THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

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

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

Appellate Case No. 2019-000670

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

v.

South Carolina Department of Revenue, ... Respondent.

RENT-A-CENTER EAST, INC. AND RENT WAY, INC.'S BRIEF

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Pursuant to Rules 242(i) and 208(b) of the South Carolina Appellate Court Rules, petitioners Rent-A-Center East, Inc. ("RAC East") and Rent Way, Inc. ("Rent Way") (together "Rent-A-Center") submit their Brief in the above appeal of the decision of the Court of Appeals captioned *Rent-A-Center East, Inc. and Rent Way, Inc. v. South Carolina Department of Revenue*, Op. No. 5615 (S.C. Ct. App. January 16, 2019) (Shearouse Adv. Sh. No. 3 at 27) ("Opinion"), which ruled in favor of the South Carolina Department of Revenue (the "Department"). Appendix ("App.") p. 1. For the reasons set forth below, the decision of the Court of Appeals should be reversed.

QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE IMPOSITION STATUTE IMPOSES A SALES TAX ON PERSONS REGARDLESS OF WHAT THEY ARE SELLING INSTEAD OF ON PERSONS WHEN THEY ARE SELLING TANGIBLE PERSONAL PROPERTY AND CERTAIN SERVICES AND DID IT ALSO ERR IN FINDING THAT THE WAIVERS WERE TAXABLE WHEN NO IMPOSITION STATUTE IMPOSES SUCH A TAX?

II. DID THE COURT OF APPEALS ERR IN REACHING THE "MEASURE OF TAX" STATUTE WHEN NO IMPOSITION STATUTE WAS INVOKED, AND, EVEN IF PROPERLY REACHED, DID IT ERR IN FINDING THE WAIVER PROCEEDS PART OF RENT-A-CENTER'S "GROSS PROCEEDS OF SALE"?

III. DID THE COURT OF APPEALS ERR IN MISAPPLYING THE TRUE OBJECT TEST, WHICH LED IT TO INCORRECTLY CONCLUDE THAT SUBSTANTIAL EVIDENCE SUPPORTED THE ALC'S FINDING THAT THE WAIVER AND RENTAL AGREEMENT WERE INEXTRICABLY LINKED SUCH THAT THEY COULD NOT BE EASILY SEPARATED?

IV. DID THE COURT OF APPEALS ERR IN FAILING TO PROPERLY APPLY THE APPROPRIATE RULES OF STATUTORY CONSTRUCTION TO THE TAXING STATUTES AT ISSUE?

STATEMENT OF THE CASE

Procedural History and Case Issues

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

The ALC held a hearing on September 24-25, 2015 and issued a Final Order ("Order") finding for the Department on March 30, 2016. Order, R. pp. 1-11. Rent-A-Center filed a Motion for Reconsideration on April 12, 2016, which the ALC denied on May 5, 2016. Rent-A-Center's Mot. for Reconsid'n, R. pp. 25-53; Order Deny'g Mot. for Reconsid'n, R. p. 12. In compliance with S.C. Code Ann. §12-60-3370, Rent-A-Center submitted payment to the Department for all taxes and interest owed in the amount of $919,585.55. R. p. 849. Rent-A-Center then timely filed a Notice of Appeal on June 6, 2016. After the parties completed briefing but without holding oral argument, the Court of Appeals issued its decision affirming the ALC's order on January 16, 2019. Opinion

("Op."), App. p. 1. Rent-A-Center filed a Petition for Rehearing on February 19, 2019 (App. p. 12), which the Court of Appeals denied on March 21, 2019. App. p. 11.

Rent-A-Center filed a Petition for Writ of Certiorari with this Court on April 22, 2019. The Department filed a response on May 16, 2019, and Rent-A-Center filed a reply on June 7, 2019. This Court granted Rent-A-Center's Petition on August 5, 2019. Thereafter, Rent-A-Center requested and received a five-day extension to file this brief such that it was due on September 12, 2019

Summary of Relevant Facts

A. The Rental Agreement

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

the goods while they are being rented.").

B. The Waiver

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

The fee for the optional Waivers is separate and distinct from the charges for renting an item, is noted separately on the customer's receipt and is recorded separately in Rent-A-Center's books and records. Tr., R. p. 171:21-25 and 168:17- 169:8; Waiver, R. pp. 344-345; Sample Receipt, R. pp. 346-347. The charges due under the Rental Agreement remain the same regardless of whether a customer purchases an optional Waiver, and payment of the Waiver fee does not count towards the rental charge or eventual purchase of the property. Tr., R. pp. 163:11- 164:12; Rental Agr., R. p. 342; Waiver, R. pp. 344-345. As to

timing, customers can purchase a Waiver when they enter a Rental Agreement or later. Tr., R. p. 164:13-17; Waiver Policy Statement, R. p. 348. Customers can cancel Waivers at any time, and, if canceled, the Rental Agreement is not impacted and remains in effect. Tr., R. pp. 166:14- 167:3; Waiver, R. pp. 344-345. Unlike the Rental Agreement, the Waiver may be canceled by Rent-A-Center at any time. Waiver, R. pp. 344-345.

