinema Entertainment v. S.C. Dept. of Rev., 2014 WL 2417715 (S.C. Admin. Law Ct. May 28, 2014), Snite, 74 N.E.2d 877 (Ill. 1974), Brock Serv., LLC v. Ala. Dept. of Revenue, Docket No. S. 14-1236 (Ala. Tax Tribunal Sept. 28, 2015), and B&B Inflatable Fun World, LLC v. Ala Dept. of Revenue, Docket No. S. 15-1595 (Ala. Tax Tribunal Jul. 20, 2016). Southeastern Cinema supports the Department's argument that the plain meaning of the "value proceeding or accruing" language demonstrates that gross proceeds of sales includes services or intangibles that are inextricably linked to the sale of the tangible personal property, like the Waivers are here. In Southeastern Cinema, the ALC examined whether the proceeds from both the sale of an IMAX theater cinema and the associated intangible trademarks were subject to sales tax. In making its determination, the ALC relied on Meyers Arnold and stated that "Meyers Arnold suggests that service fees or benefits that are incident to the sale of tangible personal property are part of the gross proceeds of sale and subject to sales tax." Southeast Cinema, 2014 WL 2417715, at *5. The Taxpayers cite Southeastern Cinema in support of their proposition that each aspect of a transaction must be analyzed separately, but that is not what the ALC did in Southeastern Cinema. The ALC did not look at the intangible trademark on its own and determine its taxability. If the ALC had done so,

it would have determined that the trademark was not taxable. Instead, the ALC looked at the entire transaction and determined that the trademark was inextricably linked to the tangible personal property and, thus, taxable. Contrary to the Taxpayers' assertions, applying the ALC's logic in Southeastern Cinema to the facts in this case supports the Department's arguments and the ALC's decision because the Waivers are service fees or benefits that are incident to the rental of tangible personal property and, thus, taxable.

The Taxpayers' also cite Snite, but in order to support their position only quote part of the rule set forth in the case. An analysis of the full rule set forth in Snite actually supports the Department's arguments. Specifically, the applicable part of the rule set forth in Snite provides that "[i]f 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]." 74 N.E.2d. at 879 – 880. In applying the facts in this case to the rule set forth in Snite, the whole transaction is clearly taxable, as the ALC properly held. Specifically, the rental of the tangible personal property is the substance of the transaction. The Taxpayers' own witness even admitted that the Taxpayers are in the rent-to-own business (not the Waiver business). (R. pp. 154 – 156; Hr'g Tr. 69:1 – 71:25.) Clearly, customers go to the Taxpayers' stores to rent tangible personal property, not to purchase Waivers. In fact, customers cannot go into a Taxpayers' store and just purchase a Waiver. Moreover, the Waiver is merely incidental to the rental and adds value to said rental by shifting the risk of loss. Despite the Taxpayers' attempt to make Snite appear to support their argument that the ALC should have separately analyzed each component of the transaction, Snite actually supports the Department's argument and the ALC's ruling that the Waiver is merely incidental to the rental of tangible

personal property and, thus, taxable as value proceeding or accruing from said rental.

The Taxpayers also cite two decisions from the Alabama Tax Tribunal (Tribunal) – Brock Serv., LLC v. Ala Dept. Of Revenue and B&B Inflatable Fun World, LLC v. Ala Dept. of Revenue – which, while distinguishable, actually support the Department’s arguments and the ALC’s decision. Alabama’s measure of tax statute uses the same “value proceeding or accruing” language as South Carolina’s measure of tax statute. See Code of Ala. 1975, § 40-12-220(4) (West 2016). Alabama’s law is also distinguishable, however. Specifically, Alabama has a regulation providing that when there is a separate, optional agreement for maintenance, delivery, pick-up, installation, or setup the rental tax will not apply to the gross proceeds derived therefrom. See Ala. Admin. Code r. 810-6-5-.09.01 (West 2016).¹⁸ The Tribunal examined both

¹⁸ Regulation 810-6-5-.09.01 provides in part:

(3)(a) When a lessor engaged in leasing or renting tangible personal property requires maintenance of the item leased or rented as part of the leasing or rental contract, the gross proceeds derived therefrom, including charges for maintenance, will be subject to the tax. When there is a separate, optional contract for maintenance only, the rental or leasing tax will not apply to the gross proceeds derived therefrom.

(b) When a lessor engaged in leasing or renting tangible personal property is required to deliver and pick-up the leased property as part of the leasing or rental contract, the gross proceeds derived therefrom, including the delivery and pick-up charges, will be subject to the tax. When there is a separate, optional agreement for delivery and pick-up of the leased property, the rental tax will not apply to the gross proceeds derived therefrom.

(c) When a lessor engaged in leasing or renting tangible personal property is required to provide installation or setup services as part of the leasing or rental contract, the gross proceeds derived therefrom, including charges for the installation or setup, will be subject to the tax. When there is a separate, optional agreement for installation or setup of the leased property, the rental tax will not apply to the gross proceeds derived therefrom.

the measure of tax statute and the regulation in Brock and B&B, both of which involved the rental of tangible personal property combined with the provision of a service.

