

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Home Depot U.S.A., Inc., d/b/a/ The Home Depot,
Petitioner,
vs.
South Carolina Department of Revenue,
Respondent.

Docket No. 15-ALJ-17-0253-CC

FINAL DECISION AND ORDER

APPEARANCES:

For the Petitioner: Catherine A. Battin, Esq.; Stephen P. Kranz, Esq.; and Ray N. Stevens, Esq.

For the Respondent: Nicole M. Wooten, Esq.; Sean G. Ryan, Esq.; Patrick A. McCabe, Esq.; and Jason P. Luther, Esq.

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court (ALC or Court) on Home Depot U.S.A., Inc., d/b/a The Home Depot's (Home Depot) request for a contested case hearing pursuant to section 12-60-460 of the South Carolina Code (2014). Home Depot contests the South Carolina Department of Revenue's (Department) Department Determination assessing Home Depot for South Carolina sales tax and interest for the period of April 1, 2008 through March 31, 2011 (Audit Period).

The Department's Determination assessed additional sales tax and interest to Home Depot for the Audit Period after concluding that Home Depot did not properly remit sales tax on the materials used in its install contracts. Specifically, the Department determined Home Depot improperly remitted use tax based upon its cost for the materials used in its install contracts rather than remitting sales tax based on the retail selling price of the materials used in its install contracts.

A hearing was held before this Court on November 8, 2017, in Columbia, South Carolina.

FILED

March 12, 2018

SC ADMIN. LAW COURT

ISSUES

The following issues were raised in this proceeding:

1. Whether the Department properly assessed Home Depot for additional sales and use taxes on its install contracts during the Audit Period.
 - a. Whether Home Depot was acting as a contractor under the South Carolina Sales and Use Tax Act for the purpose of assessing tax on the install contracts?
 - b. Whether Home Depot properly remitted sales or use tax based on its cost for the materials utilized in the install contracts.
 - c. Whether the Department accurately determined the fair market value of the materials used in the install contracts.
 - d. Whether the Department's Determination violates the Equal Protection Clause.
2. Whether the interest the Department assessed on the additional taxes for the Audit Period should be abated.

STIPULATIONS OF FACT

At the hearing in this matter and pursuant to Rule 25(c) of the South Carolina Rules of Procedure for the Administrative Law Court (SCALC Rules), the parties entered the following written stipulations of fact into the Record:

1. On May 4, 2011, the Department sent Home Depot a letter informing it that its sales and use tax returns for the Audit Period were selected for examination. Due to the large volume of records for the Audit Period, Home Depot and the Department agreed to use electronic data files containing sales transactions for one year (2/1/2010-1/31/2011) for all its retail stores located in South Carolina. Based on the information received, the Department's auditor divided the data into three separate categories at the request of Home Depot: (1) install program transactions (install contracts); (2) sales to exempt consumers; and (3) cash and carry transactions. The Department also reviewed Home Depot's expense accounts and fixed asset purchases. Home Depot also provided evidence of use tax accruals.

2. From the one-year data, the Department's auditor used a stratified statistical sampling method to obtain sample data from each population. After a review of the sample data, the Department determined Home Depot paid sales tax on the cost of the materials used in the install contract transactions rather than the retail price of the materials which Home Depot was charging its consumers. The samples were subsequently reviewed, and the sample data from the one-year period were projected over the Audit Period.

3. The Department's auditor calculated the tax due for each transaction by multiplying the tax rate for the county in which the transaction occurred by the retail price Home Depot charged its consumers for the materials. The Department's auditor then applied the amount of tax previously remitted by Home Depot on the acquisition cost of the materials as a credit against the amount of tax due on the retail price of the materials.

4. On October 28, 2014, the Department issued a Proposed Notice of Assessment (PNOA) to Home Depot in the amount of \$2,048,779.24 due in sales and use tax, including \$332,347.02 in interest. By letter dated January 27, 2015, Home Depot timely protested the PNOA. Home Depot's protest letter stated it had additional documentation to provide to the Department with regard to the audit examination.

5. On February 19, 2015, the Department issued a Revised PNOA to Home Depot based on additional documentation Home Depot provided. The Revised PNOA proposed an assessment of \$1,999,731.57 in sales and use tax, including \$324,424.17 in interest. This amount was based on interest accrued through January 28, 2015.

6. By letter dated March 13, 2015, Home Depot protested the Revised PNOA. The Revised PNOA includes assessments for three sample sets, expenses, and assets. Home Depot only disputes the Revised PNOA as to Sample 1 (the sales category for material sales pursuant to its install program transactions). Home Depot does not dispute the Revised PNOA as to Sample 2, Sample 3, Expenses, or Assets. However, Home Depot has not remitted payment for the tax and interest for these undisputed assessments.

7. Thereafter, the matter was forwarded to the Departments' Office of General Counsel for Litigation for review of the Revised PNOA. On April 30, 2015, the Office of General Counsel for Litigation issued the Department Determination upholding the Revised PNOA related to Sample 1.

8. On May 28, 2015, Home Depot timely requested a contested case hearing before this Court.

9. The parties do not dispute the audit method used by the Department in this matter. Further, the parties agree that the amounts of tax in the chart below represent the disputed and non-disputed assessments of sales or use tax at issue in this matter plus interest.

Revised Assessment	Tax	Interest*	Total
Sample 1	\$ 1,412,264.70	\$ 443,515.34	\$ 1,855,780.04
Sample 2	\$ 57,393.00	\$ 18,211.37	\$ 75,604.37
Sample 3	\$ 13,378.90	\$ 4,242.24	\$ 17,621.14
Expenses	\$ 34,880.07	\$ 11,046.07	\$ 45,926.14
Assets	\$ 25,682.47	\$ 10,499.20	\$ 36,181.67
Total	\$ 1,543,599.14	\$ 487,514.22	\$ 2,031,113.36

***Interest is accrued thru 11/8/17.**

10. The parties agree that if the Court determines that Home Depot properly paid tax on the cost of the materials used in the install contract transactions rather than paying tax on the retail or selling price of the materials to Home Depot’s consumers, then Home Depot only owes tax for the non-disputed assessments related to Sample 2, Sample 3, Expenses, and Assets. The tax for these non-disputed assessments totals \$131,334.44, not including interest.

