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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Deborah Brooks Durden, Administrative Law Judge

Case No. 17-ALJ-17-0002-CC
Appellate Case No. 2018-001250

Keith Purdy, d/b/a A Southern Bartender ..... Respondent,

v.

South Carolina Department of Revenue,.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

DID THE ADMINISTRATIVE LAW COURT ERR BY HOLDING THAT A BEVERAGE CATERER CAN DEDUCT LABOR AND SERVICE COSTS FROM HIS GROSS PROCEEDS OF SALES IF HE STATES THOSE COSTS AS A SEPARATE LINE ITEM ON HIS INVOICE?

STATEMENT OF THE CASE

This matter came before the Administrative Law Court (ALC) in accordance with the Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310 et seq. (2005 & Supp. 2015) for a contested case hearing. Keith Purdy, d/b/a A Southern Bartender (Respondent[1]) filed a request for a contested case hearing with the ALC on January 6, 2017, in case number 17-ALJ-17-0002-CC to challenge a Department Determination issued by the South Carolina Department of Revenue (Department/Appellant) on December 7, 2016. (R. pp. 198-203; Department Determination). In the Department Determination, the Department made two determinations. First, the Respondent is a person in the business of selling tangible personal property at retail (e.g. liquor, beer, wine, mixers, etc.) and, thus, subject to sales tax pursuant to S.C. Code Ann. § 12-36-910(A). Second, the proceeds from the Respondent's alcohol catering (including the cost of goods sold, materials, labor, and service) must be included in the Taxpayer's gross proceeds of sales pursuant to S.C. Code Ann. § 12-36-90 (2014).

On January 25, 2018, the ALC held a contested case hearing. Thereafter, the ALC issued its Order on April 26, 2018 finding that the Respondent's bartending services are subject to sales tax when the services are part of a package that includes beverages. (R. p. 013; Order p. 10). However, the ALC further ordered the Department to deduct from the Respondent's gross proceeds of sales any payments made for bartending and other services that were not invoiced as part of a beverage package. (R. p. 014; Order p. 11). On May 7, 2018, the Department filed a Motion to Reconsider. (R. pp. 072-091; Resp't Mot. to Recons.). On May 16, 2018, the Respondent filed a Memorandum in Opposition to the Department's Motion to Reconsider. On May 25, 2018, the Department filed a Reply to Respondent's Memorandum in Opposition to the

[1] Mr. Purdy was the Petitioner at the ALC.

Department's Motion to Reconsider. (R. pp. 092-099A; Reply to Pet'r's Resp. to Resp't Mot. to Recons.). The ALC issued an order on June 4, 2018, denying the Department's Motion to Reconsider. (R. p. 015; Order Denying Mot. to Recons.) The Department appealed the Final Order on July 5, 2018.

STANDARD OF REVIEW

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 & Envtl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500-501 (Ct. App. 2008); Turner v. S.C. Dep't of Health & Envtl. 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. 2017) 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.

The decision by the ALC is affected by error of law and is in violation of statutory provisions. Resolution of the issues in this case depends upon the rules of statutory construction and 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." Id. 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). Also, "[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).

STATEMENT OF FACTS

I. The Respondent's Beverage Catering Business.

The Respondent operates a beverage catering business where he sells beverage packages that include liquor, beer, wine, mixers, ice, cups, garnishes, napkins to his customers. (R. p. 005; Order p. 2). The package price includes specified beer, wine, liquor, and/or mixers, as well as one bartender per ninety (90) people for three hours. (R. p. 005; Order p. 2). The packages are priced per person based on the quality of the product provided, not the bartending service. (R. p. 005; Order p. 2). Customers can add extra bartenders and/or extra time to any package for an additional charge. (R. p. 005; Order p. 2). Customers can also rent glassware for an additional charge. (R. p.

005; Order p. 2). The Respondent adds an 18% gratuity charge to the total package price. (R. p. 005; Order p. 2). On occasion, the Respondent provides solely bartending services where the Respondent provides the bartenders and the customer provides everything else. (R. p. 005; Order p. 2; R. p. 130; Tr. p. 31:13-25).

