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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. 14-ALJ-17-0552-CC

Appellate Case No. 2021-000031

Lowe's Home Centers, LLC

Appellant,

v.

South Carolina Department of Revenue

Respondent.

**APPELLANT'S OPPOSITION TO THE SOUTH CAROLINA
DEPARTMENT OF REVENUE'S MOTION TO STRIKE**

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INTRODUCTION

The South Carolina Department of Revenue's ("Department") Motion to Strike ("Motion") is much ado about nothing.

Appellant Lowe's Home Centers, LLC ("Lowe's") seeks review of the Administrative Law Court's ("ALC") Final Order. The ALC contested case hearing examined whether the Department properly concluded that Lowe's underpaid sales tax on its real property improvement contracts with customers ("Installation Contracts"). Lowe's argued that it accurately paid sales tax because it operated as a contractor when affixing items of tangible person property ("TPP") to customers' real property pursuant to its Installation Contracts. All sales by vendors to Lowe's of the materials it used to perform the Installation Contracts were retail sales under S.C. CODE ANN. §§ 12-36-110(1)(a) or (1)(c). Pursuant to S.C. CODE ANN. § 12-36-90, the amount subject to tax was the cost price Lowe's paid to acquire the materials.

During the ALC hearing, Lowe's' Director of Sales and Use Tax during the period at issue, Craig Price, testified to the following relevant facts: (1) Lowe's uses a standardized form for its Installation Contracts nationwide; (2) early in the history of Lowe's' contractor line of business, Maryland, Ohio, and Utah notified Lowe's that it served as a contractor when performing its Installation Contracts; (3) other states have wrongly claimed that Lowe's should not be treated as a contractor for sales tax purposes when performing its Installation Contracts, and that the contracts were taxable sales of TPP; and (4) courts and tribunals in Kansas, Indiana, and Oklahoma issued opinions in favor of Lowe's relating to its Installation Contracts. Lowe's submitted a list of authorities to the ALC that included the Kansas, Indiana, and Oklahoma opinions. The foregoing

facts help show the relevance of those authorities. Because Lowe's relied on the opinions as legal authorities, it did not introduce or admit them in evidence in the ALC hearing.¹

The ALC ruled against Lowe's. It disagreed with Lowe's arguments that the taxable retail sale was the sale by vendors to Lowe's and that Lowe's functioned as a contractor for purposes of the sale. Instead, the ALC found that the taxable retail sale was the sale of TPP by Lowe's to customers and that Lowe's functioned as a retailer for purposes of the sale. The ALC agreed with the Department that the proceeds subject to tax were the retail price paid by customers. Therefore, the issue of whether Lowe's underpaid sales tax and Lowe's arguments about what constituted the taxable retail sale and the capacity in which it functioned have been preserved and are properly before this Court on Lowe's appeal.

The Initial Brief of Appellant contains a Table of Authorities and Statement of Facts as required by SCAR 208(b). The Table of Authorities includes the following authorities, among others: *Lowe's Home Ctrs., LLC v. Indiana Dep't of State Revenue*, 23 N.E.3d 52 (Ind. T.C. 2014), *cert. denied* (2015); *Matter of Lowe's Home Ctrs., LLC*, 394 P.3d 149 (Kan. Ct. App. 2017); *In the Matter of the Sales Tax and Use Tax Protest of Lowe's Home Ctrs., LLC, a/k/a Lowe's Home Ctrs., Inc., Okla. Tax Comm'n Order*, Case No. P-09-195-H (Fed. 26, 2015) (hereafter "OTC Order"²). (Initial Brief of Appellant p. iii).³ Lowe's discussed these authorities in the Arguments

¹ Because the Kansas, Indiana, and Oklahoma opinions are authorities, Lowe's was not required to introduce or have any of them admitted during the hearing. (See Motion p. 3 n.2) ("Importantly, **no document included on the List of Authorities was introduced or admitted as an exhibit** during the ALC hearing.") (emphasis supplied). Lowe's simply attached a copy of the Oklahoma decision because, unlike the KS and IN decisions, it is difficult to find.

² The OTC Order adopts the Findings, Conclusions and Recommendation that were issued by the Administrative Law Judge ("ALJ") and appended to the Order.