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

The parties agree that a Waiver is not tangible personal property. Tr., R.p. 290:17-291:6. Rent-A-Center contended that the Waiver is an intangible while the Department characterized it as a service. The ALC appeared to agree with Rent-A-Center that it is an intangible. Order, R. p. 9 (discussing several definitions of "intangible" defining it as something abstract like a responsibility or an obligation and then describing the Waiver as an obligation).

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

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

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

D. Expert Testimony regarding Tax Policy Matters

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

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[1] Professor Pomp was qualified as an expert in tax policy. Tr., R. p. 204:8-15. He is the Alva P. Loiselle Professor of Law at the University of Connecticut School of Law and an adjunct professor at NYU School of Law. He has taught tax law specializing in state and local tax law for over 40 years. *Id.* at 204:22-205:25. *See also* CV of Richard D. Pomp, R. pp. 780-94.

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; *see also The Original Blue Ribbon Taxi Corporation v. S.C. Dept. of Motor Vehicles*, 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 neither it nor any other imposition statute 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 the Department's agreement 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 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 (providing that only sales of tangible personal property and certain enumerated services are subject to sales tax). *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.

The Department attempts to avoid this result here by arguing for an incorrect and unsupported interpretation of the imposition statute that would impose a tax on anyone selling tangible personal property at retail regardless of the particular transaction involved or the item being sold. As will be discussed herein, this interpretation is counter to the statute itself, case law, numerous regulations as well as the Department's own policies and procedures. The Department also argues that because the Waivers are often sold in conjunction with the rentals of tangible personal property, these two revenue streams should be combined 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 COURT OF APPEALS ERRED IN HOLDING THAT THE IMPOSITION STATUTE IMPOSES A SALES TAX ON PERSONS REGARDLESS OF WHAT THEY ARE SELLING INSTEAD OF ON PERSONS WHEN THEY SELL TANGIBLE PERSONAL PROPERRTY AND CERTAIN SERVICES, AND IT ERRED IN FINDING THE WAIVERS TAXABLE WHEN NO IMPOSITION STATUTE IMPOSES SUCH A TAX.

The Court of Appeals erred in holding that the imposition statute imposes a sales tax on ***persons*** regardless of what they are selling and not on ***persons when engaging in certain transactions*** (sales of tangible personal property and certain services), and it erred in finding the Waivers taxable when no imposition statute imposes such a tax. *See* Op., App. p. 6 (finding that the imposition statute "levies a sales tax on persons" and does not apply only "to transactions and certain enumerated services" and concluding that it covered Waivers).[2] This interpretation is contrary to South Carolina law, sales tax law generally, the Department's interpretation of the law in its policies and the trial testimony of its manager of policy.

First, the conclusion that the sales tax imposition statute applies to persons regardless of what they are selling is contrary to the plain meaning of that statute. 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. The relevant part of the imposition statute at issue 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

[2] The ALC, on the other hand, failed to identify an imposition statute imposing a tax on intangible Waivers and referred instead to the "measure of tax" statute as the basis for imposing sales tax. *See* Order, R. pp. 4-8; Order Deny'g Mot. for Reconsid'n, R. p. 13.

> continuing within this State in the business of selling tangible personal property at retail.

In addition to imposing sales tax on sales of tangible personal property, the imposition statute then describes certain specific services that are also subject to sales tax, including operating a laundry (§12-36-910(b)(1)), providing accommodations (§12-36-920), providing communications services (§§12-36-910(b)(3)& (5) and 12-36-1310), and selling electricity (§12-36-910(b)(2)). Thus, the statute identifies (a) the party responsible for the sales tax ("every person engaged or continuing within this State in the business of selling tangible personal property at retail"), and (b) the transactions that will be subject to tax (sales of tangible personal property and certain specific services). S.C. Code Ann. §12-36-910.

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

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

S.C. Code Ann. §12-36-60 (emphasis added). Thus, only sales of tangible personal property and those services or intangibles ***specifically identified*** in the sales tax chapter are subject to sales tax. S.C. Code Ann. §§12-36-910 and 12-36-60.[3] As one court explained, a retailer is subject to sales tax "because it is engaging in a retail sales transaction ***and***

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

because that sales transaction is for tangible personal property." *Textile Restoration Services, Inc. v. S.C. Dept. of Rev.*, 2015 WL7443800, slip. op. at 3 (S.C. Admin. Law Ct. November 12, 2015) (emphasis added).

A strikingly similar case was addressed by the ALC in *Alltel Communications, Inc. v. S.C. Dept. of Rev.*, 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015),4 which examined whether sales proceeds from optional contracts sold by Alltel for indemnification coverage in the form of repair or replacement for lost, stolen or damaged wireless phones were subject to sales tax when the contracts were sold in conjunction with sales of wireless phones. Alltel argued that under the plain meaning of the imposition statute (§12-36-910), the indemnification coverage proceeds were not subject to tax because an insurance type product is not tangible personal property and therefore cannot be part of its gross proceeds of sales under §12-36-90. *Id.* at 17. The ALC noted the Department's concessions that no imposition statute referenced insurance policies and that the policies are not tangible personal property. *Id.* Applying the plain meaning rule, the ALC concluded that no imposition statute imposed a tax on indemnification coverage proceeds and held that they were not subject to sales tax. *Id.* at 18.