11. The parties agree that if the Court determines Home Depot should have paid tax on the retail or selling price of the install contract materials to Home Depot’s consumers, then Home Depot owes sales and use tax for the assessments related to Sample 1, Sample 2, Sample 3, Expenses, and Assets. The sales and use tax for these disputed and non-disputed assessments totals \$1,543,599.14, not including interest.

12. The parties agree that interest is due on all issues listed in the chart in paragraph 9. Further, interest will continue to accrue until the assessments are paid in full.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of proof and the credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence.

Home Depot’s Operations and Practices

Home Depot is the “world’s largest home improvement retailer.” As a “retailer,” Home Depot sells a wide assortment of building materials, home improvement and lawn and garden products, and provides a number of services. Home Depot has a variety of competitors against which it tries to maintain a competitive price advantage. Its competitors include “Lowe’s Home

Improvement” and any other company which offers similar products and services that Home Depot offers.

At the end of fiscal year 2011, Home Depot operated nearly 2,000 home improvement stores in the United States. At this time, Home Depot also used 143 warehouses and distribution centers located in thirty-five states or provinces. A typical Home Depot store stocks between 30,000 and 40,000 items, and an additional 300,000 items are available through the store’s website, homedepot.com. During the Audit Period, Home Depot operated twenty-five stores in South Carolina.

Home Depot divides its business into two different categories. First, its self-described “do-it-yourself” business conducts retail sales of home improvement materials and rents home improvement equipment to people who want to “do it themselves.” This side of the business is where most of Home Depot’s “traditional retail sales” transactions take place. In a traditional retail sales transaction, the customer walks through the store, picks out an item from the shelf, proceeds to the cash register, and pays for the item. In these traditional retail sales, Home Depot collects sales tax from the customer at the time of purchase, and the sales tax is calculated based upon the retail price or selling price of the item.

The second self-described category of Home Depot’s business is the “do-it-for-you” business.¹ In this capacity, Home Depot acts, in part, as a general contractor to facilitate the installation of home improvements for its customers.² Generally, Home Depot has three home improvement contract programs: (1) install contract; (2) furnish and install; and (3) sell, furnish and install. The install contract is the contracting service program at issue in this case.

Generally, an install contract is utilized when a customer, with the help of a Home Depot associate, selects home improvement materials to purchase and agrees to have Home Depot install those materials. Home Depot then contracts with a third-party subcontractor to install the chosen materials. Such materials include, but are not limited to, the following: carpet, kitchen cabinets, doors, and screens doors. Following the customer’s tentative agreement to an install contract,

¹ Home Depot currently earns approximately five and a half billion dollars in revenue annually from its home improvement contracts, which constitute approximately five percent of its sales. Its home improvement contracts make up a relatively small part of its overall revenue, which is approximately ninety-five billion dollars annually.

² Home Depot is licensed as a General Contractor by the South Carolina Department of Labor, Licensing and Regulation (SCDLLR), License #: G110121, effective October 22, 2008. Home Depot’s General Contractor License expires on October 31, 2018. Home Depot is also licensed for Residential Home Building.

Home Depot sends an individual to the customer's home to take appropriate measurements to confirm how much material is needed. Using the measurements, the third-party installer prepares a quote for the labor to install the materials.³ Home Depot then combines the labor and installation price with the cost of materials to create an overall quote for the customer. A Home Depot associate then communicates the overall quote to the customer who reviews it with the associate.

The install contract separately identifies the cost of materials and the cost of labor. The contract further identifies the individual materials needed along with each individual material's cost. If the customer elects to proceed with Home Depot's installation, the customer signs an install contract. The customer then brings the contract to the register and pays the entire balance of the contract. If, during the installation process, circumstances necessitate a change in the installation or a need for more materials, Home Depot creates a change order that is signed by Home Depot and the customer. The customer must sign and pay for the additional materials or services up-front before any changes can be made to the installation.

Importantly, Home Depot will only install materials purchased from Home Depot. Moreover, these materials must be purchased and paid for prior to Home Depot commencing installation of such materials. Accordingly, Home Depot does not provide purely contracting services to its customers – the customer must purchase a product from Home Depot to have access to the installation service.

Types of Materials Used in Install Contracts

Home Depot separates the materials purchased by customers for install contracts into two types based upon the method used to source the materials. These two types of material are "stock" and "special order." "Stock" materials are part of the existing inventory of a Home Depot retail store or warehouse. "Special order" materials are not part of existing inventory and must be ordered from one of Home Depot's vendors. For example, kitchen cabinets must often be special ordered to fit the unique dimensions of a customer's kitchen. During the Audit Period, approximately sixteen percent of install contracts used stock materials while approximately eighty-four percent of install contracts used special order materials.

³ Home Depot contracts with third-party installers who provide the installation services for the install contracts, but the third-party installers are not employed by Home Depot. Home Depot does not sell any materials to its third-party installers for use in the install contracts.

Stock Materials

For install contracts using stock materials, Home Depot gathers the materials from one of three places where it houses its existing retail inventory: the retail store where the customer signed the contract; another Home Depot retail location; or a Home Depot distribution center. When Home Depot originally purchases stock materials from a vendor, Home Depot does not know whether the materials will be sold in a traditional retail sale or as part of an install contract. It thus purchases all its stock materials at wholesale, free of sales tax, using its resale certificate.

When a Home Depot customer purchases stock materials as part of an install contract, Home Depot charges the customer the retail sales price for the materials. This retail price is also listed on the customer's install contract. However, Home Depot does not collect any sales tax from the customer when stock materials are purchased as part of an install contract because it considers the taxable transaction to be its purchase and withdrawal of the materials for use as a contractor.

Other than the payment of sales taxes, the distinction between a purchase of stock materials in a typical retail sales transaction or as part of an install contract is negligible. In a traditional retail sales purchase, the customer pays the retail price for the material and pays sales tax on the retail price. In an install contract, the customer also pays the retail price for the material, but he does not pay any sales tax; instead, Home Depot remits use tax based upon the its cost for the material it consumes while completing the installation.

