THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

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

Opinion No. 5615 (S.C. Ct. App. Filed January 16, 2019)
Appellate Case No. 2019-000670

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

v.

South Carolina Department of Revenue,.....Respondent.

Return To Petition For a Writ of Certiorari

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May 16, 2019

Respondent, South Carolina Department of Revenue (Department) asserts that this Court should not issue a Writ of Certiorari to review Rent-A-Center East, Inc., and Rent Way, Inc., v. South Carolina Department of Revenue, Op. No. 5615 (S.C. Ct. App. January 16, 2019) (Shearouse Adv. Sh. No. 3 at 27) in which a Panel of the South Carolina Court of Appeals unanimously affirmed the Administrative Law Court's (ALC) decision of March 30, 2016. (App., pp. 1-10.) The ALC correctly held and the Court of Appeals correctly affirmed that Rent-A-Center East and Rent Way's (Taxpayers) gross proceeds of sales must include amounts received from the sale of Liability Damage Waivers (Waivers). (App., pp. 5-6.) In so holding, the Court of Appeals properly applied the plain meaning rule and found that Taxpayers are persons engaged in selling tangible personal property at retail in South Carolina. (App., pp. 4-6.) As such, the Taxpayers must include the value proceeding or accruing from the sale of tangible personal property in their gross proceeds of sales. (App., p. 9.) The Taxpayers rent and sell tangible personal property through their Consumer Rental-Purchase Agreement (Rental Agreement). (App., p. 2.) The Taxpayers' Rental Agreements provided that as an additional part of the Rental Agreement, a customer could purchase a Waiver. (App., p. 2.) Because the Taxpayers Rental Agreements and Waivers are inextricably linked, the Court of Appeals found that the value proceeding or accruing from the Rental Agreements includes the value received for the Waivers. (App., p. 9.) Because the Court of Appeals' decision is a straightforward application of applicable precedent and South Carolina statutes, and such holding is supported by substantial evidence, the Petition should be denied.

COUNTER STATEMENT OF THE CASE

Procedural History

The Department concurs with Taxpayers' statement regarding the procedural history in this matter. (Petition, pp. 2-3.)

Summary of Facts

During the audit period,[1] 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 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 payment for subsequent rental terms; and other charges, including the fee for the Waivers. (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

[1]The 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.

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' customers could purchase a waiver 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.) 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). A customer could purchase a 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.) 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.) 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.)

SUMMARY OF GROUNDS FOR DENYING CERTIORARI

The Petition should be denied because the Court of Appeals' decision is a routine and proper application of the relevant South Carolina case law and statutes. The Court of Appeals correctly interpreted and applied the relevant statutes in determining that the Taxpayers' gross proceeds of sales must include the proceeds from the sale of Waivers. The Department found in its Department Determination that the Taxpayers were in the business of selling tangible personal property at retail, and the revenue of the Waivers proceeded or accrued from the Taxpayers sales/rentals of tangible personal property. Therefore, the Taxpayers could only prevail at the ALC if they proved by a preponderance of the evidence that the proceeds from the sale of Waivers did not proceed or accrue from their sale/rental of tangible personal property. The ALC found that the Taxpayers failed to meet this burden, and the Court of Appeals affirmed that finding based on the evidence in the record. The Court of Appeals' ruling on in this matter is consistent with applicable

case law, relevant statutes, and the Department's long-standing administrative policy.

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. As this Court previously explained, 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 and the Court of Appeals decision because, as will be discussed throughout this brief, such are supported by evidence in the record. See Original Blue Ribbon Taxi Corp., 380 S.C. at 604, 670 S.E.2d at 676 (internal citations omitted).

As the Taxpayers correctly recognize, SCACR 242(b) provides that certiorari is not a matter of right, but rather one of sound judicial discretion and will only be granted where there are special and important reasons. Contrary to the Taxpayers' assertions, there are no special and important reasons present in this matter, and therefore this Court should not grant certiorari. There are no novel issues of law in this matter, and the Taxpayers' incorrect application of the law does not create a novel issue warranting this Court's involvement. The Court of Appeals applied existing South Carolina law and interpreted the applicable statutory language. The decision does not conflict with prior decisions of this Court. Accordingly, the Petition should be denied.