S.C. Code Ann. Regs. §117-308 also confirms that sales tax is a transactional tax and not a tax based on a certain class of taxpayer. It provides that "[t]he receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax, unless the sales and use tax is specifically imposed by statute on such services

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[4] The Department 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.

(i.e. accommodation services, communication services)." *See also* S.C. Code Ann. Regs. §117-308.1- 308.16 (listing numerous services not subject to sales and use tax, including veterinarians, optometrists and beauty and barber shops). The regulation also notes that "several businesses, in addition to selling nontaxable services, also sell tangible personal property and should be licensed to report the tax." S.C. Code Ann. Regs. §117-308. Such retailers would only owe sales tax on transactions involving sales of tangible personal property and not on the "nontaxable services" or intangibles. These regulations clearly recognize that retailers (which both veterinarians selling pet supplies, an optometrist selling glasses and a beauty or barber shop selling hair care products would be) are not subject to sales tax on all sales but rather only on sales of tangible personal property. Such regulations would not be lawful if the imposition statute imposed sales tax on everything sold by a person "engaged . . . in the business of selling tangible personal property at retail." *See Home Medical Systems, Inc. v. S.C. Dept. of Rev.*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009)(citations omitted)(stating that "[r]egulations authorized by the Legislature have the force of law. . . . Nonetheless, a regulation may not alter or add to a statute.").

In addition, it is widely accepted that sales tax is a transactional tax. *See e.g.* J. Hellerstein & W. Hellerstein, State Taxation, 3d ed. at §12.01 (2000) (citing R. Haig & C. Shoup, The Sales Tax in the American States 3 (1934))(discussing definition of sales tax as "any tax which includes within its scope all business sales of tangible personal property at either the retailing, wholesaling, or manufacturing stage with the exceptions noted in the taxing law;" describing the retail sales tax as "a single-stage levy on consumer expenditures;" and noting that state sales taxes are "collected from the purchaser by the seller and are collected on a *transaction-by-transaction basis*.") (emphasis added);

Tronco's Catering, Inc. v. S.C. Dept. of Rev., 09-ALJ-17-0089-CC at p. 8 (Admin. Law Ct. April 12, 2010) (stating that "[s]ales tax under § 12-36-90 is a transactional tax . . . that 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 here to the contrary, its long-standing policy is that sales tax is a transactional tax. Its Sales and Use Tax Manual from 2015 states that "[i]n addition to *applying to the sale or use of tangible personal property* (*e.g.*, furniture, clothing, computers, etc.), the sales and use taxes also apply to" and then it lists the services enumerated in the imposition statute. S.C. Dept. of Rev. Sales and Use Tax Manual (2015).[5] The current edition of the manual also confirms that sales tax is a "'transaction tax' imposed with respect to the transaction of a 'retail sale' of tangible personal property." S.C. Dept. of Rev. Sales and Use Tax Manual at Chapter 2, p. 1 (2018). Furthermore, the Department's manager of policy correctly testified at trial that ". . . the way the Department looks at it is, sales tax is a transactional tax." Tr., R. at p. 271:23-25.

In sum, the imposition statute applies to particular transactions and not all persons selling tangible personal property at retail regardless of what they are selling. The particular transactions covered by the imposition statute are sales of tangible personal property and certain enumerated services that are not at issue here. Nothing similar to a Waiver, whether

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

it be an intangible as Rent-A-Center contends and the ALC appears to have found or a service as the Department appeared to argue, is identified in this statute or any other South Carolina tax statute as being subject to sales tax. *See* S.C. Code Ann. §12-36-910. In fact, the Department agrees that Waivers are not taxable on their own, underscoring that the imposition statute does not cover them. Tr., R. pp. 294:19- 295:2 (testimony of Department's manager of policy that sales of Waivers by third parties or even a Rent-A-Center affiliate would not be taxable). *See Pot-O-Gold Rentals, LLC v. City of Baton Rouge*, 155 So.3d 511, 512 (La. 2015) (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 were owned by a third party). Therefore, the Waivers are not subject to sales tax as no imposition statute imposes a tax on intangibles such as waivers.

This is particularly true if the imposition statute is deemed to be ambiguous as it must then be construed in favor of the taxpayer and against imposition of the tax.[6] *Alltel Communications, Inc. v. South Carolina Dept. of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012) *citing Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 76, 188 S.E. 508, 509-10 (1936). As this Court stated in *Alltel* in reversing the Court of Appeals: "[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." *Id.*

[6] As discussed more fully in §IV(B) herein, Rent-A-Center contends that the statute is unambiguous as it clearly states that it imposes a tax only on tangible personal property and certain enumerated services; however, in the alternative, Rent-A-Center argues that the statute is at least ambiguous and is reasonably susceptible to this interpretation.

See also United States v. Merriam, 263 U.S. 179, 188 (1923) (citations omitted) (if the words in a tax statute are in doubt then "the doubt must be resolved against the Government and in favor of the taxpayer"); *Clark v. S.C. Tax Comm'n*, 259 S.C. 161, 191 S.E.2d 23 (1972). The imposition statute is certainly at least "reasonably susceptible" to the interpretation that it only covers sales of tangible personal property and certain services. In fact, this is the exact conclusion reached by the ALC in the *Alltel* decision. *Alltel*, 2015 WL 7681302.