Special Order Materials

Home Depot also specially orders some of the materials used in its install contracts when the materials are not located in one of Home Depot's retail locations or distribution centers. These materials are ordered from one of Home Depot's established vendors. As with the purchase of stock materials, Home Depot purchases all of its special order materials at wholesale, free of sales tax, using its resale certificate.⁴ However, Home Depot maintains it does not purchase special

⁴ Home Depot contends that it "would be very difficult for the vendor to be able to charge use tax directly on those building materials in a – for that particular situation [install contract] versus the stock inventory."

order items with the intent for resale because it purchases these items as a contractor for a specific install contract.⁵

Nevertheless, Home Depot does not distinguish between stock and special order purchases for its vendors, nor does it designate which purchases are for install contracts - it uses a “single contract” to purchase all of its materials from a particular vendor. Furthermore, other than the fact that special order materials are ordered for a specific install contract, Home Depot offered no evidence that these special orders are processed any differently from a traditional retail sale special order. Customers can purchase special order materials in a traditional retail sales transaction or as part of an install contract. When a customer purchases special order materials in a traditional retail sale, Home Depot collects sales tax from the customer based upon the retail price of the special order. When Home Depot sells the identical special order materials as part of an install contract, Home Depot does not collect any sales tax from the customer on the special order materials, but rather remits use tax based upon its cost for the special order materials used to complete the install contract.

Returns Under Install Contracts

When a customer purchases stock materials to be used in an install contract, the customer can return the materials to Home Depot and receive a refund. In this situation, Home Depot will place the stock materials back on the shelf for resale. When a customer purchases special order materials to be used in an install contract, the customer can also return the special order materials to Home Depot and receive a refund. In that situation, Home Depot will also place the special order material in its store for resale.

Contractor Purchases at Home Depot

Contractors, who Home Depot calls “Pro Consumers,” are one of Home Depot’s larger customer bases, representing approximately forty percent of Home Depot’s sales. Nevertheless, Home Depot does not offer cost or wholesale pricing for its contractors. Rather, Home Depot offers discount programs to Pro Consumers based upon the amount of money spent by the Pro Consumer at Home Depot. The discounts offered by Home Depot to its Pro Consumers are not automatic but may be issued after the Pro Consumer has submitted information to Home Depot

⁵ Prior to his testimony in court, Home Depot’s witness, Mr. Jeff McGhehey, stated in his deposition that Home Depot does not pay sales taxes on special order materials to vendors at the time of purchase because “[i]t’s considered inventory being held for resale.”

for its consideration, including information about previous orders. Home Depot did not provide any specific information regarding the discount programs extended to Pro Consumers such as the levels of discounts offered, how often the discounts are given, or which purchases qualify the Pro Consumer to receive such discounts.

Home Depot's Method of Remitting Tax
on Install Contract Materials During the Audit Period

During the Audit Period, Home Depot remitted use tax for the materials it used in its install contracts based upon its cost for the materials. Home Depot extended its resale certificate for all purchases of materials used in the install contracts and, therefore, purchased all its materials free of sales tax at the wholesale price. Home Depot thus remitted use tax based upon the wholesale cost of the materials it used. Additionally, it did not remit tax at the time it purchased the materials from its vendors; rather, it remitted tax at the time it used the materials.

Retail Licenses in South Carolina

The Department issues retail licenses to taxpayers in South Carolina. A retail license allows a taxpayer to sell tangible personal property at retail to the end consumer and collect and pay sales tax to the Department. A resale certificate gives a taxpayer the privilege of purchasing merchandise at wholesale, free of the tax, because the taxpayer certifies he will resell those items to the end user and collect sales tax. To obtain a resale certificate, a person must be engaged in the business of selling tangible personal property in South Carolina. It can be extended by a taxpayer to other retailers or other wholesalers.

During the audit examination, Home Depot extended a resale certificate to each vendor for the purchase of the materials it used in its install contracts and, consequently, it was able to purchase the materials at wholesale (cost) without paying sales tax. Home Depot also accepted resale certificates from customers purchasing materials from Home Depot's store for resale (sales to exempt customers).

In contrast to a retailer, a contractor cannot accept a resale certificate because he is not in the business of making sales of tangible personal property. Similarly, a contractor cannot extend a resale certificate to another taxpayer because he does not have a retail license, which is required to make retail sales in South Carolina. A contractor can also neither extend a resale certificate to a retailer nor accept a resale certificate from a retailer.

CONCLUSIONS OF LAW

General Conclusions

This Court has subject matter jurisdiction in this case pursuant to section 1-23-600(A) of the South Carolina Code (Supp. 2017) and section 12-60-460 of the South Carolina Code (2014). This is a contested case, and it is heard *de novo*. *Be Mi, Inc. v. S.C. Dep't of Revenue*, 408 S.C. 290, 297, 758 S.E.2d 737, 740 (Ct. App. 2014) (“In reaching a decision in a contested violation matter, the ALC serves as the sole finder of fact in the *de novo* contested case proceeding.” (citation omitted)); *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002) (explaining that a contested case before the ALC is “in the nature of a *de novo* hearing with the presentation of evidence and testimony”). The standard of review is a preponderance of the evidence. S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2017); *see also Anonymous (M-156-90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 375-78, 496 S.E.2d 17, 19-20 (1998) (“Absent an allegation of fraud or a statu[t]e or a court rule requiring a higher standard, the standard of proof in administrative hearings is generally a preponderance of the evidence.”). Because Home Depot is challenging a Department Determination, Home Depot has the burden of proof to show by a preponderance of the evidence that the Department’s Determination was incorrect. *Leventis v. Dep't of Health and Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that generally, the complaining party bears the burden of proof).

Sales and Use Tax on Install Contracts

Home Depot contends it is both a retailer and a contractor, but it argues that for the purpose of assessing sales and use tax on the install contracts, it was acting as a contractor. In contrast, the Department argues Home Depot was acting in its capacity as a retailer for the purpose of assessing sales and use tax on install contracts. The Court concludes Home Depot is both a retailer and a contractor at different stages during the install contract process, but ultimately agrees with the Department that Home Depot was acting as a retailer for the purposes of assessing tax in these specific circumstances.

Relevant Sales and Use Tax Law

In this state, a “sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail.” S.C. Code Ann. § 12-36-910(A) (2014). Complementing this is the use tax, which is “imposed on the storage, use, or other consumption in this State of tangible

personal property purchased at retail for storage, use, or other consumption in this State, at the rate of five percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.” S.C. Code Ann. § 12-36-1310 (2014). An additional one percent tax is also applied to the sales and use tax pursuant to section 12-6-1110 of the South Carolina Code (2014).

