RECEIVED

APR 22 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

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

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

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

v.

South Carolina Department of Revenue, ... Respondent.

PETITION FOR WRIT OF CERTIORARI

John C. von Lehe, Jr.
SC Bar No. 5719
Bryson M. Geer
SC Bar No. 13606
Nelson Mullins Riley & Scarborough, LLP
151 Meeting Street / Sixth Floor
P.O. Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Petitioners

Other Counsel of Record:

Lauren Acquaviva
Sean G. Ryan
South Carolina Department of Revenue
P.O. Box 12265
Columbia, SC 29211-9979
(803) 898-1826

Attorneys for Respondent

INDEX

CERTIFICATION REGARDING REHEARING....................1

QUESTIONS PRESENTED FOR REVIEW....................1

I. DID THE COURT OF APPEALS ERR IN FAILING TO APPLY THE APPROPRIATE RULES OF STATUTORY CONSTRUCTION?......1

II. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE IMPOSITION STATUTE IMPOSES A SALES TAX ON PERSONS AND NOT TRANSACTIONS AND ALSO IN FINDING THAT THE WAIVERS WERE TAXABLE WHEN NO IMPOSITION STATUTE IMPOSES SUCH A TAX?....................1

III. DID THE COURT OF APPEALS ERR IN REACHING THE "MEASURE OF TAX" STATUTE WHEN NO IMPOSITION STATUTE WAS INVOKED, AND, EVEN IF PROPERLY REACHED, ERR IN FINDING THE WAIVER PROCEEDS PART OF APPELLANTS' "GROSS PROCEEDS OF SALE"?....................1

IV. DID THE COURT OF APPEALS ERR IN MISAPPLYING THE TRUE OBJECT TEST, WHICH LED IT TO INCORRECTLY CONCLUDE THAT SUBSTANTIAL EVIDENCE SUPPORTED THE ALC'S FINDING THAT THE WAIVER AND RENTAL AGREEMENT WERE INEXTRICABLY LINKED?....................1

STATEMENT OF THE CASE....................2

Procedural History and Case Issues....................2

Summary of Relevant Facts....................3

A. The Rental Agreement....................3

B. The Waiver....................3

C. Tax Treatment of the Proceeds from the Rental Agreements and the Waivers....................5

D. Expert Testimony regarding Tax Policy Matters....................6

SUMMARY OF GROUNDS FOR CERTIORARI....................6

ARGUMENT....................8

I. THE COURT OF APPEALS ERRED IN FAILING TO APPLY THE APPROPRIATE RULES OF STATUTORY CONSTRUCTION. 8

A. The Court of Appeals Erred in Failing to Properly Apply the Plain Meaning Rule. 8

B. The Court of Appeals Erred in Failing to Construe the Relevant Tax Statutes in Favor of Rent-A-Center and Against the Department and Imposition of the Tax. 9

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE IMPOSITION STATUTE IMPOSES A SALES TAX ON PERSONS AND NOT TRANSACTIONS AND IN FINDING THE WAIVERS TAXABLE WHEN NO IMPOSITION STATUTE IMPOSES SUCH A TAX. 11

III. THE COURT OF APPEALS ERRED IN REACHING THE "MEASURE OF TAX" STATUTE WHEN NO IMPOSITION STATUTE WAS INVOKED, AND, EVEN IF PROPERLY REACHED, IN FINDING THE WAIVER PROCEEDS PART OF APPELLANTS' "GROSS PROCEEDS OF SALE." 16

IV. THE COURT OF APPEALS ERRED BY MISAPPLYING THE TRUE OBJECT TEST, WHICH LED IT TO INCORRECTLY CONCLUDE THAT SUBSTANTIAL EVIDENCE SUPPORTED THE ALC'S FINDING THAT THE WAIVER AND THE RENTAL AGREEMENT WERE INEXTRICABLY LINKED. 19

CONCLUSION 24

PROOF OF SERVICE 26

Pursuant to Rule 242 of the South Carolina Appellate Court Rules ("SCACR"), petitioners Rent-A-Center East, Inc. ("RAC East") and Rent Way, Inc. ("Rent Way") (together "Rent-A-Center" or "Appellants") petition the Court to issue a writ of certiorari to review the decision of the Court of Appeals styled Rent-A-Center East, Inc. and Rent Way, Inc. v. South Carolina Department of Revenue, Op. No. 5615 (S.C. Ct. App. January 16, 2019) (Shearouse Adv. Sh. No. 3 at 27) ("Opinion"), finding in favor of the South Carolina Department of Revenue ("Department" or "Respondent"). Appendix ("App.") p. 1. For the reasons set forth below, the petition should be granted, and the decision of the Court of Appeals should be reversed.

CERTIFICATION REGARDING REHEARING

The undersigned hereby certifies that Rent-A-Center filed a Petition for Rehearing (App. p. 12), which the Court of Appeals ruled upon on March 21, 2019. App. p. 11.

QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN FAILING TO APPLY THE APPROPRIATE RULES OF STATUTORY CONSTRUCTION?

II. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE IMPOSITION STATUTE IMPOSES A SALES TAX ON PERSONS AND NOT TRANSACTIONS AND ALSO IN FINDING THAT THE WAIVERS WERE TAXABLE WHEN NO IMPOSITION STATUTE IMPOSES SUCH A TAX?

III. DID THE COURT OF APPEALS ERR IN REACHING THE "MEASURE OF TAX" STATUTE WHEN NO IMPOSITION STATUTE WAS INVOKED, AND, EVEN IF PROPERLY REACHED, ERR IN FINDING THE WAIVER PROCEEDS PART OF APPELLANTS' "GROSS PROCEEDS OF SALE"?

IV. DID THE COURT OF APPEALS ERR IN MISAPPLYING THE TRUE OBJECT TEST, WHICH LED IT TO INCORRECTLY CONCLUDE THAT SUBSTANTIAL EVIDENCE SUPPORTED THE ALC'S FINDING THAT THE WAIVER AND RENTAL AGREEMENT WERE INEXTRICABLY LINKED?