Based on the above, this Court should reverse the Court of Appeals' decision because it erred in finding that the imposition statute imposes a tax on persons regardless of the item they are selling and not transactions and in finding that the imposition statute imposes a tax on Waivers, which are not tangible personal property or enumerated services but instead are intangibles.

II. THE COURT OF APPEALS ERRED IN REACHING THE "MEASURE OF TAX" STATUTE WHEN NO IMPOSITION STATUTE WAS INVOKED, AND, EVEN IF PROPERLY REACHED, IT ERRED IN FINDING THE WAIVER PROCEEDS TO BE PART OF RENT-A-CENTER'S "GROSS PROCEEDS OF SALE."

The Court of Appeals erred in affirming the ALC's decision, which reached the "measure of tax" or "gross proceeds" statute when no imposition statute was invoked, and, even if properly reached, it erred in finding the Waiver proceeds to be part of Rent-A-Center's "gross proceeds of sale." The Court of Appeals found that the ALC could rely on the "measure of tax" statute because it found substantial evidence supported the ALC's finding that "the Waivers were merely incidental to the Rental Agreements" or were "inextricably linked." Op., App. p. 6. It did not address Rent-A-Center's argument that a "measure of tax" statute cannot be reached unless an imposition statute is invoked, possibly

because the Court of Appeals found (incorrectly) that S.C. Code Ann. §12-36-910 imposes a sales tax on persons not transactions or because it found (incorrectly) that the transaction was bundled and subject to sales tax under the true object test. Rent-A-Center agrees that the "measure of tax" statute can be reached if either (1) an imposition statute imposes a tax; or (2) the sale of a non-taxable service or intangible is (a) bundled or inextricably linked with the sale of a taxable item of tangible personal property such that the two transactions cannot be easily separated and a separate value determined for each, and (b) the true object of the bundled transaction is the sale of tangible personal property. However, because as discussed in sections I (no imposition statute) and III (no bundled transaction) herein, neither situation applies here, the Court of Appeals erred in reaching the "measure of tax" statute.

From a tax policy perspective, an imposition statute places a taxpayer on notice that a tax will be owed if he conducts certain activities, while a "measure of tax" statute tells the taxpayer the amount of tax he will owe. Tr., R. p. 223:6-22. As stated by Rent-A-Center's tax policy expert and as reflected in the relevant case law, one must "pass through the first statute [the imposition statute] before you get to the second [the "measure of tax" statute], because the second is irrelevant if you are not subject to the imposition in the first place. So assuming that you pass through the first statute, you get to the second one, and now we go ahead and calculate the gross proceeds of sales, and that's what you will pay your tax on the basis of." Id. at 223:22- 224:7. If you do not have an imposition statute, then that is "the end of the game. You don't ever get to [the "measure of tax" statute], because there is no sales tax in play." Id. at 229:12-15; *Alltel*, 2015 WL 7681302, slip op. at pp. 18-20 (rejecting the Department's argument that sales proceeds from optional

indemnification contracts sold with wireless phones were subject to sales tax as "value proceeding or accruing from the sale of tangible personal property" under the "measure of tax" statute where no imposition statute imposed such a tax). Because no imposition statute applies in this case (*see supra* §I), the "measure of tax" statute (§12-36-90) is never reached and cannot be used to justify imposing a sales tax on the Waiver proceeds.[7]

In reaching its erroneous conclusion that the measure of tax or gross proceeds statute could be reached, the Department and the ALC also relied upon *Meyers Arnold* and *Travelscape*. The Court of Appeals correctly concluded that these cases are not "directly analogous" to this case as they both involve attempts to deduct service costs. Op., App. p. 10. *See also Travelscape, LLC v. S.C. Dept. of Rev.*, 391 S.C. 89, 705 S.E.2d 28 (2011) (concluding that facilitation and service fees charged with rental fee for hotel room to customers was an improper attempt by the taxpayer to deduct a service cost); *Meyers*

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[7] *See also Brock Serv., LLC v. Ala. Dept. of Rev.*, No. S. 14-1236, slip op. at pp. 3-10 (Ala. Tax Tribunal Sept. 28, 2015) (labor services provided with rental of scaffolding were not subject to sales tax under the imposition statute (which mirrors South Carolina's statute) and tax could not be imposed under "measure of tax" statute (which also mirrors South Carolina's statute)); *Rent-A-Center West, Inc. v. Utah State Tax Comm'n*, 367 P.3d 989, 991-994 and n. 1 (Utah 2016) (finding same Waivers at issue here were not subject to sales tax because, *inter alia,* they were not "an amount paid or charged for leases or rentals of tangible personal property" as Utah imposition statute required and because whether the fees could be encompassed within the definition of "purchase price" or "sales price" in the definitions statute was irrelevant because no imposition statute imposed tax); Ltr Ruling No. CL 2290, 2000 Mo. Tax Ltr. Rul. LEXIS 37 (Mo. Dep't Rev. May 18, 2000) (finding sale of optional damage waiver protection for a separately stated price was not taxable as it was not the sale of tangible personal property nor was it listed as a taxable service under the relevant statutes); *Ky Dept. of Rev. v. Rent-A-Center East, Inc. and Rent-Way, Inc.*, 2019 WL 3059900 at *2 (Ky. Ct. App. July 12, 2019), *cert. petition filed* August 9, 2019 (affirming lower court's conclusion that sales of same waivers at issue here were not subject to tax under imposition statute, which must be narrowly construed in favor of taxpayer). *But see Rent-A-Center East v. Lincoln Par. Sales & Use Tax Comm'n*, 60 So.3d 95 (La. App. 2 Cir. 2011), *writ denied*, 63 So.3d 985 (2011) (finding same waivers at issue here taxable).