In reaching a decision in this case, the Court must determine the applicability of this sales or use tax to the materials purchased at Home Depot as part of the install contract transaction. A “retail sale mean[s] all sales of tangible personal property except those defined as wholesale sales.” S.C. Code Ann. § 12-36-110 (2014). It includes, in relevant part,

- (a) sales of building materials to construction contractors, builders, or landowners for resale or use in the form of real estate;
- (c) the withdrawal, use, or consumption of tangible personal property by anyone who purchases it at wholesale,
- (e) sales to contractors for use in the performance of construction contracts;

Id. 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 . . .” S.C. Code Ann. § 12-36-60 (2014).

Moreover, under the statutory scheme, a “retail sale” is consistently the sale to the final purchaser of the tangible personal property, who is the entity taxed so as to avoid pyramiding taxes at each level of sale. The Court of Appeals identified this principle in *Hercules Contractors & Engineers, Inc. v. South Carolina Tax Commission* when it noted:

The rationale by which materials which improve real property are taxed while those which are used to manufacture personal property are not, is equally obvious. When real property is subsequently sold, no sales or use tax is collected, and thus, if the materials which went into the property were not taxed, the tax would be forever lost. On the other hand, when personal property is sold to the consumer, sales or use tax is collected. If the materials sold for use in manufacturing personal property were taxed, they would be taxed a second time when the property was ultimately sold. A purpose of the exemption at issue here is to avoid the pyramiding of taxes and thereby prevent the increase of sales price to the ultimate consumer.

280 S.C. 426, 434-35, 313 S.E.2d 300, 305-06 (Ct. App. 1984).

Once a taxable retail sale has been identified, sales tax is measured by the gross proceeds of sales, which is defined as “the value proceeding or accruing from the sale, lease, or rental of tangible personal property.” S.C. Code Ann. § 12-36-90(1)(b) & (c) (2014); *see also* S.C. Code Regs. Ann.117-318 (providing “[g]ross proceeds of sales’ is the basis for calculating the sales

tax”). Gross proceeds of sales for the purpose of calculating use tax is based upon the “sales price” of the tangible personal property sold. S.C. Code Regs. Ann. 117-318. Notably, “[i]t is presumed that all gross proceeds are subject to the tax until the contrary is established,” and “[t]he burden of proof that the sale of tangible personal property is not a sale at retail is on the seller.” S.C. Code Ann. § 12-36-950 (2014).

In contrast, sales tax is not assessed for wholesale sales, which are sales of “tangible personal property to licensed retail merchants, jobbers, dealers, or wholesalers for resale, and do not include sales to users or consumers not for resale.” S.C. Code Ann. § 12-36-120 (2014); *see PalmettoNet, Inc. v. S.C. Tax Comm’n*, 318 S.C. 102, 106, 456 S.E.2d 385, 388 (1995) (“Wholesale sales are not subject to sales tax.”).

The accompanying sales and use tax regulations provide further guidance about how sales and use tax is applied to specific actors, such as retailers and contractors. Regulation 117-324 of the South Carolina Code of Regulations, entitled “Dual Business,” provides guidance for businesses that have a substantial retail business, but also withdraw or use materials from the same stock of goods. It provides:

Operators of businesses who are both making retail sales and withdrawing for use from the same stock of goods are to purchase at wholesale all of the goods so sold or used and report both retail sales and withdrawals for use under the sales tax law.

This ruling applies only to those who actually carry on a retail business having a substantial number of retail sales and does not apply to contractors, plumbers, repairmen, and others who make isolated or accommodating sales and who have not set themselves up as being engaged in selling. Where only isolated sales are made, tax should be paid on all of the taxable property purchased with no sales tax return being required of the seller making such isolated or “accommodation” sales.

S.C. Code Regs. Ann. 117-324 (2012).

Notably, Regulation 117-314 discusses construction in the context of sales and use tax law. It provides that “[s]ales of building materials to contractors, builders, or landowners for resale or use in the form of real estate **are retail sales** in whatever quantity sold.” S.C. Code Regs. Ann. 117-314 (2012) (emphasis added). Regulations 117-314.1 and 117-314.2 further provide that sales of building materials to contractors, or sales of building materials for use in adding to, repairing, or altering real property are subject to sales or use tax “at the time of purchase.” S.C. Code Regs. Ann. 117-314.1 to 117-314.2 (2012).

In reviewing the above statutory scheme, it is apparent that the type of sale – either retail or wholesale – as well as the type of person involved in the sale – a retailer versus a contractor –

determines when and how sales or use tax is assessed. Based upon the different treatment of retailers and contractors under the statutory scheme, this Court must first determine whether Home Depot qualifies as a retailer, a contractor, or both, and then determine in what capacity it was acting during the execution of the install contracts.

Home Depot - Retailer and/or Contractor

Under South Carolina law, “retailers” are defined as every person “selling or auctioning tangible personal property whether owned by the person or others.” S.C. Code Ann. § 12-36-70(1)(a) (2014). Tangible personal property, as previously discussed, means “personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses . . .” § 12-36-60.

Based on the evidence and facts presented, Home Depot falls within the definition of a retailer under South Carolina Law. Home Depot is in the business of selling tangible personal property that can be seen, weighed, measured, felt, and touched. Home Depot also holds itself out as a retailer and advertises to the public that it is a retailer. It is a licensed retailer in South Carolina and holds a resale certificate, which it uses to purchase materials at wholesale. Home Depot operates twenty-five retail stores in South Carolina. The overwhelming majority of Home Depot’s sales (95%) are traditional retail sales that do not include installation services. Moreover, even when Home Depot provides contracting services to its customers, it does not provide those services unless the customers simultaneously purchase the materials to be installed in the contract from Home Depot. All of these facts support the conclusion that Home Depot is a retailer.

Home Depot is also a contractor under South Carolina law. The term “contractor” is not defined in Title 12 of the South Carolina Code; however, it is defined in the accompanying regulations. A “contractor,” in the context of South Carolina’s sales and use tax regulations, is “any person, firm, association or corporation making repairs, or additions to real property.” S.C. Code Regs. Ann. 117-314.2 (2012). Further, the term “contractor” is defined under Title 40 of the South Carolina Code, governing professions and occupations. There, “contractor” is defined as “a general or mechanical contractor regulated under this chapter.” S.C. Code Ann. § 40-11-20(4) (2011). A “general contractor” is further defined as “an entity which performs or supervises or offers to perform or supervise general construction” and a “mechanical contractor” is “an entity which performs or supervises, or offers to perform or supervise, mechanical construction.” S.C. Code Ann. § 40-11-20(8), (9) (2011). Although the definition of “contractor” in Title 40 is outside

of Title 12’s statutory scheme, it is not in conflict with the definition found in regulation 117-314.2 and provides guidance. *Cf. City of Camden v. Fairfield Elec. Co-op., Inc.*, 372 S.C. 543, 548, 643 S.E.2d 687, 690 (2007) (holding the circuit court properly applied the definition of “premises” from another title of the code where the term was not defined in the applicable title).