ARGUMENTS

I. THE COURT OF APPEALS CORRECTLY APPLIED THE PLAIN MEANING RULE.

Contrary to the Taxpayers' first argument, the Court of Appeals correctly found that the language of all statutes at issue in this case is plain and unambiguous. (App., pp. 5-6.) "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 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). The ALC and the Court of Appeals properly applied the "plain meaning" 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). The imposition statute explicitly states, "[a] sales tax, equal to five[2] 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" Section 12-36-910(A) (emphasis added.)[3] [4] A plain reading of the imposition statute establishes that the

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

[3]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 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).

[4]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

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 . . . .

§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 herein, the ALC and the Court of Appeals properly concluded that the Waiver fees did constitute value proceeding or accruing from the rental of tangible personal property.

In their Petition, the Taxpayers claim that the Court of Appeals failed to apply the plain meaning rule when reading the taxing statutes. According to the Taxpayers, "the Court of Appeals' decision takes the unusual and unsupported position that the sales tax imposition statute applies to persons, not transactions" (Petition pp. 6-7.) Section 12-36-910(A) states "[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 Taxpayers fail

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acting as a unit, the State, any state agency, any instrumentality, authority, political subdivision, or municipality." S.C. Code Ann. § 12-36-30 (2014).

to explain how it is either unusual or unsupported for the Court of Appeals to find that Section 12-36-910(A) applies to persons, when the language of the statute explicitly states such. By its very terms, the statute states that it is imposed upon every person engaged in selling tangible personal property at retail.

Despite the imposition statute clearly imposing a sales tax on *persons*, the Taxpayers want this Court to replace the word "person" with the phrase "transaction" 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 transaction for the 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. 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). The Taxpayers failed to provide any authority to support their assertion that the plain meaning rule allows for the deletion of words within the statute, or that the plain meaning rule allows for insertion of new words into the statute. To the contrary, the need to delete and or insert words demonstrates that the Taxpayers' interpretation is a "forced construction" and not the plain meaning.

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 Court of Appeals, who failed to properly apply the plain meaning rule when reading the taxing statutes at issue.

The Taxpayers assert that the Court of Appeals failed to properly construe the taxing statutes at issue in their favor. (Petitioner pp. 9-10.) The Taxpayers argue that all taxing statutes are to be construed in favor of the taxpayer. (Petitioner pp. 9-10.) Specifically, the Taxpayers assert that "where a question of imposition of tax (or coverage) and not one of exemption is at issue, the taxing statutes must be construed in favor of the taxpayer and against the imposition of tax . . . ." (Petition p. 9.) The Taxpayers' assertion is neither correct nor supported by South Carolina law. The Taxpayers cite to authority after making this assertion, but the authority cited does not actually support the Taxpayers' assertion. The authority cited by the Taxpayers demonstrates that a court must first determine whether a taxing statute is ambiguous. Only if the court determines the taxing statute is ambiguous, should it resolve that ambiguity in favor of the taxpayer. See e.g. United States v. Merriam, 263 U.S. 179, 188 (1923).

In an apparent recognition that a taxing statute must be ambiguous in order to be interpreted against the government, the Taxpayers argue that § 12-36-910 is ambiguous and ""reasonably susceptible" to an interpretation that only imposes tax on sales of tangible personal property. (Petition p.10.) The Taxpayers are estopped from now asserting an ambiguity because the Taxpayers stated in their brief to the Court of Appeals the Taxpayers stated they "agree that the taxing statutes at issue are unambiguous" (App., p. 55.)

