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Apr 08 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No. 2014-ALJ-17-0552-CC

Appellate Case No. 2021-000031

Lowe’s Home Centers, LLC Appellant,

v.

South Carolina Department of Revenue Respondent.

SOUTH CAROLINA DEPARTMENT OF REVENUE’S MOTION TO STRIKE

BACKGROUND

Appellant Lowe’s Home Centers, LLC (Lowe’s) seeks this Court’s review of the Administrative Law Court’s (ALC) decision finding the sale of materials to Lowe’s customers for use in installation contracts is a retail sale pursuant to S.C. Code Ann. § 12-36-110; thus, according to the unambiguous provisions of S.C. Code Ann. § 12-36-90 (gross proceeds of sales), Lowe’s is responsible for remitting sales tax on the materials based upon the purchase price paid by Lowe’s retail customers.

Throughout the life of the case, Lowe’s has made a variety of arguments that are extraneous to the application of South Carolina law to the facts in this matter. For example, Lowe’s continues to assert that South Carolina law reaches a different conclusion than other jurisdictions regarding the

sales tax liability for retailers that also operate as contractors in limited circumstances. Specifically, Lowe's claims "the contracts at issue in this matter contain the same terms and conditions as contracts used by Lowe's in other jurisdictions" and those jurisdictions "have concluded that Lowe's installs real property improvements as a contractor during its Installation Contract transactions." (Appellant's Br. pp. 21-22.) Lowe's makes this assertion despite the applicable statutory scheme in each of the cases cited by Lowe's is inapplicable or distinguishable from the specific statutory provisions in South Carolina.

As support for Lowe's' argument, it includes "facts" within its brief related to the decisions in other jurisdictions, and Lowe's also included "Attachment 1" to its appellate brief. *Id.* at 21-22.¹ For the reasons that follow, a portion of the Statement of the Facts, the Oklahoma Tax Commission findings, and the corresponding arguments that appear in Lowe's initial appellate brief should be stricken and not considered by the Court in this matter.

ARGUMENT

I. Lowe's improperly includes "facts" within its Statement of Facts that were not introduced as evidence at the hearing below and do not appear in the ALC's Final Order.

In its initial appellate brief, Lowe's asserts "the facts of this case are not in dispute." (Appellant's Br., p. 6.) The Department disagrees. In particular, Lowe's attempts to include a section within its Statement of the Facts entitled "HL Installation Contract Issues in Other States." In this section, Lowe's directs the Court to findings and conclusions concerning similar – but not identical – issues in other jurisdictions and includes "Attachment 1" to its appellate brief as support for its argument. The first document (Oklahoma Tax Commission findings, the "Oklahoma Findings") in

¹Significantly, the Court appears to recognize Lowe's improper attempt to include Attachment 1 to its appellate brief. By letter dated February 17, 2021, the Court informed Lowe's that its documents were being returned as they should not be attached to Lowe's brief in this matter.

Attachment 1 is wholly irrelevant to the issues before the Court. Moreover, despite Lowe's presenting the Oklahoma Findings and decisions from other jurisdictions to the ALC as "supporting authority"² during the ALC contested case hearing³, the ALC did not address those decisions during the hearing and he did not reference them in any way in the Final Order.

By submitting the List of Authorities at the beginning of the hearing and attempting to elicit testimony from its witnesses, Lowe's raised its argument regarding installation contract issues in other states. However, there are no findings of fact or conclusions of law in the ALC Final Order related to installation contract issues in other states.⁴ Nevertheless, prior to filing its notice of appeal in this matter, Lowe's failed to file with the ALC a motion to reconsider or a motion to alter or amend the judgment in order to preserve its argument related to installation contracts in other states. *See Ion, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (stating "the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.")

²During the opening of the hearing before the ALC, the parties informed the ALC they prepared a "List of Authorities . . . one or both of the parties believe is relevant" in the case. (R. p. ---; Hr'g Tr. 11:5-10.) Lowe's included the Oklahoma Tax Commission decision in the List of Authorities. Importantly, **no document included on the List of Authorities was introduced or admitted as an exhibit** during the ALC hearing. *Id.*

³Attachment 1 contains two separate documents: (1) the Oklahoma Findings and (2) SCDOR Private Letter Ruling (PLR) 07-04 (July 13, 2007). It is unclear why Lowe's believes PLR 07-04 is "difficult to find" when PLR 07-04 was admitted into evidence under Exhibit 58, and Lowe's Designation of Matter includes Exhibit 58. Further, like all official Department policy documents, PLR 07-04 is publicly available on the Department's website, www.dor.sc.gov/policy/index.

⁴The ALC likely concluded that, upon review of the sales tax law in South Carolina, each of the decisions offered by Lowe's is inapplicable or distinguishable from the relevant statutory provisions in South Carolina. Nevertheless, the ALC Final Order did not address Lowe's argument regarding similar litigation in other jurisdictions, and Lowe's did not file a motion to reconsider or motion to alter or amend regarding this argument.

Accordingly, the Department respectfully requests this Court to strike from the “Statement of Facts” section “**H. Installation Contract issues in Other States**” on pages 21 - 22 of Lowe’s initial appellate brief as there are no facts or conclusions of law in the ALC’s Order (or the record) related to issues in other states, and Lowe’s did not move to request the ALC to amend the Final Order to address this argument prior to filing the notice of appeal in this matter.

