

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APR 22 2019

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S.C. SUPREME 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.

APPENDIX
VOLUME I of III

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

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

Attorneys for Respondent

Attorneys for Petitioners

INDEX OF APPENDIX

APPENDIX VOLUME I

Decision of the Court of Appeals, op. No. 5615

(S.C. Ct. App. Filed January 16, 2019).....	APP 1
Order Denying Petition for Rehearing.....	APP 11
Petition for Rehearing.....	APP 12
Final Brief of Appellant.....	APP 38
Final Brief of Respondent.....	APP 83
Final Reply Brief of Appellant	APP 130

APPENDIX VOLUME II

Record on Appeal Volume I

Final Order and Decision dated March 30, 2016.....	ROA 1
Order Denying Motion for Reconsideration dated May 5, 2016	ROA 12
RAC East's Protest dated July 30, 2012.....	ROA 16
Rent Way's Protest dated July 30, 2012	ROA 21
Petitioners' Motion for Reconsideration under ALC Rule 29(D) and/or to Alter or Amend under SCRCP 59(E) and Memorandum Supporting Same filed April 12, 2016	ROA 25
Respondent's Response in Opposition to Petitioner's Motion for Reconsideration dated April 21, 2016.....	ROA 54
Petitioners' Reply in Support of Motion for Reconsideration filed April 28, 2016	ROA 73
Hearing Transcript dated September 24 and September 25, 2015.....	ROA 86
Pre-Trial Motions.....	ROA 89
Testimony of Hugh L. Tollack, II, CPA	
Direct Examination by Ms. Geer, Counsel for RAC East and Rent Way	ROA 151

Cross Examination by Ms. Acquaviva, Counsel for SCDOR	ROA 178
Redirect Examination by Ms. Geer, Counsel for RAC East and Rent Way	ROA 201
Testimony of Professor Richard Pomp	
Direct Examination by Mr. von Lehe, Counsel for RAC East and Rent Way	ROA 203
Cross Examination by Mr. Ryan, Counsel for SCDOR.....	ROA 245
Redirect Examination by Mr. von Lehe, Counsel for RAC East and Rent Way	ROA 255
Testimony of John McCormack	
Direct Examination by Ms. Acquaviva, Counsel for SCDOR.....	ROA 265
Cross Examination by Ms. Geer, Counsel for RAC East and Rent Way	ROA 283
Redirect Examination by Ms. Acquaviva, Counsel for SCDOR.....	ROA 328
Testimony of Professor Richard Pomp	
Direct Examination by Mr. von Lehe, Counsel for RAC East and Rent Way	ROA 331
Consumer Rental-Purchase Agreement (blank) (RAC East and Rent Way Ex. 1)	ROA 342
Sample Consumer Rental-Purchase Agreement (RAC East and Rent Way Ex. 2).....	ROA 343
Optional Liability Waiver Provision (RAC East and Rent Way Ex. 3)	ROA 344
Sample Receipt (RAC East and Rent Way Ex.4)	ROA 346
Waiver Policy Statement (RAC East and Rent Way Ex. 5)	ROA 348
SCDOR Audit Report for RAC East dated April 30, 2012 (RAC East Ex. 6)	ROA 349
SCDOR Audit Report for Rent Way dated April 30, 2012 (Rent Way Ex. 6)	ROA 375
Department Determination for RAC East dated November 18, 2013 (RAC East Ex. 7) ...	ROA 398
Department Determination for Rent Way dated November 18, 2013 (Rent Way Ex. 7) ...	ROA 408

APPENDIX VOLUME III

Record on Appeal Volume II

SCDOR Audit File for RAC East (RAC East Ex. 8).....	ROA 418
SCDOR Audit File for Rent Way (Rent Way Ex. 8).....	ROA 620
CV of Professor Richard Pomp (RAC East and Rent Way Ex. 10)	ROA 780
House Bill 3700, Part IB, Section 90, Provisio 90.21 (Act No. 73) (RAC East and Rent Way Ex. 9).....	ROA 795
Petitioners' Proposed Order	ROA 798
SCDOR's Proposed Order.....	ROA 821
February 16, 2016 letter from Rent-A-Center counsel to Judge Funderburk in response to SCDOR's Proposed Order	ROA 840
February 16, 2016 letter from SCDOR counsel to Judge Funderburk forwarding Respondent's Response to Petitioners' Proposed Order	ROA 844
February 17, 2016 letter from Rent-A-Center counsel to Judge Funderburk responding to SCDOR's February 16, 2016 letter and response	ROA 845
February 18, 2016 letter from SCDOR counsel to Judge Funderburk in response to Petitioners' February 17, 2016 letter.....	ROA 848
May 31, 2016 letter to SCDOR enclosing \$919,585.55 check for payment of RAC East and Rent Way's taxes and interest through June 1, 2016.....	ROA 849
Certificate of Counsel	ROA 850

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2016-001210

Appeal From The Administrative Law Court
Harold W. Funderburk, Jr., Administrative Law Judge

Published Opinion No. 5615
Submitted October 2, 2018 – Filed January 16, 2019

AFFIRMED

John C. Von Lehe, Jr. and Bryson Moore Geer, both of
Nelson Mullins Riley & Scarborough, LLP, of
Charleston, for Appellants.

Lauren Acquaviva and Sean Gordon Ryan, both of
Columbia, for Respondent.

THOMAS, J.: Rent-A-Center East, Inc. and Rent Way, Inc. (collectively, Taxpayers) appeal the decision of the Administrative Law Court (ALC) finding the gross proceeds from Taxpayers' rental of tangible personal property included fees from the sale of "Optional Liability Waiver Provisions" (Waivers). On appeal, Taxpayers argue the ALC erred in (1) failing to apply the appropriate rules of statutory construction to the applicable taxing statutes; (2) finding the Waivers were taxable when no imposition statute imposes a tax on waivers; (3) relying on

the measure of tax statute when no imposition statute was invoked; (4) finding the Waiver proceeds were part of Taxpayers' gross proceeds of sale; (5) failing to determine whether the intangible Waivers were subject to sales tax; and (6) finding the "Consumer Rental-Purchase Agreements" (Rental Agreements) and Waivers constituted a single agreement or transaction. We affirm.

FACTS/PROCEDURAL HISTORY

Taxpayers operate retail stores in South Carolina from which customers can rent-to-own durable consumer goods such as televisions, computers, appliances, and furniture. A customer who rented goods from Taxpayers was required to enter into a Rental Agreement. Under the Rental Agreement, the customer chose a weekly, monthly, or semi-monthly rental term and made rental payments accordingly. A customer could acquire ownership of a rental item by making all term payments for a specified number of rental terms. The customer could also unilaterally terminate the Rental Agreement at any time by returning the rental property and paying any overdue fees. The Rental Agreement contained a "Risk of Loss and Damages" section which provided the customer was responsible for the fair market value of the rental property if it was lost, stolen, damaged, or destroyed.

Taxpayers also offered customers a Waiver. The Waiver gave the customer the option to pay an additional fee along with the rental term payment—weekly, monthly, or semi-monthly. If a customer chose to pay the Waiver fee, Taxpayers would waive the customer's liability for the value of the rental property in the event of certain enumerated conditions: lightning, fire, smoke, windstorm, theft, or flood. The Waiver provided 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" Either the customer or Taxpayers could terminate the Waiver at any time without notice; the termination became effective at the end of the rental term. The Waiver further stated it was "an additional part of the Rental Agreement."

The South Carolina Department of Revenue (the Department) audited Rent-A-Center East, Inc.'s sales tax returns for the period April 1, 2007 through October 31, 2010; the Department audited Rent Way, Inc. for the period April 1, 2007 through October 31, 2009.¹ The audits showed Taxpayers properly paid sales

¹ Rent Way, Inc. merged into Rent-A-Center East, Inc. on December 31, 2009.

taxes on proceeds from the Rental Agreements. However, Taxpayers did not pay sales taxes on proceeds from the Waivers. The Department determined Rent-A-Center East, Inc. owed \$521,694.93 plus interest; Rent Way, Inc. owed \$192,158.64 plus interest. Taxpayers submitted payment in the amount of \$919,585.55 for all taxes and interest owed and timely requested a contested hearing before the ALC.

After a hearing, the ALC found the Rental Agreements and Waivers were "fundamentally interconnected" because the Waivers were described as "provisions" of the Rental Agreements, the Waivers could not be entered into independently of the Rental Agreements, and the Waiver fees were calculated based on the term payment of the Rental Agreements. The ALC went on to find the true object of the transaction was "to obtain the use of an item while minimizing the financial risk of its damage, loss, or destruction." The ALC concluded the Waivers were subject to sales tax and ordered Taxpayers to remit payment of \$851,622.31 plus accrued interest to the Department.² This appeal followed.

STANDARD OF REVIEW

This court's standard of review is set forth in section 1-23-610(B) of the South Carolina Code (Supp. 2018), which provides:

The review of the [ALC]'s order must be confined to the record. The court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact. The court . . . 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;

² The audit report originally included penalties, but they were later dropped and are not at issue.

- (c) affected by other error of law;
- (d) 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.

APPLICATION OF TAXING STATUTES

Taxpayers argue the ALC failed to apply the appropriate rules of statutory construction to the tax statutes at issue. Taxpayers assert the ALC failed to apply the plain meaning rule because it failed to identify an imposition statute that imposes a tax on the Waivers and instead looked to the "gross proceeds" language in the measure of tax statute. We disagree.

"Questions of statutory interpretation are questions of law, which [the appellate c]ourt is free to decide without any deference to the [ALC]." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). "The language of a tax statute must be given its plain and ordinary meaning in the absence of an ambiguity therein." *Id.* "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.*

"[A]ny substantial doubt in the application of a tax statute must be resolved in favor of the taxpayer." *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 318, 731 S.E.2d 869, 872 (2012); *see also Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 76, 188 S.E. 508, 509–510 (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."). "The 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." *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987).

"A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this [s]tate in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-910(A) (Supp. 2018).

"Tangible 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 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 and does not include stocks, notes, bonds, mortgages, or other evidences of debt.

S.C. Code Ann. § 12-36-60 (Supp. 2018).

"Gross proceeds of sales, or any similar term, means the value proceeding or accruing from the sale, lease, or rental of tangible personal property." S.C. Code Ann. § 12-36-90 (Supp. 2018). Gross proceeds of sales includes proceeds from the sale of tangible personal property without deduction for certain costs, taxes, interest paid, and losses. *Id.*

We find the ALC did not err as a matter of law in its interpretation and application of sections 12-36-910(A) and 12-36-90. *See Duke Energy*, 415 S.C. at 355, 782 S.E.2d at 592 ("Questions of statutory interpretation are questions of law, which [the appellate c]ourt is free to decide without any deference to the [ALC]."). Looking to the plain and ordinary meaning of the language in section 12-36-910(A), we believe the statute imposes a tax on all persons engaged in the business of selling tangible personal property at retail. *Id.* ("The language of a tax statute must be given its plain and ordinary meaning in the absence of an ambiguity therein."); *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute."). This court has previously stated the section levies a sales tax on persons; thus, we find Taxpayers' argument that the section applies instead to transactions and certain enumerated services unpersuasive. *See Meyers Arnold, Inc. v. S.C. Tax Comm'n*, 285 S.C. 303, 307, 328 S.E.2d 920, 923 (Ct. App. 1985) ("The sales tax is

imposed under [s]ection [12-36-910]³ 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." (emphasis added)). The Department also adopts this interpretation of section 12-36-910(A) and has previously applied the statute to impose sales taxes on the sale of collision damage waivers on car rentals and maintenance contracts. *See Dunton*, 291 S.C. at 223, 353 S.E.2d at 133 ("The 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."). Section 12-36-910(A) therefore applies to Taxpayers, and the ALC did not err in its application of the plain meaning rule.

Taxpayers next argue the ALC erred in failing to construe section 12-36-910(A) in their favor and against the imposition of a sales tax. However, because the statute is unambiguous, the ALC was in no position to apply rules of statutory interpretation. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning."). Thus, there was no ambiguity in the statute to construe in Taxpayers' favor. *See Cooper River Bridge*, 182 S.C. at 76, 188 S.E. at 509–510 ("[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.").

Taxpayers further argue the ALC erred in relying on section 12-36-90, the measure of tax statute, because no imposition statute imposes a sales tax on the Waivers. As the parties agree, sections 12-36-910(A) and 12-36-90 must be read sequentially. Section 12-36-910(A) imposes a sales tax of five percent on the "gross proceeds" of all *persons* engaged in the business of selling tangible personal property at retail. Section 12-36-90 then defines "gross proceeds" as "the value proceeding or accruing from" the sale or lease of tangible personal property. Because we find Taxpayers' argument that section 12-36-910(A) imposes a sales tax on certain enumerated transaction types rather than persons unavailing, we also find the ALC did not err in reaching section 12-36-90 in determining whether the proceeds from Taxpayers' sale of Waivers constituted "gross proceeds" within the scope of section 12-36-910(A).

³ Section 12-36-910 was previously codified as section 12-35-510 of the South Carolina Code (2014).

THE TRUE OBJECT TEST

Taxpayers argue the ALC erred in determining the Rental Agreement and Waiver constituted a single agreement under the true object test. We disagree.

In *Boggero v. S.C. Dep't of Revenue*, this court considered whether the gross proceeds of a business were taxable as the rental of portable toilets or non-taxable as the service of waste removal. 414 S.C. 277, 280–88, 777 S.E.2d 842, 842–47 (Ct. App. 2015). This court found the appeal of the ALC's application of the true object test was a mixed question of law and fact and therefore limited its analysis to whether substantial evidence supported the ALC's determination that the true object of the taxpayer's business was the rental of portable toilets. *Id.* at 284–86, 777 S.E.2d at 845–46. We similarly limit our review of the ALC's finding that the Waivers and Rental Agreements were "fundamentally interconnected" as a bundled transaction to the substantial evidence standard set forth in section 1-23-610(B).

"[T]he true object test focuses on factual questions; namely, whether the customer's purpose for entering the transaction was to procure a good or a service." *Boggero*, 414 S.C. at 285, 777 S.E.2d at 846. "According to the 'true object test[,] sales which are merely incidental to the transaction and not its true object are not exempt from the retail sales tax." *Fraternal Order of Police v. S.C. Dep't of Revenue*, 332 S.C. 496, 501 n.2, 506 S.E.2d 495, 497 n.2 (1998).

In *Rent-A-Center East, Inc. v. Lincoln Parish Sales & Use Tax Comm'n*, a Louisiana appellate court addressed an identical issue to the case at bar. 60 So.3d 95, 96–99 (La. App. 2 Cir. 3/9/11). The pertinent language in the Louisiana sales tax statutes imposed a two percent tax on "the gross proceeds derived from the lease or rental of tangible personal property." *Id.* at 98 (quoting LSA–R.S. 47:302). The Louisiana appellate court applied the "real object" test and found the proceeds from the sale of waivers were subject to sales tax because the waivers were merely incidental to the lease of tangible personal property. *Id.* at 98–99.

Louisiana appellate courts have also addressed the analogous issue of whether liability damage waivers sold in connection with the rental of motor vehicles were sales taxable. *Enter. Leasing Co. of New Orleans v. Curtis*, 977 So.2d 975, 976–81 (La. App. 1 Cir. 11/2/07). Therein, the taxpayer was in the business of renting motor vehicles and offered an optional damage waiver which reduced a customer's liability for certain incidents. *Id.* at 976–78. On appeal, the taxpayer argued the waivers were not subject to sales tax because they were optional and separately stated on the face of the rental contract. *Id.* at 979. The Louisiana court applied

the "real object" test and determined the "real object of the transaction [was] the lease of tangible personal property, a motor vehicle." *Id.* at 979–80. The court concluded the waivers were sales taxable because they were incidental to the rental contracts for the motor vehicles. *Id.* at 980–81.

We find these decisions instructive. Similar to the Louisiana statute imposing a sales tax on gross proceeds derived from sales or rentals, section 12-36-910(A) imposes a sales tax on "gross proceeds of sales" of tangible personal property. Moreover, both the "real object" test and our "true object" test focus on the customer's intent for entering a transaction with elements of both goods and services. *See Boggero*, 414 S.C. at 285, 777 S.E.2d at 846 ("[T]he true object test focuses on factual questions; namely, whether the customer's purpose for entering the transaction was to procure a good or a service.").

The evidence before the ALC showed the fee for the Waiver and the fee for the Rental Agreement were paid together during each rental term. The Waiver could only be enforced if all payments under the Rental Agreement were made. The Rental Agreement contained a line item for the Waiver fee. The Waiver fee was calculated as a fixed percentage of the term payment under the Rental Agreement. Customers could not purchase a Waiver without first entering a Rental Agreement, and Taxpayers did not offer Waivers for items sold by third parties. The Waiver also specifically stated it was "an additional part of the Rental Agreement"; although Taxpayers argued this language was included in the Waiver solely to reduce their liability under consumer protection laws, they failed to point to any specific law or policy of any state mandating the inclusion of such language. Therefore, substantial evidence in the record supported the finding that the sale of the Waiver was merely incidental to the Rental Agreement under the true object test. *See Fraternal Order of Police*, 332 S.C. at 501 n.2, 506 S.E.2d at 497 n.2 ("According to the 'true object test[,] sales which are merely incidental to the transaction and not its true object are not exempt from the retail sales tax.").

We acknowledge evidence could also support a finding that the Waivers were separate and distinct from the Rental Agreements. The Waivers were optional and could be cancelled at any time without cancelling a Rental Agreement. Taxpayers also separately listed the fee for the Rental Agreement and the fee for the Waiver on customers' receipts. Moreover, payment of the Waiver fee did not count toward the purchase of the rental property. Nonetheless, because this court "may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions on fact" and our review of the ALC's application of the true object test is limited to substantial evidence under *Boggero*, we affirm the ALC on

this issue. *See* § 1-23-610(B) (providing an appellate court may not substitute its judgment for that of the ALC as to the weight of evidence on questions of fact).

GROSS PROCEEDS

Taxpayers argue even if the ALC properly reached the measure of tax statute, it erred in finding the Waiver proceeds were gross proceeds of the sale of the Rental Agreements. We disagree.

In our view, because substantial evidence supports the ALC's finding that the Waivers were merely incidental to the Rental Agreements, the Waivers must also be subject to the sales tax as gross proceeds of the Rental Agreements. *See* § 12-36-910(A) ("A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this [s]tate in the business of selling tangible personal property at retail."); § 12-36-90 ("Gross proceeds of sales, or any similar term, means *the value proceeding or accruing from the sale, lease, or rental of tangible personal property.*" (emphasis added)). Put differently, because the Waivers and Rental Agreements were inextricably linked, the value proceeding from the Rental Agreements included the value Taxpayers received from the Waivers, and the Waivers are not exempt from the sales tax. *See Fraternal Order of Police*, 332 S.C. at 501 n.2, 506 S.E.2d at 497 n.2 ("According to the 'true object test[,] sales which are merely incidental to the transaction and not its true object are not exempt from the retail sales tax."); *see also Lincoln Parish*, 60 So.3d at 96–99 (finding identical waivers were subject to a sales tax statute imposing a tax on "the gross proceeds derived from the lease or rental of tangible personal property" because the waivers were inextricably linked to the rental agreements).

The ALC also addressed the holdings of *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011) and *Meyers Arnold*, 285 S.C. 303, 328 S.E.2d 920 to determine whether the Waivers were subject to a sales tax as the gross proceeds of the Rental Agreements. Taxpayers assert these cases are inapposite and the ALC erred in relying on them because each involved mandatory fees for services, whereas the Waivers were optional. The Department argues the cases are controlling. We address them in turn.