Even if the Court were to consider the Taxpayers' change of heart, their argument fails. As an initial matter, these statutes have previously been analyzed by our appellate courts and they have never been found to be ambiguous. See Boggero v. S.C. Dep't of Revenue, 414 S.C.277, 777 S.E.2d 842 (Ct. App, 2015.); Meyers Arnold v. S.C. Tax Comm'n, 285 S.C. 303, 328 S.E.2d 920

(1985). 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.

Neither § 12-36-910 (the imposition statute) nor § 12-36-90 (the measure of tax 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 transactions and not on persons, that is not how the statute is written.[5] An interpretation of a statute that requires eliminating some words and inserting new 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," and insertion of "transaction," it is not a reasonable interpretation.

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

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[5]The 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.

> The sales tax is imposed under Section 12–35–510 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 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.[6]

Meyers Arnold, 285 S.C. at 307, 328 S.E.2d at 923. Accordingly, because the Court of Appeals 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, the measure of tax statute can only have one *reasonable* interpretation. 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 April 30, 2019) and Accruing, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/accruing (last visited April 30, 2019). 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. The proceeds of the Waivers come from and are a direct result of the Rental Agreements, therefore the proceeds of the Waivers proceed or accrue from the Rental Agreements.

[6]S.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.

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. The Court of Appeals 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. The same is true concerning the Waivers at issue in this matter; but for the Rental Agreements the Taxpayers would not receive the Waiver fees. Interestingly, the Taxpayers Petition makes no mention of Meyers Arnold, and in so doing, fails to explain how their assertion of ambiguity is consistent with the Court of Appeals holding in Meyers Arnold. In fact, the Taxpayers fail to provide any explanation as to how their theory of sales tax overall is consistent with the holding in Meyers Arnold.

Rather than address Meyers Arnold, the Taxpayers instead ask this Court to focus upon the ALC's decision in Alltel v. S.C. Dept. of Rev., 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015). In Alltel, the ALC found amounts for insurance, paid by customers to Alltel and then passed through to third party insurance companies, were not included in Alltel's gross proceeds. In Alltel, the ALC did not find either the imposition statute or the tax measure statute to be ambiguous. The fact the ALC in Alltel found that insurance premiums paid through to third party insurance companies are not included in Alltel's gross proceeds, while the ALC in the present matter found that waiver fees paid to and retained by the Taxpayers are included in gross proceeds, does not render § 12-36-910(A) ambiguous.

The Taxpayers fail to specify how either the imposition statute or the taxing statute in this matter are ambiguous. The Taxpayers assert interpretations of these statutes that require ignoring the words actually contained in the statutes and adding words that are not contained therein. The Taxpayers cannot render these statutes ambiguous by simply putting forth unreasonable interpretations that require alteration to the text of the statutes. Moreover, the long standing precedent of the Court of Appeals in Meyers Arnold holds that imposition statute and taxing statute are not ambiguous. Because the Taxpayers failed to specify any ambiguity in the statutes at issue, or put forth a reasonable interpretation of those statutes showing ambiguity, this Court should deny the Taxpayers' Petition.

II. THE COURT OF APPEALS PROPERLY APPLIED THE PLAIN LANGUAGE OF THE IMPOSITION STATUTE AND FOUND THAT IT IMPOSES A SALES TAX ON PERSONS NOT TRANSACTIONS.

The Taxpayers assert that the Court of Appeals erred in holding that the imposition statute imposes sales tax on persons rather than on transactions (Petition p.11.) As explained previously, § 12-36-910(A) imposes a sales tax on "every **person** engaged or continuing within this State in the business of selling tangible personal property at retail." A plain reading of the imposition statute demonstrates that a sales tax is imposed on every *person*, not on every transaction as asserted by the Taxpayers. The ALC and the Court of Appeal correctly found that the Taxpayers are persons in the business of renting and selling tangible personal property at retail in South Carolina. (App., p. 2; R. p. 2; Order 2.) The evidence in the record supports the Court of Appeals 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, the Court of Appeals did not err in holding that the imposition statute applies to persons and the Taxpayers' Petition should be denied.

