STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 7036
NORTH CAROLINA DEPARTMENT OF REVENUE, Petitioner, v. WIRELESS CENTER OF NC, INC., Respondent.	**ORDER AND OPINION ON CROSS-PETITIONS FOR REVIEW OF FINAL DECISION**

1. **THIS MATTER** is before the Court on cross-petitions for judicial review of the Final Decision issued by the North Carolina Office of Administrative Hearings ("OAH") on 13 May 2022, (Pet. Jud. Rev., ECF Nos. 3, 12), in a contested tax case arising under a section of the North Carolina Sales and Use Tax Act ("SUTA") titled "Tax Imposed on Retailers and Certain Facilitators." N.C.G.S. § 105-164.4 (2016).[1] For the reasons set forth below, the Court **REVERSES** the Final Decision of the OAH and **REMANDS** to the OAH with instructions to enter judgment affirming the tax assessment of the North Carolina Department of Revenue.

North Carolina Department of Justice, by Tania X. Laporte-Reverón, for Petitioner North Carolina Department of Revenue.

Culp Elliott & Carpenter, PLLC, by Stanton P. Geller and Harris S. Sinsley, for Respondent Wireless Center of NC, Inc.

Robinson, Judge.

[1] Unless otherwise indicated, all statutory references to SUTA set forth herein are the versions in effect during the period at issue—from 1 January 2016 to 31 December 2018.

I. INTRODUCTION

2. The matter before the Court involves a dispute between the North Carolina Department of Revenue (the "Department") and Wireless Center of NC, Inc. ("Wireless Center") regarding whether Wireless Center, a retailer of cell phone products and services, was required to collect and remit sales tax on products known as "Real Time Replenishments" ("RTRs") during tax years 2016–18.

II. FACTUAL AND PROCEDURAL BACKGROUND

3. When reviewing a final decision in a contested tax case, the Court does not make findings of fact. *See McCabe v. N.C. Dep't of Revenue*, 2023 NCBC LEXIS 53, at **2 (N.C. Super. Ct. April 3, 2023). The following background is intended only to provide context for the Court's analysis and ruling.

4. The Department is an agency of the State of North Carolina responsible for collecting the State's tax funds and administering the tax laws. *See* N.C.G.S. § 143B-218. The Department's examination of Wireless Center's records gave rise to the issues before this Court.

5. Wireless Center is a North Carolina S-corporation formed in 2015 with Faye Ngalandou ("Mr. Ngalandou") as its sole owner, director, and shareholder. (R. 0939.)[2] From 1 January 2016 to 31 December 2018 (the "Audit Period"), Wireless Center operated six stores in Monroe, Greensboro, and Winston-Salem, North Carolina selling mobile phone equipment, products, and services as an independent contractor with Boost Mobile ("Boost"). (R. 0299, 0126.)

[2] Citations to the Official Record on Judicial Review, (ECF No. 17), are denoted as "R."

6. Wireless Center's relationship with Boost began on 18 April 2016, when Wireless Center entered into a contract with Sprint Solutions, Inc. ("Sprint"), Boost's then-parent company,[3] to join Sprint's Branded Retail Program (the "Boost Contract"). (R. 0289.) The Boost Contract provided that Wireless Center would be an independent contractor and that no agency relationship was formed between Boost and Wireless Center. (R. 0848.)

7. As a participant in Sprint's Branded Retail Program, Wireless Center became a Branded Retailer and agreed to sell Boost products exclusively. (R. 0290.) Wireless Center also ceded control of its advertising and other functions to Boost. (R. 0292, 0313.) As an authorized dealer, Wireless Center had to abide by Boost's corporate policies. (R. 0294.)

8. The Boost Contract provided that Wireless Center would be solely responsible for collecting and remitting any state and local sales tax required by law to be collected at the point of sale for any boost products. (R. 0848). Wireless Center also agreed that "in no event will [Boost] be responsible for collecting, remitting, or paying 'Sales Taxes.' " (R. 0848.)

9. Among the products sold by Wireless Center are RTRs, which are defined as "real time replenishments of Airtime units for use on Sprint's network . . . . [W]ith RTR, no Airtime vouchers are created, no inactive Airtime units are stored with a technology service provider, and Airtime is immediately added directly to a Customer Account when Airtime is purchased." (R. 0594.)

[3] Boost was sold to Dish Network in 2020.