In *Meyers Arnold*, this court considered whether fees associated with both lay away sales and the sale of wrapping paper were sales taxable. 285 S.C. at 304–08, 328 S.E.2d at 921–23. With respect to the wrapping paper, this court concluded the fee was charged in connection with the quality of wrapping paper a customer

chose and thus was not for a service. *Id.* at 304–06, 328 S.E.2d at 921–22. Due to a specific exemption in the tax code for wrapping paper, the transaction was not sales taxable. *Id.* at 306–07, 325 S.E.2d at 922–23. The *Meyers Arnold* court also considered whether fixed, nonrefundable fees charged in connection with lay away sales were taxable as gross proceeds. *Id.* at 307, 325 S.E.2d at 923. In considering whether the lay away fees were gross proceeds of the sale of the tangible items, the court looked to the previous iteration of section 12-36-90 and defined gross proceeds of sales as "the value proceeding or accruing from the sale of tangible personal property . . . without any deduction for service cost." *Id.* The court then stated that the taxpayer would not earn the lay away fees "but for" the sales and concluded the fees were sales taxable. *Id.*

In *Travelscape*, our supreme court considered a similar issue of service fees. 391 S.C. at 95–103, 705 S.E.2d at 31–35. The taxpayer charged a service fee in connection with the booking of hotel rooms. *Id.* at 95, 705 S.E.2d at 31. In determining whether the service fees were gross proceeds of the booking of hotel rooms, the supreme court specifically defined gross proceeds as the value obtained without deduction for the cost of services. *Id.* at 98, 705 S.E.2d at 33. The court then concluded the fees were subject to sales tax as a cost of service. *Id.*

The ALC considered the facts of these cases and relied on them in two respects. First, the ALC reasoned the holding in *Travelscape* and the lay away fees issue in *Meyers Arnold* show mandatory costs associated with the sale of tangible goods may be sales taxable. Second, the ALC considered the wrapping paper issue in *Meyers Arnold* and concluded that merely being optional does not prevent one part of a transaction from being subject to sales tax. While we agree with Taxpayers that these cases are not directly analogous to the instant appeal because they involve attempts to deduct service fees, we find no error in the ALC's consideration of them in its final order.

CONCLUSION

Accordingly, the decision of the ALC is

AFFIRMED.⁴

LOCKEMY, C.J., and GEATHERS, J., concur.

⁴ We decide this case without oral argument pursuant to Rule 215, SCACR.

The South Carolina Court of Appeals

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

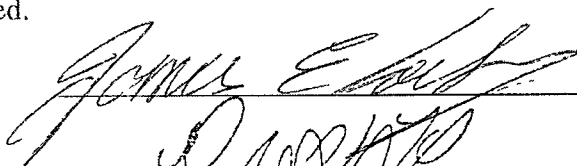
v.

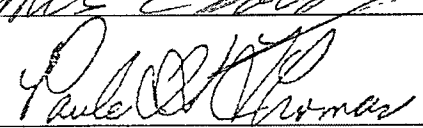
South Carolina Department of Revenue, Respondent.

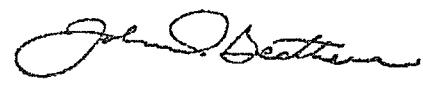
Appellate Case No. 2016-001210

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.


J.


J.

Columbia, South Carolina

FILED

cc:

Bryson Moore Geer, Esquire
John C. Von Lehe, Jr., Esquire
Sean Gordon Ryan, Esquire
Lauren Acquaviva, Esquire

March 31, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT COUNTY

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

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

Appellate Case No. 2016-001210

RECEIVED

FEB 19 2019

SC Court of Appeals

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

Appellants,

v.

South Carolina Department of Revenue,

Respondent.

APPELLANTS' PETITION FOR REHEARING

John C. von Lehe, Jr.
Bryson M. Geer
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Appellants

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Rent-A-Center East, Inc. (“RAC East”) and Rent Way, Inc. (Rent Way”) (collectively “Rent-A-Center”) hereby petition for rehearing of this Court’s Opinion in the above-captioned appeal. See Rent-A-Center East, Inc. and Rent Way, Inc. v. South Carolina Department of Revenue, Op. No. 5615 (S.C. Ct. App. filed January 16, 2019) (Shearouse Adv. Sh. No. 3 at 27) (“Op.”) The Court should grant rehearing and issue a revised opinion in favor of Rent-A-Center reversing the decision of the Administrative Law Court (“ALC”), which ruled in favor of the South Carolina Department of Revenue (the “Department”), based on the grounds set forth below.

INTRODUCTION

This Court held that proceeds from the sale of optional waivers (which negate the risk of certain covered events, including lightening, fire, smoke, windstorm, theft and flood occurring to property rented by the customer from Rent-A-Center)¹ (“Waivers”) sold by Rent-A-Center are subject to sales tax in South Carolina. In doing so, Rent-A-Center would respectfully submit that the Court overlooked, misunderstood or misapplied South Carolina law and/or the evidence in the record.

First, the Court overlooked, misunderstood or misapplied South Carolina law regarding the two statutory construction issues raised by Rent-A-Center by failing to: (a) construe the relevant statutes pursuant to their plain meaning; and (b) construe any ambiguities in the relevant statutes in favor of the taxpayer and against imposition of the tax. Op. at pp. 30-33.

In addition, the Court’s holding appears to have overlooked, misunderstood or misapplied the law in interpreting the sales tax imposition statute (S.C. Code Ann. §12-36-910) to tax **persons** and not **transactions**. Op. at pp. 31-32. This was not the basis of the ALC’s

¹ See Tr., R. pp. 157:12- 159:11 and 163:6-10; Waiver, R. pp. 344-345.

decision, which ignored the imposition statute and instead found the Waivers subject to sales tax under the “measure of tax” or gross proceeds statute (S.C. Code Ann. §12-36-90). See Order, R. pp. 4-8. This Court’s Opinion that persons and not transactions are subject to sales tax, if not altered, would mean that *all* transactions of retailers are subject to sales tax. For example, a hair salon that sells haircare products, and thus is a service provider as well as a retailer, would suddenly be faced with its hair cutting services being subject to sales tax. This is not consistent with the plain language of the statute, the related regulations, the relevant case law, the Department’s own policy manual and the trial testimony of its manager of policy. Rather, as the law and the Department’s past policies and practices in interpreting the law make clear, only specific transactions are subject to sales tax in South Carolina- sales of tangible personal property and certain enumerated services not relevant here. S.C. Code Ann. §12-36-910(A) and (B); S.C. Code Ann. Regs. §117-308.

Because the Court of Appeals, unlike the ALC, found that the imposition statute imposes a sales tax on Waivers, it determined that the ALC did not err in reaching the “measure of tax” statute. Op. at p. 6. Rent-A-Center agrees that if an imposition statute imposes a tax, then the “measure of tax” statute comes into play. However, the ALC did not find an imposition statute that applied to the Waivers, and Rent-A-Center respectfully submits that as previously stated, the Court of Appeals erred in finding to the contrary. Therefore, the “measure of tax” statute should not have been reached. Moreover, even if one could skip to the “measure of tax” statute, it only reaches proceeds that proceed or accrue from the sale of tangible personal property, and the proceeds from the sale of a Waiver proceed or accrue from the sale of an intangible.

Finally, the Court overlooked, misunderstood or misapplied South Carolina law and/or the evidence in the record in its application of the true object test to conclude that the sale of a Waiver is subject to sales tax. No substantial evidence supported the ALC's finding that the sale of a Waiver is inextricably linked to the Rental Agreement such that the true object test should be applied. Instead the evidence showed that the two transactions, while related, were not inextricably linked and could easily be separated and thus, the intangible Waivers should not be subject to sales tax.

In sum, rehearing is necessary in this matter because the Opinion does not comport with South Carolina law and because the ALC's conclusions are not supported by substantial evidence. Accordingly, the Court should issue a revised Opinion reversing the ALC's order.

LAW/ANALYSIS

I. THE COURT OF APPEALS OVERLOOKED, MISAPPLIED OR MISUNDERSTOOD SOUTH CAROLINA LAW AS TO TWO STATUTORY CONSTRUCTION ERRORS BY THE ALC.

The Court of Appeals overlooked, misapplied or misunderstood South Carolina law and/or the ALC's order in finding that (a) the plain meaning rule was either applied by the ALC or is irrelevant because the ALC reached the correct result; and (b) no ambiguity exists in the sales tax imposition statute and thus it need not be construed in favor of the taxpayer and against imposition of the tax.

First, as argued in Rent-A-Center's Final Brief in more detail, { TC "A. The ALC Erred in Failing to Apply the Plain Meaning Rule." \f C \l "2" }the ALC erred in failing to apply the plain meaning rule. In construing statutes, the court should start with the text 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){ TA

\l "Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)" \s "Hodges" \c 1 }; State v. Leopard, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct. App. 2002){ TA \l "State v. Leopard, 349 S.C. 467, 563 S.E.2d 342 (Ct. App. 2002)" \s "Leopard" \c 1 }; Rosmer v. Pfizer, 263 F.3d 263 (4th Cir. 2001){ TA \l "Rosmer v. Pfizer, 263 F.3d 263 (4th Cir. 2001)" \s "Rosmer" \c 1 }; Alltel{ TA \l "Alltel v. S.C. Dept. of Rev., 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015)" \s "Alltel" \c 1 } v. S.C. Dept. of Rev., 2015 WL 7681302, slip op. at pp. 17-20 (S.C. Admin. Law Ct. Nov. 13, 2015){ TA \s "Alltel" } (applying the plain meaning rule to the imposition statute to determine whether a taxpayer's indemnification coverage proceeds were subject to sales tax). While the Court of Appeals recognized that the plain meaning rule should be applied (Op. at p. 30), it appears to have concluded either that the ALC implicitly applied it or that it does not matter whether it applied it because the ALC reached the correct result. Op. at pp. 31-32. Moreover, the Court appears to have misunderstood or misapplied the plain meaning rule as its finding that the imposition statute imposes a tax on all persons and not on transactions is not supported by the plain meaning of the statute, particularly when read in conjunction with related statutes and regulations. See infra §II.

As discussed in more detail below, while the ALC failed to identify an imposition statute that imposes a tax on Waivers and relied instead on the "measure of tax" statute { TA \l "S.C. Code Ann. § 12-36-60" \s "12-36-60" \c 2 } as the basis for imposing sales tax on the Waivers,² the Court of Appeals found that the imposition statute "levies a sales tax on persons" and not on particular transactions. Op. at pp. 31-32. The ALC and Court of Appeals' failure to properly apply the plain meaning rule caused both courts to improperly construe the taxing

² See Order, R. pp. 4-8; Order Denying Mot. for Reconsideration, R. p. 13.

statutes at issue and to err in finding the Waivers subject to sales tax. See infra Section II for full discussion of the proper application of the plain meaning rule to the statutes at issue.

In addition, the Court of Appeals misunderstood or misapplied South Carolina law in determining that no ambiguity exists in the tax statutes at issue such that the ALC did not need to construe them in favor of the taxpayers and against imposition of the tax. { TC "B. The ALC Erred in Failing to Construe the Tax Statutes at Issue in Favor of the Taxpayers and Against SCDOR and Imposition of the Tax." \f C \l "2" } The 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 the tax (as opposed to an exemption statute, which is construed against the taxpayer claiming the exemption and in favor of the government); United States v. Merriam, 263 U.S. 179, 188 (1923){ TA \l "United States v. Merriam, 263 U.S. 179 (1923)" \s "Merriam" \c 1 } (citations omitted) (stating that 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"); Clark v. S.C. Tax Comm'n, 259 S.C. 161, 191 S.E.2d 23 (1972){ TA \l "Clark v. S.C. Tax Comm'n, 259 S.C. 161, 191 S.E.2d 23 (1972)" \s "Clark" \c 1 } (holding that "[r]evenue laws are generally construed in favor of the taxpayer and against the taxing authority"); see also Rent-A-Center's Final Brief at pp.11-12 (discussing the policy reasons underlying this rule, including due process of law, which require 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 Court of Appeals found that the taxing statutes at issue are not ambiguous, and, thus, the ALC should not have applied this rule of statutory construction. See Op. at pp. 32-

33. While Rent-A-Center contends that the taxing statutes at issue are unambiguous in the sense that they do not subject the Waivers to sales tax, the Department's arguments, which the ALC and the Court of Appeals appear to have adopted, create an ambiguity in the statute and thereby invoke this rule of statutory construction. The heading of the imposition statute states that the sale tax is "on tangible personal property" and certain enumerated items (see S.C. Code Ann. § 12-36-910{ TA \s "12-36-910" }), and the statutory definition of tangible personal property confirms that only items enumerated under the sales tax chapter are subject to sales tax as "tangible personal property." See S.C. Code Ann. §12-36-60{ TA \s "12-36-60" }. See also S.C. Code Regs. §117-308 (providing that the sales tax applies to particular transactions) and infra §II (for additional law and discussion on same).³

In a case very similar to this one, the ALC found the imposition statute for sales tax ambiguous and ruled that it must be construed in favor of the taxpayer and against imposition of the tax. Alltel{ TA \s "Alltel" } Communications, Inc. v. S.C. Dept. of Rev., 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015)(concluding that sales tax imposition statute did not impose a tax on indemnification coverage proceeds sold in conjunction with wireless phones, and, thus, such proceeds were not subject to sales tax). The interpretation of the imposition statute by the Department and the Court of Appeals that leads to the faulty conclusion that the sales tax applies to everything that a retailer of tangible personal property

³ Case law also confirms that services are generally not taxable. See Boggero{ TA \s "Boggero" } v. S.C. Dept. of Rev., 414 S.C. 277, 777 S.E.2d 842 at n. 1 (Ct. App. 2015) (noting that "[g]enerally, the gross proceeds from services are not subject to sales and use tax")(citations omitted). The Court of Appeals' statement in this case correctly focuses on the transaction (a sale of services) and not the seller.

sells renders the imposition statute, at best, ambiguous and, therefore, it must be construed in favor of Rent-A-Center and against imposition of the sales tax.

Based on the above, the Court should grant the Petition for Rehearing and reverse the ALC's decision because the ALC erred in failing to apply the plain meaning rule and in failing to construe the imposition statute in favor of the taxpayer and against imposition of the tax.

II. THE COURT OF APPEALS OVERLOOKED, MISUNDERSTOOD OR MISAPPLIED SOUTH CAROLINA LAW IN HOLDING THAT THE IMPOSITION STATUTE IMPOSES A SALES TAX ON PERSONS AND NOT TRANSACTIONS.

The Court of Appeals overlooked, misapplied or misunderstood South Carolina law in holding that the imposition statute imposes a sales tax on **persons** and not **transactions**. As previously stated, the ALC failed to identify an imposition statute that imposes a tax on intangible Waivers and referred instead to the "measure of tax" statute { TA \1 "S.C. Code Ann. § 12-36-60" \s "12-36-60" \c 2 } as the basis for imposing sales tax on the Waivers.⁴ Rent-A-Center's briefing before this Court contains extensive argument on why this is improper. See Rent-A-Center Final Brief at pp. 14-20 and 26-28 and Final Reply Brief at pp. 6 and 10-13.⁵ However, the Court of Appeals found that the sales tax imposition statute

⁴ See Order, R. pp. 4-8; Order Denying Mot. for Reconsideration, R. p. 13.

⁵ As the Final Brief also discussed, the ALC's decision that the Waivers are subject to sales tax appears to be primarily based on the following three cases (in addition to the measure of tax statute at S.C. Code Ann. §12-36-90{ TA \s "§12-36-90" }): Travelscape, LLC v. S.C. Dept. of Rev., 391 S.C. 89, 705 S.E.2d 28 (2011){ TA \1 "Travelscape, LLC v. S.C. Dept. of Rev., 391 S.C. 89, 705 S.E.2d 28 (2011)" \s "Travelscape" \c 1 }; Meyers{ TA \s "Meyers" } Arnold v. S.C. Tax Comm'n, 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985); and Boggero{ TA \s "Boggero" }{ TA \s "Boggero" } v. S.C. Dept. of Rev., 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015). Order, R. pp. 5-7. Rent-A-Center argued that none of these cases supports the ALC's conclusion that the Waivers are subject to sales tax. See Rent-A-Center Final Brief at pp. 17-25. Because this Court agrees that these cases are "not directly analogous to the instant appeal because they involve attempts to deduct service fees" (Op. at p. 36) and because

does, in fact, apply to Waivers. More specifically, the Court found that the sales tax statute "levies a sales tax on persons" and does not apply "to transactions and certain enumerated services." Op. at 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 testimony of the manager of policy at the Department at the trial of this case.

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{ TA \s "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 those enumerated services that are subject to sales tax, including operating a laundry (S.C. Code Ann. §12-36-910(b)(1){ TA \l "S.C. Code Ann. § 12-36-910(b)(1)" \s "12-36-910(b)(1)" \c 2 }}, providing accommodations (S.C. Code Ann. §12-36-920{ TA \l "S.C. Code Ann. § 12-36-920" \s "12-36-920" \c 2 }}, providing communications services (S.C. Code Ann. §§12-36-910(b)(3){ TA \l "S.C. Code Ann. § 12-36-910(b)(3)" \s "§12-36-910(b)(3)" \c 2 }& (5){ TA \l "S.C. Code Ann. § 12-36-910(b)(5)" \s "12-36-910(b)(5)" \c 2 } and 12-36-1310{ TA \l "S.C. Code Ann. § 12-36-1310" \s "12-36-

its affirmance of the ALC did not rely on these cases and is based on separate grounds, Rent-A-Center will not repeat those arguments herein but incorporates them herein by reference. Certainly absent an imposition statute imposing a tax and/or substantial evidence that the Rental Agreement and Waiver are inextricably linked and that the true object of the transaction was the purchase of tangible personal property, the ALC could not properly find the Waivers taxable on the basis of these three cases.

1310" \c 2 }}, and selling electricity (S.C. Code Ann. §12-36-910(b)(2){ TA \l "S.C. Code Ann. § 12-36-910(b)(2)" \s "12-36-910(b)(2)" \c 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{ TA \s "12-36-60" } (emphasis added). Thus, only the sales of tangible personal property and those services or intangibles that are *specifically identified* in the sales tax chapter are subject to sales tax. S.C. Code Ann. §§12-36-910{ TA \s "12-36-910" } and 12-36-60{ TA \s "12-36-60" }.⁶ As the ALC has explained, a retailer is subject to sales tax under the imposition statute "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).

S.C. Code Regs. §117-308 also confirms that the sales tax applies to transactions and not persons. This regulation 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,

⁶ 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{ TA \s "Boggero" } v. S.C. Dept. of Rev.{ TA \s "Boggero" }, 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015); S.C. Regs. §117-308. No such transaction is at issue here. See infra §IV.

communication services)." See also S.C. Code Regs. §117-308 (listing sixteen different professional, personal or other services that are not subject to sales and use tax, including doctors, lawyers, architects, beauty and barber shops and painters among others). 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." Id. { TA \1 "Boggero v. S.C. Dept. of Rev., 414 S.C. 277, 777 S.E.2d 842

(Ct. App. 2015)" \s "Boggero" \c 1 } Such retailers would only owe sales tax on the transactions involving the sale of tangible personal property and not on the "nontaxable services" or other nontaxable items such as intangibles. See id.⁷ These regulations clearly recognize that a retailer can sell both taxable and nontaxable items.

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

⁷ There are also numerous regulations providing that certain charges for labor (i.e. a service) are not taxable even though sold in conjunction with the sale of tangible personal property. See S.C. Code Ann. Regs. §117-313.3 (installation charges); S.C. Code Ann. Regs. §117-306 (repair charges); S.C. Code Ann. Regs. §117-313.4 (alteration charges); S.C. Code Ann. Regs. §117-318.2 (interest charges on seller financing). Such regulations would not be valid if the imposition statute actually imposed sales tax on all retailers of tangible personal property for all transactions. See also S.C. Rev. Ruling #14-7 (providing that optional charges for hurricane rental insurance sold in conjunction with sleeping accommodations are not subject to sales tax but mandatory charges are). If the Department believes that its interpretation of the imposition statute in this case (i.e. that it applies to persons and not transactions) is correct, it has had many years to challenge these regulations but has not done so.

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. A transactional tax is a tax that 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 in its briefs to the contrary, the long-standing policy of the Department is that the 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:

- (1) certain communication services,
- (2) laundry and dry cleaning services,
- (3) electricity,
- (4) the fair market value of tangible personal property manufactured within South Carolina or brought into South Carolina by its manufacturer for storage, use, or consumption in South Carolina by the manufacturer,
- (5) transient construction property, and
- (6) the furnishing of accommodations."

See S.C. Department of Revenue Sales and Use Tax Manual (2015).⁸ The current edition of the manual also confirms that the sales tax "is a 'transaction tax' imposed with respect to the transaction of a 'retail sale' of tangible personal property." S.C. Department of Revenue Sales

⁸ 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.

and Use Tax Manual at Chapter 2, p. 1 (2018). Furthermore, the manager of policy at the Department correctly testified at trial that “. . . under the code, the way the Department looks at it is, sales tax is a transactional tax.” (Tr., R. at p. 271:23-25).