The Taxpayers, however, assert that the Court of Appeals erred in because the sales tax applies to transactions and not persons. (Petition pp. 11-16.) As explained above, the Taxpayers' argument is based on their misreading of § 12-36-910(A). Here again, the Taxpayers urge an interpretation of § 12-36-910(A) that requires deletion of words "every person engaged or continuing" and insertion of the word "transaction." If the Taxpayers read the imposition statute correctly, as written, like the ALC and the Court of Appeals did in this case, then the Taxpayers would understand that the sales tax is imposed on their *business*, not what they sell. The Court of Appeals correctly found that the Taxpayers were in the business of renting and selling tangible personal property at retail and therefore subject to § 12-36-910(A). (App., pp. 5-6.) The Court of Appeals then found that the Waiver fees proceeded or accrued from the sale, lease, or rental of tangible personal property. (App., pp. 9-10.)

The Taxpayers assert that sales tax applies to transactions and not persons because such concept is "widely accepted" in the tax world. (Petition p.14.) The Taxpayers fail to put forth any authority that supports ignoring the explicit words of a statute because the tax community views something differently. The Taxpayers further assert that the imposition statute must be interpreted as applying to transactions and not persons because S.C. Code Regs. §117-308 includes the word "transaction." Contrary to the Taxpayers assertions, when Regulation §117-308 is read as a whole it is clear that it is being applied to persons, such as dentists, doctors, lawyers, veterinarians, and architects. The Regulation then provides that these persons are in the business of providing

services and explains how sales and use tax applies to persons providing such services. Nothing in Regulation §117-308 states that sales tax only applies to transactions and not persons, moreover nothing in Regulation §117-308 addresses businesses engaged in the business of selling tangible personal property at retail like the Taxpayers. Here again, the Taxpayers fail to put forth any authority supporting their assertion that the plain explicit text of a statute can be ignored and replaced with new words because a particular word is used in a regulation.

The Taxpayers assert that it is the Department's long standing policy that sales tax is a transactional tax. Nothing cited or relied upon by the Taxpayers in their Petition demonstrates that the Department applies § 12-36-910(A) to transactions and not to persons. To the contrary, the second page of the first chapter of the 2015 Sales and Use Tax Manual cited in the Petition states "South Carolina imposes a 6% sales tax on the gross proceeds of sales of ***every person*** engaged in the business of selling tangible personal property at retail" (emphasis added). Despite the Taxpayers assertions, the Department properly applies the imposition statute to persons as provided in § 12-36-910(A).

Contrary to the Taxpayers assertions, the case law, statutes, regulations, and Department policies all support the imposition of sales tax on persons consistent with the holdings of the ALC and the Court of Appeals. Because the Court of Appeals properly applied the imposition statute the Petition should be denied.

III. THE COURT OF APPEALS PROPERLY APPLIED THE TAX MEASURE STATUTE AND FOUND THAT THE TAXPAYERS SHOULD HAVE INCLUDED THE WAIVER PROCEEDS IN THEIR GROSS PROCEEDS OF SALES.

The Taxpayers once again argue that the imposition statute is not satisfied, therefore, the Court of Appeals should not have reached the measure of tax statute. (Petition p.16.) As explained

previously herein, the imposition statute is satisfied and therefore the Court of Appeals properly reached the measure of tax statute. Once the Court of Appeals correctly determined that the imposition statute applies to 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 thus should have been included in the Taxpayers' gross proceeds. (App., pp. 9-10.)

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 it. 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.) Furthermore, without a rental, there can be no price on the Waiver as the price in the Rental Agreement determines the price of the Waiver. (R. p. 201; Hr'g Tr. 116:8 – 12.) 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.) 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.) 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 Agreement, which otherwise placed liability on the customer. 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.) All of the evidence demonstrates that the value proceeding or accruing from the Taxpayers' rentals must include the amounts received for the Waiver because the Taxpayers do not sell Waivers without the corresponding rental.

