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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

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

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

SOUTH CAROLINA DEPARTMENT OF REVENUE'S BRIEF

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STATEMENT OF THE CASE

Procedural History

The South Carolina Department of Revenue (Respondent or Department) agrees with the Procedural History set forth in Rent-A-Center East, Inc.'s (RAC East) and Rent Way, Inc.'s (Rent Way) (collectively Appellants or Taxpayers) Brief. (App. Brief, pp. 2-3.)

Summary Of Facts

A. The Taxpayers' Business.

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 Consumer Rental-Purchase Agreement (Rental Agreement.) (R. pp. 155 – 156, 342 – 343; Hr'g Tr. 70:12 – 71:25; Hr'g Exhibits 1 – 2.) The Rental Agreement sets forth, among other things: the rental term; the amount of the rental payment for the rental term; the amount of the renewal payment for subsequent rental

[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.

terms; and other charges, *including the fee for the Optional Liability Waiver Provision* (Waiver). (R. p. 167, 342 – 343; Hr'g Tr. 82:13 – 17; Hr'g Exhibits 1 – 2.) The rental term could be monthly, semi-monthly, or weekly. (R. p. 167, 342 – 343; Hr'g Tr. 82:13 – 17; Hr'g Exhibits 1 – 2.) The Taxpayers did not require a customer who rented property from them to continue renting the property beyond the initial term. (R. pp. 178 - 181; Hr'g Tr. 93:23 – 96:5.) Instead, the Rental Agreement terminated at the end of each term, and the customer had the option to renew the Rental Agreement beyond the initial term for as many terms the customer wanted up until the customer acquired ownership of the item. (R. pp. 178 – 181, 342 – 343; Hr'g Tr. 93:23 – 96:5; Hr'g Exhibits 1 – 2.) For example, a customer with a weekly rental term had the option to renew or not renew the Rental Agreement each week. Once a customer renewed the Rental Agreement for the specified number of terms, the customer acquired ownership of the item. (R. pp. 179 – 181, 342 – 343; Hr'g Tr. 94:25 – 96:21; Hr'g Exhibits 1 – 2.)

Additionally, the Taxpayers offered their customers the opportunity to add a Waiver to their rental for an additional fee, which the Taxpayers calculated based on a percentage of the rental payment. (R. p. 200; Hr'g Tr. 115:18 – 21.) The Rental Agreement establishes the existence of the Waiver, the terms and conditions of that Waiver are set forth on a separate document. 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.)

Of course, a customer could not obtain a Waiver 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.) Finally, if a customer stopped making his or her rental payments, the customer could not continue to submit the Waiver fee to the Taxpayers because, according to Hugh Tollack, "[t]here is nothing for the customer or Rent-A-Center to waive at that point." (R. p. 201; Hr'g Tr. 116:13 – 20.)

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

The Department audited RAC East's sales tax returns for the period April 1, 2007 – October 31, 2010, and determined that it owed $521,694.93 in sales tax on its proceeds from the Waiver fees, plus interest in the amount of $96,652.51. (R. p. 177, 398 – 407; Hr'g Tr. 92:10 – 16; RAC East Hr'g Exhibit 7.) The Department also audited Rent Way's sales tax returns for the period April 1, 2007 – December 31, 2009, and determined that it owed $192,158.64 in sales tax on its proceeds from the Waiver fees, plus interest in the amount of $41,116.23. (R. p. 177, 408 – 417; Hr'g Tr. 92:10 – 16; Rent Way Hr'g Exhibit 7.) The Taxpayers collected sales tax on the proceeds of their sales/rentals of the above-mentioned durable consumer goods and remitted the sales tax to the Department. (R. pp. 177 – 178; Hr'g Tr. 92:17 – 93:1.) The Taxpayers did not include the proceeds from the Waiver fees in their gross proceeds of sales. (R. pp. 398 – 417; RAC East Hr'g Exhibit 7; Rent Way Hr'g Exhibit 7.)

After applying the plain language of the statutes at issue, applicable case law, previous administrative decisions, and longstanding administrative policy, the Department determined that the Taxpayers should have included the proceeds from their Waiver fees in their gross proceeds of sales. (R. pp. 271 – 277, 398 – 417; Hr'g Tr. 186:11 – 192:9; RAC East Hr'g Exhibit 7; Rent Way Hr'g Exhibit 7.) According to John McCormack, the General Manager of the Policy Section within the Department's Office of General Counsel, when the Department determines whether or not something should be included in a taxpayer's gross proceeds of sales, it looks at the whole transaction – the sale or rental of the item – not just the item itself. (R. pp. 271 – 272; Hr'g Tr. 186:11 – 187:2.) Additionally, when determining what is included in the gross proceeds of sales – or what constitutes value proceeding or accruing from the sale, lease, or rental of tangible personal property – the Department uses the "but for" test set forth in Meyers Arnold v. South

Carolina Tax Commission, 285 S.C. 303, 328 S.E.2d 920 (1985), and has used that test since this Court of Appeals issued the Meyers Arnold decision. (R. pp. 275 – 282; Hr'g Tr. 190:22 – 197:25.)

STANDARD OF REVIEW

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review. Olson v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500-501 (Ct. App. 2008); Turner v. S.C. Dep't of Health & Envtl. Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). S.C. Code Ann. § 1-23-610(B) (Supp. 2018) provides the applicable standard:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> > (a) in violation of constitutional or statutory provisions;
> > (b) in excess of the statutory authority of the agency;
> > (c) made upon unlawful procedure;
> > (d) affected by other error of law;
> > (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> > (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This Court may not reverse the Administrative Law Court's (ALC) decision unless it is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. This Court explained that in making this determination it "need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached." Barton v. S.C. Dep't of Prob. Parole & Pardon Servs., 404 S.C. 395, 401, 745

S.E.2d 110, 113 (2013) (citing Hill v. S.C. Dep't of Health and Envtl. Control, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010)). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." Original Blue Ribbon Taxi Corp. v. S.C. Dept. of Motor Vehicles, 380 S.C. 600, 605, 670 S.E.2d 674, 677 (2008) (internal citations omitted). Therefore, this Court should affirm the ALC's decision because, as will be discussed throughout this brief, it is supported by substantial evidence in the record. See Original Blue Ribbon Taxi Corp., 380 S.C. at 604, 670 S.E.2d at 676.