10. Airtime is defined, under section 21.2 of the Boost Agreement, to mean "prepaid airtime units available for use on Sprint's network. Airtime may be in the form of PINs or RTR." (R. 0593.)

11. Purchasing RTRs does not automatically activate a customer's cellular service. Instead, RTRs add value to a customer's Boost account, which customers may then use to activate or extend one of Boost's prepaid plans or purchase other products and services. (R. 0982.) Upon the purchase of phone equipment or RTRs from Wireless Center, the purchase price was remitted to Wireless Center, which deposited the funds in a joint bank account from which Boost would later collect the proceeds. (R. 1066.) Upon collection, Boost paid Wireless Center a commission. (R. 0910.)

12. In connection with the Boost Agreement, on 7 November 2017, Wireless Center entered into an "Epay Merchant Services Agreement" ("Epay Agreement") with Actify LLC under which Wireless Center agreed to act as a sub-distributor of prepaid wireless products and an independent contractor-retailer. (R. 0339.)

13. Pursuant to the Epay Agreement, Wireless Center was outfitted with in-store kiosks at which customers could purchase RTRs using a secure connection to Boost's systems. (R 0082.) The Epay Agreement charged Wireless Center with collecting and remitting tax associated with the sale of prepaid wireless products. (R 0341.)

14. During the Audit Period, Wireless Center did not collect sales tax on the sale of RTRs, although it did collect and remit all sales tax required for phone equipment. (R. 1166.)

15. Wireless Center received a letter from Boost in 2017 giving notice to Boost retailers that, beginning 8 September 2017, Boost would: (a) discontinue the sale of prepaid credits; (b) begin selling RTRs and PINs, which would be treated as stored-value cards; and (c) collect and remit all tax applicable to stored-value cards at the time they were redeemed. The letter stated that retailers such as Wireless Center would no longer be required to charge, collect, and remit sales tax on these items. (R. 0116.) The letter also stated that it contained no tax advice and that retailers should consult a tax advisor regarding the tax consequences of the change by Boost. (R. 0116.) Wireless Center sought no legal or accounting advice about the effect of the Boost letter or whether, under North Carolina law, Wireless Center was required to collect and remit sales tax for sale of RTRs and PINs notwithstanding Boost's statement to the contrary. (R. 0984.)

16. In January of 2019, the Department initiated a sales and use tax audit of Wireless Center for the Audit Period. (R. 0371.) Following the Audit, the Department on 10 September 2019 issued a Notice of Sales and Use Tax Assessment against Wireless Center in the amount of $623,186.93, finding that Wireless Center had failed to collect and remit sales tax for RTRs during the Audit Period. (R. 0377.) Wireless Center requested departmental review during which downward adjustments were made to the assessment. (R. 0373.) The Department issued a

Notice of Final Determination on 7 July 2021 concluding that Wireless Center owed $516,700.37 in unpaid sales tax, including interest and penalties. (R. 0042.)

17. On 1 September 2021, Wireless Center filed a Petition for a Contested Tax Case Hearing ("Petition") with the OAH seeking review of the Notice of Final Determination issued by the Department. (R. 0001.) The contested case hearing took place on 25 January 2022 before the Honorable Karlene S. Turrentine, Administrative Law Judge. (R. 0050.)

18. At the hearing, the Department was represented by counsel, and Wireless Center was represented by its President and CEO, Mr. Ngalandou, a non-lawyer. (R. 0861.) Two witnesses testified: Mr. Ngalandou for Wireless Center and Andrew Furuseth, Director of Sales and Use Tax at the Department, for the Department. (R. 0887, 1072.)

19. On 13 May 2022, the OAH entered its Final Decision, determining that, from 1 January 2016 to 7 September 2017 ("Period I"), Wireless Center failed to satisfy its obligation to collect and remit tax on RTRs at the point of sale under the North Carolina Sales and Use Tax Act ("SUTA"), section 105-164.1 (2016). Even so, the OAH also concluded that the Department over-assessed Wireless's tax bill by including sales receipts Wireless Center had already reported to the Department. (R. 1175.) The OAH remanded the assessment to the Department for deduction of equipment sales receipts and recalculation of the assessment for Period I. (R.1176.)