STATEMENT OF THE CASE

Procedural History and Case Issues

This case involves protests by RAC East and Rent Way of assessments of sales tax by the Department for income tax years of April 1, 2007- October 31, 2010 for RAC East and April 1, 2007- December 31, 2009 for Rent Way. The Department issued audit reports to each entity on April 30, 2012 claiming additional sums were owed. Audit Rpts. for RAC East and Rent Way, R. pp. 349-374 and 375-397. RAC East and Rent Way timely protested these assessments. Notices of Protest for RAC East and Rent Way, R. pp. 16-20 and 21-24. Thereafter, the Department issued Department Determinations on November 18, 2013 upholding the portion of the assessments related to the sale of Optional Liability Waivers. Determinations for RAC East and Rent Way, R. pp. 398-407 and 408-417. The Department assessed tax and interest totaling $618,347.44 as to RAC East and $233,274.87 as to Rent Way. Determinations, R. pp. 399 and 409. Appellants timely requested a contested case hearing before the Administrative Law Court ("ALC").

The ALC held a hearing on September 24-25, 2015 and issued a Final Order ("Order") finding for the Department on March 30, 2016. Order, R. pp. 1-11. Appellants filed a Motion for Reconsideration on April 12, 2016, which the ALC denied on May 5, 2016. Rent-A-Center's Mot. for Reconsid'n, R. pp. 25-53; Order Deny'g Mot. for Reconsid'n, App. p. 12. In compliance with S.C. Code Ann. § 12-60-3370, Appellants submitted payment to the Department for all taxes and interest owed in the amount of $919,585.55. R. p. 849. Appellants then timely filed a Notice of Appeal on June 6, 2016. After the parties completed briefing but without holding oral argument, the Court of Appeals issued its decision affirming the ALC's order. Opinion ("Op."), App. p.

1. Appellants filed a Petition for Rehearing on February 19, 2019 (App. p. 12), which the Court of Appeals denied on March 21, 2019. App. p. 11.

Summary of Relevant Facts

A. The Rental Agreement

Rent-A-Center operates retail stores in South Carolina and other states from which customers can "rent to own" household items such as electronics, appliances, furniture and computers. Trial Transcript ("Tr."), R. p. 154:1-7. A customer who chooses to rent an item enters into a "Consumer Rental-Purchase Agreement" (the "Rental Agreement") with Rent-A-Center under which he makes payments over a stated period of time, and once all payments are made, he will own the item. Tr., R. pp. 155:12-156:25; see also Rental Agr., R. p. 342. The customer can choose a weekly, semi-monthly or monthly renewal term and can automatically renew by making an advance payment prior to the expiration of the chosen term. Id. If renewed, the Rental Agreement does not terminate until the customer takes title to the item or if the item is destroyed or stolen. Id. Rent-A-Center cannot unilaterally terminate the Rental Agreement; only the customer can do so by violating its terms or returning the item. Id. Rent-A-Center provides certain services in connection with the rental of merchandise, including warranty and maintenance services. Tr., R. pp. 159:16-160:11; Rental Agr., R. p. 342 (Rent-A-Center is "responsible for maintaining or servicing the goods while they are being rented.").

B. The Waiver

In addition to Rental Agreements, Rent-A-Center also offers, for a separate price, an additional, separate and optional agreement entitled "Optional Liability Waiver Provision" ("Waiver"). If an item rented by a customer is "lost, stolen, damaged or

destroyed" during the rental term, then the customer is normally "responsible for the fair market value of the property...." Tr., R. p. 157:1-11; Rental Agr., R. p. 342. The Waiver, however, allows customers to negate that risk as to certain covered events, including lightening, fire, smoke, windstorm, theft and flood. Tr., R. pp. 157:12- 159:11 and 163:6-10; Waiver, R. pp. 344-345. The Waiver does not provide for repairs or replacement of the items nor does it provide any warranty, maintenance or other services. Waiver, R. pp. 344-345; Tr., R. pp. 159:12-15, 160:12-15 and 161:14- 162:9. Rent-A-Center does not insure the rental merchandise, and no other cost or cost of service associated with the Waiver is passed on to the customer. Tr., R. p. 162:10-16. The Waiver simply secures Rent-A-Center's promise to waive claims it would otherwise have against the customer due to certain damages to or loss of the rented item. Waiver, R. pp. 344-345.

The fee for the optional Waivers is separate and distinct from the charges for renting an item, is noted separately on the customer's receipt and is recorded separately in Rent-A-Center's books and records. Tr., R. p. 171:21-25 and 168:17- 169:8; Waiver, R. pp. 344-345; Sample Receipt, R. pp. 346-347. The charges due under the Rental Agreement remain the same whether or not a customer purchases an optional Waiver, and payment of the Waiver fee does not count towards the rental charge or eventual purchase of the property. Tr., R. pp. 163:11- 164:12; Rental Agr., R. p. 342; Waiver, R. pp. 344-345. As to timing, customers can purchase a Waiver when they enter a Rental Agreement or later. Tr., R. p. 164:13-17; Waiver Policy Statement, R. p. 348. Customers can cancel Waivers at any time, and, if canceled, the Rental Agreement is not impacted and remains in effect. Tr., R. pp. 166:14- 167:3; Waiver, R. pp. 344-345. Unlike the Rental Agreement, the Waiver may be canceled by Rent-A-Center at any time. Waiver, R. pp. 344-345.

The Waiver does not increase the value of the rented property. If a customer rents a television that is valued at $500 and then purchases a Waiver, the television's value remains $500. Tr., R. pp. 232:11- 234:20. Likewise, the Waiver does not alter, enhance or improve the rented property in any way. Id. at 169:9-14. The Waiver can be contrasted with the example discussed during trial of an engraved and assembled trophy. Tr., R. pp. 255:23-256:25. Unlike the intangible Waiver, the services of assembly and engraving alter, enhance, improve and are embodied in the trophy, and its value is thereby increased. Id.