The Court of Appeals previously held that whether the facts of a case are correctly applied to a statute or whether activities meet a statutorily defined term is a question of fact. See Boggero v. S.C. Dept. of Revenue, 414 S.C. 277, 280, 777 S.E.2d 842, 843 (Ct. App. 2015). Resolving many of the issues in this case involves determining whether the ALC correctly applied the facts to the statutes at issue. As will be discussed in more detail below, this Court must determine whether the ALC correctly determined, factually, whether the Taxpayers are in the business of selling tangible personal property and whether the Waiver fee constitutes value proceeding or accruing from the Taxpayers' rental of tangible personal property. Because both the ALC's ruling and the Court of Appeals' decision are supported by substantial evidence in the record, this Court should affirm the Court of Appeals.

Interpretations of statutes by the administrative agency charged with their administration and not expressly changed by the legislative body, are entitled to great weight. Marchant v. Hamilton, 279 S.C. 497, 500, 309 S.E.2d 781, 783 (1983). When the administrative interpretation of a statute has been applied for a number of years and has not been changed by the Legislature, as is the case in this matter, there is a strong presumption that such interpretation is correct. Ryder Truck Lines Inc. v. South Carolina Tax Commission, 248 S.C. 148, 149 S.E.2d 435 (1966). As

explained more fully herein, the Department applied the applicable statutes to the Taxpayers in the same manner it has applied those statutes for many years. Accordingly, there is a strong presumption that that Department's interpretation of the applicable statutes is correct.

ARGUMENTS

In this appeal the Court is asked to decide whether the Taxpayers' Waivers are subject to sales tax. The intent of our General Assembly is clear, sales tax applies to all persons engaged in the sale of tangible personal property at retail. What is subject to tax specifically, is determined through the measure of tax statute. The General Assembly instructed that the total value that proceeds or accrues from the sale of tangible personal property to be subject to sales tax. The Taxpayers are persons engaged in the sale of tangible personal property at retail, therefore the total value that proceeds or accrues from such sales is subject to sales tax. The ALC and the Court of Appeals properly applied existing South Carolina law, interpreted the applicable statutory language, and found the Taxpayers liable for sales tax on the Waivers sold as part of the Rental Agreements. Although the Taxpayers improperly encourage this Court to re-weigh the evidence and adhere to flawed legal theories, the ALC's ruling, and the Court of Appeals decision, are legally correct and supported by substantial evidence. Accordingly, this Court should affirm the Court of Appeals.

The Taxpayers argue that the Waivers are not taxable based upon the inaccurate assertion that the Waiver is "separate and distinct" from the Rental Agreement. The Taxpayers urge this Court to believe the fiction that there are two transactions happening when a customer enters one of the Taxpayers' stores. The first transaction involves a customer entering into a Rental Agreement, and the second transaction is the acquisition of a Waiver to protect himself from

liability for damage to the rented item. As the facts in this matter clearly demonstrate, there is only one transaction and the Waivers are not separate and distinct from the Rental Agreement.

"Separate" is defined by Webster's Dictionary as "existing by itself," and by American Heritage Dictionary as "existing or considered as an independent entity." See, Separate http://www.merriam-webster.com/dictionary/separate (last visited September 26, 2019) and http://www.ahdictionary.com/word/search.html?q=separate (last visited September 26, 2019). Accordingly, in order to be "separate," the Waivers must exist independently. The Waivers cannot and do not exist independent of the Rental Agreement. To the contrary, each Waiver is entirely dependent upon a Rental Agreement between the Taxpayers and a consumer. This dependent relationship is demonstrated by substantial evidence; the Waiver states that it is an additional part of the Rental Agreement; the Taxpayers do not sell Waivers without a corresponding Rental Agreement; the Waivers change the liability provided in the Rental Agreement; the price of the Waiver can only be determined when there is a Rental Agreement, and most significantly the Waiver ceases to exist if the Rental Agreement is cancelled. The Waivers are inextricably linked to the Rental Agreements. The Taxpayers ask this Court to disregard all of the evidence showing that inextricable link and instead focus on the facts the Waiver is optional and its fee is separately stated on a receipt. These facts do not separate the Waiver from the Rental Agreement, nor do these facts make the Waiver and Rental Agreement any less inextricably linked. Because the Waiver and the Rental Agreement are inextricably linked, this Court should affirm the Court of Appeals.

I. THE COURT OF APPEALS AND THE ALC PROPERLY APPLIED THE IMPOSITION AND THE MEASURE OF TAX STATUTES

A. The Statutes At Issue Are Not Ambiguous

The Court of Appeals and the ALC 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 Taxpayers make the inconsistent and inaccurate argument that the statutes at issue are simultaneously ambiguous and unambiguous. (App. Brief, p. 30.) According to the Taxpayers, if this Court interprets the statutes in a way that makes their Waivers not subject to sales tax then the statutes are unambiguous. (App. Brief, p. 30.) But, on the other hand, if the Court interprets the statutes in a way that makes the Waivers subject to tax, then the statutes must be ambiguous. (App. Brief, p. 30.) The Taxpayers have not put forth any case law supporting their ability to claim such an inconsistent view of a statute. A statute is either ambiguous or it is not: the Taxpayers cannot simultaneously argue both, as they are in direct contradiction with each other. Even if the Taxpayers could support such contradicting views, they fail to specify how either S.C. Code Ann. § 12-36-910 (2014) (the imposition statute) or S.C. Code Ann. § 12-36-90 (2014) (the measure of tax statute) are ambiguous. Instead, the Taxpayers assert interpretations of these statutes that require ignoring the actual language in the statutes and adding words that simply are not contained therein. These statutes do not become ambiguous by putting forth unreasonable interpretations that require alteration to the text.

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). If the language of a statute has only one reasonable interpretation, then the statute is unambiguous and the court need not apply any rules of statutory construction. As an initial matter, these statutes have previously been analyzed by our appellate courts and they have never been found to be ambiguous. Notably, the Court of Appeals in Meyers Arnold did not find the imposition statute ambiguous. Specifically, the Court stated:

> 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.[2]

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. See also, Boggero v. S.C. Dep't of Revenue, 414 S.C.277, 777 S.E.2d 842 (Ct. App, 2015).