The Taxpayers, however, argue that this Court should not focus on the clear and substantial evidence that demonstrates the Rental Agreement and Waiver are one inextricably linked transaction, but instead should find the Waiver and the Rental Agreement to be separate transactions with separate gross proceeds. (Petition p. 18.) The Taxpayers' argument requires this Court weight the evidence and ignore the substantial evidence clearly showing the inextricable link between the Wavier and Rental Agreement. 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 Taxpayers' gross proceeds must include the amounts received for the Waivers.

Relevant case law and Department rulings support the ALC's application of the imposition statute and the tax measure statute, including its ruling that the waiver fees must be included in the Taxpayers' gross proceeds. In the Meyers Arnold decision, the Court of Appeals held that the proceeds from the lay away fees were includable in the taxpayer's gross proceeds of sales because "but for the lay away sales, Meyers Arnold would not receive the lay away fees." 285 S.C. at 307, 328 S.E.2d at 923. Thus, when applying the analysis the Court of Appeals used in Meyers Arnold to the facts in this case, but for the Taxpayers' rentals of tangible personal property it would not have received the waiver fees, therefore such fees must be included in the Taxpayers' gross proceeds.

This 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 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)[7] 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 and the Court of Appeals found that the Waiver fees were inextricably linked to the rental of tangible personal property. (App., p. 9; 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. The Taxpayer in Commission Decision S-D-174, just like the Taxpayers here, 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

[7]Even 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.

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.

IV. THE COURT OF APPEALS PROPERLY APPLIED THE TRUE OBJECT TEST.

The Taxpayers assert that the Court of Appeals misapplied the true object test, but the facts in this matter do not support this assertion. When a transaction involves both a service and the sale of tangible personal property, the "true object" test is used in order to determine whether the transaction as a whole constitutes a service or the sale/rental of tangible personal property. 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".

As the Court of Appeals recognized, the ALC's application of the true object test is a mixed question of law and fact and therefore, the analysis of an appellate court is whether substantial evidence supports the ALC's decision. (App., p. 7, citing Boggero.)

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.) The ALC disagreed with the Taxpayers' argument that the Rental Agreement and the Waiver are two separate and distinct transactions. (R. p. 7; Order 7.) To the contrary, the ALC found that Waiver and Rental Agreement are one inextricably linked transaction and the sales of waivers is merely incidental to the Rental Agreement. (R. p. 7; Order 7.) The Court of Appeals provided the following summary of some of the evidence showing that the Waivers were merely incidental to the Rental Agreement under the true object test:

> 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."

(App., p. 8.) Based upon the foregoing evidence, the Court of Appeals found that substantial evidence supports the ALC's finding that the sale of the Waiver was merely incidental to the Rental Agreement under the true object test. (App., p. 8.) Because substantial evidence supports the ALC's decision, as well as the Court of Appeals affirmance of that decision, the Taxpayers' Petition should be denied.

The Taxpayers argue that the true object test only applies to "bundled transactions" therefore the Court must first analyze whether a "bundled transaction" exists. (Petition p 20.) The Taxpayers base their "bundled transaction" argument entirely upon the testimony of their tax policy expert, not upon any South Carolina authority holding such requirement. The Taxpayers

then attempt to mislead this Court by providing an irrelevant definition of "bundled transaction" contained in S.C. Revenue Ruling # 06-08. Revenue Ruling #06-08 addresses the application of sales tax to the ways and means of communications, as found in S.C. Code Ann. § 12-36-910 (B)(3). There are no ways and means of communications at issue in this matter. This Revenue Ruling does not state that it applies to sales tax generally, or the Department's use of the true object test. To the contrary, Revenue Ruling #06-08 explicitly states that it is only addressing "longstanding Department opinion concerning the taxability of various communication services." Nevertheless, the Taxpayers present this definition to the Court without any explanation of its context, or any explanation for why a policy explicitly addressing the ways and means of communications applies to matters involving the rental of durable consumer goods and corresponding waivers. Because Revenue Ruling # 06-08 only applies to communications, which are not at issue in this matter, and because that Revenue Ruling does not relate to the true object test, such Revenue Ruling is irrelevant and should be disregarded by this Court.

