NO. 96383-5

SUPREME COURT OF THE STATE OF WASHINGTON

LOWE'S HOME CENTERS, LLC, Petitioner, v. DEPARTMENT OF REVENUE, STATE OF WASHINGTON, Respondent.	RESPONSE TO RESPONDENT'S MOTION TO STRIKE PETITIONER'S REPLY TO ANSWER TO PETITION FOR REVIEW

I. IDENTITY OF RESPONDING PARTY

Petitioner Lowe's Home Centers, LLC ("Lowe's") is the responding party for purposes of this motion and requests the relief designated in Part II.

II. STATEMENT OF RELIEF REQUESTED

Lowe's asks the Court to (i) deny the Motion to Strike Petitioner's Reply to Answer to Petition for Review ("Motion to Strike") filed by Respondent the Department of Revenue ("Department") and (ii) consider Lowe's reply brief ("Reply") in its decision on the Petition for Review ("Petition").

III. FACTS RELEVANT TO MOTION

Lowe's filed the Petition, pursuant to RAP 13.4(a), on October 5, 2018, seeking review by this Court of the Court of Appeals' decision in

Lowe's Home Centers, LLC v. Department of Revenue, State of Washington, No. 50080-9-II. By letter dated October 16, 2018, this Court advised the Department to file an answer ("Answer") by November 15, 2018, which the Department did.

The Answer raised four new issues that were not mentioned in the Petition.[1] In accordance with RAP 13.4(d), Lowe's filed the Reply, addressing *only* the four additional issues raised in the Answer. In response, the Department moved to strike the Reply. The Motion to Strike is set for consideration without oral argument at the same time as this Court will be considering the Petition.

IV. GROUNDS FOR RELIEF AND ARGUMENT

RAP 13.4(d) authorizes a party to file a reply to an answer "if the answering party seeks review of issues not raised in the petition for review." RAP 13.4(d) neither defines the term "issue" nor specifies how an answering party must seek review of new issues not raised in a petition. Per this Court's rulings, arguments, such as whether a particular case should be overruled, constitute an "issue" for purposes of RAP 13.4(d).[2] Further, this

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[1] Indeed, the Answer asserts entirely new legal arguments relating to the Streamlined Sales and Use Tax Agreement and the Legislature that the Department neither raised nor argued to any court below.

[2] *See Ongom v. State, Dep't of Health, Office of Prof'l Standards*, 159 Wn.2d 132, 137 n.3, 148 P.3d 1029 (2011), overruled on other grounds by *Hardee v. State, Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 256 P.3d 339 (2011) (discussing RAP 13.4(d) and stating the

Court has clearly stated that Rule 13.4(d) does not require an answering party to "'file a cross-petition . . . or . . . affirmatively seek review.' ***The rule[ ] merely require[s] that the issue be raised.***"[3] In *Blaney*, the petitioner, the International Association of Machinists, claimed that the respondent, Ms. Blaney, could not argue an issue because she did not file a cross-petition for review or otherwise affirmatively seek review before the Court on that issue. This Court held that the issue had been raised for purposes of RAP 13.4(d) because it "was raised in a lengthy footnote to Ms. Blaney's answer."[4]

Here, the Department claims that the Reply should be stricken because the Department did not raise new issues in the Answer. The record, however, shows otherwise. The Petition raised four specific issues:

1. Whether the majority erred in concluding, contrary to *Puget Sound*, that a retailer who guarantees worthless customer debts and ultimately bears the risk of loss for all bad debts from PLCC accounts is nevertheless ineligible to take a corresponding bad debt sales tax credit and B&O tax deduction in Washington.

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tangential issue of whether the Court should overrule another decision was an issue not raised in the petition, but raised in the answer, and thus was ripe for reply).

[3] *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers*, Dist. No. 160, 151 Wn.2d 203, 210 n.3, 807 P.3d 757 (2004) (emphasis added).

[4] *Id.*

2. Whether the majority erred in purporting to rely on *Home Depot* to hold that Lowe's can never be eligible to claim a sales tax credit or B&O tax deduction on bad debts arising from PLCC accounts it does not initiate and own.
3. Whether the majority erred in concluding that the Bad Debt Regulation imposes a condition that a retailer must write off as uncollectible the specific bad debt accounts in its books in order to claim corresponding sales tax credits and B&O tax deductions, and that Lowe's did not do so.
4. Whether the majority and dissent erred in holding the denial of Lowe's claim did not violate its constitutional equal protection rights.[5]

While the Department was careful not to list in the Answer additional issues under the "Restatement of the Issues," it nonetheless raised four new issues that were not mentioned in the Petition:

1. Whether the model bad debt rules of the Streamlined Sales and Use Tax Agreement ("SSUTA") imposes a requirement that a seller must write off as uncollectible specific bad debt accounts in its books and records.

[5] *See* Petition, 5-6.

2. Whether the decision in *Home Depot* is consistent with decisions in other SSUTA member states.
3. Whether an amendment to RCW 82.08.037 shows the Legislature did not intend to authorize Washington bad debt credits and deductions for loans originated by a financial institution.
4. Whether the Legislatures' failure to enact proposed legislation in 2017 demonstrates that the Legislature did not intend to authorize Washington bad debt credits and deductions for loans originated by a financial institution.[6]

If the Department had not raised these new issues relating to SSUTA and the Legislature, they would not be before the Court. As a result, RAP 13.4(d) authorizes a reply.

The cases on which the Department relies do not support its motion.[7] For instance, this Court in *Chevron* chose to consider the petitioner's reply brief to the extent that the reply addressed a new issue raised in the answer; however, the Court struck that portion of the reply that went beyond the new issue. In this case, the Reply is limited to the four new issues raised in the Answer. Also, in *Doe*, the Court granted respondent's motion to strike

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[6] *See* Answer, 8-9, 16-19.

[7] *See Chevron U.S.A., Inc. v. Puget Sound Growth Mgmt. Hr'gs Bd.*, 156 Wn.2d 131, 140 n. 6, 124 P.3d 640 (2005); *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 700 n.8, 24 P.3d 390 (2001).

because the answer in that case did not raise additional issues. The case does not appear to address the situation here, where the Department's Answer in fact raised new issues.

In any event, consideration of the Reply is in the interests of justice and would facilitate consideration of the merits of this case. *See* RAP 1.2(a) ("These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits."); RAP 1.2(c) (Court "may waive or alter the provisions of any of these rules in order to serve the ends of justice"). The Department raised issues in the Answer that were not addressed in the Petition. The Reply will help the Court make an informed decision.

V. CONCLUSION

For the foregoing reasons, Lowe's respectfully requests the Court deny the Motion to Strike.

Respectfully submitted this 7th day of December, 2018.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the ~~10th~~ 9th day of December, 2018, I caused to be served a true and correct copy of the foregoing via Legal Messenger and addressed to the following:

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December 07, 2018 - 11:22 AM

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