In Brock, the taxpayer's customers had three options: (1) they could rent scaffolding, (2) they could obtain the taxpayer's scaffolding labor services, or (3) they could rent scaffolding and obtain the taxpayer's scaffolding labor services. Brock, No. S. 14-1236 at p. 1 of 14. The issue in the case was "whether the proceeds from the scaffolding services [were] subject to the rental tax when the taxpayer also rents the scaffolding to the customer." Id. The Tribunal analyzed prior similar cases and determined the general rule was as follows:

[T]he proceeds for labor or services performed by a lessor for a lessee in conjunction with the leasing of tangible personal property are subject to Alabama lease tax if (1) the labor or services were incidental to the leasing of the property, and (2) the lessor was required to perform the labor or services pursuant to the rental agreement.

No. S. 14-1236 at p. 8 of 14. The Tribunal then applied the facts in the case to that rule and held "if the lessor [like Brock] also performs a separate service that is **apart from and not incidental** to the leasing of the property, the fee for that service is not derived from the lease, and thus is not subject to tax." No. S. 14-1236 at p. 10 of 14 (quoting Thyssenkrupp Safeway Inc. v. State of Alabama, Docket S. 08-401 (Admin. Law Div. Mar. 18, 2009)). The Tribunal also concluded that "whether the rental of the property and the providing of labor services are required by a single contract or by separate contracts is irrelevant." No. S. 14-1236 at p. 9 of 12. In reaching such a conclusion, the Tribunal reasoned that "the substance of the transaction or transactions must control in tax matters, not the form. . . . **If the labor is performed as a direct result of and thus incidental to the leasing of the property, the labor proceeds are in substance derived from the lease transaction, and thus subject to lease tax.**" No. S. 14-1236 at p. 8 of 14 (emphasis added). Thus, because Brock's labor services could be obtained separately from

the leasing of the property, the Tribunal determined the proceeds from said services were not taxable. No. S. 14-1236 at pp. 13 – 14 of 14. In applying the Tribunal's reasoning to the facts in this case, the Waiver fee is subject to sales tax because the fee is a direct result of and incidental to the rental of the property. Moreover, the Waiver could not be obtained separately from the renting of the property. Thus, despite the fact South Carolina does not have a regulation like Alabama's regulation, the Tribunal's analysis supports the ALC's conclusion that because the Waiver fees were derived from the rental of the tangible personal property, they were taxable. (R. pp. 9 – 10; Order 9 – 10.)

Similarly, B&B involved the rental of an item combined with an optional service – specifically the rental of inflatables and the taxpayer's optional, separate service of picking up the inflatables at the end of the rental period. In reviewing Alabama's regulation, the Tribunal held that the fact only one agreement existed did not control because it was clear from the facts that the customer and the taxpayer understood there to be a separate, optional agreement regarding the service at issue. S. 15-1595 at p. 3 – 4 of 6. Therefore, in applying the facts to Alabama's regulation, the Tribunal held that the pick-up fees were not taxable. The Tribunal's logic supports the Department's position and the ALC's ruling, not the Taxpayers' argument. First, South Carolina does not have a regulation providing that when a separate, optional agreement for a Waiver exists the Waiver fee is not includable in the gross proceeds of sales. Accordingly, without such regulation, the Waiver must be includable in gross proceeds of sales regardless of the structure of the agreement. Next, the ALC's Order is in line with the Tribunal's substance over form argument. Specifically, the ALC found that the fact that the Waiver was outlined in a separate document was irrelevant because the Waiver is inextricably linked to the rental of tangible personal property. (R. p. 7; Order 7.) Thus, while two separate agreements

existed, they made up one transaction. Accordingly, the B&B decision also supports the Department's position and the ALC's ruling.

Finally, the Taxpayers cite Pot-O-Gold Rentals, L.L.C. v. City of Baton Rouge, 155 So.3d 511 (La. 2015), which provide no persuasive guidance to this Court because this Court already addressed the same issue in Boggero. The issue in both Pot-O-Gold and Boggero was whether portable toilet rentals with cleaning services included were subject to sales tax. See Boggero, 414 S.C. 277, 777 S.E.2d 842; Pot-O-Gold, 155 So.3d 511. In Pot-O-Gold, the Louisiana Supreme Court held that "the 'true object' of the transactions is, in the least, debatable, requiring the court to adopt the interpretation urged by the applicant as the least onerous to the taxpayer." 155 So.3d at 512. However, in Boggero, our Court of Appeals applied the true object test to the same set of facts as the facts in Pot-O-Gold and determined that the true object of the transaction was the rental of portable toilets. Boggero, 414 S.C. at 286, 777 S.E.2d at 846. Boggero is binding precedent. Thus, because South Carolina has case law regarding the true object test and taxability of portable toilet rentals with cleaning services included, the Taxpayers' attempt to rely on the Pot-O-Gold case is misplaced. Accordingly, because none of the above-mentioned cases cited by the Taxpayers support the conclusion that the ALC erred in analyzing the transaction at issue in this case, this Court should affirm the ALC's decision.

CONCLUSION

As explained more fully above, this Court should affirm the ALC's decision as the decision was supported by substantial evidence and the ALC did not make any errors of law that affected the decision.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable H. W. Funderburk, Jr., Administrative Law Judge

Case No. 13-ALJ-17-0601-CC
Appellate Case No. 2016-001210

Rent-A-Center East, Inc. and Rent Way, Inc., ... Appellants,

v.

South Carolina Department of Revenue, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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