Home Depot holds a General Contractor license and a Mechanical Contractor license issued by the South Carolina Department of Labor, Licensing and Regulation (SCDLLR). It is held to the same standards as other contractors who hold these licenses. It enters into contracts with customers for installation of home improvements, including repairs and additions to real property, which qualifies it as a contractor under regulation 117-314.2. Moreover, it supervises numerous third-party installers (sub-contractors) to complete its construction projects (installation contracts, among other service contracts) and therefore qualifies as a contractor under Title 40. Accordingly, the Court finds Home Depot is a contractor under South Carolina Law.

Install Contracts

Having established Home Depot qualifies as both a retailer and a contractor, the Court must now determine in which capacity Home Depot was acting during the execution of the install contracts, which necessarily involves determining at what point during the install contract transaction a “retail sale” occurred. Here, there is no dispute that the items installed pursuant to the install contracts are “tangible personal property,” so the only issue is when a “retail sale” of tangible personal property occurred.

Home Depot claims that it was acting in its capacity as a contractor when it executed and completed the install contracts and should be taxed as such. Home Depot therefore contends that a retail sale occurred when it purchased the install contract materials from its vendors pursuant to either section 12-36-110(1)(a) or section 12-36-110(1)(e) of the South Carolina Code.⁶ Section 12-36-110(1)(a) provides a retail sale includes “sales of building materials to construction contractors, builders, or landowners for resale or use in the form of real estate.” Similarly, section 12-36-110(1)(e) provides a retail sale includes “sales to contractors for use in the performance of construction contracts.” Home Depot claims these sections apply to its install contract purchases because it purchases the materials as a contractor “for resale or use in the form of real estate” or,

⁶ It is notable that Home Depot does not specify which subsection applies.

alternatively, “for use in the performance of construction contracts.” Home Depot contends this argument is buttressed by the language in regulation 117-314 stating that:

Building materials when purchased by builders, contractors, or landowners for use in adding to, repairing or altering real property are subject to either the sales or use tax at the time of purchase by such builder, contractor, or landowner.

S.C. Reg. Ann. 117-314. Seizing upon the phrase “at the time of purchase,” Home Depot contends the point in time when the retail sale occurs must be when it purchases the install materials from its suppliers. Home Depot’s argument implicitly asserts that install contracts are, in essence, simply agreements for the installation of materials, and the customer’s purchase of the materials at the register when they pay for the install contract is subsumed into the contract for services. This Court disagrees.

The Nature of the Install Contract Transaction

Home Depot’s implicit characterization of the install contract materials as “used in construction” rather than as “items purchased” disregards the nature of the transaction. Here, looking at the nature of the install contract, the Court finds for the following reasons that a retail sale occurs when the customer pays for the materials listed in the install contract.

First, Home Depot does not provide installation services to customers who have already purchased materials from somewhere else.⁷ It is thus clear that Home Depot’s installation services are conditioned on the customer’s purchase of the materials to be installed by Home Depot. The contingency of the installation services on the purchase of materials shows that Home Depot’s true purpose in offering installation services is to facilitate a sale to its retail customers. In other words, since the offer of contracting services follows the purchase of materials from Home Depot, the purchase of the materials cannot be subsumed into the service part of the install contract where Home Depot functions as a contractor. The purchase of the materials is thus a retail sale—in fact, a retail sale upon which the install contract is contingent.

Second, the sale of the install contract materials to the customer fits within the description of a traditional retail sale. A “sale” is defined in pertinent part as “any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration.” S.C. Code Ann. § 12-36-100 (2014). Further, “retail sale” generally “mean[s] all sales of tangible personal property

⁷ It is not even clear whether Home Depot would offer installation services to a customer who purchased flooring from it a couple months ago with the intention of “doing it himself” and then, upon reconsideration, wanted the Home Depot to install it for him.

except those defined as wholesale sales.” § 12-36-110. In keeping with the statutory definition, in a traditional retail sale at Home Depot the customer selects an item of tangible personal property that is sold by Home Depot, brings the item to the cash register, and pays the retail sales price (consideration) for the item, including sales tax. *See id.* The customer may or may not immediately take an item home with him depending upon its size or availability – the customer may have the item picked up or delivered at a later time or may have to special order the item for later pick-up or delivery.

Here, like in a traditional retail sales transaction, the materials that the customer purchases are selected from the tangible personal property sold by Home Depot. Also like in a traditional retail sales transaction, the customer pays for the materials at the cash register and pays the retail sales price for the materials. Significantly, although the install contract customer pays for his materials in the context of the install contract invoice, the cost of these materials is listed individually and separately from labor on the invoice.⁸ Therefore, like a traditional retail sales transaction, the customer is paying for each item individually and separately from any labor.

Third, the use of the materials is dissimilar to either a contractor’s or retailer’s use of their existing inventory. Subsuming the purchase of the materials into the sale for the installation service implies Home Depot obtains possession and title of the materials used to fulfill the contracts. Here, however, the materials used to complete the installations are not simply materials, such as nails and glue, that are incidentally used as part of installation, but are the specific materials purchased in a retail setting to be installed at a later date. Though the customer who enters into an install contract does not leave the business with the purchased materials in hand, there is no evidence that the customer in this situation would perceive the transaction any different than a purchase of the identical materials in a traditional transaction.⁹ Therefore, the install contract reflects what the customer wants Home Depot to do with the items just purchased as part of the install contract, rather than what the customer wants Home Depot to purchase for itself to complete the contracted for service.

⁸ Similarly, if additional materials are needed to fulfill a contract, the customer cannot merely authorize the use of the extra materials; rather, the customer must pay for those materials first before the materials can be gathered and installed.

⁹ Notably, Home Depot carries the burden of proof, and since no evidence was offered that the customers view their purchase as anything other than a retail purchase, this Court presumes that customer typically view their install contract purchases as a retail purchase.