³ The Motion states that "the applicable statute scheme in each of the cases cited by Lowe's is inapplicable or distinguishable from the specific statutory provision in South Carolina." (Motion p. 2). Lowe's is unsure why this statement is contained in the Department's Motion. This argument goes to the weight the Court should afford the authority. It is not a basis to strike.

section of its initial appellate brief as persuasive authority this Court should consider in deciding this appeal. (*Id.* pp. 31-33). The Statement of Facts includes Section H, entitled Installation Contract Issues in Other States. The facts in that section relate to: (1) the uniform nature of Lowe’s Installation Contracts across jurisdictions; (2) notices Lowe’s received from Maryland, Ohio, and Utah concerning its Installation Contracts; and (3) Installation Contract cases Lowe’s litigated in Kansas, Indiana, and Oklahoma that resulted in the above-cited authorities. (*Id.* p. 21-22).

The Department’s Motion asks the Court to strike (1) Section H from the Statement of Facts, and (2) the OTC Order and corresponding arguments that appear in Lowe’s appellate brief. (Motion p. 2). First, the Court should not strike Section H. It consists solely of facts supported by evidence of record and the Department’s preservation argument lacks merit. Second, the Court should not strike the OTC Order. Lowe’s properly provided the Court a courtesy copy of the OTC Order because it is hard to find. The OTC Order is authority, which Lowe’s does not seek to include in the Record on Appeal. In any event, the Court may take judicial notice of it. SCRE 201.

ARGUMENT

I. THE COURT SHOULD NOT STRIKE SECTION H FROM THE STATEMENT OF FACTS

A. Section H Consists of Facts Properly Supported by Evidence

Section H contains solely of facts supported by evidence of record. The following is a table of each fact stated in Section H with the corresponding citation to the supporting evidence of records.

Fact	Evidence of Record
Lowe’s utilizes a standardized form for its Installation Contracts nationwide. Therefore, the contracts at issue in this matter contain the same terms and conditions as contracts used by Lowe’s in other jurisdictions.	4/20/16 T. p. 43 lines 4-17: Q: Is this a contract form that you use throughout the country? A: Yes. There's minor, minor changes. It's a, I guess the term you might use, it's a boilerplate contract.

	<p>Q: Better still. Okay. A: There are slight differences state by state but they're slight. . . . But for the most part, yes, this is a boilerplate that's used across the country.</p> <p>ALC Order p. 4 n.10</p> <p>Nationwide, Lowe's utilizes a standardized form as its written installation service contract.</p>
<p>Lowe's has confronted some of the same issues presented in this case in other states: e.g., whether Lowe's should be treated as a contractor for sales tax purposes when performing real property improvements via its Installation Contracts, and whether the Installation Contracts are real property improvements or retail sales of TPP.</p>	<p>4/20/16 T. p. 67 lines 10-18:</p> <p>Q: This dispute then about whether Lowe's is a contractor, or should it be treated as a contractor when it makes installed sales, is this the same issue that you have been fighting in other states? A: It's very similar.</p>
<p>Early in the company's contractor line of business, Lowe's received a letter from the Maryland Department of Revenue putting it "on notice that in the state of Maryland [on] these transactions, you're serving as a contractor, and you need to cease and desist charging sales tax." Ohio and Utah sent similar notices to Lowe's.</p>	<p>4/20/16 T. p. 75 line 19 – p. 76 line 7</p> <p>A: In December 2002, we received a formal letter from the state of Maryland. We were under audit by the state of Maryland and Maryland, it's just a little one-page letter and it said, "You are put on notice that in the state of Maryland these transactions, you're serving as a contractor, and you need to cease and desist charging sales tax. . . . The next state, and it was within a month or two, was the state of Ohio, same exact issue, and this was in 2002. 2003, I think the state of Utah raised the issue.</p>
<p>Other states have claimed that when performing its Installation Contracts, Lowe's should not be treated as a contractor for sales tax purposes and that the contracts were taxable sales of TPP. Consequently, Lowe's has had to litigate these same issues in multiple jurisdictions.</p> <p>Courts and tribunals in Oklahoma, Indiana, and Kansas have concluded that Lowe's installs real property improvements as a</p>	<p>4/20/16 T. p. 83 line 7 -p. 86 line 17</p> <p>Q: All right. Let's briefly talk about some other states just because this is a recurring theme. Oklahoma, did you have this issue come up in Oklahoma? A: Not the withdrawal issue but whether we should --- Q: No, the contractor/retailer thing? A: Yes, whether we should be charging sales tax to our customer, that issue came up in Oklahoma.</p>