Neither the imposition statute nor the measure of tax statute is capable of having more than one reasonable interpretation. The imposition statute imposes a sales tax on "every ***person*** engaged or continuing within this State in the in the business of selling tangible personal property

[2]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.

at retail." § 12-36-910(A)(emphasis added)[3] [4]. 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 "certain transactions of retailers" and not on "every person engaged or continuing within this State in the business of selling tangible personal property at retail", that is not how the statute is written. (App. Brief, p. 30.) An interpretation of a statute that requires eliminating some words and inserting new words within the statute is not a reasonable interpretation. See First Citizens Bank and Trust Company, Inc. v. Blue Ox, LLC, 422 S.C. 461, 471, 812 S.E.2d 418, 423 (Ct. App. 2018) ("'We are not at liberty, under the guise of construction, to alter the plain language of [a] statute by adding words [that] the [l]egislature saw fit not to include.'"). Because the Taxpayers' interpretation requires the deletion of the words "persons engaged in the business of" and insertion of "certain transactions of retailers" it is not a reasonable interpretation.

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." § 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,

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

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 fee for the Waiver is a percentage of the cost of the Rental Agreement, so quite clearly, the proceeds of the Waivers come from and are a direct result of the Rental Agreements. (R. p. 201; Hr'g Tr. 116:8 – 12.) Accordingly, the Taxpayers' gross proceeds must include the Waiver fees, as those fees proceed or accrue from the Rental Agreements.

Because the statutes in this matter are only subject to one reasonable interpretation, the Court of Appeals and the ALC properly found those statutes to be unambiguous. As this Court recognized "[t]he 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 plain and ordinary meaning is commonly referred to as the "plain meaning" rule, and the ALC and the Court of Appeals properly applied this rule when reading the text of the imposition statute and the measure of tax statute.

B. The Imposition Statute

The imposition statute explicitly states, "[a] sales tax, equal to five[5] 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" § 12-36-910(A). A plain reading of the imposition statute establishes that the tax is imposed on a person in the business of selling tangible personal property at retail.

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

The ALC and the Court of Appeals 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.) All 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.

The Taxpayers argue in their brief that 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." (App. Brief, p. 9.) The Taxpayers' argument is both legally and factually inaccurate. First and foremost, the Court of Appeals never held that the imposition statute imposes a sales tax on persons regardless of what they are selling. The actual Court of Appeals holding is "[l]ooking to the plain and ordinary meaning of the language in section 12-36-910(A), we believe the statute imposes a tax on all persons engaged in the business of selling tangible personal property at retail." (App., pp. 5.) Therefore, the Court of Appeals is not imposing a sales tax on persons regardless of what they are selling; rather the Court of Appeals followed the plain meaning of 12-36-910(A), which states that sales tax applies to all persons engaged in the business of selling tangible personal property at retail.

The Taxpayers, however, assert that the Court of Appeals erred because the sales tax applies to transactions and not persons. (App. Brief, p. 29.) According to the Taxpayers "one cannot properly apply the plain meaning rule and reach the conclusion" "that the sales tax statute

imposes a tax on persons and not transactions." (App. Brief, p. 29.) 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." 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 a Court to ignore or delete words contained in a statute, or that the plain meaning rule allows for insertion of new words into a statute. To the contrary, because the Taxpayers' interpretation requires the Court to ignore, delete, and/or insert words demonstrates that such interpretation is obviously a "forced construction" and not the plain meaning of the imposition statute.

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 sales tax established by § 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. (App. Brief, p. 12.) 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 also assert that it is the Department's long standing policy that sales tax is a transactional tax. (App. Brief, p. 13.) Nothing cited or relied upon by the Taxpayers in their Brief 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 Taxpayers' brief 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). The Taxpayers cite to S.C. Code Ann. Regs. § 117-308 for the proposition that numerous services are not subject to sales tax. The cited Regulation actually demonstrates that certain retailers who sell tangible personal property and also provide independent services are not required to pay sales tax on the services offered by the retailer.

The examples cited by the Taxpayers are easily distinguishable from the present matter. (App. Brief, p. 12.) A veterinarian can sell pet supplies, an optometrist can sell glasses, and a beauty or barber shop can sell hair care products. When those taxpayers sell those items of tangible personal property, those taxpayers pay sales tax on that property. On the other hand, when those taxpayers offer veterinary care to animals, optometry services to patients, or cut hair for customers, those services are not subject to sales tax. Each of those services is available without the retail item that the retailer might also sell. Furthermore, each of those retail items is available without the service being provided. In each of the cited examples, the service and the tangible personal property are not inextricably linked. For example, a veterinarian may sell dog food without treating a dog and a veterinarian may treat a dog without selling dog food. The same analysis is true for all of the examples cited by the Taxpayers. The same cannot be said for the Rental Agreement and the Waiver. While the Taxpayers may offer Rental Agreements without Waivers, the Taxpayer does not offer Waivers without Rental Agreements.

The Taxpayers make similar arguments through reference to testimony by their tax policy expert, Professor Pomp. In his testimony, Professor Pomp opined that two items being sold together does not automatically create a bundled transaction. (App. Brief, p 26.) In support of this conclusion, Professor Pomp offered two examples, the first being the sale of a car that also included the sale of car washes, and the second being the sale of his textbook that also included an hour of

consultation with him. Unlike the facts in this matter, in each of Professor Pomp's examples the additional item can be sold without the existence of the first item. A business can sell car washes without selling cars, and Professor Pomp can sell consultation services without selling textbooks. Moreover, the items are not inextricably linked, as each item remains capable of existing even if the other item no longer exists.

The examples relied upon by Professor Pomp, and the examples cited from Regulation 117-308, all demonstrate independence between the tangible personal property and the offered service. Each service is capable of existing without the offered service, and each service is capable of existing without the offered tangible personal property. The same cannot be said for the Taxpayers' Waiver and Rental Agreement. The Taxpayer cannot and does not sell Waivers without a corresponding Rental Agreement. Moreover, the Waiver does not exist without the Rental Agreement. Unlike the independence exhibited between each of the services and tangible personal property cited by the Taxpayers, the Waiver is entirely dependent upon the Rental Agreement. As will be discussed more fully in Section II herein, this dependent relationship exemplifies the inextricable link between the Rental Agreement and Waiver, and that inextricable link is what makes the Waiver subject to sales tax.