A strikingly similar case was addressed by the ALC in Alltel{ TA \s "Alltel" } Communications, Inc. v. S.C. Dept. of Rev., 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015).⁹ The issue in Alltel{ TA \s "Alltel" } was 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 communication devices were subject to sales tax when the contracts were sold in conjunction with the sales of wireless communication devices. Alltel argued that under the plain meaning of the imposition statute (S.C. Code Ann. §12-36-910){ TA \s "12-36-910" }, the indemnification coverage proceeds were not subject to tax because an insurance type product is not tangible personal property under §12-36-60{ TA \s "12-36-60" } and therefore cannot be part of its gross proceeds of sales under §12-36-90{ TA \l "S.C. Code Ann. § 12-36-90" \s "§12-36-90" \c 2 }. Id. at 17. The ALC noted the Department's concessions that no imposition statute referenced insurance policies (which term it used to refer to the indemnification coverage at issue) and that the policies are not tangible personal property. Id. Applying the plain meaning rule, the ALC then concluded that no imposition statute imposed a tax on indemnification coverage proceeds, and, thus, not subject to sales tax. Id. at 18.

⁹ The Department initially appealed the Alltel{ TA \s "Alltel" } decision; however, the parties subsequently settled the case and dismissed the appeal, and, thus, this opinion is a final decision of the ALC.

The plain meaning of the relevant statutes as well as the related regulations, general sales tax law, relevant case law, the Department's policies and practices as set forth in its sales and use tax manual and its manager of policy's testimony at trial all show that the imposition statute applies to transactions and not persons. Furthermore, no South Carolina statute identifies the sale of anything similar to a Waiver (whether a service or an intangible)¹⁰ as taxable. See S.C. Code Ann. §12-36-910{ TA \s "12-36-910" }; Tr., R. p. 292:17-24. In fact, the Department admits that the Waivers are not taxable on their own, which underscores that the imposition statute does not cover them. See Tr., R. pp. 294:19- 295:2. Therefore, the proceeds from the sale of Waivers are not subject to sales tax.

Based on the above, this Court should grant Rent-A-Center's Petition for Rehearing and reverse the ALC's decision, which failed to find an imposition statute imposing a sales tax on intangible Waivers, and, thus, should have found that the Waivers are not subject to sales tax.

III. THE COURT OF APPEALS OVERLOOKED, MISUNDERSTOOD OR MISAPPLIED SOUTH CAROLINA LAW IN AFFIRMING THE ALC'S RELIANCE ON THE "MEASURE OF TAX" STATUTE (S.C. CODE ANN. §12-36-90) TO REACH THE INCORRECT CONCLUSION THAT WAIVERS ARE SUBJECT TO SALES TAX.

The Court of Appeals overlooked, misunderstood or misapplied the law in affirming the ALC's reliance on the "measure of tax" statute to reach the incorrect conclusion that the Waivers are subject to sales tax. See Op. at pp. 35-36. This Court found that the ALC could rely on the "measure of tax" statute because substantial evidence supported the ALC's findings that "the Waivers were merely incidental to the Rental Agreements," or, stated differently, "the Waivers and Rental Agreements were inextricably linked." Op. at p. 35. It did not

¹⁰ The parties agreed that the sale of a Waiver is not the sale of tangible personal property. Tr., R. pp. 290:17- 291:6.

address Rent-A-Center's argument that a "measure of tax" statute cannot be reached unless an imposition statute is first identified, possibly because the Court of Appeals found (incorrectly) that S.C. Code Ann. §12-36-910 imposes a sales tax on persons not transactions and/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 if the transaction is a bundled transaction and the true object of the sale is the purchase of tangible personal property. However, because as is discussed in sections II (no imposition statute) and IV (no bundled transaction) herein, neither of these situations applies here, Rent-A-Center submits that the ALC improperly reached the "measure of tax" statute. { TA \s "§12-36-90" } See Rent-A-Center's Final Brief at pp. 26-28 (discussing the tax policy reasons why if no imposition statute imposes a tax, then one cannot reach the "measure of tax" statute and citing the following decisions in support of same: Alltel { TA \s "Alltel" }, 2015 WL 7681302, slip op. at pp. 18-20 (rejecting the Department's arguments that sales proceeds from optional indemnification contracts sold in conjunction with wireless communications devices were subject to sales tax as "value proceeding or accruing from the sale of tangible personal property" under the gross proceeds of sales statute where no imposition statute imposed such a tax); Brock Serv., LLC v. Ala. Dept. of Rev., No. S. 14-1236, slip op. at pp. 3-10 (Ala. Tax Tribunal Sept. 28, 2015){ TA \l "Brock Serv., LLC v. Ala. Dept. of Rev., No. S. 14-1236 (Ala. Tax Tribunal Sept. 28, 2015)" \s "Brock" \c 1 } (finding that labor services provided in conjunction with renting of scaffolding were not subject to sales tax under the imposition statute (which mirrors the South Carolina imposition statute) and rejecting argument that the gross proceeds of sales statute (which mirrors the South

Carolina gross proceeds of sales statute a/k/a “measure of tax statute”) justified imposing a tax noting that “the broad definition of ‘gross proceeds’ at §40-12-220(4) prevents a lessor from deducting its overhead, labor, and other operating expenses from its otherwise taxable gross proceeds. Like the gross proceeds in Thyssenkrupp, the labor receipts in issue in this case were never gross proceeds subject to the rental tax to begin with.”); Rent-A-Center West, Inc. v. Utah State Tax Comm’n, 367 P.3d 989, 991-994 and n. 1 (Utah 2016){ TA \l “Rent-A-Center West, Inc. v. Utah State Tax Comm’n, No. 20140129 (Utah January 5, 2016)” \s “Rent-A-Center West” \c 1 } (addressing the Waivers that are also at issue here and determining that they were not subject to sales tax because they were not “an amount paid or charged for leases or rentals of tangible personal property” as the Utah imposition statute required; that whether the fees could be encompassed within the definition of “purchase price” or “sales price” in the definitions statute was irrelevant because they were not encompassed by the imposition statute; and that a long-standing Tax Commission regulation was invalid because it “impermissibly broaden[ed] the language of the statute”); Letter Ruling No. CL 2290, 2000 Mo. Tax Ltr. Rul. LEXIS 37 (Mo. Dep’t Rev. May 18, 2000){ TA \l “Letter Ruling No. CL 2290, 2000 Mo. Tax Ltr. Rul. LEXIS 37 (Miss. Dep’t Rev. May 18, 2000)” \s “Letter Ruling No. CL 2290” \c 3 } (ruling that the 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 specifically 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 (holding that sales of optional intangible Rent-A-Center waivers were not subject to tax under the 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)} TA \1 "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)" \s "Rent-A-Center East" \c 1 } (finding the Rent-A-Center waivers taxable).

Furthermore, even if the ALC properly reached the "measure of tax" statute, the ALC erred in finding the Waiver proceeds to be a part of Appellants' "gross proceeds of sale." See Order, R. pp. 8 and 10. 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{ TA \s "§12-36-90" }.

The ALC's Order found the Waiver fees to be part of "the value proceeding or accruing from the sale, lease, or rental of tangible personal property." Order, R. p. 8. This is not supported by any evidence and is contrary to the law. Proceeds from the rental of property under a **Rental Agreement** are clearly "a value proceeding or accruing from" the sale or rental of tangible personal property (such as, for example, the rental of a television). On the other hand, Waiver proceeds are "a value proceeding or accruing from" the sale of intangible **Waivers**, which provide the 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. See also Alltel{ TA \s "Alltel" }, 2015 WL 7681302, slip op. at p. 17-19 (finding that 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); and Rent-A-Center Final Brief at pp. 29-30 (for full discussion of Alltel).¹¹

¹¹ The ALC's Order also appears to have relied on the ALC's mistaken belief that the value of the rented property in the customer's hands is enhanced by the Waiver. Order, R. p. 8. This is an incorrect interpretation of the evidence and the "measure of tax" statute. The ALC has erroneously shifted the focus from the value that proceeds or accrues to the seller (which is the

Based on the foregoing, Rent-A-Center respectfully requests that the Court grant the Petition for Rehearing and reverse the ALC because it failed to invoke an imposition statute prior to relying on the “measure of tax” statute and because it erred in finding the Waiver proceeds to be “gross proceeds.”

IV. THE COURT OF APPEALS OVERLOOKED, MISAPPLIED OR MISUNDERSTOOD THE LAW REGARDING THE TRUE OBJECT TEST AND INCORRECTLY CONCLUDED THAT SUBSTANTIAL EVIDENCE SUPPORTED THE ALC’S CONCLUSION THAT THE WAIVER AND THE RENTAL AGREEMENT WERE INEXTRICABLY LINKED.

The Court of Appeals overlooked, misapplied or misunderstood the law regarding the true object test and incorrectly concluded that substantial evidence supported the ALC’s conclusion that the Waiver and the Rental Agreement were inextricably linked.

The ALC found that the Rental Agreement and Waiver were inextricably linked and thus applied the true object test and concluded that a customer’s true object in entering these transactions was the rental of items and therefore that the Waivers were subject to sales tax. Order, R. p. 7. 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 (as this Court phrased it), including evidence that the Waivers were optional and could be canceled at any time without canceling the Rental Agreement, that the fee for the Waiver was listed on the customer’s receipt and that

focus of the imposition statute) to the value received by the customer. As the Department’s manager of tax policy agreed, the relevant value under the statute is the value received by the seller, i.e. the “gross proceeds” it receives from the customer. Tr., R. pp. 301:21-25 and 302:17-22. Additionally, the value of the rented property does not change because a customer purchased a Waiver. 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. No substantial evidence supports the conclusion that the value of the rented property is increased due to the Waiver.

payment of the Waiver fee did not count toward the purchase of rental property. Id. However, this Court 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 the ALC. Op. at p. 34. Rent-A-Center would respectfully submit that the Court of Appeals' conclusion on this issue is premised on a misunderstanding or misapplication of the law regarding the true object test.

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, Professor Richard Pomp, 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{ TA \s "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) (reversed and remanded on an unrelated issue 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 needs to be applied. S.C. Rev. Ruling #06-08 (2006) 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." The revenue ruling goes on to state that "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,¹ 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; that invoices were not clearly itemized as to the amounts charged for the rental of the portable toilets (tangible personal property) versus the amounts charged for the service of waste removal, including many invoices that simply charged a single flat fee; and that the taxpayer charged more for toilets that had more amenities. Id., 414 S.C. at 286-87, 777 S.E.2d at 846-47. The Court held that there was substantial evidence that the true object of the transaction was the renting of the 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 that the entire gross proceeds were subject to sales tax because the purchase agreement, which covered both the theater and the trademark, did not itemize the cost of the two items (in fact, the agreement stated that the purchase price was for the IMAX theater, not the trademark) and the IMAX theater could not be used without the trademark license such that the trademark was “inextricably connected to” the purchase of the IMAX system. Id. at p. 5-6.

Most recently, in 2018, the ALC applied the true object test in the context of a bartending service that sold bartending services as well as alcohol. A Southern Bartender,

Docket No. 17-ALJ-17-0002-CC, slip. op. at pp. 8-9. The court held that where the taxpayer provided both bartending and alcohol, but the bartending services were a separate line item on the invoice, the bartending 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, it ruled that where the taxpayer provided bartending services and beverages based on a non-itemized, per person fee, the provision of bartending services was merely incidental to (and presumably not separable from) the sale of the tangible personal property (i.e., the alcohol). *Id.* at p. 8.¹²

At trial, Professor Richard Pomp (Rent-A-Center’s tax policy expert) also discussed an engraved trophy example to illustrate how one would 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

¹² While an earlier ALC decision reached what at first glance might appear to be an inconsistent result, that case is distinguishable. See *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)(finding separately-stated catering labor and service charges were subject to sales tax and noting that true object of customer was to buy food; however, the primary basis for the ruling (and what distinguishes *Tronco’s* from this case) is that the charges for the catering services are not deductible under S.C. Code Ann. §12-36-90 as either the “cost of materials, labor or service” or as “any other expenses.” Additionally, the ALC found that the catering services enhanced the value of the meal. The Waivers here are clearly not a cost or expense of providing rental items and, as discussed above (see *supra* n. 11), the Waivers do not enhance the value of a rental item). 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 that the same optional intangible Waivers sold by Rent-A-Center that are at issue here were not inextricably linked to the Rental Agreements and noting that the Waivers did not interfere with the customer’s right to possess the rental item, the Waiver payments did not contribute to payment of the rental item and the Waiver simply entitled the customer to a single consideration that Rent-A-Center would not pursue certain claims for loss or damage and thus finding the Waivers were not subject to sales tax as no imposition statute imposed a tax on intangibles).

incorporated into the trophy and thus is inextricably linked to the trophy such that the sale of the trophy and the assembly/engraving services constitute a bundled transaction.

The ALC in this case found that the Rental Agreement and the Waiver are inextricably linked (and thus a bundled transaction) based on two purported facts: (1) that a single agreement exists, and (2) that once 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 apparent 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.” Order, R. p. 7. 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 value, and thus, is clearly erroneous for all of the reasons set forth in Rent-A-Center’s Final Brief. See Rent-A-Center’s Final Brief at pp. 24-25.¹³ The Court of Appeals does not mention this

¹³ To the extent the ALC was implying that the Waiver has no value apart from the underlying transaction because a customer does not purchase one without also renting an item, this is not a valid basis for finding the transactions to be bundled. As Professor Pomp responded when asked this question at trial:

It doesn’t make it a bundled transaction. It can still be a separate transaction. It has a factual predicate but that doesn’t mean it’s not a separate transaction. I mean, if I buy a car from you . . . for \$10.00, you could get car washes for the next year. Those car washes aren’t going to become taxable if they won’t otherwise be taxable because of the factual predicate I had to buy the car. I’ll sell you my casebook, and you know that’s tangible personal property, even though most of the value of the book is an intellectual property, but we do it as tangible. And then I say, anyone who buys the book today for a discounted price can get an hour’s worth of consultation with me. Normally legal services aren’t taxable. They don’t become taxable because you couldn’t

purported fact in its opinion and does not appear to have considered it as part of the substantial evidence supporting the ALC.

The evidence cited by the Court of Appeals as constituting substantial evidence that the Waiver is "fundamentally interconnected" to the Rental Agreement included the following: that the fee for the Waiver and the fee for the Rental Agreement are paid at the same time; that the Waiver can only be enforced if all payments are made under the Rental Agreement; that the Waiver fee is calculated as a fixed percentage of the term payment under the Rental Agreement; that the customer must enter into a Rental Agreement to buy a Waiver; that Rent-A-Center does not offer Waivers to third parties; and that the Waiver states (per Rent-A-Center due to requirements imposed by consumer protection laws in various states) that the Waiver is an additional part of the Rental Agreement. Op. at p. 8.

Rent-A-Center submits that while these facts may 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 fundamentally interconnected or inextricably linked that they cannot be easily separated. 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 charge for the Waiver is separately itemized. Tr., R. pp. 168:17- 169:8; Waiver, R. pp. 344-345; Sample Receipt, R. pp. 346-347. Moreover, even if the Court believes that this is not determinative, the other factors referenced by South Carolina courts (in addition to a non-itemized price, which is present in

get those services without purchasing the book. So you can have a factual predicate, but that doesn't make the second transaction somehow part of the bundled transaction.

Tr., R. pp. 252:24- 253:20.

Boggero, Southeast Cinema and A Southern Bartender) that have expressly or implicitly found a bundled transaction or an inextricable link are not present here. In this case, the intangible Waiver is optional and not mandatory (unlike the services in Boggero and the intangible in Southeast Cinema) and 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 intangible trademark). Nor does the intangible Waiver here alter or improve the rented item as the engraving did for the trophy in Professor Pomp's example at trial (the trophy also was not optional and the price was not itemized).

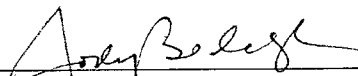
In sum, in Boggero, Southeast Cinema, A Southern Bartender and the trophy example, strong evidence of a fundamental interconnection or inextricable link exists such that it is difficult to break apart the two transactions and determine the appropriate value of each. None of the factors supporting an 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 Rehearing and reverse the ALC's decision that the Rental Agreement and the Waiver are fundamentally interconnected or inextricably linked as that conclusion is not supported by substantial evidence and is contrary to South Carolina law.

CONCLUSION

Based on the above, the Court should grant the Petition for Rehearing and issue a revised Opinion reversing the order of the ALC.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:  SC Bar 71176

John C. von Lehe, Jr.

SC Bar No. 5719

E-Mail: john.vonlehe@nelsonmullins.com

 Bryson M. Geer

SC Bar No. 13606

E-Mail: bryson.geer@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
February 19, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT COUNTY

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.,

v.

South Carolina Department of Revenue,

RECEIVED
FEB 19 2019
SC Court of Appeals
Appellants,

Respondent.

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., hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified via U.S. Mail to the following address(es):

Pleadings:

APPELLANTS' PETITION FOR REHEARING

Counsel Served:

Sean G. Ryan
Lauren Acquaviva
Counsel for Litigation
South Carolina Department of Revenue
301 Gervais Street, 3rd Floor
Columbia, SC 29201

Grace Hamie
Administrative Assistant by *Catherine F. Sease*

February 19, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT COUNTY

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 APPELLANTS

RECEIVED

FEB 14 2017

SC Court of Appeals

John C. von Lehe, Jr.
Bryson M. Geer
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT COUNTY

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 APPELLANTS

RECEIVED

FEB 14 2017

SC Court of Appeals

John C. von Lehe, Jr.
Bryson M. Geer
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Appellants

TABLE OF CONTENTS

STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
A. The Rental Agreements.....	3
B. The Waiver	4
C. Treatment of the Proceeds from the Rental Agreements and the Waivers.....	6
D. Expert Testimony regarding Tax Policy Matters	6
STANDARD OF REVIEW.....	7
ARGUMENT	7
I. The ALC Erred in Failing to Apply the Appropriate Rules of Statutory Construction to the Tax Statutes at Issue.	9
A The ALC Erred in Failing to Apply the Plain Meaning Rule.....	9
B. The ALC Erred in Failing to Construe the Tax Statutes at Issue in Favor of the Taxpayers and Against SCDOR and Imposition of the Tax.....	11
II. The ALC Erred in Finding the Waivers Subject to Sales Tax When it Failed to Identify any Imposition Statute that Imposes a Tax on Waivers	14
A S.C. Code Ann. §12-36-910 Does Not Impose a Sales Tax on Waivers.	14
B. <u>Travelscape</u> , <u>Meyers Arnold</u> and <u>Boggero</u> Do Not Support the ALC's Order	17
1. <u>Meyers Arnold</u> and <u>Travelscape</u> Involve Mandatory Fees and Improper Attempts to Deduct Costs of Service and Thus Do Not Support SCDOR's Attempt to Tax the Waivers.	18
2. <u>Boggero</u> is not Applicable Here because the Waiver is Not Part of a Bundled Transaction.	21
III The ALC Erred in Relying on the Measure of Tax Statute When No Imposition Statute Imposes a Sales Tax on Waivers.	26
IV. Even if the ALC Properly Reached the Measure of Tax Statute, the ALC Erred in Finding the Waiver Proceeds Part of Appellants' "Gross Proceeds of Sale.	29

V.	Even if the Waiver and the Rental Agreement Constituted a Single Agreement or Transaction, the Court Must Still Determine whether the Intangible Waivers are Subject to Sales Tax.	33
VI.	The ALC Erred in Making the Factual Finding that the Rental Agreement and the Waiver Constituted a Single Agreement or Transaction.	35
	CONCLUSION.....	37
	CERTIFICATE OF COUNSEL.....	39