<p>contractor during its Installation Contract transactions.</p>	<p>Q: Okay. And was their contention that you're a retailer so you can't be a contractor?</p> <p>A: That is correct.</p> <p>Q: Okay. Was that matter litigated and presented to a hearing officer who rendered a ruling?</p> <p>A: That is correct.</p> <p>Q: And what was that ruling?</p> <p>A: The ruling was in favor of Lowe's. Lowe's was, indeed, a contractor and should not be charging sales tax to its customers. . . .</p> <p>MR. SMITH: Okay. And, Your Honor, that's in one of the authorities that we've submitted to you.</p> <p>Q: Do you recall if an equal protection claim was made in Oklahoma about you can't treat this contractor different from all the other contractors?</p> <p>A: You did make that, yes, sir.</p> <p>Q: Okay. This is just a final page from the ruling of the Administrative Law Judge. I've highlighted a portion. What was the finding by the Administrative Law Judge?</p> <p>A: I will read it. "The Division's distinction between protestant and contractor as defined by the Sales Tax Code would be a violation of the equal protection clause if upheld. . . .</p> <p>Q: How about Indiana? What was the issue in Indiana?</p> <p>A: Similar. . . . The outcome was the same. Knock on wood. The court determined, the tax court determined, that Lowe's was, indeed, acting as a contractor. They also looked very thoroughly at our contracts and determined, yes, they are lump sum contracts. And, actually, the Indiana Department of Revenue appealed to the Indiana Supreme Court, the Supreme Court said, "No, tax court got it right." . . .</p> <p>Q: Okay. And that, too, is in our table of authorities. And I think it was this week last year that we had a trial in Kansas, did we not?</p> <p>A: We did. . . .</p> <p>Q: Sure. And that ruling is there, as well. But in all three rulings, was there a conclusion as</p>
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	<p>to whether or not Lowe's, when performing home improvement contracts, was a contractor?</p> <p>A: Well, that was the issue obviously. . . . And the conclusion was yes. Therefore, Lowe's is a contractor.</p>
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At the end of Section H, Lowe's cited to the Kansas, Indiana, and Oklahoma opinions themselves. (Initial Brief of Appellant p. 22). Because they are authorities, not facts, Lowe's does not oppose striking the string cite from the end of Section H.

B. Section H Does Not Contain Any Issues or Arguments Lowe's Failed to Preserve for Appeal

The Department did not challenge Mr. Price's testimony regarding Lowe's' Installation Contract issues in other states during the ALC hearing. It is unable to rebut the facts in Section H. Thus, it asks the Court to strike the section from Lowe's' appellate brief. In so doing, the Department makes a baseless preservation argument. (*See* Motion pp. 3-4) (stating "there are no findings of fact or conclusions of law in the ALC Final Order related to installation contract issues in other states. 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.") (citing *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)).

I'On, L.L.C. stands for the general proposition that if the losing party has raised an issue in the trial court, but the court fails to rule upon it, the party should file a motion to alter or amend the judgment in order to preserve the issue for appellate review. *Id.*⁴ As noted, the issue before the

⁴ The court in *I'On* stated in *dicta* that the preservation requirement applies to both issues and arguments. However, the cases cited in *I'On* address only the preservation of issues. *Smith v. Phillips*, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) ("It is well settled that, but for a very few exceptional situations not present here, an appellate court cannot address an *issue* unless it was raised to, and ruled upon by, the trial court."); *State v. Williams*, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("Generally, this Court will not consider *issues* not raised to or ruled upon by the trial judge."); *Sumter Building & Loan Ass'n v. Winn*, 45 S.C. 381, 23 S.E. 29 (1895). It is doubtful that an appellant

ALC was whether Lowe's underpaid sales tax related to its Installation Contracts and, therefore, was subject to the additional tax assessed in the Department's Final Determination. Specifically, whether Lowe's appropriately remitted tax based on the cost price of the materials it used to complete its Installation Contracts. One of the arguments Lowe's made with respect to this issue was that it was not subject to additional tax because it operated as a contractor for purposes of the Installation Contracts; the South Carolina sales tax statutes impose tax at the time a retail sale is made to a contractor and based on the purchase price paid by the contractor. The ALC decided the issue of whether Lowe's was subject to the additional tax assessed in the Department's Final Determination. It rejected Lowe's argument that it acted as a contractor for purposes of the taxable retail sale. (ALC Order, pp. 25-26).