II. Lowe’s improperly attached material to its appellate brief that is not included in the record below.

The Department objects to Lowe’s improper attempt to introduce to this Court extraneous matters that are not and should not be included for the Court’s consideration. The Oklahoma Findings submitted with Lowe’s’ initial appellate brief is not properly included with its brief or in the Record on Appeal.⁵ For a host of reasons, it would not have been admissible as an exhibit at the trial court, and the parties specifically agreed on the record that it was not being introduced as an exhibit. (R. p. ----; Hr’g Tr. 11:5-10.) It is obvious hearsay, there is no evidence in the record that it is a “learned treatise,” and it was not relied upon by any expert in the case. *See* Rules 802, 803, and 703. Finally, the ALC’s Final Order did not make any findings of fact, conclusions of law, or references concerning the Oklahoma Findings or “installation contract issues in other states.” (R. pp. -----; Final Order. pp. 1-31.)

Simply put, Lowe’s should not be able to enter by the backdoor when it could not have done so by the front door. It is clear that Lowe’s would not have complied with Rules 209 and 210 had it tried to include these materials in the Record on Appeal. As this Court has previously recognized, disregard of the Rules of Appellate Practice should not be tolerated. *See State v. Harris*, 278 S.C. 46, 47, 292 S.E.2d 40 (1982) (criticizing appellate practitioners’ violations of the rules governing what matters are properly included in the record on appeal).

⁵The Department’s Motion to Strike does not include PLR 07-04 as the parties stipulated to the admissibility of Exhibit 58. (R. pp. -----; Exhibit 58.)

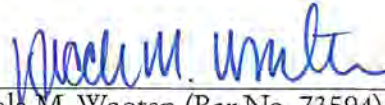
Rule 210, SCACR, provides that the Record on Appeal may contain “all matter designated by any party under SCACR Rule 209... .” But, of course, “the Record shall not, however, include matter which was not presented to the lower court or tribunal.” Rule 210(c), SCACR. Counsel for the participants are required to certify that their respective designations of matter to be included in the Record on Appeal “contain no matter which is irrelevant to the appeal.” Rule 209(c), SCACR. By including Attachment 1 as an exhibit to its initial appellate brief, Lowe’s has undertaken to avoid Rules 209 and 210 by including a document that was never addressed by the trial court during the hearing or in the Final Order. *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902 (Ct. App. 2006).

Thus, the Oklahoma Findings should be stricken from Lowe’s brief, and all arguments related to the document should not be considered by this Court when reviewing Lowe’s appeal in this matter. Further, the Oklahoma Findings should not be included in the Record on Appeal as this document was not introduced as evidence during the ALC hearing, and the ALC did not explicitly rely upon or disregard the Oklahoma Findings in its Final Order.

CONCLUSION

Lowe’s has offered for this Court’s consideration a document and arguments that were not considered or ruled upon by the ALC. Lowe’s actually concedes this in its February 23, 2021 correspondence to the Honorable Jenny Abbott Kitchings, Clerk of Court for the South Carolina Court of Appeals. See Ltr. p. 1 (“The authorities are difficult to find, so were included for the Court’s benefit as part of the Initial Brief.”) Because these arguments and the corresponding Oklahoma Findings were not – and should not be – included in the Record on Appeal, it is improper to include it as an exhibit to Lowe’s’ initial appellate brief. The Court should strike it and not consider the arguments.

Respectfully submitted,



Nicole M. Wooten (Bar No. 73594)

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Attorney for Respondent

South Carolina Department of Revenue

Columbia, South Carolina
April 8, 2021

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Lowe's Home Centers, LLC Appellant,

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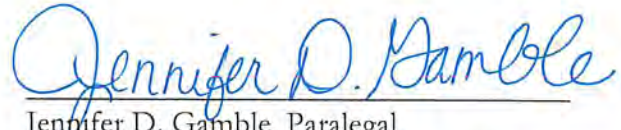
South Carolina Department of Revenue Respondent.

PROOF OF SERVICE

I hereby certify that I have served South Carolina Department of Revenue's Motion to Strike on Lowe's Home Centers, LLC by depositing a copy of it in the United States Mail, postage prepaid, on April 8, 2021, addressed to the Appellant's attorneys of record:

Burnet R. Maybank, III, Esquire
Rick Reames, III, Esquire
Jim Rourke, Esquire
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Jennifer D. Gamble, Paralegal
South Carolina Department of Revenue

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
OFFICE OF THE GENERAL COUNSEL

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April 8, 2021

VIA ELECTRONIC MAIL TO CTAPPFILINGS@SCCOURTS.ORG

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Lowe's Home Centers, LLC v. South Carolina Department of Revenue
ALC Docket No: 14-ALJ-17-0552-CC
Appellate Case No.: 2021-000031

Dear Ms. Kitchings:

Enclosed please find South Carolina Department of Revenue's Motion to Strike in regards to the above referenced matter. Additionally, I have enclosed a Proof of Service.

By copy of this letter I am serving all counsel of record with a copy of same.

If you have any questions or need anything further from me please do not hesitate to contact me at 803-898-1826 or Nicole.Wooten@dor.sc.gov. If I am not available, you can reach my paralegal, Jennifer Gamble, at 803-898-5031 or Jennifer.Gamble@dor.sc.gov.

With my regards, I am

Sincerely,

A handwritten signature in blue ink that reads "Nicole M. Wooten".

Nicole M. Wooten, Esquire
Senior Counsel, Tax

NMW/jdg
Enclosures

c: Burnet R. Maybank, III, Esquire
Rick Reames, III, Esquire
Jim Rourke, Esquire