It is important to note that the testimony of the Taxpayers' own expert as to the meaning of §12-36-910(A) does not support the Taxpayers' argument. Professor Pomp provided the following explanation of the imposition statute:

> 12-36-910 is what we would refer to as the imposition statute. It tells taxpayers there was a sales tax. Its going to be five percent. Its on the gross proceeds of sales **upon every person** engaged or continuing within the State. What's the activity, the business of selling tangible personal property at retail. So there is your notice to taxpayers. You are on notice that if you conduct these activities, there will be a five percent tax on the gross proceeds of your sales.

(Tr., R. p 223: 6-16)(emphasis added.) As Professor Pomp recognized, if you are a person engaged in the business of selling tangible personal property at retail, you are on notice that you are subject to a sales tax on your gross proceeds of sales. The foregoing testimony is entirely consistent with the both the explicit language of the imposition statute and the Court of Appeals' decision. Moreover, this testimony contradicts the Taxpayers' assertions that the sales tax applies to transactions and not to persons.

The Taxpayers' interpretation of the imposition statute is also contradicted by applicable South Carolina case law. In Meyers Arnold v. South Carolina Tax Commission, 285 S.C. 303, 328 S.E.2d 920 (1985), the Court of Appeals addressed whether lay away fees were subject to sales tax. Like the Waivers at issue here, the lay away fees were optional, because a customer did not have to pay those fees, as he or she could simply buy the item without using lay away. Nevertheless, the Court of Appeals held that the lay away fees are subject to sales tax because Meyers Arnold was a person engaged in selling tangible personal property at retail and the lay away fees are included in their gross proceeds of sales. Meyers Arnold, 285 S.C. at 307, 328 S.E.2d at 923. If the Taxpayers' interpretation of the imposition statute were correct, the Meyers Arnold ruling would have been far different. Under the Taxpayers' interpretation, the Meyers Arnold court should have analyzed whether the lay away fees were independently subject to sales tax. According to the Taxpayers, sales tax is a transactional tax, and only transactions involving "sales of tangible personal property and those services ***specifically identified*** in the sales tax chapter are subject to sales tax." (App. Brief, p. 10) (Emphasis in the original). Lay away fees are not tangible personal property and are not specifically identified in the sales tax statute. Yet, the Court of Appeals held that lay away fees are subject to sales tax.

Despite the plain language in the imposition statute, and the binding Meyers Arnold decision applying the imposition statute, the Taxpayers continue to rely on the ALC's incorrect decision in Alltel v. South Carolina Department of Revenue, 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015),[6] for the proposition that the imposition statute does not impose a sales tax on Waivers. (App. Brief, p. 11.) Alltel is a non-binding decision by the ALC that should not be followed by this Court.[7] In Alltel, the ALC misread the imposition statute just like the Taxpayers misread the imposition statute here. Specifically, the ALC in Alltel examined whether § 12-36-910(A) imposed a sales tax on the indemnification coverage instead of Alltel's business. A plain reading of the imposition statute demonstrates that a sales tax is imposed on persons in the business of renting or selling tangible personal property at retail, not the sale of tangible personal property. Thus, the Taxpayers' reliance on the Alltel decision is misplaced because the ALC in Alltel failed to read the plain language of the imposition statute. Accordingly, this Court should disregard the Alltel decision and affirm the ALC's finding that a sales tax is imposed on the Taxpayers because they are persons in the business of renting and selling tangible personal property at retail.[8]

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[6]The Department appealed the ALC's decision in Alltel; subsequent to filing the appeal, the parties resolved the matter and the Department withdrew the appeal.

[7] Pursuant to Rule 70(F) of the Rules of Procedure for the Administrative Law Court, only en banc decisions are binding upon other ALC judges. Alltel is not an en banc decision, and if a decision is not binding upon the judges of the ALC, it is not binding upon this Court.

[8] Footnote 7 of the Taxpayers' brief cites to several out of state cases to supposedly support its contention that the measure of tax statute is not reached unless the imposition statute applies. (App. Brief, p. 17.) The Department previously addressed and distinguished the Brock Serv., LLC v. Ala. Dept. of Revenue, Docket No. S. 14-1236 (Ala. Tax Tribunal Sept. 28, 2015) and Rent-A-Center West, Inc. v. Utah State Tax Comm'n, No. 20140129 (Utah Jan. 5, 2016) cases in its brief to the Court of Appeals. The Department directs the Court to Appendix pages 121-126 for full explanation of why these cases are distinguished from the present matter. The Taxpayers also include the Kentucky case of Ky Dept. Of Rev. v. Rent-A-Center East, Inc. and Rent-Way, Inc., 2019 WL 3059900 (Ky. Ct App. July 12, 2019), which the Department addresses at Footnote 11 of this Brief, and the Rent-A-Center East, Inc., v. Lincoln Parish Sales & Use Tax Comm'n, 60 So.3d 95, (La. App. 2 Cir. 2011), writ denied, 63 So.3d 985 (La. 2011) case which is addressed at

The Taxpayers' interpretative gymnastics are necessary because application of the imposition statute to "persons" and not simply transactions, easily defeats the Taxpayers' arguments. The Taxpayers are clearly persons engaged in the selling tangible personal property at retail and the analysis progresses to what is included in the Taxpayers' gross proceeds of sales.

C. The Measure of Tax Statute

Because the Taxpayers are persons engaged in the sale of tangible personal property at retail, the ALC and Court of Appeals moved on to the measure of tax statute, § 12-36-90, to determine what is included in the Taxpayers' gross proceeds of sales. 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. The measure of tax statute clearly states 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 ALC and the Court of Appeals properly applied the plain meaning rule and concluded that the Waiver fees constitute value proceeding or accruing from the rental of tangible personal property.

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pages 23 herein. Lastly, the Taxpayers cite to a Missouri Department of Revenue Letter Ruling from 2000. Missouri letter rulings are only binding for three years and only binding as to the specific taxpayer addressed in the letter. Because this Letter Ruling is no longer binding even as to the taxpayer at issue in the letter, this Court should disregard this outdated, out of state source.

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. The Taxpayers' customers could 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.) Finally, 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.)

The record is replete with evidence that demonstrates the inextricable link between the Rental Agreement and the Waiver. For example, if a customer adds a Waiver to the Rental Agreement, the Taxpayers will waive the customer's liability for the fair-market value of the rented item. (R. pp. 157 – 159, 344 – 345; Hr'g Tr. 72:12 – 74:11; Hr'g Exhibit 3.) This constitutes a material change in the terms of the Rental Agreement, which otherwise placed liability on the customer. Also, the Waiver can only be enforced if the customer made 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 includes the amounts received for the Waiver because the Taxpayers do not sell Waivers without the corresponding rental.