In sum, the Rental Agreement and the Waiver are separate and distinct transactions, which for separate charges and terms provide different benefits to the customer: the Rental Agreement provides the benefit of renting to own an item, while the Waiver provides the benefit of avoiding a risk of loss in case of certain covered events. Tr., R. pp. 169:12- 170:3 and 170:20- 171:10; Rental Agr., R. p. 342; Waiver, R. pp. 344-345.

C. Tax Treatment of the Proceeds from the Rental Agreements and the Waivers

The proceeds from the Rental Agreements for the rental of tangible personal property are subject to sales tax in South Carolina, and Rent-A-Center paid taxes on all such proceeds. Tr., R. pp. 177:17- 178:1. However, during the audit periods at issue, it did not pay sales tax on sales of separately itemized optional Waivers because (a) the Waivers are intangibles that are not covered by the imposition statute, and (b) the Waiver proceeds are not a service cost associated with the rental of tangible personal property and thus are not covered under the "measure of tax" statute.

D. Expert Testimony regarding Tax Policy Matters

Professor Richard D. Pomp[1] testified at trial regarding certain tax policy matters, including, but not limited to: (1) why questions of imposition of tax statutes (or coverage questions) are construed against the State while exemption statutes are construed against the taxpayer (Tr., R. pp. 218:11- 219:19); (2) that an item must be subject to tax under an imposition statute in order to be taxable and that a court should not reach a "measure of tax" statute unless an imposition statute is first triggered (Id. at 223:3- 224:7 and 229:4- 231:15); and (3) that the tax policy rationale behind sales tax law not allowing a deduction for costs is to avoid bifurcation of receipts, and by avoiding this bifurcation, prevent taxpayers from trying to carve out service costs that are embedded in the sale of an item that is subject to sales tax (Id. at 225:7- 229:3).

SUMMARY OF GROUNDS FOR CERTIORARI

SCACR Rule 242(b) provides that certiorari is not a matter of right but of sound judicial discretion and will only be granted for "special and important reasons." Circumstances identified in the rule and present in this case weighing in favor of issuing a writ of certiorari include that novel questions of law are at issue and that the Court of Appeals' decision conflicts with prior decisions of this Court. SCACR Rule 242(b).

This case involves novel issues of law relating to: (a) the sales tax imposition statute at S.C. Code Ann. §12-36-910; (b) the "measure of tax statute" at S.C. Code Ann. §12-36-90; and (c) the true object test related to bundled transactions. First, the Court of Appeals'

---

[1] Professor Pomp was qualified as an expert in tax policy. Tr., R. p. 204:8-15. He is the Alva P. Loiselle Professor of Law at the University of Connecticut School of Law and an adjunct professor at NYU School of Law. He has taught tax law specializing in state and local tax law for over 40 years. Id. at 204:22-205:25.

decision takes the unusual and unsupported position that the sales tax imposition statute applies to persons and not transactions. This conclusion is contrary to South Carolina law (primarily S.C. Code Ann. §§12-36-910 and 12-36-60), sales tax law generally, the Department's interpretation of the law in its policies and the trial testimony of the Department's manager of policy, which together confirm that the sales tax is a transactional tax that applies only to sales of tangible personal property and certain limited services not at issue here. Second, no court other than an ALC in South Carolina appears to have examined whether a "measure of tax" statute can be reached if an imposition statute does not impose a tax. See Alltel v. S.C. Dept. of Rev., 2015 WL 7681302, slip op. at pp. 17-20 (S.C. Admin. Law Ct. Nov. 13, 2015). Alltel correctly concluded that absent an imposition statute, the "measure of tax" statute could not be reached. The Court of Appeals does not actually address this issue because it incorrectly found that the imposition statute covered Waivers. Third, there is a novel issue regarding the true object test. No South Carolina court prior to the instant decision has ever found a fundamental interconnection or inextricable link between the sale of a good and a service or intangible such that they constitute a bundled transaction where, as is the case here, the cost of the service/intangible is itemized, the service/intangible is optional, the tangible personal property can be used without service/intangible and the service/intangible does not become incorporated into the tangible personal property.

In addition, the Court of Appeals' decision conflicts with prior decisions of this Court, including Hodges v. Rainey, 341 S.C 79, 85, 533 S.E.2d 578, 581 (2000) and similar cases that require the plain meaning rule to be applied when interpreting statutes as well as Cooper River Bridge, Inc. v. S.C. Tax Comm'n, 182 S.C. 72, 76, 188 S.E. 508, 509-10

(1936) and similar decisions, which require that a tax imposition statute be construed in favor of the taxpayer and against the taxing authority where the tax statute is ambiguous or reasonably susceptible to an interpretation that a tax is not imposed.

The above novel issues as well as the conflicts between the Court of Appeals decision and prior decisions of this Court weigh in favor of this Court granting a writ of certiorari to review the Court of Appeals' decision in this matter.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FAILING TO APPLY THE APPROPRIATE RULES OF STATUTORY CONSTRUCTION.

The Court of Appeals erred in failing to apply the appropriate statutory construction rules to the tax statutes at issue. Op., App. p. 30. It also erred in ruling that no ambiguity exists in the imposition statute thus leading to the faulty conclusion that it need not be construed in favor of the taxpayers and against the Department and imposition of the tax.[2] Op., App. p. 31-32.