20. As to sales occurring from 8 September 2017 to 31 December 2018 ("Period II"), the OAH determined that it was "more likely than not" that Boost, as the service

provider for the RTR products sold by Wireless Center, collected and remitted tax on Wireless Center's behalf. (R. 1172.) The OAH held that because the Department "refused and failed to show" that Boost did not pay tax on Wireless Center's behalf, the assessment was not based on the "best information available" as required by section 105-241.9(a). (R. 1175.) The OAH therefore reversed the Department's tax assessment for Period II. (R. 1176.)

21. The Department filed its Petition for Judicial Review pursuant to N.C.G.S. §§ 150B-43, -45, -46 in Wake County Superior Court on 10 June 2022. (ECF No. 3.) Thereafter, Wireless Center filed a cross-petition for judicial review on 25 July 2022. (ECF No. 12.)

22. This matter was designated as a mandatory complex business case by order of the Chief Justice of the Supreme Court of North Carolina on 13 June 2022 and was assigned to the undersigned on the same day. (ECF Nos. 1, 2.)

23. The Department filed a brief in support of its Petition for Judicial Review on 13 October 2022. (Pet. Br., ECF No. 19.) Wireless Center filed a brief in support of its cross-petition on 2 December 2022. (Br. Resp. Re. Pet. Jud. Rev., ECF No. 27. ["Wireless Br."].) The Department filed a reply brief on 22 December 2022. (ECF. No. 28 ["Reply Br."].)

24. On 7 February 2023 the Court held a hearing at which counsel for both parties were present. (*See* ECF No. 29.) This matter is now ripe for resolution.

III. STANDARD OF REVIEW

25. When a trial court "exercises judicial review of an agency's final decision, it acts in the capacity of an appellate court." *Meza v. Div. of Soc Servs.*, 364 N.C. 61, 75 (2010) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 662 (2004)).

26. Pursuant to N.C.G.S. § 150B-51(b), this Court may affirm the decision of the OAH, remand the case for further proceedings, or, as set forth herein, reverse or modify a final agency decision:

> [I]f the substantial rights of the petitioners may have been prejudiced because the [OAH's] findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional provisions;
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
> (6) Arbitrary, capricious, or an abuse of discretion.

27. "The nature of the error asserted by the party seeking review dictates the appropriate manner of review[.]" *Dillingham v. N.C. Dep't of Human Res.*, 132 N.C. App. 704, 708 (1999). "[I]f the appellant contends the agency's decision was affected by a legal error, N.C.G.S. § 150B-51(b)(1), (2), (3), & (4), de novo review is required; if the appellant contends the agency decision was not supported by the evidence, N.C.G.S. § 150B-51(b)(5), or was arbitrary or capricious, N.C.G.S. § 150B-51(b)(6), the whole record test is utilized." *Duke Univ. Med. Ctr. v. Bruton*, 134 N.C. App. 39, 41 (1999).

28. In exercising *de novo* review, the Court may freely substitute its own judgment for that of the OAH. *See Carroll*, 358 N.C. at 660. However, challenges to factual errors are reviewed under the "whole record" standard of review. N.C.G.S. § 150B-51(c). Under this test, the Court must "accept fact findings of the administrative agency that are supported by substantial evidence, in view of the entire record." *Home Depot U.S.A., Inc. v. N.C. Dep't of Revenue*, 2015 NCBC LEXIS 103, at **6 (N.C. Super. Ct. Nov. 6, 2015). Substantial evidence means "[r]elevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C.G.S. § 150B-2(8c).

29. The Court's scope of review includes inquiries into whether the evidence supports the OAH's findings of fact, whether the findings support the OAH's conclusions of law, and whether the conclusions of law are proper statements and applications of the law. *Home Depot U.S.A., Inc.*, 2015 NCBC LEXIS at **6 (citing *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706 (1997)).

IV. ANALYSIS

30. On appeal, the Department contends that the OAH directly contradicted the Revenue Act and Administrative Procedure Act in concluding that: (1) Wireless Center was not required to collect sales tax on RTRs during Period II; (2) sales tax need not be collected at the point of sale; (3) the Department has the burden of proof; (4) the Department did not base its assessment on the best information available; and (5) it could remand the case to the Department for recalculation of the assessment.

(Pet. Br. 2.) The Department therefore seeks to reverse the Final Decision in its entirety and uphold its tax assessment.