The evidence in the record demonstrates that the Waivers are a direct result of the rental of tangible personal property. But for the rental of tangible personal property, the Taxpayers would not receive the Waiver fees. Moreover, the Waiver has no value on its own because there is no fair market value to waive without the rental of the tangible personal property. These facts demonstrate that the Waiver is worthless without a corresponding rental of tangible personal property. Clearly, the Waiver and the rental of the tangible personal property are inextricably linked such that the Waiver is includable in the Taxpayers' gross proceeds of sales. Accordingly, this Court should affirm the ALC's and Court of Appeals' finding that the Taxpayers should have included the proceeds from the Waiver fees in their gross proceeds of sales.

In addition to Meyers Arnold, other relevant case law and Department rulings support the ALC and Court of Appeals' application of the imposition statute and the measure of tax statute, including its ruling that the Waiver fees must be included in the Taxpayers' gross proceeds. This Court addressed an issue involving the inclusion of associated fees in gross proceeds of sales in Travelscape, LLC v. South Carolina Department of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011). An issue in Travelscape was whether or not the facilitation fee and service fee that the taxpayer added to the net hotel room rate of the room being rented were included 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. This 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)[9] 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

[9]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.

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 the gross proceeds of sales. Citing Meyers Arnold, 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. Again, citing Meyers Arnold and Commission Decision S-D-174, the Department determined that the collision damage waivers were taxable. The Department based its determination upon the fact that but for the rental of the tangible personal property, the taxpayer

would not have received the waiver fee. The damage waiver fee is part of the rental transaction and must be included in the gross proceeds of sales subject to sales tax.

Furthermore, as the Court of Appeals recognized and relied upon in its ruling, other states with similar taxing statutes have reached the same conclusion as the Department and the ALC here. For example, the Louisiana Court of Appeals addressed this very same issue with RAC East and held that the proceeds from the Waiver fees were subject to tax. Rent-A-Center East, Inc., v. Lincoln Parish Sales & Use Tax Comm'n, 60 So.3d 95, (La. App. 2 Cir. 2011), writ denied, 63 So.3d 985 (La. 2011). Louisiana's relevant taxing statute reads:

> B. There is hereby levied a tax upon the lease or rental within this state of each item or article of tangible personal property, as defined herein; the levy of said tax to be as follows:
>
> > (1) At the rate of two per centum (2%) of **the gross proceeds derived from the lease or rental of tangible personal property**, as defined herein, where the lease or rental of such property is an established business, or part of an established business, or the same is incidental or germane to said business.

La. Stat. Ann. § 47:302(B)(1) (West 2016) (emphasis added). Consistent with the logic utilized by the South Carolina authorities cited above and the ALC decision here, in making its ruling the Louisiana court focused upon the fact the waivers do not exist without the renting of tangible personal property and are merely incidental to the rental of tangible personal property. Lincoln Parish, 60 So.3d at 99.

The Rhode Island Division of Taxation (Division) addressed this same issue with Rent A Center East and held that the Waiver fees were subject to sales tax. In the Matter of: ***, Taxpayers, 2008 WL 5582992 *10 (R.I.Div.Tax. May 16, 2008). Specifically, the Division held

that "the Damage Waiver is taxable as a service incidental to the rental of an item." Id. Rhode Island's relevant taxing statute at the time provided:[10]

> "Sale price" defined. — (a) "Sale price" means the total amount for which tangible personal property is sold or leased or rented . . . including all of the following:
>
> (1) Any services that are a part of the sale, valued in money, whether paid in money or otherwise.

Id. at 5 (citing R.I. Gen. Laws § 44-18-12 prior to the 2007 amendment). Similar to South Carolina, Rhode Island included anything incidental to the rental of tangible personal property in the tax base. In determining whether the Waivers were incidental to the rental of tangible personal property, the Division focused on the fact that the Waiver has no value unless it is purchased in conjunction with renting an item and the fact that a customer could not purchase a Waiver without renting an item. 2008 WL 5582992 *9. Again, this logic is consistent with the South Carolina authorities cited above and the ALC's logic in this case that the Waivers constitute value proceeding or accruing from the rental of tangible personal property.

Despite overwhelming authority to the contrary, the Taxpayers continue to rely on the ALC's non-binding, incorrect, and distinguishable decision in Alltel.[11] Specifically, the Taxpayers

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[10]On January 1, 2007, after the periods at issue in the In the Matter of: ***, Taxpayers decision, Rhode Island adopted the streamlined sales and use tax. In adopting the streamlined sales and use tax, Rhode Island amended the definition of "sale price" as set forth in R.I. Gen. Laws § 44-18-12. The amended definition, in relevant part, changed the phrase "any services that are part of the sale" to "any services **necessary** to complete the sale." R.I. Gen. Laws § 44-18-12 (emphasis added).

[11] In addition to Alltel, the Taxpayers also ask this Court to look at the Kentucky case of Ky Department of Revenue. v. Rent-A-Center East, Inc. and Rent-Way, Inc., 2019 WL 3059900 (Ky. Ct App. July 12, 2019). First, it must be noted to this Court that this is an unpublished opinion and pursuant to Kentucky Rule of Civil Procedure 76.28, opinions that are not published are not to be cited or used as binding precedent in court. Even if this Court could look to the Kentucky case for guidance, it is easily distinguishable from the present matter. Kentucky sales tax, pursuant to the explicit terms in the statute, applies to retail sales of tangible personal property. Unlike the applicable South Carolina statutes, Kentucky does not subject intangibles to sales tax.