Arnold, Inc. v. S.C. Tax Comm'n., 285 S.C. 303, 307, 328 S.E.2d 920, 923 (Ct. App. 1985) (noting statute's prohibition on deducting service costs and finding mandatory layaway charges added to cost of items placed on layaway were taxable). Section 12-36-90(b) provides 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 "cost of service" 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, which would result in bifurcation of receipts and avoidance of sales tax for items that are actually part of the tangible personal property sold. *See* Tr., R. pp. 225:7- 229:3 (for full explanation of tax policy rationale behind the cost of service rule). *See also Alltel* 2015 WL 7681302, at *16 (stating that 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. §12-35-30 (1976) [sic], which is 'the value proceeding or accruing from the sale of tangible personal property . . . without any deduction for service cost.'")(emphasis added).

The Waiver at issue here, which is optional with a separately stated cost, is (a) clearly separable from the rental of household items, (b) not a cost of producing the item rented (i.e. an appliance), (c) not added to the purchase price of the item rented, and (d) not a cost necessary to accomplish the sales transaction involving the rented item. Thus, no attempt to deduct a service cost is at issue here.

Furthermore, even if the Court of Appeals properly reached the "measure of tax"

statute, it erred in finding the Waiver proceeds to be a part of Rent-A-Center's "gross proceeds of sale." South Carolina law defines "gross proceeds of sales" as "the value proceeding or accruing from sales and leases or rental of tangible personal property." S.C. Code Ann. §12-36-90. Proceeds from the rental of property under a Rental Agreement are clearly "a value proceeding or accruing from" the sale/rental of tangible personal property. On the other hand, Waiver proceeds are "a value proceeding or accruing from" the sale of the intangible Waivers, which provide customers via separate, optional agreements and for a separate itemized charge, with the option to avoid certain risks of loss of the property rented. Tr., R. pp. 171:4-10 and 178:2-12; and *Alltel*, 2015 WL 7681302, slip op. at p. 17-19 (finding proceeds from the sale of indemnification coverage did not proceed or accrue from sale of tangible personal property as such coverage was not tangible personal property).[8]

Accordingly, this Court should reverse the Court of Appeals because it improperly relied upon the "measure of tax" statute prior to invoking an imposition statute and because it erred in finding the Waiver proceeds to be "gross proceeds."

[8] The ALC's conclusion that Waiver proceeds proceeded or accrued from the sale of tangible personal property also appears to be based on a mistaken belief that the value of the rented property is enhanced by the Waiver. Order, R. p. 8. This erroneously shifts the focus from the value that accrues to the seller (the "gross proceeds" from the customer) to the value received by the customer. As the Department's manager of tax policy agreed, the relevant value is the value received by the seller. Tr., R. pp. 301:21-25 and 302:17-22. Also, the rented property's value does not change when a Waiver is purchased. A television valued at $500 is still worth $500 after a Waiver is purchased. Tr., R. pp. 232:11- 234:20.

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

The Court of Appeals erred by misapplying the true object test, which led it to incorrectly conclude that substantial evidence supported the ALC's finding that the Waiver and the Rental Agreement were inextricably linked. The Court of Appeals acknowledged that evidence could "support a finding that the Waivers were separate and distinct from the Rental Agreements" and thus not inextricably linked or fundamentally interconnected, including evidence that the Waivers were optional and could be canceled at any time without canceling the Rental Agreement, the Waiver fee was itemized on the customer's receipt and payment of the Waiver fee did not count toward the purchase of rental property. Op., App. p. 8. However, the Court of Appeals concluded that substantial evidence also supported the ALC's finding that the Waivers were not separate and distinct from the Rental Agreement, and, thus, it stated that it would not substitute its judgment for that of the ALC. Op., App. pp. 8-9. The Court of Appeals' conclusion on this issue is premised on a misunderstanding or misapplication of the true object test and when it should be applied.

Courts use the "true object" test to determine the true object of a bundled transaction, i.e. whether it is a sale of taxable tangible personal property or a sale of a non-taxable service or intangible. *See* Tr., R. pp. 234:24- 235:9 (testimony of Rent-A-Center's tax policy expert explaining that where you have one combined or integrated transaction with two elements such that a bundled transaction exists, the true object test seeks to determine "which elements are going to dominate and control how we characterize the [integrated] transaction"). *See also Boggero v. S.C. Dept. of Rev.*, 414 S.C. 277, 777 S.E.2d

842 (Ct. App. 2015); *Southeast Cinema Entertainment v. S.C. Dept. of Rev.*, 2014 WL 2417715 (S.C. Admin. Law Ct. 2014) (*rev'd and remanded on other grounds by* 2015 WL 9393942 (Dec. 23, 2015)); *Keith Purdy, d/b/a A Southern Bartender v. S.C. Dept. of Rev.*, Docket No. 17-ALJ-17-0002-CC (April 26, 2018), *appeal filed*, July 5, 2018.