When booking an event, the customer pays the Respondent a deposit so the Respondent can purchase the inventory of beer, wine, liquor, mixers, ice, cups, garnishes, and anything else the customer may want for the event. (R. p. 002; Order p. 2). After an event, the Respondent takes all remaining beer, wine, and liquor to his storeroom for use at his next event. (R. p. 005, 008-010; Order p. 2, 5, 6-7). If a customer wants to keep the remaining beer, wine, and liquor, the Respondent will sell such to his customer for an extra charge. (R. p. 005, 008-010; Order p. 2, 5, 6-7). Sometimes, the Respondent bills his customers with a lump sum package price that includes alcohol, non-alcoholic beverages, cups, ice, napkins, and the service of alcohol. (R. p. 11; Order p. 8). Other times, the Respondent bills his customers with a separate line item for bartending services and a separate line item for alcohol, beverages, cups, ice, and napkins. (R. p. 012; Order p. 9).

II. The Department's Sales Tax Audit and Assessment.

On April 27, 2016, the Department notified the Respondent that it would be conducting an audit examination of the Respondent's books and records for an audit period between April 1, 2013 and March 31, 2016 (the "Audit Period"). (R. p. 005; Order p. 2). As a result of the audit, the Department found that the Respondent did not file any sales tax returns for the Audit Period. (R. p. 005; Order p. 2). In addition, during the Audit Period, the Respondent did not have an alcohol

license or a retail license.[2] (R. p. 005; Order p. 2). The Respondent listed "cost of goods sold," which represents all of the inventory the Respondent purchased and provided to customers for their events, on Schedule C of his 2013 – 2015 Federal Individual Income Tax returns. (R. p. 005; Order p. 2). After reviewing the Respondent's records, the Department determined that the Respondent operated a catering business, which South Carolina Courts have determined are retail businesses. (R. p. 006; Order p. 3). Accordingly, the Department determined that the Respondent should have remitted sales tax to the Department on the gross proceeds of sales from his catering business. (R. p. 006; Order p. 3).

During the audit, the Respondent did not produce accurate accounting records for his business. (R. p. 006; Order p. 3). Therefore, the Department had to calculate the Respondent's total sales using the bank-deposit method.[3] (R. p. 006; Order p. 3). Then, the Department determined what amount should be included in the Respondent's gross proceeds of sales by subtracting sales that did not include any tangible personal property (e.g. bartender only services, ID checker only services, Training for Intervention Procedures (TIPS), and expert witness services). (R. p. 006; Order p. 3). In other words, the Department excluded from the Respondent's gross proceeds of sales any sales that included only the provision of bartenders and no tangible personal property. (R. p. 006; Order p. 3). Regardless of how the customer was invoiced, the

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[2]Under S.C. Code Ann. §§ 61-4-560 (2009) and 61-6-4010 (2009), a person may not sell beer, wine, or alcoholic liquors without a valid license. When asked at his deposition if he sold alcohol, the Respondent invoked his Fifth Amendment privilege. (R. p. 125; Tr. p. 26: 17-25; 28:1-5). While the facts demonstrate the Respondent was selling beer, wine, and liquor unlawfully, the issue before the Court is limited to the tax implications of Respondent's business. Importantly, the illegality of the Respondent's sales does not exempt those sales from taxation. See e.g. S.C. Code Ann § 12-21-5090 (2014) (imposes tax on marijuana and controlled substances).

[3]Under the bank-deposit method, the Department treated all deposits minus refunds and transfers as income from sales. (R. p. 006; Order p. 3).

Department included labor and services incidental to the sale of tangible personal property in gross proceeds of sales. (R. p. 012; Order p. 9).