31. On cross-appeal, Wireless Center contends the OAH committed errors of law by concluding that (1) RTRs are a prepaid wireless calling service ("PWCS") subject to the collection and remittance of sales tax under section 105-164.4(a)(4d); and (2) Wireless Center, rather than Boost, was obligated to pay the tax associated with the sale of RTRs during Period I. (Wireless. Br. 10, 13.) Wireless Center therefore seeks to reverse the Final Decision as to Period I, and to affirm in all other respects. (Wireless. Br. 21.)

32. Section 105-164.4 provides, in relevant part:

> A privilege tax is imposed on a retailer engaged in business in the State at the percentage rates of the retailer's net taxable sales or gross receipts, listed in this subsection. The general rate of tax is four and three-quarters percent (4.75%). The percentage rates are as follows:
>
> . . .
>
> The general rate applies to the gross receipts derived from the sale or recharge of prepaid telephone calling service. The tax applies regardless of whether tangible personal property, such as a card or a telephone, is transferred. The tax applies to a service that is sold in conjunction with prepaid wireless calling service. Prepaid telephone calling service is taxable at the point of sale instead of at the point of use and is sourced in accordance with [N.C.]G.S. 105-164.4B.

33. The initial inquiry for the Court is whether RTRs are taxable under section 105-164.4(a)(4d) as a type of PWCS. The OAH concluded that RTRs were taxable during Period I, until a change in Boost's business model removed RTRs from the umbrella of PWCS during Period II. (R. 1171.) The Court undertakes a *de novo* review of the OAH's conclusions of law.

34. PWCS is defined under SUTA as:

> A right that meets all of the following requirements:
> a. Authorizes the purchase of mobile telecommunications service, either exclusively or in conjunction with other services.
> b. Must be paid for in advance.
> c. Is sold in predetermined units or dollars whose number or dollar value declines with use and is known on a continuous basis.

N.C.G.S. § 105-164.3(27a) (2016).

35. The parties disagree on whether RTRs meet each requirement of section 105-164.3(27a). Wireless Center contends that RTRs are neither "paid for in advance" nor sold in "predetermined" units or dollars. (Wireless Br. 11.) Wireless Center also emphasizes that RTRs may be redeemed on a variety of goods and services sold by Boost—not just on wireless plans. In Wireless Center's view, RTRs create the opportunity, but not the obligation, to purchase PWCS at a later date, which can be done by taking the additional step of applying an RTR's value to one of Boost's plans. (Wireless. Br. 11.) Ultimately, Wireless Center argues that because RTRs may be used to purchase an array of goods and services from Boost, they are gift cards as defined in section 66-67.5(c)(1) and should be taxed at the point of use. (Wireless Br. 9.)

36. The Department correctly points out that under section 105-164.3(27a), a PWCS is not defined as the purchase of wireless service, but instead as "a right that . . . [a]uthorizes the purchase" of wireless service. (Reply Br. 7.) By purchasing an RTR in any amount, a customer has paid in advance for *the right to later purchase* wireless service in that predetermined amount. Whether a customer proceeds to purchase wireless service is immaterial because the *right to purchase* was already

acquired. Wireless Center's assertion that RTRs should be taxed as gift cards because they are included in the definition of gift card under section 66-67.5—which is wholly unrelated to the SUTA taxation scheme—has no bearing on the Court's analysis. Accordingly, the Court concludes that the OAH properly determined that, during Period I, Wireless Center's sales of RTRs involved the sale of a type of PWCS.

37. As to Period II, the OAH found that as of 8 September 2017, Boost recharacterized its RTRs such that they were no longer PWCS, and became taxable at the point of use. (R. 1171.) The OAH further found that the Department "provided no evidence that the whole of the assessed tax was for a service that is sold in conjunction with prepaid wireless calling service, as required by N.C.G.S. § 105-164.4(a)(4d)." (R. 1170.) The OAH found these facts relying upon the affidavit of Anthony M. Whalen, dated 15 October 2019 ("Whalen Affidavit"), (R. 0112), and an unsigned letter from Sprint dated 14 May 2021 ("Sprint Letter"). (R. 0119.) The Sprint Letter and Whalen Affidavit contain information regarding Boost's purported change to a business model where "no tax is due or collected on the initial sale;" sales tax is collected at the point of use when the credits are redeemed; and no sales tax is collected by the third-party dealer "on the initial sale at the Boost dealer." (R. 0112–13).