Thus, the first question is whether a bundled transaction exists such that the true object test need be applied. S.C. Rev. Ruling #06-08 defines a bundled transaction as "a transaction consisting of distinct and identifiable properties or services, which are sold for one nonitemized price but which are treated differently for [sales and use] tax purposes." It further states: "the portion of the price attributable to any nontaxable property or service is subject to tax unless the provider can reasonably identify that portion from its books and records kept in the regular course of business for purposes other than sales taxes."[9]

Once the determination is made that a bundled transaction is at issue, then the court will apply the true object test to determine which component will dominate. South Carolina courts have applied the true object test on several occasions. In *Boggero*, for example, the Court of Appeals applied it to a taxpayer who both rented and serviced portable toilets. 414 S.C. 277, 777 S.E.2d 842. The evidence at trial showed that servicing toilets was not optional but was included with the rental of the toilets; invoices were not clearly itemized as to the amounts charged for the rental of the toilets (tangible personal property) versus the service of waste removal, including many invoices that simply charged a single flat fee;

[9] Although this ruling addresses the application of sales and use tax to the ways and means of communication, there is no logical reason that the Department would have a different definition for a "bundled transaction" for communications (which the sales tax statute defines as tangible personal property in S.C. Code Ann. § 12-36-60) versus other items subject to sales tax.

and the taxpayer charged more for toilets with more amenities. *Id.*, 414 S.C. at 286-87, 777 S.E.2d at 846-47. The Court found substantial evidence existed that the true object of the transaction was the rental of toilets and implicitly found that the rental and service transactions were bundled and could not be easily separated. *Id.*, 414 S.C. at 286-87, 777 S.E.2d at 846-48.

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

Most recently, the ALC applied the true object test to a business selling bartending services and alcohol. *See A Southern Bartender*, Docket No. 17-ALJ-17-0002-CC, slip. op. at pp. 8-9. The court held that where the bartending services were a separate line item on the invoice, these services were "separable from the provision of alcohol and/or other tangible goods, and thus, do not represent the retail sale of tangible personal property." *Id.* at p. 9. On the other hand, where bartending services and beverages were provided on a non-itemized, per person fee basis, the bartending services were merely incidental to (and presumably not separable from) the sale of tangible personal property. *Id.* at p. 8.[10] *See also*

[10] While an earlier ALC decision reached what 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)). In that case, the ALC found separately-stated catering labor and service charges were subject to sales tax and noted that the 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

Ky Dept. of Rev. v. Rent-A-Center East, Inc. and Rent-Way, Inc., 2019 WL 3059900 at *2 (Ky. Ct. App. July 12, 2019), *cert. petition filed* August 9, 2019 (stating that it was "unconvinced by the Departments 'plain language' reading of the Waiver Agreement as a provision of the Rental Agreement and concluding that while the optional Waivers may be signed at the same time as the Rental Agreement and paid on the same schedule, the two agreements were not inextricably linked as 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 if the rental item is damaged, no replacement is provided. Instead, the Waiver simply entitled the customer to a single consideration that Rent-A-Center would not pursue certain claims for loss or damage. After noting that taxing statutes must be strictly construed and doubts resolved in favor of the taxpayer, the court concluded that the Waiver was "an intangible right paid separately from the Rental Agreement" and was not subject to tax).

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

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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. 8), the Waivers do not enhance the value of a rental item).

The ALC in this case found that the Rental Agreement and Waiver were inextricably linked (and thus a bundled transaction) based on two purported facts: (1) a single agreement exists, and (2) after the Waiver is purchased, "it is merged into and becomes inextricable from the transaction and has no value apart from the underlying transaction." Order, R. p. 49. Regarding the first purported factual basis- that a single agreement exists because the Waiver states that it is an "additional part of the Rental Agreement" (*see* Waiver, R. p. 345) - this is not determinative even if true. Rent-A-Center would submit that it is not true and that the language in the Waiver is ineffective to change the fact that the Waiver is a separate, bargained for contract with separate consideration.

But even if a single agreement exists, that is not determinative. A single contract can include more than one transaction.[11] The Court must still examine each transaction on its own and determine whether each transaction is taxable. *See* 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) (stating that state sales taxes are "collected from the purchaser by the seller and are collected on a *transaction-by-transaction basis.*") (emphasis added); *Tronco's Catering, Inc. v. S.C. Dept. of Rev.*, 09-ALJ-17-0089-CC at p. 8 (Admin. Law Ct. April 12, 2010) (stating that "[s]ales tax under § 12-36-90 is a transactional tax . . . that 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."); *Southeast Cinema,* 2014 WL 2417715, slip op. at pp. 2 and 5-6 (examining two transactions, one for sale of theater and one for sale of

[11] For example, a building supply company that also sells real estate could contract to sell taxable building supplies and non-taxable real estate in a single contract. This would not render the sale of real estate subject to sales tax.

trademarks, which were contained in a single purchase agreement, to determine whether both transactions were subject to sales tax).