The testimony regarding Lowe's Installation Contract issues in other jurisdictions and the Kansas, Indiana, and Oklahoma opinions are neither issues nor arguments. They are evidence and authorities. *I'On, LLC* concerns the preservation of issues (and debatably arguments). It does not stand for the proposition that a party is precluded from citing evidence or authorities on appeal unless the lower court specifically referenced that evidence or authorities in its decision. The fact that the ALC Final Order did not specifically make findings of fact, conclusions of law, or references to Lowe's evidence or authorities regarding its Installation Contract issues in other jurisdictions is not a valid basis to strike. Lowe's is not asking the Court to find any facts or make any conclusions of law about Installation Contract issues in other jurisdictions. Lowe's simply asks the Court to consider the testimony/evidence of record in deciding this appeal.

is required to preserve arguments. Even assuming *arguendo* the preservation requirement extends to arguments, Lowe's satisfies this requirement.

II. LOWE'S PROPERLY PROVIDED A COURTESY OF THE OTC ORDER TO THE COURT

The Motion asserts that the OTC Order submitted with Lowe's' initial appellate brief "is not properly included with its brief or in the Record on Appeal." (Motion p. 4).

For the Installation Contract issue in Oklahoma, a hearing was conducted before an ALJ, wherein testimony and exhibits were received and a record was made. *See* OKLA. STAT. ANN. tit. 68, § 207, Hearings by Tax Commission (discussing procedure for hearings). The ALJ issued Findings, Conclusions and Recommendations. *See* OKLA. ADMIN. CODE § 710:1-5-10(6). The OTC Order adopted the ALJ's Findings, Conclusions and Recommendations which were appended to the Order. *Id.* § 710:1-5-10(7). Lowe's provided a courtesy copy of the OTC Order to the Court because it is hard to find. Lowe's does not seek to include the Order (or any other legal authorities) in the Record on Appeal. Thus, it did not include the OTC Order in the Designation of Matter. Lowe's' Designation of Matter contains the same items listed on the Department's Designation of Matter.⁵

Regardless, pursuant to SCRE 201, the Court may take judicial notice of matters of public record, including court and administrative filings. *See Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (taking judicial notice of contents of court records); *Davenport v. Piedmont Mfg. Co.*, 169 S.C. 165, 165 (1933) (taking judicial notice of matters of law and public record).⁶

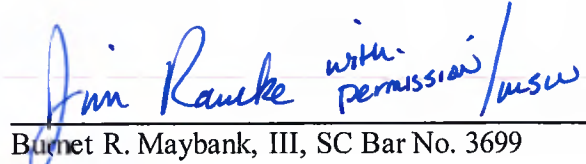
⁵ The Department refers to the letter from the Court to Lowe's dated February 17, 2021, stating the documents need to only be listed in the designation of matter and included in the record on appeal, pursuant to Rules 209 and 210, SCACR. (Motion p. 2 n.1). Lowe's contacted the Court to clarify that the OTC Order was not listed on the Designation of Matter and Lowe's did not seek to include it in the Record on Appeal

⁶ The Department's assertion that the Order is hearsay fails. The OTC Order is cited as legal authority, not as evidence or for the truth of the matter asserted therein. Thus, the Order is not hearsay. *See State v. Vick*, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct. App. 2009) ("It is well settled that evidence is not hearsay unless offered to prove the truth of the matter asserted.").

CONCLUSION

For the foregoing reasons, Lowe's respectfully requests that this Court deny the Department of Revenue's Motion to Strike.

Dated: May 11, 2021



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PROOF OF SERVICE

I hereby certify that I have served the Appellant's Opposition to Motion to Strike by sending a copy of it via electronic mail to Respondent's attorney of record at the following address:

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VIA ELECTRONIC MAIL

The Honorable Jenny Abbott Kitchings
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1220 Senate Street
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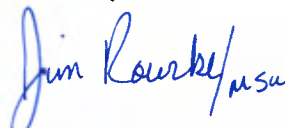
Re: Lowe's Home Centers, LLC. vs. South Carolina Department of
Revenue
Appellate Case No. 2021-000031

Dear Ms. Kitchings:

Enclosed for filing please find the original of Appellant's Initial Reply Brief and Return to the South Carolina Department of Revenue's Motion to Strike, along with a Proof of Service. Please return a clocked copy to me via electronic mail.

By way of copy, I am serving counsel of record with the same. Thank you for your assistance.

Sincerely,



Jim Rourke

JR/mw

Enclosure

cc: Nicole M. Wooten, Esquire