Once the Department determined the Respondent's gross proceeds of sales, the Department calculated the Respondent's sales tax liability. (R. p. 007; Order p. 4). On August 19, 2016, the Department sent the Respondent the auditor's working papers and detailed notes on how the auditor calculated the Respondent's gross proceeds of sales and the Respondent's sales tax liability. (R. p. 007; Order p. 4). On or about September 2, 2016, the Respondent informed the Department by email that he disagreed with the Department's determination that he was a retailer. (R. p. 007; Order p. 4; R. p. 182-184; Hr'g Joint Exhibit F). The Department accepted this email as the Respondent's formal protest letter. (R. p. 007; Order p. 4). On September 9, 2016, the Department mailed the Respondent the audit package, which included a letter outlining the Respondent's options for protesting the Proposed Assessment and an Explanation of Audit Assessments and Adjustments. (R. p. 007; Order p. 4). The documents in the audit package also outlined the Respondent's proposed liability as follows: sales tax due in the amount of $14,979.66; failure to file and failure to pay penalties due in the amount of $5,614.59, and interest due in the amount of $1,047.26.[4] (R. p. 007; Order p. 4). By letter dated September 28, 2016, the Respondent informed the Department that he wanted his file forwarded to the Office of General Counsel for Litigation. (R. p. 007; Order p. 4; R. pp. 185-193Hr'g Joint Exhibit G).

ARGUMENTS

THE ADMINISTRATIVE LAW COURT ERRED BY HOLDING THAT A BEVERAGE CATERER CAN DEDUCT LABOR AND SERVICE COSTS FROM HIS GROSS PROCEEDS OF SALES IF HE STATES THOSE COSTS AS A SEPARATE LINE ITEM ON HIS INVOICE.

[4]Penalties and interest continued to accrue.

The ALC erroneously held the same transaction should be taxed differently based on how it is billed. If a taxpayer provides a bill with a lump sum price, the whole price is subject to sales tax. However, if a taxpayer provides a bill for the exact same transaction with separate line items for incidental labor and services, those incidental labor and services are not subject to sales tax. This holding defies both logic and the law by allowing a taxpayer to determine his own sales tax liability simply by how he writes his invoices.

The Respondent is a mobile, pop-up bar. The Respondent's customers say when, where, how long, and what alcohol, and the Respondent does the rest. The Respondent provides everything needed for a bar, including: the alcohol, mixers, ice, cups, garnishes, napkins, tables, linens, coolers, and coffee makers. (R. p. 123; R. pp. 194-197; Tr. p. 24:20-25; Hr'g Joint Exhibit H). The Respondent sets up the bar, serves the drinks, and packs it all up when the event ends. The Respondent takes all the inventory when he leaves, unless the customer pays an extra charge to keep it. (R. p. 005, 008-010; Order p. 2, 5, 6-7).

Sometimes, the Respondent bills his customers a total package rate. (R. p. 011; Order p. 8). Other times, the Respondent breaks the bill down into line items—separating the cost of goods sold, materials, labor, and service. (R. p. 012; Order p. 9). For example, the Respondent produced an invoice from February 5, 2015. (R. pp. 194-197; Hr'g Joint Exhibit H). The invoice shows line items for bartending charges, wine, administrative service charge, and gratuity. Not listed as a line item, but stated as included in the price are tables, linens, coolers, sodas, and coffee makers.

The ALC correctly found the Respondent is selling tangible personal property at retail. (R. p. 011; Order p. 8). The ALC also correctly found the total invoice price subject to sales tax when billed as a package. (R. p. 013; Order p. 10). However, the ALC erroneously found the costs of labor and service—specifically "bartending and other services"—were not subject to sales tax if

billed as separate line items. (R. p. 014; Order p. 11). The transaction remains the same regardless of how the Respondent bills the customer, and the law does not allow a sales tax deduction for "bartending and other services." The ALC ruling allows a taxpayer to avoid taxation by manipulating the wording of an invoice. This holding is not supported by South Carolina law. Further, if the Respondent were a restaurant selling from a permanent fixed location with the proper retail and alcohol licenses, he would be liable for sales tax on his drinks without any deduction for bartending and other services no matter how he bills his customers.