Moreover, there is no evidence to indicate that the customer does not obtain title to the property at the point of paying for the materials as part of the install contract. This is illustrated by the purchase of special order items in both the context of an install contract and in the context of a traditional retail sale. In both instances, the customer pays full price for the items. And in both instances, the customer leaves the store without those items in their possession. In a traditional retail sale of a special order item, no one would argue that simply because the customer did not leave the store with the item, a retail sale did not occur upon that payment. Likewise, in a traditional sale of a special order item, no one would argue that the retail sale was the sale of the special order item **to** Home Depot **from** the vendor. In both instances the customer holds title to the property as illustrated by the customer's exchange of consideration for the property and his right in both instances to return the item if he wishes. The Court thus finds no reason to make a distinction here between the traditional retail sale of special order materials and sale of special order materials pursuant to an install contract where the sale is, essentially, the same.

By characterizing the items installed as “materials” installed by a general contractor, Home Depot implicitly contends that its status as a general contractor changes the nature of the transaction between Home Depot and the customer from that of a purchase of materials to one of the installation of materials. The Court acknowledges that nothing in the South Carolina statutes prohibits a retailer from also acting as a general contractor. But here, the fact that Home Depot acts as a general contractor does not affect the nature of the underlying transaction. In this instance, Home Depot acts in both capacities at distinct periods of time. Home Depot acts as a retailer at the time that the materials are purchased by the customer. It thereafter acts as a general contractor in overseeing the installation of those items that are purchased.

Special Order Purchases

Home Depot further argues it should be treated like a contractor because it does not purchase special order items for install contracts with the intent to re-sell them and, therefore, it does not have the intent necessary to purchase special order items at wholesale as a retailer.¹⁰ But

¹⁰ Home Depot only makes this argument for special order materials. It admits it purchases stock materials at wholesale for resale because it does not know whether the stock materials will be used in an install contract or not at the time of purchase. Home Depot does not explain why it should be considered a contractor as to the purchase of stock materials when stock materials are purchased at wholesale for resale.

while Home Depot claims it did not purchase special order materials with the intent for resale, its actions, as addressed above and below. say otherwise.

Home Depot admits it used its resale certificate during the Audit Period to purchase *all* its install contract materials, including its special order materials. In order to obtain a resale certificate in South Carolina, all taxpayers, including Home Depot, must certify the following statement:

As purchaser, I certify that I am engaged in the business of selling, leasing or renting tangible personal property of the kind and type sold by your firm. **Unless otherwise specified, I certify that all tangible personal property purchased on or after this date is to be resold, leased or rented by me.** This certificate shall remain in effect unless revoked or cancelled in writing. I also certify that if the tangible personal property is withdrawn for use other than for resale, lease or rent, that I will report the transaction to the SC Department of Revenue as a withdrawal from stock and pay the tax thereon based upon the reasonable and fair market value, but not less than the original purchase price. Furthermore, I understand that by extending this certificate that I am assuming liability for the sales or use tax on transactions between me and your firm.

(Ex. 15, p. 2) (emphasis added). By extending this certificate to its vendors for its special order purchases, Home Depot certified it was purchasing all its material, including the special order materials, for resale. Accordingly, if Home Depot truly purchased special order materials as a contractor without the intent to re-sell them, it should not have extended its resale certificate to purchase special order materials for install contracts. However, Home Depot did extend its resale certificate for its special order materials and did not distinguish between its install contract special orders and other special orders when it submitted its purchase orders to its vendors. Rather, as previously discussed, it used one purchase order for all its purchases, whether stock, special order, or intended for use in install contracts.

Further, by extending the resale certificate to vendors and certifying it was purchasing its materials for resale, Home Depot is by statutory definition also purchasing its materials at wholesale. *See* § 12-36-120 (providing wholesale sales are sales of “tangible personal property to licensed retail merchants, jobbers, dealers, or wholesalers for resale, and do not include sales to users or consumers not for resale”). By purchasing its materials at wholesale using a resale certificate, Home Depot did not pay tax at the time it purchased its materials. *See PalmettoNet, Inc.*, 318 S.C. at 106, 456 S.E.2d at 388 (“Wholesale sales are not subject to sales tax.”). This is in direct contrast to contractors, who pay tax on the retail purchase price of materials they buy at the time of purchase. S.C. Code Regs. Ann. 117-314.1-117-314.2.

Home Depot nevertheless argues this conundrum is required by regulation 117-324. In other words, Home Depot contends it is required to purchase special order materials at wholesale using its resale certificate, regardless of its intentions for the materials because:

Operators of businesses who are both making retail sales and withdrawing for use from the same stock of goods *are to purchase at wholesale all of the goods so sold or used* and report both retail sales and withdrawals for use under the sales tax law.

S.C. Code Regs. Ann. 117-324 (emphasis added). Home Depot argues it was similarly required by this regulation to remit taxes upon its withdrawal, use, or consumption of the materials although a contractor remits taxes at the time of purchase of the materials from a vendor. *See id.* Upon that premise, Home Depot insists that regardless of how it purchased its materials, it should still be treated as a contractor and taxed based upon the amount it paid for the materials at the time of purchase even though the regulation required it to remit taxes at the time it used the materials.¹¹

That Home Depot even argues this regulation applies to it refutes its argument that it was acting purely as a contractor during the execution of the install contracts. Regulation 117-324 manifestly provides that it “applies only to those who actually carry on a retail business having a *substantial number of retail sales* and *does not apply to contractors, plumbers, repairmen, and others who make isolated or accommodating sales and who have not set themselves up as being engaged in selling.*” S.C. Code Regs. Ann. 117-324 (emphasis added). By the plain language of the regulation, it applies to retailers who also happen to “withdra[w] for use from the same stock of goods,” but *not contractors* who might make occasional retail sales.¹² *Id.* The regulation thus presumes that the taxed person or entity is substantially a retailer, but also withdraws or uses stock in a manner that is secondary to its primary business. Essentially, a business governed by this regulation, while it may not be solely a retailer, is treated like a retailer for sales and use tax

¹¹ Home Depot’s interpretation and application of this regulation is contradictory to say the least. It argues it does not have the proper intent to purchase materials for install contracts at wholesale, but then acknowledges it purchases special order items at wholesale using its resale certificate, but only because regulation 117-324 requires it to buy special order items at wholesale. Home Depot further claims it does not withdraw special order items from stock, and yet it remitted tax at the time it withdrew, used, or consumed the install contract materials based upon this regulation’s provision that taxes are paid at the time materials are withdrawn, used, or consumed from stock. S.C. Code Regs. Ann. 117-324. To confuse the application of this regulation further, Home Depot argues it should pay tax on its cost for the special order materials at the time of purchase because it is a contractor, but it did not pay tax at the time of purchase because regulation 117-324 required it to remit tax at the time it withdrew, used, or consumed the materials. Essentially, Home Depot would manipulate this regulation and the statutory scheme to be a contractor when it is advantageous and a retailer when it is advantageous.