38. The Department contends the OAH's findings of fact and conclusions of law regarding Period II are not supported by substantial evidence and that it was an error of law for the OAH to rely upon the Whalen Affidavit and Sprint Letter because they are uncorroborated hearsay, not subject to any exception. (Pet. Br. 23–25.)

39. The Department's hearsay objections notwithstanding, neither the Whalen Affidavit nor the Sprint Letter provide how, if at all, the nature of RTRs changed under the law during Period II. Wireless Center says as much in its brief, asserting "[t]he function of an RTR did not materially change in any way during the audit period and could be used to purchase any number of products or services." (Wireless Br. 5.) The fact that Boost revised its business model to allegedly collect tax upon use, rather than sale, of RTRs does not remove RTRs from the ambit of section 105-164.4(a)(4d). Accordingly, the OAH's conclusion that RTRs were not PWCS during Period II was erroneous. The Court therefore reverses the OAH in this respect and concludes that the RTRs in question were taxable as PWCS during both periods at issue.

40. Even so, section 105-164.4 imposes tax solely upon *retailers*. The Court's next inquiry, therefore, is whether Wireless Center was a retailer of RTRs under SUTA.

41. Under section 105-164.3 a retailer is defined, in pertinent part, as:

> A person engaged in business of making sales at retail, offering to make sales at retail, or soliciting sales at retail of tangible personal property, digital property for storage, use, or consumption in this State, or services sourced to this State. When the Secretary finds it necessary for the efficient administration of this Article to regard any sales representatives, solicitors, representatives, consignees, peddlers, or truckers as agents of the dealers, distributors, consignors, supervisors, employers, or persons under whom they operate or from whom they obtain the items sold by them regardless of whether they are making sales on their own behalf or on behalf of these dealers, distributors, consignors, supervisors, employers, or persons, the Secretary may so regard them and may regard the dealers, distributors, consignors, supervisors, employers, or persons as "retailers" for the purpose of this Article.

N.C.G.S. § 105-164.3(35) (2016).

42. Applying this definition, the OAH concluded that Wireless Center, as Boost's dealer-partner, is a retailer for the purpose of any prepaid telephone calling services sold in conjunction with prepaid wireless phone services by them. (R. 1174.)

42. Wireless Center argues it is not a retailer, but merely an agent of Boost. (Wireless Br. 13.) Emphasizing Boost's ownership and control over its own products and services, Wireless Center argues it merely *facilitates* transactions for Boost—and Boost is the actual retailer. (Wireless Br. 14.) Accordingly, Wireless Center asserts that Boost alone is responsible for collecting and remitting tax on RTRs. (Wireless Br. 7.)

43. The Department, in turn, contends that Wireless Center is a retailer under SUTA, and any agency relationship between Wireless Center and Boost is irrelevant to that determination. (Reply Br. 8–9.)

44. The 18 April 2016 Sprint Agreement, in effect during the audit period, clearly defines Wireless Center as a retailer of Boost's products—specifically including RTRs. (R. 0289, 0290.)

45. Furthermore, SUTA defines "sale" in such a way that does not require ownership or control of the item by the seller. It is defined as "[t]he transfer for consideration of title, license to use or consume, or possession of tangible personal property or digital property or the performance for consideration of a service." N.C.G.S. § 105-164.3(36) (2016). The term is defined broadly, applying to . . . "[a]ny . . . item subject to tax under [SUTA]." N.C.G.S. § 105-164.3(36)(h)

(2016). The Court has already found RTRs are taxable under SUTA, and therefore the term "sale" applies to the purchase of an RTR. As a result, the OAH properly concluded that Wireless Center was a retailer at all relevant times.

46. The Court next addresses whether the OAH, again relying upon the Sprint Letter and Whalen Affidavit, properly found that "for sales made after September 8, 2017, including physical top-up cards, RTRs, PINs, and other electronic replenishments, Boost collected tax on taxable items[,]" (R. 1172 (cleaned up)) and properly concluded that "it is more likely than not" that Boost paid the tax owed by Wireless Center. (R. 1172.) The Court does so under the whole record test.

47. As the Court has already noted, the Department contends the Sprint Letter and Whalen Affidavit, upon which the OAH relied, are uncorroborated hearsay. Wireless Center, conversely, argues the Whalen Affidavit and Sprint Letter are excepted from the hearsay rule under the residual hearsay exception found in North Carolina Rule of Evidence 803(24).