seem to rely heavily on the ALC's conclusion in Alltel that because the indemnification coverage at issue was not tangible personal property, then proceeds from the sale of the indemnification coverage do not proceed or accrue from the sale of tangible personal property.[12] In other words, the Taxpayers and the ALC in Alltel read § 12-36-90 to apply only to the amount paid for tangible personal property (and certain enumerated services). Specifically, the ALC in Alltel incorrectly focused on whether the indemnification coverage met the definition of tangible personal property. 2015 WL 7681302 *12. However, the measure of tax statute does not define gross proceeds of sales as only the amount paid for tangible personal property. Rather, gross proceeds of sales include the proceeds from the sale of tangible personal property as well as the value proceeding or accruing from such sale. See § 12-36-90. The more appropriate question is whether the indemnification coverage itself constituted tangible personal property *or* whether it constituted value proceeding or accruing from the sale of tangible personal property (the wireless communication services and/or devices). An affirmative answer to either means the value is subject to sales tax. See e.g., Travelscape, 391 S.C. at 98, 705 S.E.2d at 33 (finding the Department properly included the taxpayer's service fees in the taxpayer's gross proceeds of sales); Meyers Arnold, 285 S.C. at 307, 328 S.E.2d at 923 (finding the Department properly included the lay away fees in the taxpayer's gross proceeds of sales); Textile Restoration Services, Inc. v. S.C. Dept. of

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Furthermore, unlike South Carolina, it does not appear that Kentucky utilizes the intentionally broad language of "value proceeding or accruing" from the sale in determining what is subject to sales tax. The Kentucky court found that waivers are intangibles and intangibles are not subject to sales tax. The logic applied by the Kentucky Court is not applicable here as South Carolina taxes intangibles and South Carolina defines gross proceeds broadly to include all value proceeding or accruing from a transaction.

[12]The ALC in Alltel misunderstood the transaction at issue – the sale of wireless communication services and devices, which falls under the definition of tangible personal property, with the addition of insurance/indemnification coverage. 2015 WL 7681302 *1.

Rev., 2015 WL 7443800 *4 (S.C. Admin. Law Ct. Nov. 12, 2015) (finding the Department properly included the charges incident to the dry cleaning service in the taxpayer's gross proceeds of sales); and Tronco's Catering, Inc. v. S.C. Dept. of Rev., 2010 WL 5781622 *3 (S.C. Admin. Law Ct. Apr. 12, 2010) (finding "the value of the sale of catered meals includes service, labor, and room charges. Such charges are incidental to and merely enhance the value of the sale of catered meals.").

Moreover, the reading of § 12-36-90 by the ALC in Alltel and the Taxpayers here ignores the inclusion of language allowing taxation beyond the purchase price of the tangible personal property. Under the Taxpayers' reading of § 12-36-90, the words "value proceeding or accruing" are ignored and the sole focus is on the price of the tangible personal property. As this Court has held, "a statute should be construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . ." Matter of Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). Therefore, the Taxpayers' reading of § 12-36-90 must fail as it renders the "value proceeding or accruing" language meaningless.

If the General Assembly intended for § 12-36-90 to be as narrow as the Taxpayers here and the ALC in Alltel read the statute, they would have drafted the statute to simply provide that gross proceeds of sales include proceeds from the sale of tangible personal property and certain enumerated services.[13] However, the General Assembly chose to use the phrase "value proceeding or accruing," which, as the ALC correctly pointed out, is much broader. Accordingly, the measure of tax statute includes the amount paid for the tangible personal property as well as all value

[13]The General Assembly could have drafted the measure of tax statute similar to Utah's statute, for example, which limits the tax base to "amounts paid or charged for the following transactions . . . ." Utah Code § 59-12-103(1)(k) (West 2016); see also Rent-A-Center West, Inc. v. Utah State Tax Comm'n, No. 20140129 (Utah Jan. 5, 2016).

proceeding or accruing from the sale or rental of said tangible personal property. In this case, the gross proceeds of sales include the rental payment (the amount paid for the tangible personal property) and the Waiver fee (value proceeding or accruing from the rental). Because the law is clear and the substantial evidence in the record supports the finding that the Waiver fee proceeds or accrues from the Taxpayers' rental of tangible personal property, this Court should affirm the Court of Appeals.

II. THE COURT OF APPEALS AND ADMINISTRATIVE LAW COURT PROPERLY FOUND THAT THE TAXPAYERS SHOULD HAVE INCLUDED THE WAIVER PROCEEDS IN THEIR GROSS PROCEEDS OF SALES THROUGH USE OF THE TRUE OBJECT TEST.

When a transaction involves both the sale/rental of tangible personal property and an intangible or service, 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."

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 the 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.)

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 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.) In addition to the facts cited by the Court of Appeals, the record also shows that the Waiver can only exist if there is an ongoing Rental Agreement. If the Rental Agreement ceases to exist, the Waiver also ceases to exist, because, according to the Taxpayers' own witness, "[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.) 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, this Court should affirm the Court of Appeals.

The Taxpayers, however, argue that this Court should not focus on the clear and substantial evidence demonstrating that the Rental Agreement and Waiver are one inextricably linked transaction, but instead should find the Waiver and the Rental Agreement to be separate transactions. (App. Brief, p. 5.) The Taxpayers' argument requires this Court to weigh 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." § 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 Court of Appeals and ALC. See Barton, 404 S.C. at 401, 745 S.E.2d at 113. Accordingly, this Court should affirm the finding that the Taxpayers' gross proceeds must include the amounts received for the Waivers.

The Taxpayers, however, argue that this Court should not focus on the clear evidence that demonstrates the Rental Agreement and Waiver are inextricably linked, but instead should focus on the reasons why they assert the Rental Agreement and Waiver are separate agreements and, thus, separate transactions. (App. Brief, p. 19.) The Taxpayers ask this Court to focus on individual portions of the transaction and treat such as though the other parts of the transaction did not occur simultaneously. However, this Court should disregard this form over substance argument and look at the transaction for what it truly is – one transaction wherein a customer chooses to rent a durable consumer good free from liability in certain situations. Despite the ALC's proper analysis, the Taxpayers are asking this Court to find that the Waiver provides a completely separate benefit than the Rental Agreement and, therefore, the sale of the Waiver constitutes a separate transaction from the rental of tangible personal property. (App. Brief, p. 19.) Such argument requires the Court to disregard the fact that no Waiver can exist without the underlying Rental Agreement as there is no liability to waive without the Rental Agreement. The benefits associated with the Waiver only exist if a Rental Agreement is in place. The undisputed evidence shows that a customer cannot come into one of the Taxpayers' stores and purchase a Waiver unless the customer also enters into a Rental Agreement. (Hr'g Tr. 106:7 – 18, 115:12 – 21.) Furthermore, there can be no price on the Waiver as the price set forth in the Rental Agreement determines the price of the Waiver. (Hr'g Tr. 116:8 – 12.)