I. The Respondent Is A Beverage Caterer Who Sells, And His Customers Buy, Tangible Personal Property.

The Respondent was engaged in the business of selling tangible personal property at retail—catered beverages. (R. p. 011; Order p. 8). Further, the Respondent admitted that temporary labor is not the purpose of his business. (R. p. 131; Tr. p. 32:1-4). Yet, the ALC erroneously held that bartending services were separable from the sale of tangible personal property if listed as a separate line item. (R. p. 012; Order p. 9). Other than the billing method, the transactions were identical. The ALC found no facts and provided no analysis beyond the Respondent listing the bartending and other services separately on the invoice to support its ruling that those services were a separate transaction from the sale of tangible personal property. (R. p. -012; Order p. 9). The Respondent bought the inventory of tangible personal property, provided bartending services, sold catered beverages, and kept the leftover tangible personal property. (R. p. 139; Tr. p. 40:7-16). Just as the package price varied based on quality and quantity, the price for invoices with separately stated line items varied based on quality and quantity. (R. pp. 194-197 ; Hr'g Joint Exhibit H). The true object of the transaction remains catered beverages, regardless of how the Respondent bills his customers.

From the buyer's perspective, the Respondent's customers are interested in the catered beverages, for example, a liquor drink measured and mixed over ice in a glass, a mixed drink of combined liquor and mixers, wine poured in a glass, or a cold beer opened and placed on a napkin. The Respondent's customers are not interested in purchasing beverages that they would have to mix and serve on their own. Similarly, the Respondent's customers are not interested in purchasing just bartending services; if they were, they had the option to purchase their own supplies and hire the Respondent to provide only bartending services. Further, the Respondent does not act as a mere delivery person because he keeps the tangible personal property unless the customer pays an extra charge. (R. pp. 005, 008-010; Order p. 2, 5-7).

While the Respondent may utilize various billing methods, including charging for the beverages and the bartending service separately, this does not alter the nature of the transaction. The service charges are effectively markups on the beverages due to the Respondent enhancing the beverages to make them catered beverages. Said differently, whether the Respondent charges a lump sum for the catered beverages or separates the cost of the catered beverages into the cost of the beverages and the cost of the incidental bartending services, the customer still wants the catered beverages at the end of the day. As such, the true object of the transaction at issue is the purchase of catered beverages, which constitutes the sale of tangible personal property.

II. But-For The Sale Of Catered Beverages, The Respondent Would Not Receive Fees For Bartending And Other Services.

In Meyers Arnold, this Court applied a "but for" analysis to determine whether a certain fee should be included in gross proceeds of sales. Under such analysis, a fee should be included in gross proceeds if the taxpayer would not receive the fee but for the sale of tangible personal property. Meyers Arnold v. S.C. Tax Comm'n, 285 S.C. 303, 328 S.E.2d. 920 (Ct. App. 1985). The ALC in Tronco's Catering applied the Meyers Arnold "but for" test to catered meals and found

"[b]ut for the sale of catered meals, the taxpayer would not receive fees for the servers, butlers, and bartenders." Tronco's Catering, Inc. v. S.C. Dep't of Revenue, Docket No. 09-ALJ-17-0089-CC, 2010 WL 5781622 at 6 (S.C. Admin. Law Ct. Apr. 12, 2010). Applying the "but for" test to the Respondent's beverage catering business leads to the same result—bartending fees must be included in gross proceeds of sales.