A. The Court of Appeals Erred in Failing to Properly Apply the Plain Meaning Rule.

While the Court of Appeals recognized that the plain meaning rule should be applied (Op., App. p. 30), it appears to have concluded either that the ALC implicitly applied it or that it does not matter because the ALC reached the correct result. Id. at pp. 31-32. Neither conclusion is valid. In construing statutes, the court should start with the text

[2] The ALC also failed to properly apply these rules of statutory construction. While citing them in the "Applicable Tax Provisions" section, it fails to discuss or apply them in the "Analysis" section, which analyzes the relevant statutes and concludes they impose a tax on Waivers. Order, R. pp. 4-10. The ALC also states that the statutes at issue are not ambiguous perhaps implying the statutes need not be construed in the taxpayers' favor. Id.

of the statute itself, must give words their plain and ordinary meaning and cannot re-write statutes where the language is clear. See Hodges v. Rainey, 341 S.C 79, 85, 533 S.E.2d 578, 581 (2000); State v. Leopard, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct. App. 2002); Rosmer v. Pfizer, 263 F.3d 263 (4th Cir. 2001); Alltel v. S.C. Dept. of Rev., 2015 WL 7681302, slip op. at pp. 17-20 (S.C. Admin. Law Ct. Nov. 13, 2015) (applying the plain meaning rule to the imposition statute to determine whether a taxpayer's indemnification coverage proceeds were subject to sales tax).

As discussed in detail in §§II and III below, one cannot properly apply the plain meaning rule and reach the conclusion that the Court of Appeals reached (that the sales tax statute imposes a tax on persons and not transactions) or that the ALC reached (that the "measure of tax" statute is somehow an imposition statute). The ALC and Court of Appeals' failure to properly apply the plain meaning rule caused both courts to improperly construe the taxing statutes at issue and to err in finding the Waivers subject to sales tax.

B. The Court of Appeals Erred in Failing to Construe the Relevant Tax Statutes in Favor of Rent-A-Center and Against the Department and Imposition of the Tax.

The Court of Appeals erred in failing to construe the relevant tax statutes in favor of Rent-A-Center and against the Department and imposition of the tax. Where a question of imposition of tax (or coverage) and not exemption is at issue, the taxing statutes must be construed in favor of the taxpayer and against the imposition of the tax (as opposed to an exemption statute, which is construed against the taxpayer and in favor of the government). United States v. Merriam, 263 U.S. 179, 188 (1923) (citations omitted) (if the words in a tax statute are in doubt then "the doubt must be resolved against the Government and in favor of the taxpayer"); Cooper River Bridge, Inc. v. S.C. Tax

Comm'n, 182 S.C. 72, 76, 188 S.E. 508, 509-10 (1936) ("[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor."); Clark v. S.C. Tax Comm'n, 259 S.C. 161, 191 S.E.2d 23 (1972); Rent-A-Center's Final Brief, App. pp. 54-55 (discussing policy reasons underlying this rule, including that taxpayers be given clear notice and warning of the circumstances that will lead to their payment of taxes and that tax laws, which are drafted by the State, be construed against the State).

The imposition statute is at least "reasonably susceptible" to an interpretation that it only imposes tax on sales of tangible personal property and certain enumerated services. In fact, an ALC reached that exact interpretation in Alltel Communications, Inc. v. S.C. Dept. of Rev., 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015), which concluded that the sales tax imposition statute did not impose a tax on indemnification coverage proceeds sold in conjunction with wireless phones. As discussed in more detail in §II, there is substantial support for this interpretation, including but not limited to, the heading of the imposition statute (which states that the sales tax is "on tangible personal property" and certain enumerated items); the statutory definition of tangible personal property (which confirms that only items enumerated under the sales tax chapter are subject to sales tax as "tangible personal property"); South Carolina regulations and case law (confirming same and that sales tax is transaction tax); Department policies and procedures (confirming sales tax is transactional tax); and the Department's trial testimony (confirming same). See infra §II. Because the imposition statute is ambiguous or reasonably susceptible to an

interpretation that it does not impose a tax on Waivers, it must be construed in favor of Rent-A-Center and against the Department and imposition of the sales tax.

Thus, the Court should grant the Petition for Writ of Certiorari and reverse the Court of Appeals' decision because the Court erred in failing to apply the plain meaning rule and in failing to construe the imposition statute in favor of Rent-A-Center and against the Department and imposition of the tax and because the decision conflicts with prior decisions of this Court requiring that both rules of statutory construction be applied.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE IMPOSITION STATUTE IMPOSES A SALES TAX ON PERSONS AND NOT TRANSACTIONS AND IN FINDING THE WAIVERS TAXABLE WHEN NO IMPOSITION STATUTE IMPOSES SUCH A TAX.

The Court of Appeals erred in holding that the imposition statute imposes a sales tax on **persons** and not **transactions** and in finding Waivers taxable when no imposition statute imposes such a tax. As previously stated, the ALC failed to identify an imposition statute imposing a tax on intangible Waivers and referred instead to the "measure of tax" statute as the basis for imposing sales tax. Order, R. pp. 4-8; Order Deny'g Mot. for Reconsid'n, R. p. 13. The Court of Appeals, on the other hand, found that the imposition statute "levies a sales tax on persons" and does not apply only "to transactions and certain enumerated services" and thus found that it covered Waivers. Op., App. p. 6. This interpretation is contrary to South Carolina law, sales tax law generally, the Department's interpretation of the law in its policies and the trial testimony of its manager of policy.

First, the conclusion that the sales tax imposition statute applies to persons and not transactions is contrary to the plain meaning of the statute as well as South Carolina law and sales tax law generally. The relevant part of the imposition statute reads as follows:

> **SECTION 12-36-910.** Five percent tax on tangible personal property; laundry services, electricity, communication services, and manufacturer-consumed goods.
>
> (A) A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail.

The imposition statute then describes the specific services subject to sales tax, including operating a laundry (§12-36-910(b)(1)), providing accommodations (§12-36-920), providing communications services (§§12-36-910(b)(3)& (5) and 12-36-1310), and selling electricity (§12-36-910(b)(2)).