Despite the above, the Taxpayers argue that the ALC should have found that two separate transactions were at issue. (App. Brief, p. 20.) Contrary to the Taxpayers' assertions, the facts in this case do not support the conclusion that two separate transactions were at issue. Moreover, the ALC determined that, when viewing all the facts, only a single transaction was at issue – the rental of tangible personal property with the addition of a Waiver. This Court "may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." § 1-23-610(B). Moreover, when this Court looks at the entire record, it is clear that reasonable minds could reach the same conclusion as the ALC. See Barton, 404 S.C. at 401, 745 S.E.2d at 113. Accordingly, this Court should affirm the ALC's finding that the rental of tangible personal property and its incidental sale of a Waiver constitute a single transaction.

The Taxpayers argue that the true object test only applies to "bundled transactions" therefore the Court must first analyze whether a "bundled transaction" exists. (App. Brief, 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. In fact, the Taxpayers have not set forth any South Carolina authority even including the term "bundled transaction." Moreover, the case law of this State addressing the true object test, including cases cited by the Taxpayers in their brief, neither include nor utilize the phrase "bundled transaction." See, Fraternal Order of Police v. S.C. Dept. of Rev., 332 S.C. 496, 506 S.E.2d 495 (1998); Boggero v. S.C. Dep't of Revenue, 414 S.C.277, 777 S.E.2d 842 (Ct. App, 2015.); Southeastern Cinema Entertainment v. S.C. Dept. of Rev., 2014 WL 2417715 (S.C. Admin. Law Ct. May 28, 2014). Tronco's Catering, Inc. v. S.C. Dept. of Rev., 2010 WL 5781622 *3 (S.C. Admin. Law Ct. Apr. 12, 2010).

The Taxpayers insistence on use of the phrase "bundled transaction" seemingly stems from their desire to convince this Court that an irrelevant and unrelated publication from the Department should be applied to this case. In 2003, the General Assembly amended S.C. Code Ann. § 12-36-910 to add subjection (B)(3)(b)(i). That subsection added and defined the phrase "bundled transaction"[14] in regards to means of communications, and only to means of communications. The General Assembly did not amend §12-36-910 to include a definition of "bundled transaction" for all sales tax transactions, rather it only added that language to the specific provisions addressing means of communications. In 2006, the Department issued Revenue Ruling #06-08 to address this statutory provision and how the Department applies that provision to means of communications. The Taxpayers seek to have this Court apply Revenue Ruling #06-08 and the definition of "bundled transaction" to the facts in this matter despite the fact there are no ways and means of communications at issue. (App. Brief, p. 21.) This Revenue Ruling does not state that it applies to sales tax generally or to 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." The Taxpayers' argument seeks to apply a definition the General Assembly explicitly limited to means of communications to all items subject to sales tax. Had the General Assembly intended the definition of "bundled transaction" to apply to all items subject to sales tax, as the Taxpayers' argument requires, it would have added that language to § 12-36-910 as a whole and not limited its application to only the

[14] The Taxpayers argue the "there is no logical reason that the Department would have a different definition for a "bundled transaction" for communications versus other items subject to sales tax." (App. Br. p.21, Fn.9.) The Taxpayers fail to grasp that it is the General Assembly and not the Department who created this definition, and moreover it's the General Assembly who chose to limit that definition to only communications. Therefore, while the Taxpayers may see "no logical reason" for the limited application of the definition of "bundled transaction," that is a decision entirely within the province of the General Assembly.

means of communications. The case law of this State addressing the true object test, including the case law cited by the Taxpayers, does not utilize or even mention the § 12-36-910 (B)(3)(b)(i) definition of bundled transaction, or Revenue Ruling #06-08. Because there is no authority requiring or even using the § 12-36-910 (B)(3)(b)(i) definition of "bundled transaction", or Revenue Ruling #06-08 to address the true object test, and because the definition of "bundled transaction" provided and discussed therein is unrelated and irrelevant to the issues in this case, this Court should disregard this definition and not include it in its analysis.

The Taxpayers argue that the Waiver and Rental Agreement are not inextricably linked because the Waiver is optional and could be cancelled. While it is true that a customer could obtain a Rental Agreement without a Waiver, this is only half of the inextricably linked analysis. The next question in that analysis is whether a customer could obtain a Waiver without a Rental Agreement. The answer to that question is no, a customer could not go into the Taxpayers' stores and obtain a Waiver without a Rental Agreement. (R. pp. 191, 200; Hr'g Tr. 106:7 – 18, 115:12 – 21.) The Taxpayer does not sell Waivers for third party merchandise, and it does not sell Waivers without a Rental Agreement. (R. p. 191; Hr'g Tr. 106:7 – 18.) Moreover if the customer cancelled the Rental Agreement that customer could not continue paying for the Waiver, because as the Taxpayers'' own witness testified, at that point there is nothing to waive. (R. p. 201; Hr'g Tr. 116:13 – 20.) The fact a Wavier cannot exist without a Rental Agreement demonstrates that the two are inextricably linked.

According to the Taxpayers, the finding that the Waiver is inextricably linked to the Rental Agreement is "not supported by any evidence in the record and instead is contradicted by all evidence pertaining to the Waiver's continuing separate existence and value and it thus, clearly erroneous." (App. Brief, p. 25.) The Taxpayers' assertion that the Waiver has a "continuing

separate existence" is patently false and not supported by any facts in the record. To the contrary, as explained previously herein, a customer cannot purchase a Waiver without a corresponding Rental Agreement and the Waiver ceases to exist if the Rental Agreement is terminated. The Taxpayers brief fails to explain how a Waiver has a "continuing and separate existence" when it cannot exist without a Rental Agreement. Furthermore the Taxpayers fail to explain their assertion that the Waiver has a continuing value when it does not exist without a Rental Agreement. According to the Taxpayers, the value of the Waiver is "the value of avoiding the risk of certain losses." (App. Brief, p. 25.) Without a Rental Agreement there are no losses to avoid as the customer no longer possesses the rented item. Again, as the Taxpayers own witness testified, at that point there is nothing to waive. (R. p. 201; Hr'g Tr. 116:13 – 20.) If the risk of loss no longer exists, then a Waiver protecting against those loses is worthless. The Taxpayers' brief fails to explain how a Waiver that protects against losses that are no longer even possible somehow still has any value, much less the same value.