Similar to the taxpayer in Meyers Arnold, the Respondent was engaged in the business of selling tangible personal property at retail and the question before this Court is whether certain fees are part of the gross proceeds of sales. Meyers Arnold, 285 S.C. at 307, 328 S.E.2d at 923 ("It is undisputed that Meyers Arnold is in the business of making retail sales of tangible personal property when it sells to 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."); (R. p. 011; Order p. 8). The answer is simple. But for the sale of catered beverages, the Respondent would not receive fees for bartending and other services. Like in Meyers Arnold, the fees charged for bartending and other services are charged for services rendered in selling tangible personal property, that being the catered beverages. Id. at 307, 328 S.E.2d at 923 (Layaway fees were for the service rendered in making the layaway sale, and therefore, part of gross proceeds of sales.). The customer would not pay the bartender fees if the Respondent did not provide the customer's guests catered beverages; i.e. if the Respondent poured drinks but did not give those drinks to the customer's guests. Only through the sale of catered beverages does the Respondent receive the bartending and other fees he lists on his invoice. Therefore, bartending and other services form part of gross proceeds of sales.

III. The Bartending Services Are Merely Incidental To The "True Object" Of The Respondent's Sale Of Catered Beverages.

Applying the "true object test" to the transactions at issue demonstrates the true object is the sale of catered beverages. "According to the 'true object test', sales [of services] 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, 506 S.E.2d 495, 497 n.2 (1998). "The true object test was developed in recognition of the fact that services are often a part of the sale of tangible personal property." Tronco's Catering, 2010 WL 5781622 at 4. In order to determine "whether a contract is primarily for services or primarily for the sale of tangible personal property, [one must determine] the basic purpose of the buyer." Id. at 3.

In addition to the "but for" test, the ALC in Tronco's Catering applied the true object test to find service, labor, and room charges are part of the gross proceeds of sale of a catered meal. Tronco's Catering, at 2. Specifically, the ALC held,

> When a buyer contracts with a caterer for a catered meal, the buyer's basic purpose is to obtain food for the buyer's guests. Under this test, although special skills and knowledge may go into the preparation, service, and presentation of the catered meals, it is nonetheless true that the buyer's main purpose is to purchase food and beverages.

Id. at 4. Further emphasizing the similarities between the two cases, the Respondent describes himself as "an off-premise caterer." (R. p. 119; Tr. p. 20:23-25). Like in Tronco's Catering, when the Respondent's customer contracts with the Respondent for the purchase of catered beverages, the customer's basic purpose is to obtain catered beverages for the customer's guests. Id. Thus, "although special skills and knowledge may go into the preparation, service, and presentation of the catered [beverages], it is nonetheless true that the buyer's main purpose is to purchase . . . beverages." Id. at 4. The labor and services merely enhance the tangible personal property. See Id. at 3 ("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."). The Respondent's bartending and other services are merely incidental to the sale of the catered beverages and should be included in his gross proceeds of sales. The Respondent is a caterer of beverages and should be taxed the same as other caterers.

Here, the ALC correctly found that when billed as a package, "the provision of service was merely incidental to the sale of tangible personal property." (R. p. 011; Order p. 8). However, the ALC erred when it found that billing a separate line item for bartending services made those bartending services separable from the sale of tangible personal property and thereby exempt from sales tax. (R. p. 012; Order p. 9). The invoices in Tronco's Catering included line items for a service charge, which was a "catchall line item charge for overhead costs incident to a catered meal," and a labor charge, which was a "flat fee line item charge for servers, butlers, and **bartenders** who provide services incident to catered meals." Tronco's Catering, 2010 WL 5781622 at 2 (emphasis added). However, the billing method in that case had no impact on the taxability of the transaction. 2010 WL 5781622. In fact, the ALC in Tronco's Catering explicitly ruled that "the taxpayer [was] not entitled to the deductions claimed for service, labor, [etc.]." 2010 WL 5781622 at 10. Moreover, the billing method has no impact on the taxability of the transaction here. Putting a line item on an invoice for bartenders who provide services incident to catered beverages does not change the true object of the transaction. The total invoice price, without any deduction for bartending and other services, is subject to sales tax.

IV. The Respondent's Catered Beverage Sales Are Subject To Sales Tax Without A Deduction For The Cost Of Labor Or Services.

