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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

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.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENTS

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

Appellant Eugenia Boggero testified at the Administrative Law Court (ALC) hearing in this matter that the true object of her business was the removal, hauling away, and disposal of human waste. (R. p. 49, line 15; p. 68, line 4-p.69, line 3; p. 70, lines 18-21; p. 103, lines 5-21). The true object test has been consistently applied to determine whether a particular transaction is the furnishing of a service or the sale or lease of tangible personal property. See, e.g., Fraternal Order of Police v. S.C. Dep't of Rev., 332 S.C. 496, 506 S.E.2d 495 (1998). If a transaction is a furnishing of a service, then the sales tax is generally not applied unless there is a specific statutory imposition, but if it is the sale or lease of tangible personal property, then the sales tax is applied. See S.C. Code Ann. Regs. 117-308 (2012 & Supp. 2013); see also id. 117-308.1-.16. Respondent has conceded that the imposition of the sales tax must be evaluated on a transaction-by-transaction basis and is a factual determination. (Respondent's Brief, p. 21; R. p. 170, line 23-p. 171, line 3).

Appellant contends that based on the facts and circumstances of her business, the ALC incorrectly found that the true object of her business was not a service and thus erred in imposing the state sales tax on her gross proceeds. As the true object of Appellant's business is providing a service, Respondent's argument related to the partial exemption from sales tax for the gross proceeds of the rental or lease of portable toilets is erroneous. Any consideration of an exemption from sales tax is premature because the sales tax must first be applied to the transaction, and in this case, the sales tax was erroneously applied by Respondent and the ALC. The issue before the Court is not whether there is an exemption

from sales tax for Appellant's business, but whether Appellant's business is even subject to the sales tax based on the particular manner in which she operates the business.

Ms. Boggero testified that she charges the same fee for customers who own their own portable restroom units and for customers who use her portable restroom units because she only charges customers for the services that she provides. (R. p. 66, line 16-p.67, line 19; p. 68, line 1-p.69, line 13). She testified that her customers do not enter into an agreement with her by visiting her website, but she enters into a service agreement with her customers, which is not part of her website. (R. p. 54, line 12-p. 55, line 24; pp.206-209). She also testified that her customers would not use the restroom and sink units but for the sanitation services that she provides in connection with those units. (R. p. 68, line 1-p.69, line 13). Although Ms. Boggero generally charges more for special event services than for construction unit or weekly services, she testified that this is largely because there is more waste generated with the special events than with the construction or weekly services and thus more waste has to be removed and disposed. Ms. Boggero incurs a greater service charge at the disposal plant for the special event services because of the greater amount of waste accumulated and disposed of with the special event services. (R. p. 63, lines 10-23; p. 109, line 17-p. 110, line 6). Although Ms. Boggero uses a DHEC license in her father's name, she testified that she notified DHEC of the change in ownership when she purchased the business from her father, and DHEC did not require her to otherwise update the license. (R. p. 82, lines 1-19).

Appellant clearly provides a service for her customers regardless of whether they use a unit provided by her or use their own unit, and her business is distinguishable from the businesses at issue in LZM, Inc. v. Virginia Dep't of Taxation, 606 S.E.2d 797 (Va.

2005) and South Carolina Tax Commission Decision S-D-115 (1977). Unlike the businesses in the LZM case and the Tax Commission case, Appellant does not charge two separate fees; she only charges one fee—that is for servicing. Although she charges different fees for weekly customers, such as construction units, than for special event customers, she testified this was largely because of the amount of waste generated and the relevant disposal fees that she, in turn, incurs based on the amount of waste. (R. p. 63, lines 10-23; p. 109, line 17-p. 110, line 6). There is absolutely no evidence that Appellant ever provided a unit without providing a service. To the contrary, Ms. Boggero testified that she always provide a service and she charges the same fee regardless of whether she provides a unit or the customer provides its own unit.

Appellant's business is similar to the businesses in S.C. Private Letter Ruling #04-2 (Jan. 12, 2004), S.C. Private Letter Ruling #97-4 (Sept. 18, 1997), and S.C. Technical Advice Memorandum #95-1 (May 23, 1995), wherein Respondent found that under the true object test, the sales tax did not apply. In those cases, the taxpayers used a garbage container in the first case and equipment in the latter two cases in connection with providing a service, and Respondent determined that such property was incidental to the nontaxable service. Ms. Boggero charges one fee to her customers, which is for the service of removing, hauling away, and disposing of human waste and any restroom or sink units used in the transaction are incidental to the actual service that she provides. Accordingly, the substantial evidence in this case indicates that under the true object test, Appellant is providing a service that is not subject to the sales and use tax, and the ALC's Order should be reversed.

II. THE ISSUE BEFORE THIS COURT WAS PROPERLY RAISED AND RULED ON BY THE ADMINISTRATIVE LAW COURT.

The issue before this Court is whether the true object of Appellant's business is a service. The ALC found that it was not and imposed the sales tax against Appellant's gross proceeds during the audit period. Appellant has appealed that ruling.

Respondent's argument that Appellant failed to raise certain issues before the ALC is incorrect. Appellant has appealed the issue of whether the ALC erred in finding her business was not a service and thus subject to the sales tax. South Carolina case law does not constrain Appellant to citing or arguing in her appellate briefs only the cases, statutes, and treatises referenced in the ALC's Order, as Respondent seems to contend. Also, South Carolina case law does not limit Appellant from disagreeing with Respondent's analysis of her business in an exhibit prepared by Respondent. Rather South Carolina case law requires Appellant to appeal an issue that was actually ruled on by the lower court, which Appellant did. See generally Elam v. S.C. Dep't of Transportation, 361 S.C. 9, 602 S.E.2d 772 (2004) ("A party *may* wish to file [a Rule 59(e)] motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") The issue is, therefore, properly before this Court for appellate review.

CONCLUSION

For the reasons stated above and based on the arguments set forth in Appellant's Brief, the true object of Appellant's business is the service of removing, hauling away, and disposing of human waste and any restroom or sink units used in connection therewith are

incidental to the nontaxable service. The reliable, probative, and substantial evidence in the record clearly indicates that the ALC erred in finding that the true object of Appellant's business was not providing a service and the ALC's finding should be reversed.

Respectfully submitted,

July 9, 2014



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CERTIFICATE OF COUNSEL

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

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