¹² Moreover, the regulation implies that contractors, for the purposes of sales and use tax, cannot be substantially engaged in the business of retail sales.

purposes, as evidenced by the regulation's admonition that such businesses "are to purchase at wholesale all of the goods so sold or used" like an ordinary retailer. *Id.* Importantly, Home Depot does not explain why, as a contractor, it is subject to this regulation which is geared towards retailers and not regulation 117-314, which governs construction and provides, in conflict with regulation 117-324, that contractors should remit sales tax at the time materials are purchased.

Combining Home Depot's interpretation of regulation 117-324, which allows it to purchase install contract materials at cost, with its assertion that the retail sale is the sale of the materials to it as a contractor from its vendors leads to an absurd result. Specifically, Home Depot would obtain the windfall of never having to pay taxes based on the retail sales price for materials because it has the boon of being able to purchase those materials at wholesale via its retail sale certificate, unlike any other contractor. Courts must reject "a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 232, 612 S.E.2d 719, 724 (Ct. App. 2005). Here, this Court finds that Home Depot reading of the regulation 117-324 to be so plainly absurd that it could not have been contemplated by any legislature.

Conclusion

The Court finds it dispositive that Home Depot sold the install contract materials to the customer at the retail sales price, and it was this sale that constituted the last transfer of the materials for consideration. *See ARA Servs., Inc. v. S.C. Tax Comm'n*, 271 S.C. 146, 150, 246 S.E.2d 171, 172 (1978) (noting the sale of meals to a college where student subsequently bought the meals was "not the last transfer of the meals for consideration, and thus were wholesale transactions"). The sale of the install contract materials thus falls within the general definition of retail sale under the statutory scheme and was the taxable retail sale in the install contract transaction pursuant to section. *See* § 12-36-110. Therefore, the Court finds sections 12-36-110(1)(a) and 12-36-110(1)(e) do not describe the final, retail sale in this case, and are not applicable.¹³

¹³ Even if sections 12-36-110(1)(a) and 12-36-110(1)(e) were to apply here, it would not change this Court's analysis of the amount of taxes owed by Home Depot. If the retail sale was the sale of building materials to Home Depot as the contractor, then pursuant to regulations 117-314, Home Depot would be required to pay sales tax at the time of purchase based upon its purchase price of the materials. S.C. Code Regs. Ann. 117-314. As a contractor, it could not extend its resale certificate to purchase the materials at wholesale and would therefore pay the retail selling price for the materials. The gross proceeds of sales would be calculated on the retail sales price Home Depot paid for the

Moreover, I find Home Depot was acting in its capacity as a retailer for the purpose of tax assessment because it purchased the materials for the install contract at wholesale using its resale certificate and re-sold the materials to the consumer. *See* § 12-36-120; § 12-36-70(1)(a). A contractor is the final purchaser when he buys material and he pays sales tax on the retail sales price of the item at the time the material is purchased. *See* § 12-36-110(1)(a), (e); S.C. Code Regs. Ann. 117-314. Here, Home Depot was not the final purchaser and owner of the materials. Further, unlike a contractor, Home Depot did not pay tax at the time it purchased the materials for the customer, and it did not purchase the materials at the retail selling price because it extended its resale certificate. *See* S.C. Code Regs. Ann. 117-314. Furthermore, Home Depot's interpretation of regulation 117-324 to allow it to pay use tax on the wholesale cost of the materials unlike any other contractor, or even any other retailer, is absurd and contrary to the plain meaning of the regulation, and contradictory to the statutory scheme.

The Department's Construction

The Department construes the facts in this situation to conclude that the retail sale in this case is the withdrawal, use, or consumption of the materials pursuant to the install contract in accordance with section 12-36-110(c). To reach this conclusion, the Department argues that Home Depot's withdraw, use, or consumption of the materials to complete the installation is a "deemed sale" of the materials to itself.

Generally, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (citation omitted). Here, the Court does not disagree with the Department's interpretation of this statute, but rather its application of this statute to the facts of this case. In finding that the retail sale was the withdrawal, use, or consumption of the materials, the Department fails to address why the construct of a deemed sale is necessary when a sale to the customer has already occurred. The Department's argument becomes more complicated when it argues the fair market value of the install materials is the *selling price that the customer paid when it bought the materials*. If there is a sales price that was already paid, there was already a sale.

materials, resulting in the same assessment the Department calculated under its theory applying 12-36-110(1)(c), which also assessed taxes based upon the retail sales price. *See* S.C. Code Ann. § 12-36-90.

A deemed sale is more logical in the context of what this Court will refer to as a traditional withdrawal, use, or consumption retail sale under section 12-36-110(c). An example of the traditional withdrawal, use, or consumption retail sale, as described by the Department, is one in which a grocery store (retailer) removes cleaning supplies from its inventory to use to clean the store. In this situation, it makes sense that the grocery store is deemed to have sold the cleaning supplies to itself because the grocery store is, in effect, purchasing the cleaning supplies from itself for its own use. However, in the case at bar, a deemed sale is not necessary because a sale to the customer has already occurred. Therefore, based upon the facts of this case, the Court disagrees with the Department's determination that the retail sale occurred when the install contract materials were withdrawn, used, or consumed.

Gross Proceeds of Sales

Since the Court has determined a retail sale occurred when Home Depot sold the install contract materials to the customer, the Court must now determine what constitutes the gross proceeds of sales to determine whether Home Depot properly remitted sales tax based upon its cost for the install contract materials.

Once a taxable retail sale has been identified, sales tax is measured by the gross proceeds of sales, which is defined as “the value proceeding or accruing from the sale, lease, or rental of tangible personal property,” to include, in pertinent part, “(b) the proceeds from the sale of tangible personal property.” S.C. Code Ann. § 12-36-90(1)(b) (2014); *see also* S.C. Code Regs. Ann. 117-318 (providing “[g]ross proceeds of sales’ is the basis for calculating the sales tax”). The “proceeds from sale” in this case, is the retail sales price that the customer paid for the materials in the install contract. Therefore, the taxable value of the materials used in the install contracts is the amount the customer paid for the materials, which is the retail selling price customers paid for the materials as recorded in the install contract invoice.¹⁴ Home Depot should have remitted sale tax on the retail selling price of the install contract materials at the time of the sale.