The relevant South Carolina statutes and regulations require the Respondent to pay sales tax on the gross proceeds of catered beverage sales without any deduction for bartending and other services. The statutes and regulations are clear and offer no applicable exceptions based on billing

method or otherwise. Therefore, the ALC violated statutory provisions by ordering such a deduction.

a. The plain language of Section 12-36-90 defines "gross proceeds of sales" to include the sale of tangible personal property *without any deduction for the cost of labor or service.*

Under South Carolina law, "[a] sales tax, equal to [six][5] percent 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 property at retail." S.C. Code Ann. § 12-36-910(A) (2014). 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." Beverages are tangible personal property. See Greystone Catering Co. Inc. v. S.C. Dep't of Revenue, 326 S.C. 551, 552, 486 S.E.2d 7, 8 (Ct. App. 1997); S.C. Code Ann. § 12-36-60 (2014). "Gross proceeds of sales" is defined as:

> [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:
>
> (i) the cost of goods sold;
>
> (ii) the cost of materials, labor, or service.

S.C. Code Ann. § 12-36-90 (2014). The statute lacks ambiguity so a plain reading is sufficient to determine the Legislature's intent. 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

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

[6]For 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).

designed to encompass the total value of a transaction and not simply the amount paid for tangible personal property. Further, the General Assembly clearly stated that gross proceeds must include service costs. Allowing the prohibited deductions would erode gross proceeds of sales and effectively eliminate the tax base for sales tax.

b. Regulations promulgated by the Department clearly state that when tangible personal property is sold in conjunction with a service, the retailer may not deduct the cost of the service from his gross proceeds of sales.

S.C. Code Ann. Regs. 117-309 addresses the application of the sales and use tax to a variety of retailers, including those like the Respondent who sell tangible personal property in conjunction with services. An examination of the subparts of Regulation 117-309 demonstrates that when tangible personal property is sold in conjunction with a service the retailer may not deduct the cost of the service from gross proceeds of sales. For example, an artist who sells a custom piece of artwork sells tangible personal property—art supplies—in conjunction with a service. See Regulation 117-309.4. The completed piece of artwork is a combination of the art supplies and the artist's service. The artist's service enhances the value of the art supplies by turning the supplies into a completed piece of artwork. The artist's customers do not want to purchase art supplies and a separate service, they want to purchase a completed piece of artwork. Accordingly, the true object of that sale is the purchase of a completed piece of artwork (the service combined with the tangible personal property). Id. Pursuant to Regulation 117-309.4, the artist must remit sales tax on the gross proceeds of the sale of the completed piece of artwork and cannot deduct the cost of the service even if such cost is separately stated. Id. Because the true object of a transaction involving the sale of tangible personal property in conjunction with a service is the purchase of the tangible personal property, the retailer must remit the sales tax on the entire gross proceeds of the sale.

The Respondent is similar to the artist. In fact, he signs his invoices as a "Mixologist." (R. pp. 194-197; Hr'g Joint Exhibit H). The dictionary definition of mixology is "the art or skill of preparing mixed drinks." See Proceed, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/mixology (last visited Dec. 4, 2018). The cocktail is analogous to the completed piece of custom artwork. The cocktail is a combination of the cocktail supplies (alcohol, mixers, ice, glass, napkin, etc.) and the bartender's service. The bartender's service enhances the value of the cocktail supplies. The Respondent's customers do not want to purchase cocktail supplies and a separate service, they want drinks for their guests. Therefore, the Respondent must remit sales tax on the gross proceeds of the sale of the cocktails and cannot deduct the cost of the service even if such cost is separately stated.

Regardless, no statute or regulation allowing for the deduction of labor or service charges based on the taxpayer's billing method exists for the specific circumstances at issue here. Thus, because no statute or regulation exists that would allow the Respondent to deduct his service charges from his gross proceeds of sales of catered beverages when such service charges are separately stated on the invoice, the Respondent cannot deduct such charges. Instead, irrespective of the Respondent's billing method, the Respondent must remit sales tax on the entire value of the sale, which is the total invoice price. See § 12-36-90. However, the ALC incorrectly ruled this deduction was allowed despite recognizing the service charge was "part of a larger transaction involving the sale of tangible personal property." (R. p. 012; Order p. 9). This is akin to allowing a restaurant to deduct the cost of its servers, bartenders, plates, and napkins and only remit tax on the cost of the food. The Respondent's customers buy a "package" of bartending services and beverages regardless of how they are billed. Because the true object of this transaction was the

sale of catered beverages, sales tax was due on the entire value of the sale—the total invoice price without deductions for labor or services.

c. South Carolina Regulations do not support allowing a caterer to deduct labor and service charges based upon the format of the caterer's invoice.