TABLE OF AUTHORITIES

PAGE

Cases

<u>Alltel v. S.C. Dept. of Rev.</u> , 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015).....	10, 13, 16, 18, 19, 20, 26, 28, 29, 30, 31, 33
<u>B&B Inflatable Fun World, LLC v. State of Ala. Dept. of Rev.</u> , Docket no. S. 15-1595 (Ala. Tax Tribunal July 20, 2016)	34
<u>Boggero v. S.C. Dept. of Rev.</u> , 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015).....	8, 12, 15, 17, 21, 22, 25
<u>Brock Serv., LLC v. Ala. Dept. of Rev.</u> , No. S. 14-1236 (Ala. Tax Tribunal Sept. 28, 2015).....	27, 28, 33, 34
<u>Brownlee v. South Carolina Dep't of Health and Environmental Control</u> , 382 S.C. 129, 676 S.E.2d 116.....	7
<u>Clark v. S.C. Tax Comm'n</u> , 259 S.C. 161, 191 S.E.2d 23 (1972).....	11
<u>Hodges v. Rainey</u> , 341 S.C. 79, 533 S.E.2d 578 (2000).....	9
<u>Meyers Arnold v. S.C. Tax Comm.</u> , 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985).....	13, 17, 18, 19, 20, 24, 29, 30
<u>Pot-O-Gold Rentals, LLC v. City of Baton Rouge</u> , 155 So.3d 511 (La. 2015) ...	11, 16, 31, 34
<u>Rent-A-Center East v. Lincoln Par. Sales & Use Tax Comm'n</u> , 60 So.3d 95 (La. App. 2 Cir. 2011), writ denied, 63 So.3d 985 (2011)	27
<u>Rent-A-Center West, Inc. v. Utah State Tax Comm'n</u> , No. 20140129 (Utah January 5, 2016).....	27, 33
<u>Rosmer v. Pfizer</u> , 263 F.3d 263 (4 th Cir. 2001).....	10
<u>Snite v. Ill. Dept. of Rev.</u> , 74 N.E.2d 877 (Ill. 1947).....	34
<u>Southeastern Cinema Entertainment v. S.C. Dept. of Rev.</u> , 2014 WL 2417715 (S.C. Admin. Law Ct. 2014)	21, 22, 23, 25, 33
<u>State v. Leopard</u> , 349 S.C. 467, 563 S.E.2d 342 (Ct. App. 2002).....	10
<u>Taylor v. Aiken County Assessor</u> , 402 S.C. 559, 741 S.E.2d 31 (Ct. App. 2013)	11

<u>The Original Blue Ribbon Taxi Corporation v. SCDMV</u> , 380 S.C. 600, 670 S.E.2d 674 (2008)	7
<u>Travelscape, LLC v. S.C. Dept. of Rev.</u> , 391 S.C. 89, 705 S.E.2d 28 (2011)...	17, 18, 19, 20
<u>United States v. Merriam</u> , 263 U.S. 179 (1923)	11

Statutes

S.C. Code Ann. § 1-23-610	7, 9, 25, 29
S.C. Code Ann. § 12-36-1310	14
S.C. Code Ann. § 12-36-60	10, 12, 15, 16
S.C. Code Ann. § 12-36-90	16, 17, 19, 20, 26, 31, 32
S.C. Code Ann. § 12-36-910	8, 12, 14, 15, 16
S.C. Code Ann. § 12-36-920	14
S.C. Code Ann. § 12-60-3370	3
S.C. Code Ann. § 12-60-460	2

Other Authorities

House Bill 3700, Part IB, Section 90, Proviso 90.21 (Act No. 73)	10
Letter Ruling No. CL 2290, 2000 Mo. Tax Ltr. Rul. LEXIS 37 (Miss. Dep't Rev. May 18, 2000)	27, 28
S.C. Code Ann. Regs. § 117-308 (2012)	8

STATEMENT OF ISSUES

- I. DID THE ALC ERR IN FAILING TO APPLY THE APPROPRIATE RULES OF STATUTORY CONSTRUCTION TO THE TAX STATUTES AT ISSUE?
- II. DID THE ALC ERR IN FINDING THAT THE WAIVERS WERE TAXABLE WHEN NO IMPOSITION STATUTE IMPOSES A TAX ON WAIVERS?
- III. DID THE ALC ERR IN RELYING ON THE MEASURE OF TAX STATUTE WHEN NO IMPOSITION STATUTE WAS INVOKED?
- IV. EVEN IF THE ALC PROPERLY REACHED THE MEASURE OF TAX STATUTE, DID IT ERR IN FINDING THE WAIVER PROCEEDS PART OF APPELLANTS' "GROSS PROCEEDS OF SALE"?
- V. EVEN IF THE WAIVER AND RENTAL AGREEMENT CONSTITUTE A SINGLE AGREEMENT OR TRANSACTION, DID THE ALC ERR IN FAILING TO DETERMINE WHETHER THE INTANGIBLE WAIVER IS SUBJECT TO SALES TAX?
- VI. DID THE ALC ERR IN FINDING AS A FACT THAT THE RENTAL AGREEMENT AND THE WAIVER CONSTITUTE A SINGLE AGREEMENT OR TRANSACTION?

STATEMENT OF THE CASE

This case involves a protest by Rent-A-Center East, Inc. ("RAC East") and Rent Way, Inc. ("Rent Way") (collectively "Rent-A-Center" or "Appellants") of an assessment of sales tax by the South Carolina Department of Revenue ("SCDOR" or "Respondent") for the income tax years of April 1, 2007- October 31, 2010 for RAC East and April 1, 2007- December 31, 2009 for Rent Way. SCDOR issued audit reports to Rent-A-Center on or about April 30, 2012. See Audit Report for RAC East, R. pp. 349-374; Audit Report for Rent Way, R. pp. 375-397. SCDOR claimed that Rent-A-Center owed the following in sales tax and interest as of 5/30/12:¹

¹ The audit reports also assessed penalties. However, SCDOR later dropped the penalties so they are not at issue, and the total assessments have been revised to so reflect.

RENT-A-CENTER EAST

<u>Audit Period</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
4/1/07-10/31/10	\$767,004.50	\$106,154.80	\$873,159.30

RENT WAY

<u>Audit Period</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
4/1/07-12/31/09	\$309,654.51	\$52,458.18	\$362,112.69

Appellants timely protested this assessment. See RAC East Notice of Protest, R. pp. 16-20; Rent Way Notice of Protest, R. pp. 21-24. Following a conference, SCDOR issued Department Determinations on November 18, 2013 upholding the portion of the assessments related to the sale of Optional Liability Waiver Provisions.² See SCDOR Department Determination for RAC East, R. pp. 398-407; SCDOR Department Determination for Rent Way, R. pp. 408-417. SCDOR assessed tax and interest totaling \$618,347.44 as to RAC East and \$233,274.87 as to Rent Way. Department Determinations, R. pp. 399 and 409. Appellants then timely requested a contested case hearing before the Administrative Law Court (the "ALC") pursuant to S.C. Code Ann. § 12-60-460 (2014).

The ALC held a hearing on September 24 and 25, 2015, and issued a Final Order (the "Order") finding for SCDOR on all issues on March 30, 2016. See Order, R. pp. 1-11. Appellants received written notice of the Order that same day and subsequently filed a Motion for Reconsideration on April 12, 2016. See Rent-A-Center East and Rent Way's Motion for Reconsideration, R. pp. 25-53. The ALC denied this motion on May 5, 2016, and Appellants received that order that same day. On or about May 31, 2016, Appellants submitted payment

² The figures in the Determinations differ from those in the audit reports because the audit reports included several additional findings and assessed taxes, interest and penalties associated with those findings. However, the parties resolved all issues except for the issue of whether the Optional Liability Waiver Provisions were subject to sales tax prior to the issuance of the Determinations. See Department Determinations, R. pp. 400 at n. 2 and 410 at n. 2

to SCDOR for all taxes and interest owed in the total amount of \$919,585.55. See Letter from Appellants' Counsel to SCDOR dated May 31, 2016 with enclosed check, R. p. 849.³ Appellants then timely filed a Notice of Appeal on June 6, 2016 such that the Initial Brief and Designation of Matter to be Included on Appeal were due on or before July 6, 2016. Thereafter, Appellants obtained a thirty day extension such that these items were due on or before August 5, 2016 and then requested a second thirty day extension such that they would be due on or before September 6, 2015.

STATEMENT OF FACTS

A. The Rental Agreement

Rent-A-Center operates retail stores in South Carolina (as well as other states) from which customers can "rent to own" certain 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 an agreement with Rent-A-Center entitled a "Consumer Rental-Purchase Agreement" (the "Rental Agreement") under which he makes payments over a stated period of time, and, if all payments are made, he will eventually own the item rented. Tr., R. pp. 155:12-156:25; see also Rental Agreement, R. p. 342.⁴ The customer can choose a weekly, semi-monthly or monthly renewal term. Rental Agreement, R. p. 342. The customer automatically renews the Rental Agreement by making an advance payment prior to the expiration of the term chosen. Id. Rent-A-Center cannot unilaterally terminate the Rental

³ Appellants are thus in compliance with S.C. Code Ann. § 12-60-3370 (2014), which requires payment of contested amounts prior to filing a notice of appeal.

⁴ RAC East and Rent Way submitted trial exhibits that were virtually identical, so unless otherwise indicated, references herein will be to those of RAC East, and the Court may assume the Rent Way version does not differ in any substantive way.

Agreement; only the customer can do so by violating its terms or returning the item. Id. If renewed by the customer, 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 provides certain services in connection with the rental of merchandise, including warranty and maintenance services. Tr., R. pp. 159:16- 160:11; Rental Agreement, R. p. 342 (stating that Rent-A-Center is “responsible for maintaining or servicing the goods while they are being rented.”).

B. The Waiver

If a rented item is “lost, stolen, damaged or destroyed” while the customer is renting it, then the Rental Agreement provides that the customer is “responsible for the fair market value of the property. . . .” Tr., R. p. 157:1-11; Rental Agreement, R. p. 342. However, Rent-A-Center offers its customers the opportunity to avoid some of this risk by entering an additional and separate, optional agreement entitled an “Optional Liability Waiver Provision” (the “Waiver”), which negates 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, (Waiver, R. p. 344-345 and Tr., R.p. 159:12-15), and no warranty, maintenance or other services are provided under the Waiver.⁵ Waiver, R. pp. 344-345; Tr., R. pp. 160:12-15 and 161:14-162:9 . Rent-A-Center does not insure the rental merchandise, and there is no other cost or cost of service associated with the Waiver that is passed on to the customer. Tr., R. p. 162:10-16. The Waiver simply secures Rent-A-Center’s promise to waive any claim it would

⁵ As previously stated, warranty and maintenance services are provided under the Rental Agreement, and the fee for those services is included in the taxable Rental Agreement fee.

otherwise have against the customer in the future if damage to or loss of the rented item due to the covered events occurs. Waiver, R. pp. 344-345.

If a customer purchases an optional Waiver, the fee is separate and distinct from the charge for the rental of the property. The Waiver fee is recorded separately in Rent-A-Center's books and records used for financial accounting purposes. Tr., R. p. 171:21-25. The Waiver fee is also noted separately on the customer's receipt. Tr., R. pp. 168:17- 169:8; Waiver, R. pp. 344-345; Sample Receipt, R. pp. 346-347. The payment due under the Rental Agreement remains 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 Agreement, R. p. 342; Waiver, R. pp. 344-345.

Customers can purchase a Waiver when they enter into a Rental Agreement, or they can choose to do so later. Tr., R. p. 164:13-17; Waiver Policy Statement, R. p. 348. The customer can cancel the Waiver at any time, and, if canceled, the Rental Agreement is not impacted in any way and remains in effect. Tr., R. pp. 166:14- 167:3; Waiver, R. pp. 344-345. Unlike the Rental Agreement, Rent-A-Center can also cancel the Waiver at any time.

In sum, the Rental Agreement and the Waiver are separate, distinct and singular transactions, which for separate charges and separate terms provide two 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 the risk of loss (*i.e.* avoiding responsibility for paying the fair value of the property) in case of certain enumerated damages to or theft of the property. Tr., R. pp. 169:12- 170:3 and 170:20- 171:10; see also Rental Agreement, R. p. 342; Waiver, R. pp. 344-345. The Waiver does not increase the value of the rented property. Id. In other words, 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 of an engraved and assembled trophy discussed at several points during the trial. See e.g. 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.

C. 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 all taxes on the rental proceeds. Tr., R. pp. 177:17- 178:1. However, during the audit periods at issue, Rent-A-Center did not pay sales tax on the separately itemized sales of optional Waivers because it believed that those proceeds were not taxable as they were not attributable to the rental of tangible personal property nor were they a service cost associated with the rental of tangible personal property.

D. Expert Testimony regarding Tax Policy Matters

Professor Richard D. Pomp⁶ testified at the hearing 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"

⁶ 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 is an adjunct professor at the NYU School of Law, and has taught tax law, with an emphasis or specialty in state and local tax law, for approximately 40 years. Id. at 204:22- 205:25. See also CV of Richard D. Pomp, R. pp. 780-794

statute unless an imposition statute is first triggered (Id. at 223:3- 224:7 and 229:4- 231:15); (3) that the tax policy rationale behind the sales tax 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); and (4) that SCDOR's "but for" argument (i.e. "but for" the sale of the rented item, there would be no Waiver) in support of taxing the Waiver proceeds is not sound from a tax policy perspective (Id. at 240:10- 242:1). His testimony will be discussed in more detail below where relevant.

STANDARD OF REVIEW

The Administrative Procedures Act provides the appropriate standard of review in an appeal related to the decision of an administrative agency. S.C. Code Ann. § 1-23-610 (Supp. 2009); see also The Original Blue Ribbon Taxi Corporation v. SCDMV, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (2008). Under S.C. Code Ann. § 1-23-610(B), the Court of Appeals may reverse or modify a decision of the ALC "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; . . . (d) affected by other error of law; [or] (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. . . ." S.C. Code Ann. § 1-23-610 (Supp. 2009); Brownlee v. South Carolina Dep't of Health and Environmental Control, 382 S.C. 129, 676 S.E.2d 116 (holding ALJ may be reversed based on error of law or if his findings were not supported by substantial evidence).

ARGUMENT

The primary issue in this appeal is whether the ALC properly interpreted the South Carolina tax statutes at issue to levy a sales tax upon the sales by Rent-A-Center of intangible

Waivers. As will be discussed below, the relevant imposition statute contained in S.C. Code Ann. §12-36-910 imposes sales tax on tangible personal property and certain enumerated services, but there is no imposition statute that imposes a tax on intangibles similar to the Waivers. The clearest proof that the Waivers are not subject to sales tax under the imposition statute is SCDOR's admission that the Waivers are not taxable on their own. Tr., R. pp. 294:19- 295:2. In other words, if a third party, or even an affiliate of Rent-A-Center, sold only Waivers, the Waivers would not be taxable. Id. This is not surprising as it is well known and accepted (and even SCDOR would likely agree), that the sale of services (such as legal, medical, architectural, barber shop and other similar services) as well as intangibles (such as intellectual property) are generally not subject to sales tax in South Carolina. S.C. Code Ann. §12-36-910, see also Boggero v. S.C. Dept. of Rev., 414 S.C. 277, 777 S.E.2d 842 at n. 1 (Ct. App. 2015) (noting that "[g]enerally, the gross proceeds from services are not subject to sales and use tax.") citing S.C. Code Ann. Regs. § 117-308 (2012).

SCDOR attempts to avoid this result here by focusing on the fact that the Waivers are often sold in conjunction with the rentals of tangible personal property (which is true), and thereby attempts to combine these two revenue streams into a single taxable event. However, the law is clear that unless the service is bundled or inextricably linked to the sale of tangible personal property, then the court must examine each transaction on its own to determine if it is subject to sales tax. Here, the optional Waivers, which for a separate price provide a separate benefit to the customer of protection from liability, are not inseparable from the rentals of appliances and other items, which can be purchased with or without a Waiver. In sum and as will be discussed below, because no statute imposes a tax on the intangible Waivers and because no bundled transaction is at issue, the Waivers are not subject to sales tax.

I. The ALC Erred in Failing to Apply the Appropriate Rules of Statutory Construction to the Tax Statutes at Issue.

The ALC erred in failing to apply the appropriate rules of statutory construction to the tax statutes at issue. More specifically, the Order fails (a) to apply the plain meaning rule to the tax statutes; and (b) to construe these statutes in favor of the taxpayers and against the taxing authority and imposition of the tax. While the ALC cited both of these rules in the Order under the heading “Applicable Tax Provisions” (see Order, R. pp. 4-5), there is no discussion of either rule in the “Analysis” section wherein the ALC analyzes the relevant tax statutes and determines whether they impose a tax on the Waivers. In its subsequent Order Denying Motion for Reconsideration, the ALC states that it “must follow the plain meaning rule” (see Order Denying Pet. Mot. for Reconsideration, R. p. 13) thus implying that it did apply that rule. The ALC also states that the statutes at issue are not ambiguous thus perhaps adopting SCDOR’s argument that the ALC need not construe the tax statutes in favor of the taxpayers because they were not ambiguous. Id.; see also SCDOR’s Resp. to Pet. Mot. for Reconsideration, R. pp. 58-60. However, a review of the decision reveals that neither rule was properly applied, and due to these errors of law and violations of statutory provisions, Appellants’ substantive rights have been prejudiced, and the decision should be reversed. S.C. Code Ann. § 1-23-610 (Supp. 2009).

A. The ALC Erred in Failing to Apply the Plain Meaning Rule.

The ALC erred in failing to apply the plain meaning rule. The sole function of a court in construing statutes is to determine and give effect to the intent of the legislature, and the starting point in doing so should always be the text of the statute itself. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). In interpreting the text, the plain meaning rule requires that “words must be given their plain and ordinary meaning without resort to subtle or forced

construction to limit or expand that statute's operation," and when the language of the statute is clear, "a court cannot rewrite the statute and inject matters into it which are not in the legislature's language. . . ." State v. Leopard, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct. App. 2002); see also Rosmer v. Pfizer, 263 F.3d 263 (4th Cir. 2001) (holding that when a statute is plain on its face, the court's inquiry is at an end).⁷ See also 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 plain meaning rule to imposition statute to determine whether a taxpayer's proceeds are subject to sales tax) and infra, §II (for additional discussion of Alltel court's application of plain meaning rule applied to imposition statute).

As will be discussed in more detail below, both the Order and the Order Denying Petitioners' Motion for Reconsideration fail to identify an imposition statute that imposes a tax on Waivers and refer instead to the "gross proceeds" or "measure of tax" statute contained in S.C. Code Ann. §12-36-60 as the basis for imposing sales tax on the Waivers. See Order, R. pp. 4-8; Order Denying Mot. for Reconsideration, R. p. 13; see also infra §II (for discussion of ALC's failure to identify an imposition statute) and §III (for discussion of ALC's error in relying on the measure of tax statute in §12-36-60 when no imposition statute was invoked). The ALC's failure to properly apply the plain meaning rule caused it to improperly construe the taxing statutes at issue and to err in finding the Waivers subject to sales tax. Thus, Appellants respectfully request that this Court reverse the ALC's Order.

⁷ See also House Bill 3700, Part IB, Section 90, Proviso 90.21 (Act No. 73), R. p. 796 (proviso adopted by Legislature for the year of this audit that emphasizes this rule and states that "the Department's interpretation of South Carolina's revenue statutes must be based solely on the plain meaning of the statute's text and the legislative intent giving rise to the enactment of the statute. Terms in tax statutes may not be given broader meaning beyond the meaning of the statute.").

B. The ALC Erred in Failing to Construe the Tax Statutes at Issue in Favor of the Taxpayers and Against SCDOR and Imposition of the Tax.

The Order also does not apply the cardinal rule of statutory construction that requires a court to construe a tax imposition statute in favor of the taxpayer and against the taxing authority and imposition of the tax. The 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 the tax (as opposed to an exemption statute, which is construed against the taxpayer claiming the exemption and in favor of the government). United States v. Merriam, 263 U.S. 179, 188 (1923) (citations omitted) (stating that 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”); Clark v. S.C. Tax Comm’n, 259 S.C. 161, 191 S.E.2d 23 (1972) (holding that “[r]evenue laws are generally construed in favor of the taxpayer and against the taxing authority”); Taylor v. Aiken County Assessor, 402 S.C. 559, 741 S.E.2d 31 (Ct. App. 2013) (same), Pot-O-Gold Rentals, LLC v. City of Baton Rouge, 155 So.3d 511, 512 (La. 2015) (holding that “tax statutes are to be interpreted liberally in favor of the taxpayer and against the taxing authority. If the statute can reasonably be interpreted more than one way, the interpretation less onerous to the taxpayer is to be adopted.”).