The Taxpayers' brief confuses the price of a rental item with the value of the rental transaction as a whole. According to the Taxpayers, the Waiver and Rental Agreement are not inextricably linked because a $500 television remains a $500 television regardless of whether the customer chose to add a Waiver.[15] What the Taxpayers' argument fails to grasp is the value of the transaction as a whole does not remain the same. It is illogical to argue that a rental of a television wherein the customer is liable for damage to the television has the same value as a rental of a

[15] In their brief, the Taxpayers attempt to distinguish themselves from Meyers Arnold by inaccurately claiming that the price of an item increased in Meyers Arnold when that item was placed on lay away. As the opinion states: "the lay away fee is charged on all lay away sales and is not refundable. The fee does not vary with the amount of the sale nor the time period of the lay away." Meyers Arnold, 285 S.C. at 307, 328 S.E.2d at 923. Therefore, contrary to the Taxpayers' assertions, the price of an item in Meyers Arnold did not increase because of lay away, rather the customer paid a nonrefundable flat fee for the service of using lay away. (App. Brief, p. 25.)

television wherein the customer is not liable damages. If the Taxpayers' argument was correct, there would be no reason for the Taxpayers' customers to add and pay for a Waiver.

The Taxpayers argue that the Waiver is not inextricably linked to the Rental Agreement because the Waiver is optional. To better understand the Taxpayers' arguments regarding the optional nature of the Waiver, the Department asked the Taxpayers' expert witness about optional contracts and application of the true object test. In particular, the Department asked Professor Pomp about an engraved trophy. In the Department's example, a customer enters a trophy shop and enters into one agreement to buy parts for a trophy for $20, then enters into a second agreement in a second transaction for assembly of the trophy for $80, then enters into a third agreement in a third transaction for engraving of the trophy for $10. The second and third agreements were entirely optional. Professor Pomp testified that the combined price of all three agreements, $110, would be subject to sales tax. (Tr., R. p. 257:18-19.) According to Professor Pomp, that example constitutes a bundled transaction despite being optional because "[o]nce you bought all three together, it wasn't optional anymore. You bought all three together. That's what you wanted." (Tr., R. p. 250:18-24.) The Taxpayers reference this example in their brief and make the inaccurate statement that "once a trophy has been altered or improved such the assembly and engraving are no longer optional if one is going to purchase the trophy. The engraving has been physically incorporated into the trophy and thus inextricably linked thereto such that the sale of the trophy and the assembly/engraving services constitute a bundled transaction." (App. Brief, p. 23.) Contrary to the Taxpayers' assertions, Professor Pomp did not testify that his opinion hinged on the trophy being altered or improved. Professor Pomp did not testify that the optional nature of the contract no longer mattered because the trophy had been altered or improved. Professor Pomp furthermore did not testify that the engraving was physically incorporated into the trophy and

therefore inextricably linked. To the contrary, what Professor Pomp actually testified to is that the optional nature of the three separate agreements does not matter once all three were purchased because "you bought all three together. That's what you wanted." (Tr., R. p. 250:18-24.) Therefore, in accordance with that testimony, the fact the Waiver was optional doesn't matter once the customer chose to add it to the Rental Agreement, because the customer bought both because that is what the customer wanted.

The Court of Appeals correctly recognized the Waiver "specifically stated it was "an additional part of the Rental Agreement." In their brief, the Taxpayers assert that "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." (App. Brief, p. 24.) The Taxpayers' assertions are both shocking and unfounded. Unquestionably the Waiver explicitly states that it is an additional part of the Rental Agreement. Not only does the Waiver include that language, it is language that the Taxpayers themselves drafted and included in their own document. The Taxpayers are asking this Court to not only ignore language that the Taxpayers chose to put in their own agreements, they are further asserting to this Court that the statement itself is not true.

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, Southeastern Cinema Entertainment v. South Carolina Department of Revenue, 2014 WL 2417715 (S.C. Admin. Law Ct. May 28, 2014); and Keith Purdy, d/b/a A Southern Bartender v. S.C. Dept. of Rev., Docket 17-ALJ-17-0002-CC (April 26, 2018), appeal filed July 5, 2018. 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 inaccurately 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." (App. Brief, p. 22.) Nothing in the ALC's order or the Court of Appeals' ruling supports this assertion by the Taxpayers. 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.

While the Southern Bartender case does not support the Department, that decision is on appeal because it is legally incorrect and therefore should not be followed by this Court. In the Southern Bartender, the ALC found that Mr. Purdy was a person in the business of selling tangible personal property at retail and subject to sales tax. The ALC correctly found the total invoice price for bartending an event is subject to sales tax when billed as a package. However, the ALC erroneously found the costs of labor and service—specifically "bartending and other services"—were not subject to sales tax if billed as separate line items. The transaction remains the same regardless of how Mr. Purdy bills the customer, and the law does not allow a sales tax deduction for "bartending and other services." The ALC ruling allows a taxpayer to avoid taxation by manipulating the wording of an invoice. The plain language of § 12-36-90 defines "gross proceeds of sales" to include the sale of tangible personal property without any deduction for the cost of labor or service. The ALC's holding erroneously allows a deduction for the cost of labor, therefore this holding is not supported by South Carolina law and the Department's appeal of this ruling is presently before the Court of Appeals.

CONCLUSION

The intent of our General Assembly is clear, sales tax applies to persons engaged in the sale of tangible personal property at retail. What is specifically subject to tax is determined through the measure of tax statute. As explained herein, our General Assembly clearly intended for the total value that proceeds or accrues from the sale to tangible personal property to be subject to sales tax. The Taxpayers are persons engaged in the sale of tangible personal property at retail, therefore the total value that proceeds or accrues from such sales is subject to sales tax. The Court

of Appeals properly applied existing South Carolina law and interpreted the applicable statutory language and found the Taxpayers liable for sales tax on the Waivers they sold as part of their Rental Agreements. In an effort to avoid this result, the Taxpayers put forth a brief consisting entirely of requests for this Court to re-weigh the evidence or follow unreasonable and clearly flawed theories of law. The ALC's ruling, and the Court of Appeals' affirmance of that ruling, are legally correct and supported by substantial evidence. Accordingly, this Court should affirm the Court of Appeals.

Respectfully Submitted,

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Columbia, South Carolina
October 11, 2019

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

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