A retailer's billing method does not and cannot change the taxability of a transaction absent a statute or regulation specifically permitting such.[7] In a number of circumstances, the law makes explicitly clear that the billing method does not exempt certain costs from the gross proceeds of sales. See S.C. Code Ann. Regs. 117-313.1 (2012) (providing that "[n]o method of billing will serve to exempt from the measure of the tax the . . . labor or service cost . . . ."); S.C. Code Ann. Regs. 117.310 (2012) ("Whether or not freight, delivery, or transportation charges may be deducted by the seller from the selling price of tangible personal property sold for use or consumption, in computing his liability for tax under the sales and use tax law, does not depend upon the separate billing thereof..."); S.C. Code Ann. Regs. 117.309.3 (2012) ("A printer may not deduct from the selling price of such tangible personal property charges for the labor or service of performing the printing even though such labor or service charges may be billed to the customer separately from the charge for the stock."). These regulations demonstrate the general rule that billing method does not change the taxability of a transaction. In other words, the true object of a

[7] This is evidenced by the fact the law only allows for the deduction of labor or service charges based on the method of billing under certain limited and explicitly stated circumstances. Those limited circumstances are: installation charges in S.C. Code Ann. Regs. 117.313.3 (2012), carrying and finance charges in S.C. Code Ann. Regs. 117.318.2 (2012), icing of perishables in S.C. Code Ann. Regs. 117.312.8 (2012), and repairs to machines in S.C. Code Ann. Regs. 117-306.1(c) (2012). These regulations are the few exceptions to the general rule that billing method does not change the taxability of a transaction, and none of those exceptions apply to beverage catering.

transaction does not change based on billing. Similarly here, the Respondent's billing method does not change the taxability of the transaction.

V. The Respondent Cannot Avoid Paying Sales Tax On His Entire Gross Proceeds Of Sales Simply By Stating The Bartending Service Cost As A Separate Line Item On His Invoice.

The ALC isapplied the true object test articulated by this Court as whether the customer's purpose for entering the transaction was to procure a good or service. See Boggero v. S.C. Dep't of Revenue, 414 S.C. 277 at 287, 777 S.E.2d 842 at 847 (Ct. App. 2015). In Boggero, this Court upheld an ALC decision that found "the 'true object' of the transaction is the portable toilet and not the servicing of the toilet (regular and routine removal and disposal of the waste and the replacement of chemicals and toilet paper)." Eugenia Boggero, d/b/a Boggero's Portable Toilets v. S.C. Dep't of Revenue, 13-ALJ-17-0218-CC, 2014 WL 104827, at 8 (S.C. Admin. Law Ct. Jan. 6, 2014). Similarly, the true object of the transaction here is the catered beverage and not the services involved in its creation. The customer purchases the catered beverage and without the catered beverage there would be no use for the Respondent. See Id. at 6. Bartending charges are incidental to the sale of catered beverages just as servicing a portable toilet is incidental to its rental. Therefore, bartending charges must be included in gross proceeds of sales and subject to sales tax.