As Appellants’ tax policy expert testified, there are policy reasons underlying this longstanding cannon of construction. First, the Fifth Amendment of the U.S. Constitution, which prohibits deprivation of property without due process of law, requires that taxpayers be given clear notice and warning of the circumstances that will lead to their payment of taxes. Tr., R. pp. 218:11- 219:8. Ambiguities in a tax statute interfere with these rights, and, thus, they are construed against the government. Id. Additionally, the State drafted the tax laws,

and, thus, just as contracts are construed against the drafter, so too are tax laws construed against the State. Id. at 219:8-19.

SCDOR has asserted, and the ALC found, that the taxing statutes are not ambiguous, and, thus, SCDOR contends (and the ALC appears to have at least implicitly agreed) that the ALC should not have applied this rule of statutory construction. See SCDOR's Resp. to Mot. for Reconsideration, R. pp. 58-60; Order Denying Petitioners' Mot. for Reconsideration, R. p. 13. Appellants agree that the taxing statutes at issue are unambiguous. See infra §II (for full discussion of same). However, several of SCDOR's arguments as well as the ALC's subsequent ruling regarding how the imposition statute should be interpreted would create an ambiguity in the statute and thereby invoke this rule of statutory construction. For example, SCDOR argues that the imposition statute imposes a tax on a class of taxpayers (i.e. those in the business of selling tangible personal property) as opposed to Appellants' interpretation that it imposes a tax on the sale of tangible personal property and certain enumerated services. The Order, while not articulating SCDOR's exact argument, appears to be based on similar reasoning. However, the heading of the imposition statute supports Appellants' interpretation as it states that the sale tax is "on tangible personal property" and certain enumerated items (see S.C. Code Ann. § 12-36-910), and the statutory definition of tangible personal property confirms that only items enumerated under the sales tax chapter are subject to sales tax as "tangible personal property." See S.C. Code Ann. §12-36-60 Case law also confirms that services are generally not taxable. See Boggero v. S.C. Dept. of Rev., 414 S.C. 277, 777 S.E.2d 842 at n. 1 (Ct. App. 2015) (noting that "[g]enerally, the gross proceeds from services are not subject to sales and use tax.")(citations omitted). To the extent SCDOR's (and possibly the ALC's) interpretation that the sales tax applies to everything that a retailer of tangible

personal property sells is considered by this Court, the imposition statute is, at best, ambiguous and must be construed in favor of Rent-A-Center.

SCDOR has also argued in the past that a “but for” test⁸ is controlling. It relies on Meyers Arnold v. S.C. Tax Comm'n, 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985) and argues that a “but for” test should be applied here (see SCDOR’s Proposed Order, R. p. 831-832) even though SCDOR has conceded that the Waivers are not taxable on their own. Tr., R. pp. 294:19- 295:2. The application of such a test would also render the statute ambiguous by requiring the Court to construe a statute when the plain meaning of its literal wording requires no construction. See Alltel Communications, Inc. v. S.C. Dept. of Rev., 2015 WL 7681302, slip op. at pp. 19-20 (S.C. Admin. Law Ct. Nov. 13, 2015) (stating that “even if this Court were to agree with the Department on this point [i.e. that the “but for” test applies], however, the Department would not prevail because the statute would be rendered ambiguous and therefore inapplicable to Alltel”). Although the ALC did not rely on or apply such a test, to the extent this Court considers such a test, the statute would be rendered ambiguous.

In sum, if the imposition statute is interpreted to impose a sales tax on items beyond tangible personal property and the services enumerated therein, then the imposition statute is rendered ambiguous, and the imposition statute must be construed in favor of the taxpayer and against SCDOR and the imposition of the tax. As discussed more fully in §II below, when this rule is applied to the imposition statute at hand, there is only one conclusion that can be reached - the imposition statute contains no language that imposes a tax on intangible Waivers,

⁸ The gist of SCDOR’s “but for” test is that “but for” a taxable transaction (here the rental of an appliance or other item), there would be no additional nontaxable transaction (here the Waiver), and therefore, the additional nontaxable transaction is subject to tax.

and, thus, they are not subject to sales tax. Accordingly, Appellants respectfully request that the Court reverse the ALC's decision.

II. The ALC Erred in Finding the Waivers Subject to Sales Tax When it Failed to Identify any Imposition Statute that Imposes a Tax on Waivers.

A. S.C. Code Ann. §12-36-910 Does Not Impose a Sales Tax on Waivers.

The ALC does not apply any imposition statute that imposes a tax on Waivers and thus erred in finding that the Waivers were subject to sales tax. An imposition statute imposes a tax and places taxpayers on notice of what activities will be subject to taxation. See Tr., R. p. 223:3-17. Although properly citing the relevant imposition statute (i.e., S.C. Code Ann. §12-36-910), the Order appears to incorrectly conclude that it imposes a tax on the Waivers. Order, R. pp. 4-8. This error of law and erroneous interpretation of a statute affected the ALC's decision and prejudiced the rights of Appellants, and, therefore, should be reversed.

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 certain enumerated services that are subject to sales tax, including operating a laundry (S.C. Code Ann. §12-36-910(b)(1)), providing accommodations (S.C. Code Ann. §12-36-920), providing communications services (S.C. Code Ann. §§12-36-910(b)(3)& (5) and 12-36-1310), and selling electricity (S.C. Code Ann. §12-36-910(b)(2)).

The tax code defines "tangible personal property" (which is subject to the 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). In other words, only the sales of tangible personal property and those services or intangibles that are specifically identified in the sales tax chapter are subject to sales tax. S.C. Code Ann. §§12-36-910 and 12-36-60.⁹

The parties agreed that the sale of a Waiver is not the sale of tangible personal property. Tr., R. pp. 290:17- 291:6. SCDOR characterized it as a service, while Appellants contended that it is an intangible. The ALC appears to have agreed with Appellants and found that a Waiver is an intangible. See Order, R. p. 5 at n. 5 (wherein the ALC discussed several dictionary definitions of “intangible,” which defined it as something abstract like a responsibility or obligation, and then described the Waivers as an obligation and bolded the word “intangible” when quoting the statute defining tangible personal property).

Applying the plain meaning rule to the taxing statutes at issue, it is clear that no South Carolina statute identifies the sale of anything similar to a Waiver (whether a service or an intangible) as taxable. See S.C. Code Ann. §12-36-910; Tr., R. p. 292:17-24. The ALC does not specify any imposition statute that subjects Waivers to sales tax and fails to address the law providing that sales tax only applies to services or intangibles “the sale or use of which is subject to tax under this chapter” See S.C. Code Ann. § 12-36-60. Instead, the ALC appears to rely primarily on the “gross proceeds” or “measure of tax” statute in reaching its conclusion that the Waivers are subject to tax. See Order, R. p. 9, and Order Denying Pet. Mot. for Reconsideration, R. p. 13. However, if no imposition statute is invoked, a measure of tax statute cannot be relied upon by the court. See infra §III.

⁹ 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 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 §III(B)(2).

A strikingly similar case was recently 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).¹⁰ The issue in Alltel was 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 communication devices were subject to sales tax when the contracts were sold in conjunction with the sales of wireless communication devices. Alltel argued that under the plain meaning of S.C. Code Ann. §12-36-910, the indemnification coverage proceeds were not subject to tax because an insurance type product is not tangible personal property under §12-36-60 and therefore cannot be part of its gross proceeds of sales under §12-36-90. Id. at 17. The ALC noted SCDOR's concessions that no statute states that insurance policies (which term it used to refer to the indemnification coverage at issue) are subject to sales tax and that the policies are not tangible personal property. Id. Applying the plain meaning rule, the ALC then concluded that no imposition statute imposed a tax on indemnification coverage proceeds, and, thus, they are not subject to sales tax. Id. at 18.

The Alltel decision is right on point with this case. As previously stated, no imposition statute imposes a tax on the intangible Waivers at issue. In fact, SCDOR's manager of policy recognized this when he correctly agreed that if the Waivers were sold by a third party or even by an affiliate of Rent-A-Center, they would not be taxable. Tr., R. p. 294:19- 295:2. If an imposition statute did impose a tax on Waivers, then the sales by affiliates or third parties would be subject to tax. See Pot-O-Gold, 155 So.3d at 512 (noting absurdity of lower court's finding that the sale of optional cleaning services sold in conjunction with the rental of portable toilets would be taxable if the toilets were owned by the lessor but not taxable if the toilets

¹⁰ SCDOR initially appealed the Alltel decision; however, the parties subsequently settled the matter and dismissed the appeal, and, thus, this opinion is a final decision of the ALC.

were owned by a third party). Thus, the ALC erred in finding the Waivers subject to tax when no imposition statute imposes such a tax.

While Appellants agree that the taxing statutes are clear and unambiguous and thus no statutory construction rules need be applied, if the Court is persuaded by SCDOR or the ALC's interpretations of the taxing statutes, then they are at best rendered ambiguous such that the statutes must be construed in favor of the taxpayers and against SCDOR and imposition of the tax. See supra §I. When the imposition statute is construed in favor of the taxpayers and against imposition of the tax, there can be no doubt that the statute does not impose a tax on an intangible Waiver, and, thus, the ALC's Order should be reversed.

B. Travelscape, Meyers Arnold and Boggero Do Not Support the ALC's Order.

The ALC's decision that the Waivers are subject to sales tax appears to be primarily based not on the imposition statute but on the following three cases (in addition to the measure of tax statute at S.C. Code Ann. §12-36-90 discussed in §III below): Travelscape, LLC v. S.C. Dept. of Rev., 391 S.C. 89, 705 S.E.2d 28 (2011), Meyers Arnold v. S.C. Tax Comm'n, 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985) and Boggero v. S.C. Dept. of Rev., 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015). Order, R. pp. 5-7. Appellants respectfully submit that none of these cases supports the ALC's conclusion that the Waivers are subject to sales tax.

1. Meyers Arnold and Travelscape Involve Mandatory Fees and Improper Attempts to Deduct Costs of Service and Thus Do Not Support SCDOR's Attempt to Tax the Waivers.

Meyers Arnold and Travelscape both involve mandatory (versus optional) fees as well as improper attempts to deduct service costs and therefore do not support SCDOR's attempt to tax the Waivers. In Meyers Arnold, a layaway fee was required in order to make a layaway purchase and in Travelscape, a "service and facilitation" fee was added to the price of booking a hotel room. In other words, the fees were required in order for the layaway sale or the hotel room sale to take place and those fees were added to the purchase price of the tangible personal property. See Alltel, 2015 WL 7681302, slip op. at p. 24 (noting that Meyers Arnold and Travelscape both involve fees where the customer could not make the purchase of tangible personal property without paying the fee).

The ALC agreed that the fees in both Meyers Arnold and Travelscape were mandatory but still found that the optional Waivers here were inextricably linked to the rentals apparently based on the gift wrapping issue also addressed in Meyers Arnold. Order, R. p. 6. However, this reliance is misplaced and does not support the ALC's conclusion. In Meyers Arnold, this Court addressed whether charges for the service of gift wrapping were taxable where the service was free unless more expensive paper was chosen were taxable. It found that the charge was really for the wrapping paper and not the separate service of wrapping and found that the transaction would have been taxable except for a statutory exemption from sales tax for wrapping paper. The ALC's Order in this case then concludes: "Without this fact-specific exemption, the exercise of this option would have subjected the fees to tax. Thus merely being optional does not prevent part of a sales transaction from being subject to sales tax." Order, R. p. 6.

The statement that merely being optional does not automatically prevent a transaction from being taxable is correct, but clarification of the reason it is correct is warranted. The wrapping paper charges would be taxable absent an exemption because the paper is tangible personal property and the wrapping service was a part of that sale. In this case, the Waiver is not tangible personal property and its acquisition is separate from the rental of appliances and other items because customers can and do rent items without the Waiver. In addition, the ALC made no determination, nor is one supported by the facts, that the fee for Waivers is not actually a charge for the service or intangible of providing the Waivers, but is instead really a charge for purchasing tangible personal property (such as a television) as was the case with the wrapping paper. Being optional cannot save an otherwise taxable transaction from being taxable, but if a transaction is not taxable under the imposition statute (like the intangible Waivers here), then whether an item is optional is a critical factor to be considered in resolving whether an otherwise non-taxable transaction (the Waiver) that is purchased at the same time as a taxable transaction (the rented property) can become taxable. See Alltel, 2015 WL 7681302, slip op. at p. 20 (finding that the wrapping paper holding in Meyers Arnold does not require conclusion that the indemnification coverage at issue was taxable because wrapping paper itself is tangible personal property). Appellants submit that in this case, the fact that the Waivers are optional is one of many factors that establish that the two transactions at issue here are not bundled such that the “true object” test discussed hereinbelow should not be applied. See infra §III(B)(2).

Additionally, both Meyers Arnold and Travelscape can be viewed as attempts by the taxpayers to deduct service costs from revenues, which is prohibited under South Carolina sales tax law. More specifically, S.C. Code Ann. §12-36-90(b) provides that the term “gross

proceeds” (which is the measure of the sales tax) includes the proceeds from the sale of tangible personal property *without any deduction for*: . . . (ii) the cost of materials, labor, *or service* . . .” Id. (emphasis added). As Appellants’ tax policy expert testified, if deduction of service costs was not prohibited, taxpayers might be tempted to bifurcate service costs (which are generally not subject to sales tax) in their receipts so that the labor that went into producing a product would not be taxable. Tr., R. pp. 227:14- 228:17. Thus, this rule prevents the deduction of certain expenses incurred prior to or concurrent with the sale of the tangible personal property.

In contrast, the ALC in the case at hand acknowledges that the Waivers here are optional (versus the mandatory fees in Travelscape and Meyers Arnold) and did not find the Waiver proceeds to be an improperly deducted service cost (as the proceeds were in Travelscape and Meyers Arnold). The overwhelming evidence in the record supports the facts that the Waiver is not a cost of producing the item rented (i.e. an appliance), is not added to the purchase price of the item rented, and is not a cost necessary to accomplish the sales transaction involving the rented item. See supra pp. 5-6. Stated differently, the Waiver fees are revenue from the intangible Waivers sold and not a cost of the appliances and other items being rented. Instead, as in Alltel, the Waiver is a separate item of value that is in the nature of an intangible, and in the case of the Waiver, any cost associated with the Waiver would only arise in the future, if and when, a covered event occurred. Id. Thus, the ALC should have found that Meyers Arnold and Travelscape do not support the Waivers being subject to sales tax.

2. The “True Object” Test Applied in Boggero is Not Applicable Here because the Waiver is Not Part of a Bundled Transaction.

The “true object” test applied in Boggero v. S.C. Dept. of Rev., 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015) is not applicable here because the Waiver is not part of a bundled transaction. The “true object” test is used where a bundled transaction exists (stated another way, where two transactions are inextricably linked), and the court must examine the “true object” of the bundled transactions (i.e. whether the true object is the sale of tangible personal property or the sale of a service) to determine if the transaction is subject to sales tax. Id.; see also 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”).

In Boggero, the taxpayer rented and serviced portable toilets via a single agreement, and it appears that servicing the toilets was included with the rental and was not optional. See Boggero, 414 S.C. at 286-87, 777 S.E.2d at 846-47. The invoices also do not appear to have separately itemized the charges for the rental of portable toilets versus the charges for the service of waste removal. Id. Hence, although not specifically discussed in the opinion, the rental and service transactions were bundled and could not be easily separated. The Court then affirmed the lower court’s application of the “true object” test whereby the ALC found that the customer’s true object was to obtain the use of the toilet (versus the service of waste removal), and thus, the true object was the rental of tangible personal property, which is subject to sales tax. Id.

Another example can be found in Southeastern Cinema where the ALC examined whether proceeds from the sale of a trademark sold in conjunction with the sale of an IMAX

theater were part of “gross proceeds” and thus subject to sales tax. Southeastern Cinema Entertainment v. S.C. Dept. of Rev., 2014 WL 2417715, slip op. at p. 2 (S.C. Admin. Law Ct. 2014). The ALC in that case concluded that the trademark proceeds were part of “gross proceeds” because the purchase agreement, which covered both the theater and the trademark, did not itemize the cost of the two items (id. at 5) and because the IMAX theater could not be used without the trademark license such that the trademark was inextricably linked to or embodied in the purchase of the system. Id. at 6.

At trial, Rent-A-Center’s tax policy expert discussed an engraved trophy as another example of a bundled transaction. Tr., R. pp. 249:9- 250:24 and 255:23- 256:25. He states that whether the sale takes place via one agreement or separate agreements, the transaction is bundled because the customer’s object is to purchase an engraved trophy. Id. In other words, once a trophy is assembled and engraved, the trophy has been altered or improved such that assembly and engraving are no longer optional if one is going to purchase that trophy. The services that caused the improvements have been physically incorporated into the trophy and thus are inextricably linked to it such that the sale of the trophy and the sale of the assembly and engraving services are bundled transactions. Once a trophy has been assembled and engraved, it cannot be unassembled and unengraved.

Unlike Boggero, Southeastern Cinemas and the engraved trophy example, the transactions here are not bundled such that they cannot be separated. The Waiver is optional at all times prior to purchase and its charge is separately delineated on a customer’s receipt. See Waiver, R. p. 344-345; Sample Receipt, R. p. 346-347; Tr., R. pp. 163:6-10, 168:17- 169:8, and 238:4- 239:2 (testimony of Appellants’ tax policy expert stating that because the Waiver here is optional, the transaction is not bundled). Additionally, the Waiver does not alter or

improve the rented property and is not physically incorporated into the property (as in the assembled and engraved trophy example)¹¹ nor does it permit the rented property to be used (as was the case in Southeastern Cinemas with the sale of the intellectual property rights to operate the IMAX theater) such that its value cannot be separated from the value of the rented item or such that it is inextricably linked to the rented item. See Tr., R. p. 169:9-14 and Waiver, R. p. 344-345. The two values of (1) renting an item, and (2) avoiding the risk of certain losses are clearly separate and distinct, and the rented item can obviously be used without the Waiver. The simple undisputed fact that customers can and do rent items without purchasing Waivers proves that the rental item and the Waiver can be separated. Thus, the two separate transactions of the sale of a Waiver and the rental of an item are not inextricably linked or bundled.

The ALC reached the contrary conclusion that the Rental Agreement and the Waivers were inextricably linked (and thus presumably a bundled transaction) based on two purported facts: (1) that a single agreement existed, and (2) that once 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. As explained in §V below, even if a single agreement

¹¹ The trophy example may have been misunderstood by the ALC. The Order points to the statement that "once you bought all three together" [i.e. the trophy assembled and engraved], "it wasn't optional anymore" and was bundled, and the ALC construes or analogizes this to mean that once a Rent-A-Center customer purchases a Waiver, it is no longer optional and thus is a bundled transaction. Order, R. pp. 3-4. This errant conclusion does not follow. Of course, one could say that any item, once purchased, is no longer optional. The key question is whether it is optional at the time of the sale of the tangible personal property in the form that the customer desires it. In the trophy example, although the customer may have the option of assembly and engraving, if he desires to purchase the tangible personal property of an assembled and engraved trophy, those services are not optional. In contrast, if a Rent-A-Center customer desires the tangible personal property of a TV, the intangible Waiver remains optional until the time of purchase.

or transaction is at issue, that is not determinative. The Court must still evaluate whether the otherwise non-taxable intangible of a Waiver is subject to tax. See infra §V.