The Taxpayers also cite several cases that actually support the ALC's decision and the Court of Appeals affirmance of that decision. Specifically, the Taxpayers cite Boggero, and Southeastern Cinema Entertainment v. S.C. Dept. of Rev., 2014 WL 2417715 (S.C. Admin. Law Ct. May 28, 2014). In Boggero, the ALC found using the true object test that the rental of portable toilets was subject to sales tax because the true object of the rental transactions was the toilet itself, not simply the service of waste removal. 414 S.C. at 280, 777 S.E.2d at 843. The Court of Appeals found that substantial evidence supported the ALC's ruling and therefore affirmed the ruling. 414 S.C. at 288, 777 S.E.2d at 847. The Taxpayers mistakenly assert that the ALC and Court of Appeals found the true object to be the rental of toilets because "servicing the toilets was not optional" and "the invoices were not clearly itemized as to the amounts charged for the rental of

the toilets (tangible personal property) versus the service of waste removal" (Petition p. 21). The Taxpayers further assert that the Court found that the true object was the rental of the toilets and not the service because "rental and service transactions were bundled and could not be easily separated." Nothing in the ALC's order or the Court of Appeals ruling supports any of these assertions by the Taxpayer. Neither court indicated that its holding depended upon whether the servicing of the toilet was optional, whether the different charges were itemized, or whether the charges could be separated. The ALC and the Court of Appeals properly applied the true object test and analyzed the true object of the transaction for the customer. 414 S.C. at 285, 777 S.E.2d at 846. Both Courts agreed that substantial evidence showed the object of the transaction was to obtain a toilet. 414 S.C. at 287-288, 777 S.E.2d at 847. Similarly here, the ALC and the Court of Appeals found that the true object for the Taxpayer's customers is to obtain durable consumer goods, not a waiver. Therefore, Boggero supports the Department's position, the ALC's ruling, and the holding of the Court of Appeals in this matter.

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 ALC found that the trademarks were "inextricably linked" to the theater and therefore subject to sales tax. Southeast Cinema, 2014 WL 2417715, at *5 Contrary to the Taxpayers' assertions, applying the ALC's logic in Southeastern Cinema to the facts in this case supports the ALC's ruling and the Court of Appeals affirmance because the Waivers are inextricably linked to the Rental Agreements.

Because substantial evidence supports the ALC's application of the true object test and the Court of Appeals affirmance of that test, this Court should deny the Taxpayers' Petition.

CONCLUSION

SCACR 242(b) provides that certiorari is not a matter of right, but rather one of sound judicial discretion and will only be granted where there are special and important reasons. As explained herein, there are no special and important reasons present in this matter and therefore this Court should not grant certiorari. The Taxpayers' Petition consists entirely of requests for this Court to re-weigh the evidence or follow unreasonable and clearly flawed theories of law. There are no novel issues of law in this matter, and the Taxpayers' incorrect application of the law does not create a novel issue warranting this Court's involvement. The Court of Appeals properly applied existing South Carolina law and interpreted the applicable statutory language. Furthermore, the decision in the matter does not conflict with prior decisions of this Court. Accordingly, the Petition should be denied.

Respectfully Submitted,

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Columbia, South Carolina
May 16, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

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

RECEIVED
MAY 16 2019
S.C. SUPREME COURT

Opinion No. 5615 (S.C. Ct. App. Filed January 16, 2019)
Appellate Case No. 2019-000670

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

v.

South Carolina Department of Revenue,.....Respondent.

PROOF OF SERVICE

I, the undersigned employee of the South Carolina Department of Revenue, Office of General Counsel, do hereby certify that I have served a copy of the Respondent's Return to Petition for a Writ of Certiorari in connection with the above-captioned matter by causing a copy of the same to be deposited in the United States Mail on the below date, postage prepaid to the following parties at their address of record:

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