Regarding the ALC's purported factual basis that the Waiver "merges into and becomes inextricable from [the Rental Agreement]," this does not appear to be based on any additional facts beyond that it found a single agreement (which is not determinative as previously discussed) and its erroneous belief that the Waiver "has no value apart from the underlying transaction." *Id.* The finding that the 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.

More specifically, 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, and no evidence was presented to the contrary. Tr., R. pp. 169:12- 170:3 and 170:20- 171:10. 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 *Southeast 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 the Department at trial), this is likewise not a valid basis for finding the transactions to be bundled. Rent-A-Center's tax policy expert explained this concept as follows:

> 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.

The Court of Appeals does not mention this purported fact in its opinion and does not appear to have considered it as part of the substantial evidence supporting the ALC. Instead, it mentions that the Waiver is part of the Rental Agreement (similar to the ALC) plus the following additional items: the Waiver and Rental Agreement fees are paid at the same time; the Waiver can only be enforced if all payments are made under the Rental

Agreement; the Waiver fee is calculated as a fixed percentage of the term payment under the Rental Agreement; the customer must enter into a Rental Agreement to buy a Waiver; and Rent-A-Center does not offer Waivers to third parties. Op., App. p. 8.

While these facts show that the Waiver and Rental Agreement are related in certain ways, they do not rise to the level of substantial evidence that the transactions are so inextricably linked that they cannot be easily separated. "Substantial evidence is not a mere scintilla of evidence but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Whitworth v. Window World, Inc.*, 377 S.C. 637, 640, 661 S.E.2d 333, 335 (2008). First, S.C. Rev. Ruling #06-08 defines a bundled transaction as "a transaction consisting of distinct and identifiable properties or services, which are sold for one nonitemized price." That is not the case here as the Waiver fee is separately itemized. Tr., R. pp. 168:17- 169:8; Sample Receipt, R. pp. 346-347. Moreover, even if this revenue ruling regarding communications is not determinative, the other factors referenced by South Carolina courts (in addition to a non-itemized price, which is present in *Boggero, Southeast Cinema and Southern Bartender*) that have expressly or implicitly found an inextricable link are not present here. The intangible Waiver is optional, not mandatory (unlike the services in *Boggero* and the intangible in *Southeast Cinema*); the taxable rental items can be used without the non-taxable Waiver (unlike the theater in *Southeast Cinema* which could not be used without the trademark); and the Waiver does not alter or improve the rented item (like the trophy engraving example).

In sum, in *Boggero, Southeast Cinema, Southern Bartender* and the trophy example, strong evidence of a fundamental interconnection or inextricable link exists such

that it is difficult to break apart the two transactions and determine the appropriate value of each (which, as S.C. Rev. Ruling #06-08 makes clear, is what a bundled transaction is). None of the factors that supported an inextricable link in those cases is present here. The cost of the Waivers is itemized, the Waivers are optional, the rental item can be used without the Waiver and the Waiver does not become incorporated into the rental item, which means that it is not difficult to break apart the transaction and determine the appropriate value for each.

Accordingly, this Court should reverse the Court of Appeals' decision that the Rental Agreement and Waiver are inextricably linked as that conclusion is based on a misapplication of the law and is not supported by substantial evidence particularly where none of the factors identified as supporting a finding of an inextricable link in the lower court decisions are present here.

IV. THE COURT OF APPEALS ERRED IN FAILING TO PROPERLY APPLY THE APPROPRIATE RULES OF STATUTORY CONSTRUCTION TO THE TAXING STATUTES AT ISSUE.

The Court of Appeals erred in failing to properly apply the appropriate statutory construction rules to the tax statutes at issue. First, it failed to properly apply the plain meaning rule to the taxing statutes at issue, which if properly applied would have resulted in the Court concluding that the imposition statute does not impose sales tax on intangibles like the Waivers at issue here. In addition, the Court of Appeals erred in failing to construe the imposition statute in favor of the taxpayers and against the Department and imposition of the tax.[12]

[12] The ALC also failed to properly apply these rules of statutory construction. While citing them in the "Applicable Tax Provisions" section, it fails to discuss or apply them in the "Analysis" section, which analyzes the relevant statutes and concludes they impose a tax

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

While the Court of Appeals recognized that the plain meaning rule should be applied (Op., App. p. 4), it appears to have concluded either that the ALC implicitly applied it or that it does not matter because the ALC reached the correct result. Neither conclusion is valid. 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); *State v. Leopard*, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct. App. 2002); *Rosmer v. Pfizer*, 263 F.3d 263 (4th Cir. 2001)(holding that when a statute is plain on its face, the court's inquiry is at an end).[13] *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 the plain meaning rule to the imposition statute to determine whether a taxpayer's indemnification coverage proceeds were subject to sales tax).