Additionally, the ALC's apparent finding that the Waiver once purchased "merges into and becomes inextricable from it" does not appear to be based on any additional facts beyond that it found a single agreement was involved (which is not determinative as discussed below) and its erroneous belief that the Waiver "has no value apart from the underlying transaction." Order, R. p. 7. 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 value, and thus, is clearly erroneous. The Waiver has the same value before and after its purchase as does the Rental Agreement. The record clearly shows that these agreements provide two separate and distinct values- the value of renting an item such as a television and the value of avoiding the risk of certain losses. Tr., R. pp. 169:12- 170:3 and 170:20- 171:10. There was no evidence to the contrary. The Waiver does not suddenly lose its value or have its value merged into the property rented upon purchase. Its value remains the same. Additionally, the price of the rental property is not impacted at all by the Waiver; the rental price is not increased if the Waiver is purchased (versus the price of the items in Meyers Arnold, which increased if the item was purchased on layaway), and the Waiver can also be terminated at any time without affecting the rental price. Tr., R. pp. 166:14- 167:3 and 163:11- 164:12. Additionally, the Waiver does not enhance or increase the value of the property rented. Id. at 169.9- 170:3. The value of the property rented is the same whether or not a Waiver is purchased. A television that is worth \$500 at the time of purchase remains that value even if the Waiver is purchased Id. at 232:11- 234:20. There is also no merger of value between the two as there is with the engraved trophy example (where the tangible

personal property was altered or improved by the otherwise non-taxable services) or as in Southeastern Cinemas (where the tangible personal property could not be used without the otherwise non-taxable intangible property)

To the extent the ALC was implying that there is no value to the Waiver apart from the underlying transaction because a customer does not purchase a Waiver without also renting an item (an argument made by SCDOR at trial), this is likewise not a valid basis for finding the transactions to be bundled. As Appellants' tax policy expert responded when asked this very question at trial:

It doesn't make it a bundled transaction. It can still be a separate transaction. It has a factual predicate but that doesn't mean it's not a separate transaction. I mean, if I buy a car from you . . . for \$10.00, you could get car washes for the next year. Those car washes aren't going to become taxable if they won't otherwise be taxable because of the factual predicate I had to buy the car. I'll sell you my casebook, and you know that's tangible personal property, even though most of the value of the book is an intellectual property, but we do it as tangible. And then I say, anyone who buys the book today for a discounted price can get an hour's worth of consultation with me. Normally legal services aren't taxable. They don't become taxable because you couldn't get those services without purchasing the book. So you can have a factual predicate, but that doesn't make the second transaction somehow part of the bundled transaction.

Tr., R. pp. 252:24- 253:20. In sum, the fundamental question is not whether the Waiver can be purchased without renting an item but whether the Waiver must be purchased in order to rent the item desired by the customer. Accordingly, the ALC's conclusion that the Rental Agreement and the Waiver are inextricably linked or are a bundled transaction is not supported by any evidence in the record and thus is clearly erroneous and should be reversed. S.C. Code Ann. § 1-23-610(B). Additionally, because a bundled transaction is not at issue, the "true object" test set forth in Boggero need not be applied.

III. The ALC Erred in Relying on the Measure of Tax Statute When No Imposition Statute Imposes a Sales Tax on Waivers.

The ALC erred in relying on the measure of tax statute contained in S.C. Code Ann. §12-36-90 (i.e. the definition of “gross proceeds”) when no imposition statute imposes a sales tax on the Waivers. This error of law and erroneous interpretation of a statute affected the ALC’s decision and prejudiced the rights of Appellants, and, therefore, should be reversed. S.C. Code Ann. § 1-23-610(B).

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 tax cases cited by Appellants, one must “pass through the first statute [i.e. the imposition statute] before you get to the second [i.e. 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 § 12-36-90, because there is no sales tax in play.” Id. at 229:12-15.

Because no imposition statute applies in this case (see supra §II), the measure of tax statute (i.e. §12-36-90) is never reached and cannot be used to justify imposing a sales tax on the Waiver proceeds. Id. See also Alltel, 2015 WL 7681302, slip op. at pp. 18-20 (rejecting SCDOR’s arguments that sales proceeds from optional indemnification contracts sold in conjunction with wireless communications devices were subject to sales tax as “value proceeding or accruing from the sale of tangible personal property” under the gross proceeds

of sales statute where no imposition statute imposed such a tax); Brock Serv., LLC v. Ala. Dept. of Rev., No. S. 14-1236, slip op. at pp. 3-10 (Ala. Tax Tribunal Sept. 28, 2015) (finding that labor services provided in conjunction with renting of scaffolding were not subject to sales tax under the imposition statute (which mirrors the South Carolina imposition statute) and rejecting argument that the gross proceeds of sales statute (which mirrors the South Carolina gross proceeds of sales statute) justified imposing a tax noting that "the broad definition of 'gross proceeds' at §40-12-220(4) prevents a lessor from deducting its overhead, labor, and other operating expenses from its otherwise taxable gross proceeds. Like the gross proceeds in Thyssenkrupp, the labor receipts in issue in this case were never gross proceeds subject to the rental tax to begin with."); Rent-A-Center West, Inc. v. Utah State Tax Comm'n, No. 20140129, slip op. at pp. 3-6 and n. 1 (Utah January 5, 2016) (addressing the Waivers that are also at issue here and determining that they were not subject to sales tax because they were not "an amount paid or charged for leases or rentals of tangible personal property" as the Utah imposition statute required; that whether the fees could be encompassed within the definition of "purchase price" or "sales price" in the definitions statute was irrelevant because they were not encompassed by the imposition statute; and that a long-standing Tax Commission regulation was invalid because it "impermissibly broaden[ed] the language of the statute");¹² Letter Ruling No. CL 2290, 2000 Mo. Tax Ltr. Rul. LEXIS 37

¹² The ALC in this case cited this Rent-A-Center case in Utah (finding the same Waivers as are at issue here not taxable) as well as a Louisiana case (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 the Waivers taxable) in support of its decision. It found that the South Carolina statute, which imposes sales tax on the "value proceeding or accruing from the sale of tangible personal property" was broader and more inclusive than the Utah statute (which imposes sales tax on the "amounts paid or charged for leases or rentals of tangible personal property") and was instead more similar to the Louisiana statute (which imposes sales tax on "gross proceeds derived from the lease or rental of tangible personal property. . ."). See Order, R. pp. 8-9.

(Mo. Dep't Rev. May 18, 2000) (ruling that the 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 specifically listed as a taxable service under the relevant statutes.).

The ALC appears to have distinguished the Alltel decision on the basis that Alltel paid the premiums received from its customers for the indemnification coverage directly to a third party insurer. Order, R. pp. 7-8. While the ALC in Alltel did make that factual finding, a review of the full opinion makes it clear that this should not alter the outcome. The law and analysis discussed therein¹³ would apply regardless of whether Alltel retained the proceeds and paid them out of its own accounts to satisfy a bill from a third party insurer or remitted payments directly to the third party insurer. That factual distinction is simply irrelevant and does not change the law that requires that an imposition statute first be invoked before the measure of tax statute can be reached.

Appellants respectfully request that the Court reverse the ALC because it failed to invoke an imposition statute prior to relying on the measure of tax statute and thus should have found that the Waivers are not taxable.

Appellants disagree with the ALC's interpretation of these cases. None of the imposition statutes therein encompass the Waivers, which are not values, amounts or proceeds (a) paid for the sale or rental of tangible personal property, (b) derived from the sale or rental of tangible personal property, or (c) proceeding or accruing from the sale or rental of tangible personal property. Curiously, the ALC failed to mention the Brock case cited above, which found labor services provided in conjunction with the renting of scaffolding were not subject to sales tax because they were not a "value proceeding or accruing from the sale of tangible personal property." Brock Serv., LLC v. Ala. Dept. of Rev., No. S. 14-1236, slip op. at pp. 4-10 (Ala. Tax Tribunal Sept. 28, 2015). Alabama's imposition and gross proceeds statutes are *identical* to those of South Carolina and therefore would appear to be more instructive.

¹³ See also supra § II (as to Alltel court's analysis on whether imposition statute imposed a tax on indemnification coverage proceeds) and infra §IV (as to Alltel court's discussion of whether those proceeds constituted gross proceeds of sale).

IV. Even if the ALC Properly Reached the Measure of Tax Statute, the ALC Erred in Finding the Waiver Proceeds Part of Appellants' "Gross Proceeds of Sale."

Even if the ALC properly reached the measure of tax statute, the ALC erred in finding the Waiver proceeds to be a part of Appellants' "gross proceeds of sale." See Order, R. pp. 8 and 10. This error of law and erroneous interpretation of a statute affected the ALC's decision and prejudiced the rights of Appellants, and, therefore, should be reversed. S.C. Code Ann. § 1-23-610(B).

The Order states that the Waiver fees are part of "the value proceeding or accruing from the sale, lease, or rental of tangible personal property." Order, R. p. 8. This conclusion appears to be based on a number of assumptions including the Court's finding that the Waiver might enhance the value of the rented item and its application of the "true object" test. These issues have been previously addressed. However, Appellants will now address whether, even if the measure of tax statute can be used when no imposition statute has been invoked, the facts of this case fit within the statutory language of "gross proceeds of sale," as the ALC held.

This issue was recently addressed in the Alltel case previously discussed with regard to indemnification coverage proceeds collected in conjunction with the sale of communication devices. Alltel, 2015 WL 7681302, slip op. at pp. 18-20. After concluding that no imposition statute covered those proceeds, the ALC went on to examine SCDOR's argument that, notwithstanding the lack of an imposition statute, they were taxable because they were sold in conjunction with the sale of tangible personal property (i.e. the communication devices). Id. The ALC described SCDOR's argument as characterizing "'gross proceeds of sale almost as a bucket with regard to the sale of tangible personal property' and that 'anything associated with that sale of tangible personal property goes into the bucket of gross proceeds.'" Id. at 19 (citing to trial transcript). SCDOR cited to Meyers Arnold, as they have done in this case, in

support of this argument. Id. At trial and in its proposed order, SCDOR contended that “but for” the sale of the tangible personal property (such as a television), there would be no sale of a Waiver, therefore the Waiver is part of gross proceeds and thus taxable. See SCDOR’s Proposed Order, R. pp. 831-32. Although the ALC’s order does not expressly adopt or apply the so-called “but for” test, the result under the “bucket” analogy appears to be the same.

The ALC in Alltel correctly rejected these arguments. It noted that insurance like the indemnification coverage at issue is not tangible personal property, and thus proceeds from the sales of such coverage do not proceed or accrue from the sale of tangible personal property. Alltel, 2015 WL 7681302, slip op. at pp. 17-18. The ALC also explained that “to accept the Department’s argument that the statute requires that any amounts of revenue collected at the same time it receives revenue from the sale of tangible personal property be subjected to sales tax, the court would be required to read language into the statute that is absent. This violates the plain meaning rule.” Id. at 19. The ALC further held that SCDOR’s position would also “require the court to read out of the statute language that limits the application of sale tax to ‘services and intangibles . . . the sale . . . of which is subject to tax under Chapter 36 of Title 12 . . . [which] . . . also violates the plain meaning rule.” Id. Moreover, accepting SCDOR’s interpretation of the statute would render the statute ambiguous, and thus the statute would have to be construed in favor of the taxpayer and against imposition of the tax. Id. at 19-20 (stating that “even if this Court were to agree with the Department on this point, however, the Department would not prevail because the statute would be rendered ambiguous and therefore inapplicable to Alltel”). See also supra § I.

Applying the plain meaning of the relevant statutes to the facts of this case and construing the statute against imposition of the tax as South Carolina law requires¹⁴ necessarily results in the conclusion that the Waiver fees do not qualify as “gross proceeds of sales.” As previously stated, 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 (2014). Here, the proceeds from the rental of property under the **Rental Agreements** are clearly “a value proceeding or accruing from” the sale or rental of tangible personal property (such as, for example, the rental of a television). On the other hand, the Waiver proceeds are “a value proceeding or accruing from” the sale of the intangible **Waiver**, which provides the customer, via a separate, optional agreement and for a separate charge, with the option to avoid certain risks of loss of the property rented. Tr., R. pp. 171:4-10 and 178:2-12. See also Alltel, 2015 WL 7681302, slip op. at p. 17-19 (finding that 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). As SCDOR agreed, the Waiver is not tangible personal property, and, therefore, the value proceeding or accruing from its sale is not from the sale of tangible personal property. See S.C. Code Ann. §12-36-90 (2014).¹⁵

The Order mistakenly asserts that the value of the rented property in the customer’s hands is enhanced by the Waiver and appears to have viewed that as another basis for concluding that the Waiver proceeds were part of Rent-A-Center’s gross proceeds. Order, R.

¹⁴ See supra § I.

¹⁵ SCDOR’s manager of policy correctly agreed that if the Waiver was sold by a third party or even by an affiliate of Appellants, it would not be taxable (Tr., R. pp. 294:19- 295:2), which, as the Pot-O-Gold court noted, would produce an absurd result. Pot-O-Gold Rentals, 155 So.3d at 512.

p. 8 (stating that customers who purchase items from Rent-A-Center “could reasonably consider that the value of their doing so would be enhanced by avoiding the obligation to pay for lost or damaged items by shifting the risk to [Rent-A-Center]”); Order Denying Pet. Mot. for Reconsideration, R. p. 13, n. 4 (stating that the “value” in the context of the gross proceeds statute “is not the price of the durable good, which as Petitioners correctly observe, is not changed by the Waiver. It is the value of the transaction to the consumer.”).

This is an incorrect interpretation of the gross proceeds statute. The ALC has erroneously shifted the focus from the value that proceeds or accrues to the seller (which is the focus of the imposition statute) to the value received by the customer. As SCDOR’s manager of tax policy agreed, the relevant value under the statute is the value received by the seller, i.e. the “gross proceeds” it receives from the customer. Tr., R. pp. 301:21-25 and 302:17-22.

A simple example will illustrate this point. If a customer buys a diamond ring for \$5,000 but receives an accurate appraisal at the time of sale valuing the ring at \$7,000, only the \$5,000 received by the seller is subject to tax. The value to the customer because he benefitted from a bargain purchase is irrelevant because the value to the customer is not being taxed; the sales tax statute only reaches the value received by the seller. See S.C. Code Ann. §12-36-90.

In sum, applying the plain meaning of the gross proceeds statute and construing it in favor of the taxpayer results in the conclusion that the Waiver proceeds cannot be part of Appellants’ gross proceeds of sale, and Appellants respectfully request that this Court reverse the ALC’s finding to the contrary.

V. Even if the Waiver and the Rental Agreement Constitute a Single Agreement or Transaction, the Court Must Still Determine whether the Intangible Waivers are Subject to Sales Tax.

The ALC erroneously found that the Rental Agreement and the Waiver constituted one agreement or transaction. See Order, R. pp. 3-4 (finding that “the Agreement and Waiver are not separate agreements” and “that there is one transaction, one document consisting of two forms. . . .”). See also supra §VI (discussing these erroneous findings). The ALC then concluded from this that both components of the agreement or transaction are subject to sales tax. This is not true. The Court must still examine whether each part of the agreement or transaction is subject to sales tax. Where 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 property. See e.g. Alltel, 2015 WL 7681302, slip op. at pp. 18-20 (finding that sales proceeds from Alltel’s optional contracts for indemnification coverage for wireless communication devices sold in conjunction with the devices were not subject to sales tax because no statute imposed such a tax); Southeastern Cinema Entertainment v. S.C. Dept. of Rev., 2014 WL 2417715 (S.C. Admin. Law Ct. 2014)(analyzing whether the proceeds from both the sale of an IMAX theater cinema and the sale of intangible trademarks pursuant to a single agreement were subject to sales tax); Rent-A-Center West, Inc. v. Utah State Tax Comm’n, No. 20140129, slip op. at p. 5 (Utah January 5, 2016) (holding that “[a]lthough the findings show a connection between the rental payments and the liability waiver fee – the liability waiver provision is signed at the same time as the rental agreement, payments are made on the same schedule, etc. – none of these findings illustrate why this fee is paid *for* the rental property” and stating that “the waiver fee does not have any effect on the customer’s possession, use or operation of the property”); Brock Serv., LLC v. Ala. Dept. of

Rev., No. S. 14-1236, slip op. at p. 2 and 10 (Ala. Tax Tribunal Sept. 28, 2015)(finding that labor services provided in conjunction with renting of scaffolding pursuant to a single agreement were not subject to sales tax and noting that this result would follow “whether the separate labor services are included in the rental agreement or in a separate contract”); Pot-O-Gold Rentals, L.L.C. v. City of Baton Rouge, 155 So.3d 511, 512 (La. 2015) (holding that Pot-O-Gold’s proceeds from the sale of optional cleaning services to a customer in conjunction with the rental of a portable toilet were not part of its gross proceeds and noting the absurdity of a conclusion that would find cleaning services for portable toilets not taxable if the toilet is owned by a third party but would find it a taxable service if the toilet is owned by the lessor.); Snite v. Ill. Dept. of Rev., 74 N.E.2d 877, 880 (Ill. 1947) (holding that “[i]f 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.”); B&B Inflatable Fun World, LLC v. State of Ala. Dept. of Rev., Docket no. S. 15-1595 (Ala. Tax Tribunal July 20, 2016)(explaining that whether the sale of labor services and the sale of tangible personal property are set forth in one versus two agreements does not control as “otherwise, evasion of the taxing statutes would be permitted by merely affixing a nontaxable label to an otherwise taxable transaction”). See also infra § II(B)(2) (for discussion of bundled transactions, which can result in a service or intangible sold in conjunction with tangible personal property being subject to tax, but which are not at issue here).

In sum, whether one agreement or transaction or multiple agreements or transactions are at issue, a court must still examine whether each part of the agreement(s) or transaction(s) is subject to sales tax. The ALC failed to do this, and therefore, the Order must be reversed.

VI. The ALC Erred in Making the Factual Finding that the Rental Agreement and the Waiver Constitute a Single Agreement or Transaction.

The ALC erroneously found that the Rental Agreement and the Waiver constituted a single agreement or transaction. See Order, R. pp. 3-4. The ALC based this conclusion primarily on the following: that the Waiver is entitled “Optional Liability Waiver Provision” and states that it is “an additional part of the Rental Agreement;” that the Waiver fee is calculated as a percentage of the rental fee and may only be enforced while the Rental Agreement is in effect; that the Waiver fee is listed on the Rental Agreement; that the Waivers are only available on items acquired from Rent-A-Center; that Professor Pomp stated in his testimony once an engraved trophy was purchased, engraving and assembly were no longer optional. Id.

While a finding that a single agreement or transaction existed is not determinative in this matter (see supra §V), it is clearly erroneous in light of the substantial evidence in the record establishing that the Rental Agreement and the Waiver are, in fact, two separate agreements and transactions, and this finding appears to have led the ALC to improperly conclude that the agreements were “fundamentally interconnected” and to incorrectly apply the “true object” test. Order, R. pp. 3 (as to ALC’s finding that the agreements were “fundamentally interconnected”) and 8 (as to ALC’s application of “true object” test); see also supra at §II(B)(2) (for discussion of improper application of “true object” test).

Substantial evidence in the record established that two separate agreements or transactions are at issue here. The Waivers are entirely optional, and if purchased, the fee is

noted separately on the customer's receipt. Waiver, R. p. 344-345; Sample Receipt, R. p. 346-347; Tr., R. pp. 163:6-10 and 168:17- 169:8. Payment of that fee does not count toward the rental charge or the purchase of the rental property. Rental Agreement, R. p. 342; Waiver, R. p. 344-345; Tr., R. pp. 163:11- 164:12. The Waivers can be purchased at any time and canceled at any time without impacting the Rental Agreement in any way. Waiver, R. pp. 344-345; Waiver Policy Statement, R. p. 348, Waiver, R. p. 344-345; Tr., R. pp. 164:13-17 and 166:14- 167:3, Waiver, R. pp. 344-345.

Additionally, the two agreements provide two 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 the risk of loss (*i.e.* avoiding responsibility for paying the fair value of the property) in case of certain enumerated damages to or theft of the property. Tr., R. pp. 169:15- 170:3 and 170:20- 172:5; see also Rental Agreement, R. p. 342; Waiver, R. pp. 344-345. Each agreement has its own separate offer, acceptance and consideration, and the parties execute each agreement independently. Id. Each is therefore a separate and independently enforceable contract.

The reference to the cost of the Waiver in the Rental Agreement and the incorporation by reference of some terms of the Rental Agreement into the Waiver were both required by law.¹⁶ These requirements should not be used to convert the Waiver into something that it is not (*i.e.* a single agreement or transaction) when the facts establish that the Waiver is an optional, additional, separate and independent agreement and transaction. Additionally, the

¹⁶ More specifically and as stated in the testimony, certain consumer protection laws related to notice and transparency require that the cost of the Waiver be reflected in the Rental Agreement versus being only set forth in the Waiver. Tr., R. p. 167:13-23. Various consumer protection laws also require that the Waiver include some of the disclosures made in the Rental Agreement. Tr., R. p. 170:4-19.

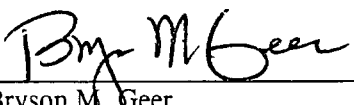
labeling of the Waiver as a “provision” and as an “additional part of the rental agreement” in order to incorporate the provisions from one agreement into the other is not determinative. The Waiver remains an optional, separate and independent contract with its own offer, acceptance and consideration. Calling it a provision does not change those facts, and viewing it as a single agreement or transaction would be elevating form over substance.