In its Department Determination, the Department upheld its decision assessing additional tax to Home Depot because Home Depot improperly remitted sales tax based upon its cost for the

¹⁴ Because the Court finds the retail sale is the sale of the install contract materials to the customer and the gross proceeds of sales is the selling price of the materials to the customer, this court does not need to determine the fair market value of the install contract materials. Consequently, the Court finds the issue of whether the Department erred in calculating the fair market value of the install contract materials is moot.

install contract materials rather than the retail sales price of the materials. Although the Department arrived at its assessment by incorrectly categorizing the retail sale as the withdrawal, use, or consumption of the install contract materials, the outcome is the same: Home Depot should have remitted tax based upon the retail selling price of the install contract materials. Accordingly, this Court finds that Home Depot improperly remitted tax based upon its cost of the install contract materials rather than the retail selling price for the materials. Further, the Court finds the amount of the Department's tax assessment for the Audit Period is proper, even if the theory it used to arrive at the assessment was flawed. Because this Court has determined Home Depot should have paid taxes on the retail sales price of the materials, the parties are in agreement as to the amount of additional sales tax owed by Home Depot as reflected in Stipulation 11.

Equal Protection Claim

Because the Court has determined Home Depot is a retailer during the pertinent part of the transactions at issue, Home Depot's argument that it was treated differently than other contractors in the state resulting in an equal protection violation is moot. Even if the Court agreed with Home Depot that it should be treated like a contractor for the narrow purpose of assessing tax in this situation, the Court finds that Home Depot's application of the law would result in an equal protection violation giving it a competitive advantage over other contractors in the state.

Pursuant to the South Carolina Constitution, "no 'person shall be denied the equal protection of the laws.'" *Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013) (citing S.C. Const. art. I, § 3). For an equal protection claim to stand, it is necessary for the party to show "that similarly situated persons received disparate treatment." *Bodman*, 403 at 69, 742 S.E.2d at 367. Moreover, "[a] crucial step in the analysis of any equal protection clause is the identification of the pertinent class. . . ." *Id.* (quoting *Sloan v. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 481, 636 S.E.2d 598, 613 (2006)). Equal protection does not require that all taxpayers be treated the same, rather, only similarly-situated taxpayers be treated the same. *See id.*

Here, Home Depot asserts it is a contractor and that it should be treated the same as all other contractors in the state. The class it bases its claim on is therefore the class consisting of all contractors in this state. *See id.* Home Depot claims that because the Department assessed it for tax as a retailer on the retail/selling price of its install contract materials, it was treated differently than other contractors who pay tax on the price they pay for the materials at the time of purchase.

Home Depot therefore argues that it should be able to pay tax like all other contractors on its price for install contract materials at the time of purchase, which for Home Depot is the wholesale cost.

If other contractors could purchase materials at wholesale, Home Depot's equal protection argument might be valid. However, what Home Depot conveniently leaves out of its argument is that contractors cannot purchase materials at wholesale using a resale certificate like Home Depot can; therefore, if this Court were to agree with Home Depot's assessment in this case, Home Depot would be treated differently than every other contractor because it would pay tax on the wholesale cost of its materials whereas all other contractors are required to pay tax on the retail sales price of the materials. A contractor might receive a discount on the sales price compared to an individual customer, but contractors are not able to buy at wholesale because they do not possess a resale certificate. Home Depot's argument is flawed and taken to its conclusion would actually result in it being treated differently than all other contractors to its competitive advantage because it would not pay as much for materials as other contractors.

Accordingly, this Court finds Home Depot's equal protection claim is moot and, even if Home Depot's equal protection claim was viable, taken to its logical conclusion Home Depot's position would result in an equal protection violation in its favor.

Interest on the Additional Taxes

Because the Court finds the Department properly assessed Home Depot for additional tax based on the retail sales price of the install contract materials, the Court finds the Department properly assessed interest on Home Depot's outstanding tax liability in this case. Section 12-54-25(A) of the South Carolina Code provides "[i]f any tax is not paid when due, interest is due on the unpaid portion from the time the tax was due until paid in its entirety." S.C. Code Ann. § 12-54-25(A) (2014). Further, "[f]or administrative convenience, the department may waive up to thirty days' interest." *Id.* Here, the Department has not indicated it would like to waive thirty days' interest for administrative purposes and there is no statute indicating the Department may otherwise waive interest when it is properly assessed based on an underpayment. *See id.* Because Home Depot had use of monies owed and due to the State for the outstanding sales tax liability, interest is applicable in this matter, and it continues to accrue until the sales tax liability is paid in its entirety. *See id.*

Conclusion

After considering the evidence in the record and the pertinent legal authorities, I conclude Home Depot failed to show by a preponderance of the evidence that the Department Determination upholding the additional sales tax assessment on the sale of materials in Home Depot's install contracts was incorrect. S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2017); *see also Anonymous (M-156-90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 375-78, 496 S.E.2d 17, 19-20 (1998) ("Absent an allegation of fraud or a statu[t]e or a court rule requiring a higher standard, the standard of proof in administrative hearings is generally a preponderance of the evidence."); *Leventis v. Dep't of Health and Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that generally, the complaining party bears the burden of proof). Although this Court disagrees with the Department's theory for assessing the tax, the Court agrees with the ultimate outcome and amount of the assessment and, therefore, the Department Determination is upheld as to the amount of taxes assessed on Home Depot. Likewise, this Court finds the Department properly assessed Home Depot for interest on its outstanding tax liability.

ORDER

IT IS THEREFORE ORDERED that Home Depot be assessed \$1,543,599.14 in tax and \$487,514.22 in interest with regard to the disputed and non-disputed issues involved in this matter.

IT IS FURTHER ORDERED that interest was calculated through November 8, 2017, and will continue to accrue until this matter is resolved.

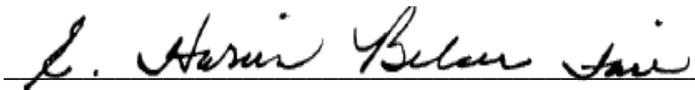
AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

March 12, 2018
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

A handwritten signature in cursive script, reading "E. Harvin Belser Fair", is written over a horizontal line.

E. Harvin Belser Fair
Judicial Law Clerk

March 12, 2018
Columbia, South Carolina