The tax code defines "tangible personal property" (which is subject to sales tax) as:

> personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also *includes services and intangibles*, including communications, laundry and related services, furnishing of accommodations and sales of electricity, *the sale or use of which is subject to tax under this chapter . . . .*

S.C. Code Ann. §12-36-60 (emphasis added). Thus, only sales of tangible personal property and services or intangibles *specifically identified* in the sales tax chapter are subject to sales tax. S.C. Code Ann. §§12-36-910 and 12-36-60.[3] As one court explained, a retailer is subject to sales tax "because it is engaging in a retail sales transaction and *because that sales transaction is for tangible personal property.*" Textile Restoration Services, Inc. v. S.C. Dept. of Rev., 2015 WL7443800, slip. op. at 3 (S.C. Admin. Law Ct. November 12, 2015) (emphasis added).

---

[3] The only exception to this rule is that where a bundled transaction is at issue, certain services that are inextricably linked to the sale of tangible personal property can be subject to sales tax if the "true object" of the sale is the purchase of tangible personal property and not the purchase of a service. See Boggero v. S.C. Dept. of Rev., 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015). No such transaction is at issue here. See infra §IV.

A strikingly similar case was addressed by the ALC in Alltel Communications, Inc. v. S.C. Dept. of Rev., 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015), which examined whether sales proceeds from optional contracts sold by Alltel for indemnification coverage in the form of repair or replacement for lost, stolen or damaged wireless phones were subject to sales tax when the contracts were sold in conjunction with sales of wireless phones. Alltel argued that under the plain meaning of the imposition statute (§12-36-910), the indemnification coverage proceeds were not subject to tax because an insurance type product is not tangible personal property and therefore cannot be part of its gross proceeds of sales under §12-36-90. Id. at 17. The ALC noted the Department's concessions that no imposition statute referenced insurance policies and that the policies are not tangible personal property. Id. Applying the plain meaning rule, the ALC concluded that no imposition statute imposed a tax on indemnification coverage proceeds, and, thus, they were not subject to sales tax. Id. at 18.

S.C. Code Regs. §117-308 also confirms that sales tax is a transactional tax. It provides that "[t]he 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)." See also S.C. Code Regs. §117-308.1- 308.16 (listing numerous services not subject to sales and use tax, including veterinarians, optometrists and beauty and barber shops). The regulation also notes that "several businesses, in addition to selling nontaxable services, also sell tangible personal property and should be licensed to report the tax." S.C. Code Regs. §117-308. Such retailers would only owe sales tax on transactions involving sales of tangible personal property and not on the "nontaxable

services" or intangibles.[4] These regulations clearly recognize that retailers, which both veterinarians selling pet supplies, an optometrist selling glasses and a beauty or barber shop selling hair care products would be, are not subject to sales tax on all sales but rather only on sales of tangible personal property. Such a regulation would not be lawful if the imposition statute imposed sales tax on everything sold by a person "engaged . . . in the business of selling tangible personal property at retail." Home Medical Systems, Inc. v. S.C. Dept. of Rev., 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) (citations omitted)(stating that "[r]egulations authorized by the Legislature have the force of law. . . . Nonetheless, a regulation may not alter or add to a statute.").

In addition, it is widely accepted that sales tax is a transactional tax. See e.g. J. Hellerstein & W. Hellerstein, State Taxation, 3d ed. at §12.01 (2000) (citing R. Haig & C. Shoup, The Sales Tax in the American States 3 (1934))(discussing definition of sales tax as "any tax which includes within its scope all business sales of tangible personal property at either the retailing, wholesaling, or manufacturing stage with the exceptions noted in the taxing law;" describing the retail sales tax as "a single-stage levy on consumer expenditures;" and noting that state sales taxes are "collected from the purchaser by the seller and are collected on a *transaction-by-transaction basis*.") (emphasis added); Tronco's Catering, Inc. v. S.C. Dept. of Rev., 09-ALJ-17-0089-CC at p. 8 (Admin. Law Ct. April 12, 2010) (stating that "[s]ales tax under § 12-36-90 is a transactional tax . . . that

[4] Numerous regulations provide that certain charges for labor are not taxable even though sold with tangible personal property. S.C. Code Ann. Regs. §117-313.3 (installation charges); §117-306 (repair charges); §117-313.4 (alteration charges); §117-318.2 (interest charges on seller financing). These would be invalid if the imposition statute imposed sales tax on retailers for all transactions. Home Medical, 382 S.C. at 564, 677 S.E.2d at 587.

must be determined on a transaction-by-transaction basis. In order to derive the correct and appropriate tax base, each transaction must be analyzed separately and the type of transaction specifically identified.").

Moreover, despite the Department's arguments to the contrary, its long-standing policy is that sales tax is a transactional tax. Its Sales and Use Tax Manual from 2015 states that "[i]n addition to *applying to the sale or use of tangible personal property* (*e.g.*, furniture, clothing, computers, etc.), the sales and use taxes also apply to" and then it lists the services enumerated in the imposition statute. S.C. Dept. of Rev. Sales and Use Tax Manual (2015).[5] The current edition of the manual also confirms that sales tax is a "'transaction tax' imposed with respect to the transaction of a 'retail sale' of tangible personal property." S.C. Dept. of Rev. Sales and Use Tax Manual at Chapter 2, p. 1 (2018). Furthermore, the Department's manager of policy correctly testified at trial that ". . . the way the Department looks at it is, sales tax is a transactional tax." Tr., R. at p. 271:23-25.

The above shows that the imposition statute applies to transactions and not persons. This is particularly true where, as here, the imposition statute must be construed in favor of the taxpayer and against imposition of the tax due to the ambiguous nature of the imposition statute. See supra §I(B). The imposition statute is certainly "reasonably susceptible" to the interpretation that it only covers sales of tangible personal property and certain services as this is the exact conclusion reached by the Alltel court. Alltel, 2015 WL

---

[5] The Department's Sales and Use Tax Manual is published by its Policy Section in the Office of General Counsel, and the 2015 edition was available on the Department's website at www.dor.sc.gov at the time this appeal began and is cited in Rent-A-Center's Final Reply Brief. Although the 2018 version appears to be the only edition currently available on the website, it contains similar language at Chap. 7, p. 1.