In light of the above discussed evidence, the ALC’s finding that the Rental Agreement and the Waiver were a single agreement or transaction is contrary to the substantial evidence in the case and is clearly erroneous. Thus, Appellants respectfully request that the Court reverse the ALC’s finding as the evidence clearly shows that two separate agreements or transactions are at issue.

CONCLUSION

Based on the foregoing, Appellants respectfully requests that this Court reverse the ALC’s decision because their rights have been prejudiced because the administrative findings, inferences, conclusions or decisions are in violation of constitutional or statutory provisions, affected by errors of law, or are clearly erroneous in light of the reliable, probative and substantial evidence in the record, and the assessment against them should be dismissed.

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
February 13, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT COUNTY

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

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

Appellant Case No. 2016-001210

RECEIVED

FEB 14 2017

SC Court of Appeals

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

Appellants,

v.

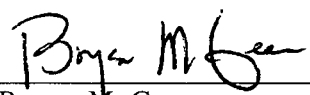
South Carolina Department of Revenue,

Respondent.

CERTIFICATE OF COUNSEL

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

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.

February 13, 2017

RECEIVED

JAN 27 2017

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

Lauren Acquaviva (Bar No. 100528)

Counsel for Litigation

Sean G. Ryan (Bar No. 76585)

Managing Counsel for Litigation

Milton G. Kimpson (Bar No. 7917)

General Counsel for Litigation

P.O. Box 12265

Columbia, SC 29211-9979

(803) 898-5110

Lauren.Acquaviva@dor.sc.gov

CourtOrders@dor.sc.gov

Attorneys for Respondent

South Carolina Department of Revenue

TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issues on Appeal	1
Statement of the Case	2
Statement of Facts	3
A. The Taxpayers' Business	3
B. The Department's Sales Tax Audit and Assessment	6
Arguments	7
I. THE ADMINISTRATIVE LAW COURT PROPERLY APPLIED THE PLAIN MEANING RULE WHEN READING THE TEXT OF THE "IMPOSITION" AND "MEASURE OF TAX" STATUTES.....	10
A. The ALC Properly Applied the Plain Meaning Rule When Reading the Text Of The Taxing Statutes	10
B. The Taxpayers Abandoned Their Statutory Construction Issue	12
C. The ALC Properly Concluded That The Taxing Statutes At Issue Are Unambiguous	14
D. The Taxpayers' Interpretation Of The Rules Of Statutory Construction Is Flawed	17
II. THE ADMINISTRATIVE LAW COURT PROPERLY FOUND THAT THE "IMPOSITION" STATUTE IMPOSES A SLAES TAX ON THE TAXPAYERS.....	18
III. THE ADMINISTRATIVE LAW COURT PROPERLY FOUND THAT THE TAXPAYERS SHOULD HAVE INCLUDED THE WAIVER PROCEEDS IN THEIR GROSS PROCEEDS OF SALES.....	20
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.....	28

Conclusion	38
------------------	----

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Alltel v. S.C. Dept. of Rev.</u> , 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015)	Passim
<u>Alltel Communications, Inc. v. S.C. Dept. of Rev.</u> , 399 S.C. 313, 731 S.E.2d 869 (2012)	Passim
<u>Barton v. S.C. Dep't of Prob. Parole & Pardon Servs.</u> , 404 S.C. 395, 745 S.E.2d 110 (2013)	8, 19, 22, 32
<u>B&B Inflatable Fun World, LLC v. Ala Dept. of Revenue</u> , Docket No. S. 15-1595 (Ala. Tax Tribunal Jul. 20, 2016)	Passim
<u>Beach v. Livingston</u> , 248 S.C. 135, 149 S.E.2d 328 (1966)	10
<u>Boggero v. S.C. Dept. of Revenue</u> , 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015)	Passim
<u>Brock Serv., LLC v. Ala. Dept. of Revenue</u> , Docket No. S. 14-1236 (Ala. Tax Tribunal Sept. 28, 2015)	Passim
<u>Brown v. S.C. Dep't of Health & Envtl. Control</u> , 348 S.C. 507, 560 S.E.2d 410 (2002)	10
<u>Centex Int'l, Inc. v. S. C. Dep't of Revenue</u> 406 S.C. 132, 750 S.E.2d 65 (2013), <i>reh'g denied</i> (Sept. 20, 2013)	9
<u>Clark v. Aiken County Gov't</u> , 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005)	7
<u>Dunton v. S.C. Bd. of Examin'rs in Optometry</u> , 291 S.C. 221, 353 S.E.2d 132 (1987) ..	10
<u>Georgia-Carolina Bail Bonds, Inc. v. County of Aiken</u> , 354 S.C. 18, 579 S.E.2d 334 (Ct. App. 2003)	9
<u>Glasscock, Inc. v. U.S. Fidelity and Guaranty Co.</u> , 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001)	13

<u>Hill v. S.C. Dep't of Health and Envtl. Control,</u> 389 S.C. 1, 698 S.E.2d 612 (2010)	8
<u>Hitachi Data Sys. Corp. v. Leatherman,</u> 309 S.C. 174, 420 S.E.2d 843 (1992)	9
<u>In the Matter of: ***, Taxpayers,</u> 2008 WL 5582992 (R.I.Div.Tax. May 16, 2008)	25
<u>Kennedy v. S.C. Retirement System,</u> 345 S.C. 339, 549 S.E.2d 243 (2001)	14
<u>Lancaster Cnty. Bar Ass'n. v. S.C. Comm'n on Indigent Defense,</u> 380 S.C. 219, 670 S.E.2d 371 (2008)	27
<u>Matter of Decker,</u> 322 S.C. 215, 471 S.E.2d 462 (1995)	27
<u>Meyers Arnold v. S.C. Tax Comm'n,</u> 285 S.C. 303, 328 S.E.2d 920 (1985)	Passim
<u>Mulherin-Howell v. Cobb,</u> 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005)	13
<u>Nucor Steel v. S.C. Pub. Serv. Comm'n,</u> 310 S.C. 539, 426 S.E.2d 319 (1992)	10
<u>Olson v. S.C. Dep't of Health & Envtl. Control,</u> 379 S.C. 57, 663 S.E.2d 497 (Ct. App. 2008) ..	7
<u>Original Blue Ribbon Taxi Corp. v. S.C. Dept. of Motor Vehicles,</u> 380 S.C. 600, 670 S.E.2d 674 (2008)	8
<u>Pot-O-Gold Rentals, L.L.C. v. City of Baton Rouge,</u> 155 So.3d 511 (La. 2015)	Passim
<u>Rent-A-Center East, Inc., v. Lincoln Parish Sales & Use Tax Comm'n,</u> 60 So.3d 95, (La. App. 2 Cir. 2011), <i>writ denied</i> , 63 So.3d 985 (La. 2011)	24, 25
<u>Rent-A-Center West, Inc. v. Utah State Tax Comm'n,</u> No. 20140129 (Utah Jan. 5, 2016)	28, 32
<u>Snite v. Ill. Department of Revenue,</u> 74 N.E.2d. 877 (Ill. 1974)	Passim

<u>Southeastern Cinema Entertainment v. S.C. Dept. of Rev.,</u> 2014 WL 2417715 (S.C. Admin. Law Ct. May 28, 2014)	Passim
<u>Textile Restoration Services, Inc. v. S.C. Dept. of Rev.,</u> 2015 WL 7443800 *4 (S.C. Admin. Law Ct. Nov. 12, 2015)	27
<u>Thyssenkrupp Safeway Inc. v. State of Alabama,</u> Docket S. 08-401 (Admin. Law Div. Mar. 18, 2009)	36
<u>Travelscape, LLC v. S.C. Dept. of Revenue,</u> 391 S.C. 89, 705 S.E.2d 28 (2011)	23, 27
<u>Tronco's Catering, Inc. v. S.C. Dept. of Rev.,</u> 2010 WL 5781622 *3 (S.C. Admin. Law Ct. Apr. 12, 2010)	27
<u>Turner v. S.C. Dep't of Health & Envtl. Control,</u> 377 S.C. 540, 661 S.E.2d 118, (Ct. App. 2008) ..	7
<u>United States v. Merriam,</u> 263 U.S. 179 (1923)	13
<u>Ward v. West Oil Co., Inc.,</u> 387 S.C. 268, 522 S.E.2d 516 (2010)	9
 <u>S.C. STATUTES AND REGULATIONS</u>	
S.C. Code Ann. § 1-23-610(B) (Supp. 2014)	7, 31
S.C. Code Ann. § 2-13-175 (2005)	15
S.C. Code Ann. § 12-35-510 (2014)	15
S.C. Code Ann. § 12-36-30 (2014)	11
S.C. Code Ann. § 12-36-60 (2014)	11
S.C. Code Ann. § 12-36-90 (2014)	Passim
S.C. Code Ann. § 12-36-910(A) (2014)	Passim
S.C. Code Ann. § 12-36-1110 (2014)	10
S.C. Code Ann. Regs. 117-308 (2012)	29

OTHER AUTHORITIES

Commission Decision S-D-174 (1986) ..	23, 24
<u>Merriam-Webster Dictionary,</u> http://www.merriam-webster.com/dictionary/proceed (last visited Sept. 26, 2016)	16
S.C. Info. Ltr. #90-25	15
S.C. Rev. Rul #93-1	23, 24

OTHER STATES STATUTES

Code of Ala. 1975, § 40-12-220(4) (West 2016)	35
Ala. Admin. Code r. 810-6-5-.09.01 (West 2016)	35
La. Stat. Ann. § 47:302(B)(1) (West 2016)	25
R.I. Gen. Laws § 44-18-12	25, 26
Utah Code Section 59-12-103(1)(k) (West 2016)	28, 33

OTHER SOURCES

9 Vanderbilt Law Review 231 (1956)	29
--	----

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,

A handwritten signature in black ink, reading "Lauren Acquaviva". The signature is fluid and cursive, with the first name "Lauren" and last name "Acquaviva" clearly distinguishable.

Lauren Acquaviva (Bar No. 100528)

Counsel for Litigation

Sean G. Ryan (Bar No. 76585)

Managing Counsel for Litigation

Milton G. Kimpson (Bar No. 7917)

General Counsel for Litigation

P.O. Box 12265

Columbia, SC 29211

803-898-5110 (Tel.)

803-896-0171 (Fax)

Lauren.Acquaviva@dor.sc.gov

CourtOrders@dor.sc.gov

Attorneys for Respondent

South Carolina Department of Revenue

January 27, 2017

RECEIVED
JAN 27 2017
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.

CERTIFICATE OF COUNSEL

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



Lauren Acquaviva (Bar No. 100528)
Counsel for Litigation
Sean G. Ryan (Bar No. 76585)
Managing Counsel for Litigation
Milton G. Kimpson (Bar No. 7917)
General Counsel for Litigation
P.O. Box 12265
Columbia, SC 29211-9979
(803) 898-5110
Lauren.Acquaviva@dor.sc.gov
CourtOrders@dor.sc.gov
Attorneys for Respondent
South Carolina Department of Revenue

January 27, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT COUNTY

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 REPLY BRIEF OF APPELLANTS

RECEIVED

FEB 14 2017

SC Court of Appeals

John C. von Lehe, Jr.
Bryson M. Geer
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Appellants

TABLE OF CONTENTS

ARGUMENT	1
I. RENT-A-CENTER DID NOT ABANDON ITS ARGUMENT THAT THE ALC ERRED IN FAILING TO APPLY THE APPROPRIATE RULES OF STATUTORY CONSTRUCTION TO THE TAX STATUTES AT ISSUE, AND THESE RULES SHOULD HAVE BEEN APPLIED.	1
II. SCDOR'S ARGUMENT THAT THE IMPOSITION STATUTE IMPOSES SALES TAX ON RETAILERS IN GENERAL AND IS NOT LIMITED TO WHEN THEY SELL TANGIBLE PERSONAL PROPERTY OR CERTAIN SERVICES IS NOT COMPELLING.	5
III. SCDOR'S INTERPRETATION OF THE MEASURE OF TAX STATUTE AND ITS APPLICATION OF A "BUT FOR" TEST ARE INCONSISTENT WITH THE PLAIN MEANING OF THAT STATUTE AS WELL AS REVENUE RULING #06-08 AND S.C. REG. 117-313.3	10
IV. THE CASES CITED BY SCDOR ARE DISTINGUISHABLE AND DO NOT SUPPORT ITS POSITION.	13
CONCLUSION	15
CERTIFICATE OF COUNSEL.....	16

TABLE OF AUTHORITIES

	Page(s)
 Cases	
<u>Alltel v. S.C. Dept. of Rev.</u> , 2015 WL 7681302, slip op. (S.C. Admin. Law Ct. Nov. 13, 2015)	4, 8, 10, 11, 12
<u>Boggero v. S.C. Dept. of Rev.</u> , 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015)	3, 11
<u>Florence Co. Democratic Party v. Florence Co. Repub. Party</u> , 398 S.C. 124, 727 S.E.2d 418 (2012)	9
<u>Goodman v. City of Columbia</u> , 318 S.C. 488, 458 S.E.2d (1995)	4
<u>Home Medical Systems, Inc. v. S.C. Dept. of Rev.</u> , 382 S.C. 556, 677 S.E.2d 582 (2009)	4
<u>Kennedy v. S.C. Retirement Systems</u> , 345 S.C. 339, 549 S.E.2d 243 (2001)	2
<u>Meyers Arnold v. S.C. Tax Comm’n</u> , 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985)	10, 11, 13
<u>Rent-A-Center West, Inc. v. Utah State Tax Comm’n</u> , No. 20140129 (Utah January 5, 2016)	14
<u>Textile Restoration Services, Inc. v. S.C. Dept. of Rev.</u> , 2015 WL7443800, slip. op. (S.C. Admin. Law Ct. November 12, 2015)	3, 7
<u>Travelscape, LLC v. S.C. Dept. of Rev.</u> , 391 S.C. 89, 705 S.E.2d 28 (2011)	13
<u>Tronco’s Catering, Inc. v. S.C. Dept. of Rev.</u> , 09-ALJ-17-0089-CC (Admin. Law Ct. April 12, 2010)	13
 Rules	
South Carolina Appellate Court Rule 242(g)	1
 Statutes	
S.C. Code Ann. § 12-35-30	10
S.C. Code Ann. § 12-36-60	8
S.C. Code Ann. § 12-36-90	6, 8, 10, 11, 13, 14
S.C. Code Ann. § 12-36-910	7, 8, 9

S.C. Code Ann. § 12-36-1350	9
S.C. Code Ann. § 12-36-1360	9
Other Authorities	
Comm’n Decision S-D-174 (1986)	13
J. Hellerstein & W. Hellerstein, State Taxation, 3d ed. at §12.01 (2000)	5, 6
Letter Ruling No. CL 2290, 2000 Mo Tax Ltr. Rul. LEXIS 37 (Mo. Dep’t Rev. May 18, 2000)	14, 15
S.C. Code Ann. Regs. § 117-308	3
S.C. Code Ann. Regs. § 117-313.3	3, 10, 11
S.C. Code Ann. Regs. § 117-306	4
S.C. Code Ann. Regs. § 117-313.4	4
S.C. Code Ann. Regs. § 117-318.2	4
S.C. Rev. Ruling #14-7	4
S.C. Rev. Ruling #06-08	8, 11
SCDOR’s website at www.dor.sc.gov	8
SCDOR Tax Manual (2015)	8

Pursuant to Rule 242(g) of the South Carolina Appellate Court Rules, Appellants, Rent-A-Center East, Inc. ("RAC East") and Rent Way, Inc. ("Rent Way") (collectively "Rent-A-Center" or "Appellants") file this Reply Brief in response to the Initial Brief of Respondent South Carolina Department of Revenue's ("SCDOR" or "Respondent") in this matter. For the reasons stated in the Initial Brief of Rent-A-Center ("Rent-A-Center Brief") and herein, this Court should grant the relief requested in Rent-A-Center's Brief and hereinbelow and reverse the decision of the Administrative Law Court ("ALC").

ARGUMENT

I. RENT-A-CENTER DID NOT ABANDON ITS ARGUMENT THAT THE ALC ERRED IN FAILING TO APPLY THE APPROPRIATE RULES OF STATUTORY CONSTRUCTION TO THE TAX STATUTES AT ISSUE, AND THESE RULES SHOULD HAVE BEEN APPLIED.

SCDOR claims that Rent-A-Center has abandoned its arguments regarding statutory construction. SCDOR Brief at pp. 12-14. More specifically, SCDOR asserts that Rent-A-Center "made only conclusory, unsupported statements in [its] attempt to argue that the ALC erred in failing to apply the rules of statutory construction" (*id.* at p. 12) and "failed to cite any authority that supports their position." *Id.* at 13. This is simply not true. Rent-A-Center's Brief fully analyzes the failure of the ALC to (a) properly apply the plain meaning rule to the tax statutes at issue; and (b) construe these statutes in favor of the taxpayers and against the taxing authority and imposition of the tax. *See* Rent-A-Center Brief at pp. 9-14. Rent-A-Center cites a plethora of cases in support of its arguments and has not abandoned these arguments. *Id.*

Additionally, SCDOR appears to mistakenly believe that Rent-A-Center is asserting that all imposition statutes must be construed in favor of taxpayers even if there is no ambiguity

in the statutes. SCDOR Brief at p. 13. This is not the case as Rent-A-Center agrees that this rule need only be applied when the tax statute is ambiguous. See Rent-A-Center Brief at pp. 11-13. Moreover, SCDOR candidly agrees that if this Court finds the statute at issue ambiguous, then "it should resolve that ambiguity in favor of the taxpayer." SCDOR Brief at p. 13.

In this case, both parties believe that the imposition statute is not ambiguous and that their respective readings of the statute are correct. However, as SCDOR concedes, when the language in a statute can have more than one reasonable interpretation, then it is rendered ambiguous. See SCDOR Brief at p. 14 (citing Kennedy v. S.C. Retirement Systems, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001)). SCDOR claims that its interpretation of the imposition statute is the only reasonable one, but Rent-A-Center's interpretation is actually more reasonable. See Rent-A-Center Brief at pp. 14-17; infra § II (for in depth discussion of Rent-A-Center's interpretation of the imposition statute).

More specifically, Rent-A-Center's reading of the imposition statute is that it imposes a tax on "persons" only when they sell tangible personal property and/or certain enumerated services, while SCDOR's position appears to be that the statute imposes a tax on all retailers of tangible personal property in general and not only when they sell tangible personal property or enumerated services. As was discussed in its Brief and in more detail below, Rent-A-Center's interpretation that sales tax is imposed on retailers when they sell tangible personal property and the services listed in the statute is reasonable in light of the heading of the chapter (which reads "Five percent tax on tangible personal property; laundry services, electricity, communication services, and manufacturer-consumed goods") and case law confirming that sales tax is imposed on retailers because they are engaging in

retail sales transactions for the sale of tangible personal property and that gross proceeds from services are generally not subject to sales tax. See Textile Restoration Services, Inc. v. S.C. Dept. of Rev., 2015 WL7443800, slip. op. at 3 (S.C. Admin. Law Ct. November 12, 2015)(explaining that sales tax is imposed on retailers because they are engaging in retail sales transactions for the sale of tangible personal property); Boggero v. S.C. Dept. of Rev., 414 S.C. 277, 777 S.E.2d 842 at n. 1 (Ct. App. 2015) (noting that “[g]enerally, the gross proceeds from services are not subject to sales and use tax.”) citing S.C. Code Ann. Regs. § 117-308 (2012).

This interpretation also comports with how retailers of tangible personal property that also sell services are actually treated in South Carolina. No one would dispute that a veterinarian, as both a retailer and service provider, must pay sales tax on its sales of tangible personal property such as collars and leashes but not on its veterinary services or that a barber must pay sales tax on its sales of shampoo and brushes but not on the haircuts provided. Under SCDOR's interpretation that sales tax is imposed on all retailers of tangible personal property regardless of what is being sold, all of these services could be subject to tax under the imposition statute. Clearly these are examples of retailers in the business of selling tangible personal property, but no tax is imposed on them when they render non-taxable services.