Notably, the Court in Boggero found a reasonable inference that the amounts invoiced as "delivery and pickup fees" were in fact disguised rental fees of the tangible personal property. Boggero v. S.C. Dep't of Revenue, 414 S.C. 277 at 287, 777 S.E.2d 842 at 847 (Ct. App. 2015). As such, this Court affirmed the ALC decision that such fees were part of gross proceeds of sale and subject to sales and use tax. Id. The trial court in Boggero held, "The characterization of the transaction through mere nomenclature cannot be controlling as to whether there is a retail sale of

tangible personal property." Eugenia Boggero, d/b/a Boggero's Portable Toilets v. S.C. Dep't of Revenue, 13-ALJ-17-0218-CC, 2014 WL 104827, at 7 (S.C. Admin. Law Ct. Jan. 6, 2014). The ALC went on to state:

> As we also noted in WTAR, the taxpayer's "manner of computing the invoice" is not determinative of either the true object of the transaction or whether the service provided is truly separate and distinct from the property leased. 217 Va. at 884, 234 S.E.2d at 249. Otherwise, a taxpayer could create its own tax exemption merely by altering the printing of its invoices.

Id. In other words, the line items on an invoice are not determinative of whether the true object of a sale, lease, or rental is the sale, lease, or rental of tangible personal property or the sale of a service.

Contradicting Boggero, the ALC here incorrectly found the manner of computing the invoice to be determinative. In the instant case, the bartending charges are disguised markups on the sale of tangible personal property. The Respondent is selling tangible personal property at retail. (R. p. 011; Order p. 8). The line items on an invoice created by the Respondent do not change that. The ALC's decision allows the Respondent to reduce his sales tax obligation by shifting amounts to the bartending line item from the line items for tangible personal property. As made clear by Boggero, the Respondent cannot escape the intent of the legislature by adroit draftsmanship.

VI. Allowing Retailers To Deduct The Cost Of Labor Or Service From Their Gross Sales By Manipulating Their Invoices Will Result In An Erosion Of The State's Sales Tax Base.

The ALC clearly erred when it ordered the Department to deduct from gross proceeds of sales "any payments made for bartending or other services that were not invoiced as part of a beverage package." (R. p. 014; Order p. 11). Because the true object of the transaction was the sale of tangible personal property, the ALC's order violates the statutory provisions defining gross

proceeds of sales to explicitly preclude any deduction for labor or services. See § 12-36-90(1)(b)(ii). Further, the ALC decision contradicts the Troncos Catering decision and creates uncertainty with taxpayers over whether separately stating services incidental to sales of tangible personal property exempts those services from sales and use tax.

Allowing all retailers to deduct the cost of labor or service based upon their chosen billing method would nullify § 12-36-90(1)(b)(ii) and have a devastating impact on this State's revenue. Retailers would inevitably use creative or distortive billing practices to reduce the amount attributable to the tangible personal property and increase the amount attributed to the cost of the labor or service. This Court saw such creative or distortive billing practices in Boggero yet held the true object of the transaction was not a service. The General Assembly clearly did not intend for a retailer's gross proceeds of sales to be subject to such manipulation. Therefore, this Court should follow its precedent, the plain language of § 12-36-90, and the intent of the General Assembly to hold that separately stating labor and service costs on an invoice does not exclude those costs from gross proceeds of sales.

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CONCLUSION

As explained more fully above, this Court should reverse the ALC's decision to the extent the decision orders the Department to exclude bartending and other services from gross proceeds of sales. Said order is in violation of statutory provisions and affected by an error of law.

Respectfully Submitted,

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January 22, 2019

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In The Court Of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Deborah Brooks Durden, Administrative Law Judge

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Keith Purdy, d/b/a A Southern Bartender ..... Respondent,

v.

South Carolina Department of Revenue,.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 221(b), SCARC.

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PROOF OF SERVICE

I, Geneva J. McIntosh, hereby certify that I have caused to be mailed a copy of Appellant, South Carolina Department of Revenue's Final Brief in the above-referenced case, by depositing the same in the United States Mail, postage prepaid, on January 22, 2019, addressed to the Respondent, Keith Purdy, d/b/a A Southern Bartender, P.O. Box 20126, Charleston, SC, 29413 and by hand delivery to the Court of Appeals, 1220 Senate Street, Columbia, SC 29201.

Geneva J. McIntosh