7681302. Furthermore, no South Carolina statute identifies the sale of anything similar to a Waiver as taxable. S.C. Code Ann. §12-36-910; Tr., R. p. 292:17-24. In fact, the Department admits that Waivers are not taxable on their own, underscoring that the imposition statute does not cover them. Tr., R. pp. 294:19- 295:2.

Based on the above, this Court should grant Rent-A-Center's Petition for Writ of Certiorari and reverse the Court of Appeals' decision because it erred in finding that the imposition statute imposes a tax on persons and not transactions and in finding that the imposition statute imposes a tax on Waivers and because such issues are novel and warrant this Court's consideration.

III. THE COURT OF APPEALS ERRED IN REACHING THE "MEASURE OF TAX" STATUTE WHEN NO IMPOSITION STATUTE WAS INVOKED, AND, EVEN IF PROPERLY REACHED, IN FINDING THE WAIVER PROCEEDS PART OF APPELLANTS' "GROSS PROCEEDS OF SALE."

The Court of Appeals erred in reaching the "measure of tax" when no imposition statute was invoked, and, even if properly reached, in finding the Waiver proceeds part of Appellants' "gross proceeds of sale." Op., App. pp. 35-36. It found that the ALC could rely on the "measure of tax" statute because it found substantial evidence supported the ALC's finding that "the Waivers were merely incidental to the Rental Agreements" or were "inextricably linked." Id. at p. 35. It did not address Rent-A-Center's argument that a "measure of tax" statute cannot be reached unless an imposition statute is invoked, possibly because the Court of Appeals found (incorrectly) that S.C. Code Ann. §12-36-910 imposes a sales tax on persons not transactions or because it found (incorrectly) that the transaction was bundled and subject to sales tax under the true object test. Rent-A-Center agrees that the "measure of tax" statute can be reached if either an imposition statute imposes a tax or

the transaction is bundled and the true object of the sale is the purchase of tangible personal property. However, because as discussed in sections II (no imposition statute) and IV (no bundled transaction), neither situations applies here, the Court of Appeals erred in reaching the "measure of tax" statute.

From a tax policy perspective, an imposition statute places a taxpayer on notice that a tax will be owed if he conducts certain activities, while a "measure of tax" statute tells the taxpayer the amount of tax he will owe. Tr., R. p. 223:6-22. As stated by Appellants' tax policy expert and as reflected in the relevant case law, one must "pass through the first statute [the imposition statute] before you get to the second [the "measure of tax" statute], because the second is irrelevant if you are not subject to the imposition in the first place. So assuming that you pass through the first statute, you get to the second one, and now we go ahead and calculate the gross proceeds of sales, and that's what you will pay your tax on the basis of." Id. at 223:22- 224:7. If you do not have an imposition statute, then that is "the end of the game. You don't ever get to [the "measure of tax" statute], because there is no sales tax in play." Id. at 229:12-15; Alltel, 2015 WL 7681302, slip op. at pp. 18-20 (rejecting the Department's argument that sales proceeds from optional indemnification contracts sold with wireless phones were subject to sales tax as "value proceeding or accruing from the sale of tangible personal property" under the "measure of tax" statute where no imposition statute imposed such a tax). Because no imposition statute applies in this case (see supra §II), the "measure of tax" statute (§12-36-90) is never reached and cannot be used to justify imposing a sales tax on the Waiver proceeds.[6]

---

[6] See also Brock Serv., LLC v. Ala. Dept. of Rev., No. S. 14-1236, slip op. at pp. 3-10 (Ala. Tax Tribunal Sept. 28, 2015) (labor services provided with rental of scaffolding were not

Furthermore, even if the Court of Appeals properly reached the "measure of tax" statute, it erred in finding the Waiver proceeds to be a part of Appellants' "gross proceeds of sale." South Carolina law defines "gross proceeds of sales" as "the value proceeding or accruing from sales and leases or rental of tangible personal property." S.C. Code Ann. §12-36-90. Proceeds from the rental of property under a Rental Agreement are clearly "a value proceeding or accruing from" the sale/rental of tangible personal property. On the other hand, Waiver proceeds are "a value proceeding or accruing from" the sale of Waivers, which provide customers via separate, optional agreements and for a separate itemized charge, with the option to avoid certain risks of loss of the property rented. Tr., R. pp. 171:4-10 and 178:2-12; and Alltel, 2015 WL 7681302, slip op. at p. 17-19 (finding proceeds from the sale of indemnification coverage did not proceed or accrue from sale of tangible personal property as such coverage was not tangible personal property).[7]

---

subject to sales tax under the imposition statute (which mirrors South Carolina's statute) and tax could not be imposed under "measure of tax" statute (which also mirrors South Carolina's statute)); Rent-A-Center West, Inc. v. Utah State Tax Comm'n, 367 P.3d 989, 991-994 and n. 1 (Utah 2016) (same Waivers at issue here were not subject to sales tax because, *inter alia,* they were not "an amount paid or charged for leases or rentals of tangible personal property" as Utah imposition statute required and whether the fees could be encompassed within the definition of "purchase price" or "sales price" in the definitions statute was irrelevant because no imposition statute imposed tax); Ltr Ruling No. CL 2290, 2000 Mo. Tax Ltr. Rul. LEXIS 37 (Mo. Dep't Rev. May 18, 2000) (sale of optional damage waiver protection for a separately stated price was not taxable as it was not the sale of tangible personal property nor was it listed as a taxable service under the relevant statutes); Ky Dept. of Rev. v. Rent-A-Center East, Inc. and Rent-Way, Inc., Op. no. 16-CI-1075 (Ky. Cir. Ct. Sept. 11, 2017), appeal filed, October 10, 2017 (sales of same waivers at issue here were not subject to tax under imposition statute, which must be narrowly construed). But see Rent-A-Center East v. Lincoln Par. Sales & Use Tax Comm'n, 60 So.3d 95 (La. App. 2 Cir. 2011), writ denied, 63 So.3d 985 (2011) (finding same waivers at issue here taxable).