Additionally, Rent-A-Center's interpretation is consistent with various regulations that specify that certain services provided in conjunction with the sale of tangible personal property are not taxable. For example, note the regulation providing that sales tax is not imposed on retailers providing installation services with the sale of tangible personal property. Such a regulation would, in fact, be invalid if the imposition statute actually

imposed sales tax on all that a retailer does as regulations cannot expand or limit the substance of a statute. See S.C. Code Ann. Regs. § 117-313.3 (2002) (providing that charges for installation incident to the sale of tangible personal property are not subject to the sales or use tax when such charges are separately stated from the sales price of the property)¹; Home Medical Systems, Inc. v. S.C. Dept. of Rev., 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) (citing Goodman v. City of Columbia, 318 S.C. 488, 490, 458 S.E.2d, 531, 532 (1995) (stating that "[r]egulations authorized by the Legislature have the force of law. . . . Nonetheless, a regulation may not alter or add to a statute.")).

Finally, at least one other taxpayer has asserted the exact same interpretation of the imposition statute, and an Administrative Law Court Judge found the assertion both reasonable and compelling and adopted it in its decision. 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).²

¹ There are many other regulations providing that certain service charges are not taxable even though sold in conjunction with the sale of tangible personal property. See S.C. Code Ann. Regs. 117-313.3 (installation charges); S.C. Reg. 117-306 (repair charges); S.C. Code Ann. Regs. 117-313.4 (alteration charges); S.C. Reg. 117-318.2 (interest charges on seller financing)). Such regulations would not be valid if the imposition statute actually imposed sales tax on all retailers of tangible personal property. See also S.C. Rev. Ruling # 14-7 (providing that optional charges for hurricane rental insurance sold in conjunction with sleeping accommodations are not subject to sales tax but mandatory charges are subject to sales tax) If SCDOR believes its current interpretation of the imposition statute is correct, it has had many years to challenge these regulations but has not done so.

² SCDOR states that "the ALC [in Alltel] misread the imposition statute," and SCDOR characterizes Alltel's interpretation of the statute as "absurd" and the decision as "incorrect." SCDOR Brief at pp. 18-20 and 27. However, interestingly, while SCDOR initially appealed this decision, it later settled and dismissed the appeal thus leaving this decision, which found the imposition statute ambiguous and construed it as Rent-A-Center argues it should be construed here, to stand. Rent-A-Center submits that while not binding on this court, Alltel is well-reasoned and supported by South Carolina law, and the same imposition analysis should be applied here.

In sum, Rent-A-Center's interpretation that the imposition statute imposes a sales tax on retailers only when they sell tangible personal property and certain listed services is clearly reasonable. Accordingly, if this Court finds that SCDOR's interpretation is also reasonable, then it should find that the imposition statute is ambiguous (i.e. capable of two reasonable interpretations) and that the ALC should have applied the rules of statutory construction and construed the statute in favor of the taxpayers and against imposition of the tax. See Rent-A-Center Brief at pp. 9-14.

II. SCDOR'S ARGUMENT THAT THE IMPOSITION STATUTE IMPOSES SALES TAX ON RETAILERS IN GENERAL AND IS NOT LIMITED TO WHEN THEY SELL TANGIBLE PERSONAL PROPERTY OR CERTAIN SERVICES IS NOT COMPELLING.

As Rent-A-Center asserted in its Brief, the Waivers are not taxable because no imposition statute imposes a tax on retailers when Waivers are sold. SCDOR claims that because the imposition statute imposes a tax on "every *person* in the business of selling tangible personal property at retail" then, in SCDOR's words, "the sales tax is imposed on their *business*, not what they sell." SCDOR Brief at pp. 18-19 (emphasis in original). Thus, SCDOR's position is that the imposition statute does not impose a tax on retailers entering into specific transactions but rather imposes a tax on a type of taxpayer, i.e. retailers in general.

This is contrary to the plain meaning of the imposition statute as well as South Carolina law and sales tax law generally. First, it is widely accepted that a sales tax is a transactional tax. The Hellerstein Treatise on State Taxation notes that two distinguished authorities have defined a 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." 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)). The Hellerstein Treatise then describes the retail sales tax as "a single-stage levy on consumer expenditures." Id. It also notes that state sales taxes are "collected from the purchaser by the seller and are collected on a *transaction-by-transaction basis*." Id. (emphasis added). Thus, an imposition statute for a transactional tax must identify the transaction subject to tax. It is not sufficient that it merely identify a class of taxpayers such as retailers.

Additionally, SCDOR's interpretation relies on the measure of tax statute in S.C. Code Ann. §12-36-90 (versus the imposition statute) to impose a tax on Waivers, which is not proper. As explained in Rent-A-Center's Brief, an imposition statute provides notice to taxpayers of what transactions will be subject to tax. See Rent-A-Center Brief at p. 26. And as Appellants' tax policy expert testified (which is also reflected in the tax cases cited by Appellants), one must "pass through the first statute [i.e. the imposition statute] before you get to the second [i.e. 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. (citing Tr., R. pp. 223:22- 224:5). If you do not have an imposition statute, then that is "the end of the game. You don't ever get to §12-36-90, because there is no sales tax in play." Id. (citing Tr., R. p. 229:12-15). SCDOR erroneously relies on the measure of tax statute to attempt to define what transactions are subject to tax, but the measure of tax statute (measuring the amount to be taxed) is never reached unless the imposition statute first imposes a tax. Thus, Waivers are not taxable unless the imposition statute imposes a tax when they are sold, and, as will be discussed below, the

imposition statute only imposes tax on retailers when they sell tangible personal property and certain enumerated services not at issue here.

The South Carolina imposition statute begins as follows:

SECTION 12-36-910. Five percent tax on tangible personal property; laundry services, electricity, communication services, and manufacturer-consumed goods.

Section A then provides states that "[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," and section B then provides that "[t]he sales tax imposed by this article also applies to the" sale of various enumerated services, including laundry services, electricity, and communications services. Id. As was explained by the ALC in another matter, a retailer is subject to sales tax under the imposition statute "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).

It is clear from a full reading of the imposition statute that it imposes a tax on a retailer only upon the sale of tangible personal property and certain enumerated services.³ Moreover, SCDOR's Tax Manual supports Rent-A-Center's interpretation of the imposition statute as it 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:

- (1) certain communication services,
- (2) laundry and dry cleaning services,

³ SCDOR contends that headings cannot be used to expand or limit a statute. SCDOR Brief at p. 15, n. 8. Rent-A-Center does not seek to do either. The heading of the imposition statute is consistent with the text of the statute that follows, to wit, that the tax is imposed when tangible personal property or certain enumerated services are sold.

- (3) electricity,
- (4) the fair market value of tangible personal property manufactured within South Carolina or brought into South Carolina by its manufacturer for storage, use, or consumption in South Carolina by the manufacturer,
- (5) transient construction property, and
- (6) the furnishing of accommodations."

S.C. Department of Revenue Tax Manual (2015)⁴ (footnotes omitted). SCDOR makes no mention of Waivers as being subject to sales tax in this Manual. Additionally, Rent-A-Center's interpretation is also consistent with (a) how retailers in South Carolina are actually treated, (b) the various regulations exempting certain services from sales tax when sold by retailers in conjunction with the sale of tangible personal property (which would be invalid under SCDOR's interpretation), and (c) the Alltel decision. See supra pp. 3-4. See also Rent-A-Center Brief at pp. 14-17.

To construe the imposition statute otherwise would be to ignore the specific statutory requirement under S.C. Code Ann. §12-36-60 that intangibles or services must otherwise be subject to sales tax under Chapter 36 of Title 12 in order to come within the definition of tangible personal property for purposes of §12-36-90 and §12-36-910. In other words, this statute clearly states that sales tax is only imposed on a retailer for a sale of an intangible or a service if the intangible or service is listed therein (i.e. communications, laundry services, electricity, etc.). See also S.C. Rev. Ruling #06-08 at p. 5 (2006)(stating that "the definition of tangible personal property, as defined in Code Section 12-36-60, includes services and *intangibles* 'the sale or use of which is *subject to tax under [Chapter 36],*' such as

⁴ The South Carolina Sales and Use Tax Manual is published by the Policy Section of the Office of General Counsel of SCDOR and is available on SCDOR's website at www.dor.sc.gov.

'communications.'")(emphasis added). Again, Waivers are not among those intangibles or services listed in Chapter 36.

SCDOR's interpretation that the imposition statute applies to a class of taxpayers would also lead to the absurd result that the imposition statute does not impose a tax on any transactions (except presumably the services identified in section B). Stating who will be responsible for a tax (here, "every person engaged or continuing within this State in the business of selling tangible personal property at retail") and identifying which transactions will cause that person to be taxed are two completely different things. If SCDOR is correct, and the imposition statute only addresses who is responsible for paying sales tax and certain services that are subject to tax, then sales of tangible personal property would not actually be subject to sales tax in South Carolina under the imposition statute, which cannot be the intent of the Legislature. Florence Co. Democratic Party v. Florence Co. Repub. Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012)("[t]his Court will not construe a statute in a way which leads to an absurd result or renders it meaningless").

SCDOR also argues that Rent-A-Center is asking this Court to read out the language in §12-36-910 that imposes sales tax on retailers of tangible personal property. See SCDOR Brief at p. 15 (stating that "Taxpayer's interpretation requires the deletion of the words 'persons engaged in the business of'"). This is not accurate. The purpose of this language is to (a) identify who is responsible for paying sales tax (similar to the way that the use tax statutes identify the persons upon whom the use tax is imposed),⁵ and (b) describe the circumstances when these persons have a tax imposed upon them, i.e. when they sell tangible personal

⁵ See S.C. Code Ann. §§12-36-1350 and 1360 (providing that responsibility for payment of the use tax generally falls upon the purchaser).

property or render certain enumerated services. Rent-A-Center's interpretation of the imposition statute gives full effect to this statutory language.

III. SCDOR'S INTERPRETATION OF THE MEASURE OF TAX STATUTE AND ITS APPLICATION OF A "BUT FOR" TEST ARE INCONSISTENT WITH THE PLAIN MEANING OF THAT STATUTE AS WELL AS REVENUE RULING #06-08 AND S.C. REG. 117-313.3.

SCDOR argues that the language in S.C. Code Ann. §12-36-90, i.e. the measure of tax statute, is expansive and reaches services and intangibles sold in conjunction with sales of tangible personal property. SCDOR Brief at pp. 20-28. In support of this, SCDOR points to the statutory phrase "the value proceeding or accruing from the sale, lease or rental of tangible personal property" and then pulls definitions of "proceed" and "accrue" from the dictionary to argue that "gross proceeds" are any value that is a direct result of the sale of tangible personal property thereby satisfying the alleged "but for" test in Meyers Arnold. SCDOR Brief at pp. 16 and 21. SCDOR then argues that "the Waivers are a direct result of the rental of tangible personal property" and that "[b]ut for the rental of tangible personal property, the Taxpayers would not have received the fees." Id. at 21.

Of course, no "but for" test appears in the statute. Had the Legislature intended that to be the test, then it would have included that language in the statute. Nor did the ALC apply or adopt a "but for" test in its decision in this case. Moreover, that is not even the holding in the Meyers Arnold case, which is relied upon by SCDOR as the origin of this so called "test." As the ALC in the Alltel case observed:

[The] holding in *Meyers Arnold* does not support the Department's argument. Instead, this holding reflects that the Court of Appeals was applying the definition of gross proceeds found in S.C. Code Ann. §12-36-30 (1976), which is "the value proceeding or accruing from the sale of tangible personal property . . . without any deduction for service cost." *Meyers Arnold, supra* (emphasis supplied). In other words, the Court of

Appeals' holding in *Meyers Arnold* addresses an attempt by a taxpayer to exclude from gross proceeds a cost of service provided by the retailer in the sale of tangible personal property. Here, Alltel has not excluded any costs associated with the selling of its communications services from its revenues.

Alltel, 2015 WL 7681302, at p. 24.⁶ Additionally, if the "but for" test was the law in South Carolina, then the Legislature could not have enacted the previously discussed regulation exempting installation of labor sold in conjunction with parts from sales tax as clearly there would be no installation labor needed "but for" the sale of the repair parts even though the labor is "incidental to" and "enhances the value of" the parts sold. See S.C. Reg. 117-313.3 (2002). The same reasoning applies to the other examples cited in footnote 1 above.

SCDOR's interpretation of the measure of tax statute also ignores and runs counter to one of its own revenue rulings interpreting "gross proceeds" of sale. S.C. Rev. Ruling #06-08 (2006). This revenue ruling looks at the dictionary definitions of "gross" and "proceeds" (as well as some other relevant terms) and concludes that gross proceeds are "the total amount of money derived, exclusive of deductions, from a commercial venture and accruing or proceeding from charges" for certain communication services. Id. at p. 5. While the primary

⁶ Additionally, Alltel concludes that the same result would have been reached in Meyers Arnold without using a "but for" test (which the Court of Appeals has not subsequently mentioned or applied and which does not appear to be used in any other jurisdictions) either as an improperly deducted service cost (see S.C. Code Ann. §12-36-90 and Alltel, 2015 WL 7681302, at p. 23) or under the more commonly accepted and used "true object" test. The latter test is used in mixed or bundled transactions where the transactions are inextricably linked, and the court must examine the "true object" of the transaction (i.e. whether the true object is the sale of tangible personal property or the sale of a service) to determine if it is subject to sales tax. See e.g. Boggero v. S.C. Dept. of Rev., 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015). Because the Waivers here are optional and their costs separately stated, this Court is not faced with a mixed or bundled transaction, and thus, the "true object" test is not applicable. See Tr. 153:4-154:2; see also Rent-A-Center Brief at pp. 21-26. Additionally, as was discussed in Rent-A-Center's Brief, this is not an improperly deducted service cost. See Rent-A-Center Brief at pp. 19-21.

topic of this ruling was sales tax on communication services, there is no logical reason why gross proceeds should be interpreted any differently in this context. Furthermore, the same revenue ruling 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" and goes on to state that "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." Therefore, SCDOR's published tax treatment of bundled transactions is directly opposite to its interpretation of the imposition statute here.

SCDOR also argues that "[i]f the General Assembly intended for the measure of tax statute to be construed as narrowly as the Taxpayers here and the ALC in Alltel read the statute, they would have drafted the [measure of tax] statute to simply provide that gross proceeds of sales include proceeds from the sale of tangible personal property and certain enumerated services." SCDOR Brief at p. 27. It further claims that Rent-A-Center's interpretation is strictly focused on the price of an item. Neither of these claims is accurate. The purpose of the "value proceeding or accruing from" language is to capture different types of consideration that could be exchanged. For example, if the statute simply said gross proceeds from the sale of tangible personal property, then that might not reach an in-kind trade. If a vendor traded office furniture worth \$500 to a marketing consultant in exchange for \$500 worth of consulting services, that would not be covered by the "gross proceeds" language alone (i.e. total amount of money derived from the sale). However, there would certainly be "value proceeding or accruing from" that sale, and the measure of tax statute, which does not focus exclusively on the price of an item, seeks to capture that value.

In fact, Rent-A-Center would submit that it is SCDOR that seeks to read out this statutory language defining "gross proceeds of sales" as "the value proceeding or accruing from the sale, lease or rental of tangible personal property." S.C. Code Ann. §12-36-90. If value does not proceed or accrue from *the sale of tangible personal property*, then it is not gross proceeds. The sale of Waivers, which are intangibles, is clearly not value proceeding or accruing from the sale of tangible personal property but rather is value proceeding or accruing from the sale of the intangible Waivers. See Rent-A-Center Brief at §IV, pp. 29-33.

IV. THE AUTHORITIES CITED BY SCDOR ARE DISTINGUISHABLE AND DO NOT SUPPORT ITS POSITION.

SCDOR cites several authorities that it claims support its position, including Meyers Arnold v. S.C. Tax Comm'n, 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985), Travelscape, LLC v. S.C. Dept. of Rev., 391 S.C. 89, 705 S.E.2d 28 (2011), Tronco's Catering, Inc. v. S.C. Dept. of Rev., 09-ALJ-17-0089-CC (Admin. Law Ct. April 12, 2010), Commission Decision S-D-174 (1986) and others. SCDOR Brief at pp. 22-28. As stated in prior briefing, these cases are distinguishable and inapplicable here. See Rent-A-Center Brief at pp. 17-20; Rent-A-Center Reply in Support of Motion for Reconsideration at pp. 9-11, R. p. 81-83. For example, some involve mandatory charges (Meyers Arnold, Travelscape and Comm'n Decision S-D-174, which does not mention whether the charge was mandatory or optional and thus does not even consider this important element) or inseparable components (Tronco's), and many involve improper attempts to deduct a service cost (Meyers Arnold, Travelscape and Tronco's). Rent-A-Center Brief at pp. 17-20; Rent-A-Center Reply in Supp. of Mot. for Reconsideration, R. pp. 81-83; Rent-A-Center's Proposed Order, R. pp. 810-815.

When a charge for a service or intangible is mandatory versus optional or is otherwise inseparable from the sale of the tangible personal property, then it is subject to sales tax as the sale of the service or intangible would proceed or accrue from the sale of the tangible personal property. Additionally, where the charge at issue is a service cost of the sale of the tangible personal property, then it is likewise subject to sales tax. See S.C. Code Ann. §12-36-90(b) (providing that the term “gross proceeds” includes the proceeds from the sale of tangible personal property *without any deduction for*: . . . (ii) the cost of materials, labor, *or service*. . . .” Id. (emphasis added). This rule precludes a retailer from deducting from the sum paid by the customer to purchase tangible personal property (i.e. the gross proceeds) any amounts representing a component of the cost incurred by the retailer in providing the tangible personal property for purchase. The Waiver at issue here is optional with a separately stated cost, is clearly separable from the rental of household items, is clearly not a cost of producing the item rented (i.e. an appliance), is not added to the purchase price of the item rented, and is not a cost necessary to accomplish the sales transaction involving the rented item. See Rent-A-Center Brief at pp. 17-20. Thus, the cases cited by SCDOR do not support the Waivers being subject to sales tax.

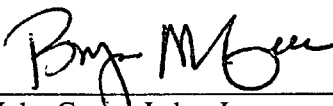
Finally, Rent-A-Center would note that decisions from other jurisdictions have also reached the conclusion that optional waivers were not subject to sales tax. See Rent-A-Center West, Inc. v. Utah State Tax Comm'n, No. 20140129, at p. 3 (Utah January 5, 2016) (addressing exact same Waivers at issue here and determining that they were not subject to sales tax because they were not “an amount paid or charged for leases or rentals of tangible personal property” as the Utah statute required and invalidating a long-standing Tax Commission regulation that “impermissibly broaden[ed] the language of the statute.”); Letter

Ruling No. CL 2290, 2000 Mo. Tax Ltr. Rul. LEXIS 37 (Mo. Dep't Rev. May 18, 2000) (ruling that the 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 specifically listed as a taxable service under the relevant statutes.).

CONCLUSION

For the reasons set forth above and in Rent-A-Center's Brief, the Court should reverse the ALC's decision and find that the Waivers are not taxable under South Carolina law.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

John C. von Lehe, Jr.
SC Bar No. 5719
E-Mail: john.vonlehe@nelsonmullins.com
Bryson M. Geer
SC Bar No. 13606
E-Mail: bryson.geer@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
February 13, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT COUNTY

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

RECEIVED

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

FEB 14 2017

Appellant Case No. 2016-001210

SC Court of Appeals

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

Appellants,

v.

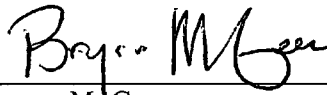
South Carolina Department of Revenue,

Respondent.

CERTIFICATE OF COUNSEL

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

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.

February 13, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT COUNTY

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

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

Appellant Case No. 2016-001210

RECEIVED

FEB 14 2017

SC Court of Appeals

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

Appellants,

v.

South Carolina Department of Revenue,

Respondent.

PROOF OF SERVICE

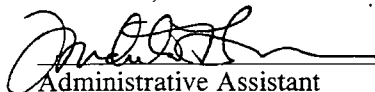
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Rent-A-Center East, Inc. and Rent Way, Inc., hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified via U.S. Mail to the following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

Pleadings:

FINAL REPLY BRIEF OF APPELLANTS

Counsel Served:

Sean G. Ryan
Lauren Acquaviva
Counsel for Litigation
South Carolina Department of Revenue
301 Gervais Street, 3rd Floor
Columbia, SC 29201


Administrative Assistant

February 13, 2017