48. Even assuming the OAH properly admitted and considered the Sprint Letter and Whalen Affidavit, the record nonetheless fails to support the OAH's conclusions that (1) Wireless Center overcame the presumption that the Department's tax assessment is correct, and (2) the Department was required, and failed, to prove, by a preponderance of the evidence, that Wireless Center's taxes remain due and owing.

49. In contested tax cases, the "proposed assessment of the Secretary [of Revenue] is presumed to be correct." N.C.G.S. § 105-241.9(a). Under SUTA,

retailers "must keep records that establish their tax liability[,]" and "all gross receipts of . . . retailers are subject to the retail sales tax until the contrary is established by proper records[.]" N.C.G.S. §§ 105-164.22, .26. (2016). Furthermore, the OAH "shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C.G.S. § 150B-34(a).

50. Therefore, this Court begins with a presumption that the Department did not receive any payments for the tax due on RTRs sold by Wireless Center and gives due regard to the Department's knowledge and expertise.

51. The Sprint Letter and Whalen Affidavit represent that during Period II, Boost believed RTRs, like gift cards, were taxed at the point of use. (R. 0113, 0119.) As explained above, because RTRs convey the right to purchase PWCS, Boost's characterization of RTRs is not persuasive or controlling and does not remove RTRs from the ambit of section 105-164.4(a)(4d). The letter and affidavit go on to state that Boost collected tax on RTRs when customers selected prepaid service plans. (R. 0113, 0119.) Critically, however, the letter next states:

> Boost was agnostic with respect to the origination point of credit customers brought to the Boost ecosystem . . . . [W]hen a customer registered credit for use with Boost, Boost has no way of knowing whether the [RTR] which originated that credit was associated with any specific retailer. Boost Tax does not have records that attributes [sic] revenue originating with any specific vendor partner.

(R. 0119.) In other words, Boost has no record that it paid tax on behalf of Wireless Center, and Wireless Center admits it made no remittances to the State for the sale of RTRs. (R. 0971.) In the absence of records establishing satisfaction of its tax

liability, Wireless Center is unable to overcome the initial presumption that the tax assessment is correct. The Court concludes that there was not substantial evidence for the OAH's finding in this regard. Therefore, the Court reverses the OAH and upholds the tax assessment by the Department for Period II.

52. Finally, the Court addresses the OAH's finding that the assessment fails to deduct gross receipts for equipment sales for which Wireless Center already paid tax. (R. 1175.) Upon this finding, the OAH concluded the assessment was incorrect and remanded the issue to the Department for recalculation. The Court reviews the OAH's finding under the whole record test.

53. The Department asserts that, in preparing the tax assessment, Wireless Center was credited with the taxable sales it reported for equipment. (Pet. Br. 28.) Upon review of the whole record, the Court concludes that the OAH's finding is not supported by substantial evidence. In preparing the assessment, the Department made clear that, "[a] credit was allowed for taxable sales reported to the Department as reflected in Schedule E-1A. Figures from this schedule are carried to the Audit Summary for calculation of tax due." (R. 0127.) Schedule E-1A lists the taxable sales that Wireless Center reported to the Department during the audit period and for which Wireless Center remitted sales tax, and Schedule E-2 shows that the Department deducted that amount from Wireless Center's gross receipts prior to calculating tax due. (R. 0656, 0661.)

54. These documents, admitted into evidence and unrebutted by Wireless Center, clearly demonstrate that the Department, from the outset, credited Wireless

Center for the tax it already remitted. Consequently, the OAH's finding in this regard is not supported by substantial evidence and is clearly erroneous. The Court therefore reverses the OAH and upholds the tax assessment in this respect.[4]

V. CONCLUSION

55. For the foregoing reasons, the Court hereby **REVERSES** the Final Decision of the OAH and **REMANDS** to the OAH for entry of a revised decision affirming in whole the tax assessment.[5]

SO ORDERED, this the 2nd day of June, 2023.

/s/ Michael L. Robinson
Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases

[4] Accordingly, the Court need not address the propriety of the OAH's decision to remand the tax assessment to the Department.

[5] Due to the passage of time since the Department originally entered its assessment, the Court anticipates that the Department will update its calculations taking into account additional interest, which should be included in the OAH's final decision on remand.