[7] The ALC's conclusion that Waiver proceeds proceeded or accrued from the sale of tangible personal property also appears to be based on a mistaken belief that the value of the rented property is enhanced by the Waiver. Order, R. p. 8. This erroneously shifts the

Accordingly, Rent-A-Center requests that the Court grant the Petition for Writ of Certiorari and reverse the Court of Appeals because it improperly relied upon the "measure of tax" statute prior to invoking an imposition statute and because it erred in finding the Waiver proceeds to be "gross proceeds." As no court other than a single ALC decision has addressed these issues, they are novel issues that warrant this Court's consideration.

IV. THE COURT OF APPEALS ERRED BY MISAPPLYING THE TRUE OBJECT TEST, WHICH LED IT TO INCORRECTLY CONCLUDE THAT SUBSTANTIAL EVIDENCE SUPPORTED THE ALC'S FINDING THAT THE WAIVER AND THE RENTAL AGREEMENT WERE INEXTRICABLY LINKED.

The Court of Appeals erred by misapplying the true object test, which led it to incorrectly conclude that substantial evidence supported the ALC's finding that the Waiver and the Rental Agreement were inextricably linked. The Court of Appeals acknowledged that evidence could "support a finding that the Waivers were separate and distinct from the Rental Agreements" and thus not inextricably linked or fundamentally interconnected, including evidence that the Waivers were optional and could be canceled at any time without canceling the Rental Agreement, the Waiver fee was itemized on the customer's receipt and payment of the Waiver fee did not count toward the purchase of rental property. Op., App. p. 8. However, the Court of Appeals concluded that substantial evidence also supported the ALC's finding that the Waivers were not separate and distinct from the Rental Agreement, and, thus, it stated that it would not substitute its judgment for that of

---

focus from the value that accrues to the seller (the "gross proceeds" from the customer) to the value received by the customer. As the Department's manager of tax policy agreed, the relevant value is the value received by the seller. Tr., R. pp. 301:21-25 and 302:17-22. Also, the rented property's value does not change when a Waiver is purchased. A television valued at $500 is still worth $500 after a Waiver is purchased. Tr., R. pp. 232:11- 234:20.

the ALC. Op., App. pp. 8-9. The Court of Appeals' conclusion on this issue is premised on a misunderstanding or misapplication of the true object test and when it should be applied.

Courts use the "true object" test to determine the true object of a bundled transaction, i.e. whether it is a sale of taxable tangible personal property or a sale of a non-taxable service or intangible. See Tr., R. pp. 234:24- 235:9 (testimony of Appellants' tax policy expert explaining that where you have one combined or integrated transaction with two elements such that a bundled transaction exists, the true object test seeks to determine "which elements are going to dominate and control how we characterize the [integrated] transaction"). See also Boggero v. S.C. Dept. of Rev., 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015); Southeast Cinema Entertainment v. S.C. Dept. of Rev., 2014 WL 2417715 (S.C. Admin. Law Ct. 2014) (rev'd and remanded on other grounds by 2015 WL 9393942 (Dec. 23, 2015)); Keith Purdy, d/b/a A Southern Bartender v. S.C. Dept. of Rev., Docket No. 17-ALJ-17-0002-CC (April 26, 2018), appeal filed July 5, 2018.

Thus, the first question is whether a bundled transaction exists such that the true object test need be applied. S.C. Rev. Ruling #06-08 defines a bundled transaction as "a transaction consisting of distinct and identifiable properties or services, which are sold for one nonitemized price but which are treated differently for [sales and use] tax purposes." It further states: "the portion of the price attributable to any nontaxable property or service is subject to tax unless the provider can reasonably identify that portion from its books and records kept in the regular course of business for purposes other than sales taxes."

South Carolina courts have applied the true object test on several occasions. In Boggero, for example, the Court of Appeals applied it to a taxpayer who both rented and serviced portable toilets. 414 S.C. 277, 777 S.E.2d 842. The evidence at trial showed that

servicing toilets was not optional but was included with the rental of the toilets; invoices were not clearly itemized as to the amounts charged for the rental of the toilets (tangible personal property) versus the service of waste removal, including many invoices that simply charged a single flat fee; and the taxpayer charged more for toilets with more amenities. Id., 414 S.C. at 286-87, 777 S.E.2d at 846-47. The Court found substantial evidence existed that the true object of the transaction was the rental of toilets and implicitly found that the rental and service transactions were bundled and could not be easily separated. Id., 414 S.C. at 286-87, 777 S.E.2d at 846-48.

In Southeast Cinema, the ALC examined a sale involving an IMAX theater and its trademark licenses. 2014 WL 2417715, slip op. at pp. 2 and 5-6. It found the entire gross proceeds subject to sales tax because the purchase agreement covering both the theater and the trademark did not itemize the cost of the two items (in fact, it stated that the purchase price was for the theater), and the theater could not be used without the trademark license such that the trademark was "inextricably connected to" the purchase of the theater. Id.

Most recently, the ALC applied the true object test to a business selling bartending services and alcohol. A Southern Bartender, Docket No. 17-ALJ-17-0002-CC, slip. op. at pp. 8-9. The court held that where the bartending services were a separate line item on the invoice, these services were "separable from the provision of alcohol and/or other tangible goods, and thus, do not represent the retail sale of tangible personal property." Id. at p. 9. On the other hand, where bartending services and beverages were provided on a non-itemized, per person fee basis, the bartending services were merely incidental to (and

presumably not separable from) the sale of tangible personal property. Id. at p. 8.[8]

At trial, Rent-A-Center's tax policy expert's engraved trophy example illustrated how to analyze whether a bundled transaction exists. (Tr., R. pp. 249:9- 250:24 and 255:23-256:25). He explained that once the trophy is assembled and engraved, it has been altered or improved such that assembly and engraving are no longer optional if one is going to purchase that trophy. The engraving has been physically incorporated into the trophy and thus is inextricably linked thereto such that the sale of the trophy and the assembly/engraving services constitutes a bundled transaction.