As discussed in detail in §§I and II above, one cannot properly apply the plain meaning rule and reach the conclusion that the Court of Appeals reached (that the sales tax statute imposes a tax on persons and not transactions) or that the ALC reached (that the "gross proceeds" or "measure of tax" statute contained in S.C. Code Ann. §12-36-90 is

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on Waivers. Order, R. pp. 4-10. The ALC also states that the statutes at issue are not ambiguous perhaps implying the statutes need not be construed in the taxpayers' favor. *Id.*

[13] *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.").

somehow an imposition statute). The ALC and Court of Appeals' failure to properly apply the plain meaning rule caused both courts to improperly construe the taxing statutes at issue and to err in finding the Waivers subject to sales tax.

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

The Court of Appeals erred in failing to construe the relevant tax statutes in favor of Rent-A-Center and against the Department and imposition of the tax. The Department has asserted, and the Court of Appeals has found, that the taxing statutes at issue are not ambiguous, and, thus, both believe that this rule of statutory construction need not be applied in this case. As previously discussed, the Department and the Court of Appeals interpret §12-36-910 to impose a tax on all "persons" selling tangible personal property at retail regardless of what items they sell.

Rent-A-Center, on the other hand, asserts that §12-36-910 unambiguously does **not** impose a tax on persons when they are not selling tangible personal property or certain services. Stated differently, Rent-A-Center contends that sales of intangibles do not become taxable simply because they are sold by a retailer of tangible personal property. *See supra* §I (for full discussion of same). However, alternatively, Rent-A-Center has argued that should the Court not agree that the imposition statute unambiguously imposes sales tax only on certain transactions of retailers, then Rent-A-Center contends that the imposition statute is at least ambiguous on this point.

When a taxing statute is ambiguous or "reasonably susceptible" to an interpretation that the imposition statute does not impose a tax on a person, then it is black letter law that the taxing statute must be construed in favor of the taxpayer and against the imposition of

the tax (as opposed to an exemption statute, which is construed against the taxpayer and in favor of the government). *United States v. Merriam*, 263 U.S. 179, 188 (1923) (citations omitted) (if the words in a tax statute are in doubt then "the doubt must be resolved against the Government and in favor of the taxpayer"); *Alltel Communications v. S.C. Dept. of Rev.*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012), *citing Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 76, 188 S.E. 508, 509-10 (1936) ("[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor."); *Clark v. S.C. Tax Comm'n*, 259 S.C. 161, 191 S.E.2d 23 (1972) (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).

As Rent-A-Center's 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.

In this case, the Court of Appeals should have found that the imposition statute is at least "reasonably susceptible" to an interpretation that it only imposes sales tax on sales of tangible personal property and certain enumerated services and does not impose a tax

on an intangible simply because it is being sold by a retailer who also sells tangible personal property. In fact, an ALC reached that exact conclusion in *Alltel Communications, Inc. v. S.C. Dept. of Rev.*, 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015) (holding that the sales tax imposition statute did not impose a tax on indemnification coverage proceeds sold in conjunction with wireless phones.). As discussed in more detail in §I above, there is substantial support for this interpretation, including but not limited to, the heading of the imposition statute (which states that the sales tax is "on tangible personal property" and certain enumerated items) (*see* S.C. Code Ann. § 12-36-910); the statutory definition of tangible personal property (which confirms that only items enumerated under the sales tax chapter are subject to sales tax as "tangible personal property") (*see* S.C. Code Ann. §12-36- 910); the statutory definition of tangible personal property (which confirms that only items enumerated under the sales tax chapter are subject to sales tax as "tangible personal property") (*see* S.C. Code Ann. §12-36-60); South Carolina regulations and case law (confirming same and that sales tax is transaction tax) (*see Boggero v. S.C. Dept. of Rev.*, 414 S.C. 277, 777 S.E.2d 842 at n. 1 (Ct. App. 2015) and S.C. Code Ann. Regs. §117-308-308.18); Department policies and procedures (confirming sales tax is transactional tax) (*see supra* p. 12-13); and the Department's trial testimony (confirming same) (*id.*). *See also supra* §I. The Court of Appeals erred in failing to find that the imposition statute was at least ambiguous and thus should have been construed in favor of Rent-A-Center and against imposition of the tax.

In sum, the Court should reverse the Court of Appeals' decision because it erred in failing to apply the plain meaning rule and in failing to construe the imposition statute in favor of Rent-A-Center and against the Department and imposition of the tax.

CONCLUSION

Based on the above, Rent-A-Center respectfully requests that this Court reverse the Court of Appeals' decision. When the appropriate rules of statutory construction are applied to the taxing statutes at issue, it is clear that no imposition statute imposes a tax on intangibles like the Waivers at issue here and that the measure of tax statute cannot be reached because no imposition statute is applicable. Moreover, substantial evidence does not support the ALC's finding (and Court of Appeals affirmance thereof) that the sale of tangible personal property (such as appliances) are inextricably linked to the sale of Waiver. Accordingly, the intangible Waivers at issue are not subject to sales tax, and the Court of Appeals decision should be reversed.

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By: Bryson M. Geer by Matt Bogan w/ express permission

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Charleston, South Carolina
September 11, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ADMINISTRATIVE LAW COURT

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

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

Appellate Case No. 2019-000670

South Carolina Department of Revenue, ... Respondent,

v.

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

PROOF OF SERVICE

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

Pleadings: Rent-A-Center East, Inc. and Rent Way, Inc.'s Brief and Appendix

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September 11, 2019