The ALC in this case found that the Rental Agreement and Waiver were inextricably linked (and thus a bundled transaction) based on two purported facts: (1) a single agreement exists, and (2) after the Waiver is purchased, "it is merged into and becomes inextricable from the transaction and has no value apart from the underlying transaction." Order, R. p. 7. The ALC's finding that the Waiver "merges into and becomes inextricable from [the Rental Agreement]" does not appear to be based on any additional facts beyond that it found a single agreement (which is not determinative) and its erroneous belief that the Waiver "has no value apart from the underlying transaction." Id. This latter finding regarding value is not supported by any evidence in the record and instead is contradicted by all evidence pertaining to the Waivers' continuing separate existence and

---

[8] While an earlier ALC decision reached what might appear to be an inconsistent result, that case is distinguishable. See Appellants' Pet. for Reh'g., App. p. 32, n. 12 (discussing Tronco's Catering, Inc. v. S.C. Dept. of Rev., 09-ALJ-17-0089-CC at pp. 4-9 (S.C. Admin. Law Ct. April 12, 2010)). See also Ky Dept. of Rev. v. Rent-A-Center East, Inc. and Rent-Way, Inc., Op. no. 16-CI-1075 (Ky. Cir. Ct. Sept. 11, 2017) at pp. 5-6, appeal filed, October 10, 2017 (holding Rent-A-Center's optional Waivers were not inextricably linked to Rental Agreements and thus not taxable).

value, and thus, is clearly erroneous for all of the reasons set forth in prior briefing. Rent-A-Center's Final Brief, App. pp. 67-68. The Court of Appeals does not mention this purported fact in its opinion and does not appear to have considered it as part of the substantial evidence supporting the ALC. Instead, it mentions that the Waiver is part of the Rental Agreement (similar to the ALC) plus the following additional items: the Waiver and Rental Agreement fees are paid at the same time; the Waiver can only be enforced if all payments are made under the Rental Agreement; the Waiver fee is calculated as a fixed percentage of the term payment under the Rental Agreement; the customer must enter into a Rental Agreement to buy a Waiver; and Rent-A-Center does not offer Waivers to third parties. Op., App. p. 8.

While these facts show that the Waiver and Rental Agreement are related in certain ways, they do not rise to the level of substantial evidence that the transactions are so inextricably linked that they cannot be easily separated. "Substantial evidence is not a mere scintilla of evidence but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." Whitworth v. Window World, Inc., 377 S.C. 637, 640, 661 S.E.2d 333, 335 (2008).

First, S.C. Rev. Ruling #06-08 defines a bundled transaction as "a transaction consisting of distinct and identifiable properties or services, which are sold for one nonitemized price." That is not the case here as the Waiver fee is separately itemized. Tr., R. pp. 168:17- 169:8; Sample Receipt, R. pp. 346-347. Moreover, even if this is not determinative, the other factors referenced by South Carolina courts (in addition to a non-itemized price, which is present in Boggero, Southeast Cinema and Southern Bartender) that have expressly or implicitly found an inextricable link are not present here. The

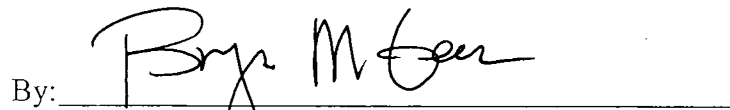
intangible Waiver is optional, not mandatory (unlike the services in Boggero and the intangible in Southeast Cinema); the taxable rental items can be used without the non-taxable Waiver (unlike the theater in Southeast Cinema which could not be used without the trademark); the Waiver does not alter or improve the rented item (like the trophy engraving example).

In sum, in Boggero, Southeast Cinema, Southern Bartender and the trophy example, strong evidence of a fundamental interconnection or inextricable link exists such that it is difficult to break apart the two transactions and determine the appropriate value of each (which, as S.C. Rev. Ruling #06-08 makes clear, is what a bundled transaction is). None of the factors that supported an inextricable link in those cases is present here. The cost of the Waivers is itemized, the Waivers are optional, the rental item can be used without the Waiver and the Waiver does not become incorporated into the rental item. Accordingly, this Court should grant the Petition for Writ of Certiorari and reverse the Court of Appeals' decision that the Rental Agreement and Waiver are inextricably linked as that conclusion is based on a misapplication of the law and/or is not supported by substantial evidence, and this is a novel issue that warrants consideration by this Court due to the Court of Appeals' finding an inextricable link when none of the factors identified as supporting such a finding in lower court decisions are present here.

CONCLUSION

Based on the above, Rent-A-Center respectfully requests that this Court grant this Petition for Writ of Certiorari to review the Court of Appeals' decision because there are "special and important reasons" under SCACR 242, including several novel issues and that the decision of the Court of Appeals conflicts with prior decisions of this Court.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Bryson M. Geer
SC Bar No. 13606
E-Mail: bryson.geer@nelsonmullins.com
John C. von Lehe, Jr.
SC Bar No. 5719
E-Mail: john.vonlehe@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Rent-A-Center East, Inc. and Rent Way, Inc.

Charleston, South Carolina
April 22, 2019

RECEIVED
APR 22 2019
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Judge, Circuit Court Judge

---

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

South Carolina Department of Revenue, ... Respondent,

v.

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

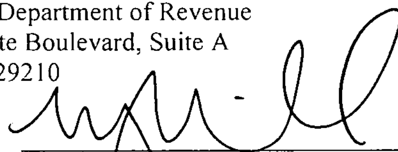
PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Rent-A-Center East, Inc. and Rent Way, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by hand delivery, to the following address(es):

Pleadings: Rent-A-Center East, Inc. and Rent Way, Inc.'s Petition for Writ of Certiorari and Appendix

Counsel Served: Lauren Acquaviva
Sean G. Ryan

South Carolina Department of Revenue
300 Outlet Pointe Boulevard, Suite A
Columbia, SC 29210



Grace Hamill
Administrative Assistant

April 22, 2019