THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

ALC Case No. 16-ALJ-17-0113-CC
Appellate Case No. 2017-001519
Opinion No. 28110 (S.C. Ct. Filed September 14, 2022)
Supreme Court Case No. 2020-001102

Books-A-Million, Inc..... Petitioner

v.

South Carolina Department of Revenue ..... Respondent

PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240 of the South Carolina Appellate Court Rules, Books-A-Million, Inc. ("Petitioner") petitions this Court for a rehearing regarding the Court's decision in this matter dated September 14, 2022 (the "Order").

In finding for the Department in this case, the Court has eschewed a simple and predictable rule (i.e., sales of intangibles are not subject to sales tax) in favor of an unwieldy and fact-specific one requiring constant analysis to determine whether a sale of otherwise exempt or excluded property is sufficiently connected to a taxable sale so as to meet its "proceeding or accruing" test. Applying the Court's Order will significantly increase the burden on retailers and will require

constant analysis of each transaction. It also adds fuel to the "so-called Fourth Branch government," *Joseph v. S.C. Department of Labor, Licensing and Regulation*, 417 S.C. 436, 455-56, 790 S.E.2d 763, 773 (2016) (Kittredge, J., dissenting), giving the Department of Revenue new-found powers to look beyond an actual transaction to uncover some more tenuous connection.

The grounds for Petitioner's Petition for Rehearing are as follows:

I. The Court Misapprehended the Distinction between Tax Exclusions and Tax Exemptions.

The Supreme Court's Order affirms the decision of the Court of Appeals and Administrative Law Court ("ALC") that the sale of an excluded item—an intangible—is subject to sales taxes if purchased "proceeding or accruing" the sales of a non-exempt item. All sides—the Supreme Court, Petitioner, and the Department—agree that the memberships in question are intangibles. The Court's decision holds that excluded or exempt items are subject to sales taxes when purchased "proceeding or accruing from the sales, lease or rental of tangible personal property." S.C. Code Ann. § 12-36-90. The Court notes that it has "interpreted our tax code to have broad language which inextricably links value to sales," Order at p. 4, and that "a plain reading of the South Carolina tax code…results in our sales tax being more inclusive than those of other states." *Id.* at p. 7.

The sales tax applies to sales of *tangible* personal property; therefore, sales of intangibles are an *excluded*—not exempted—item. This is important because as stated by the Department below, exemptions are construed against the taxpayer. Exclusions are not. Intangibles are excluded under the definition of tangible personal property. Section 12-36-90 defines "gross proceeds of sales" as the value proceeding or accruing from the sale of "tangible personal property," which is defined in § 12-36-60.

The Department's South Carolina Sales and Use Tax Manual (Winter 2021 Edition) provides:

> If a transaction is excluded from the tax, it is not subject to sales and use tax in South Carolina. The exclusions are found in several sections of the sales and use tax statute and apply to a variety of transactions. While a transaction must squarely fall within the requirements of an exclusion in order for the tax not to apply, ***exclusions are liberally construed. In other words, if there is doubt as to whether a transaction falls within the requirements of an exclusion, the tax will not be imposed.***

Chapter 8, p. 1 (emphasis added). By contrast, Chapter 9, page 1 provides:

> As a general rule, tax exemption statutes are strictly construed against the taxpayer. This rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor.

Id. Intangibles have the exact same legal status as real property or services, which historically have been excluded from sales tax under the same definition of "tangible personal property." The Court's opinion subjects intangibles, services, and real estate to sales taxes when purchased proceeding or accruing taxable items.

II. The Court erred in holding that "proceeding or accruing" language of our Sales Tax Act renders the sale of intangibles subject to sales tax.

The Order is primarily based on the word "proceed." The Order states:

> Within the relevant statutory language, ***the term 'proceeding' is critical.*** When used as an intransitive verb as it is in the statute, *Merriam-Webster* defines "proceed" to mean "to come forth from a source." *See Proceed,* Merriam-Webster Online, https://www.merriamwebster.com/dictionary/ proceed (last visited November 21, 2021) (listing synonyms of proceed as, "spring, arise, rise, originate, derive, flow, …")

Order at p. 3-4 (emphasis added). The Supreme Court cites dictionary definitions of "proceed" but ignores the General Assembly's definition of "proceed." Did the General Assembly mean to subject all exempted and excluded items to sales taxes by using the language "proceeding or

accruing" in Section 12-36-90? No, in fact, the General Assembly provides a lengthy definition of *"proceeding or accruing,"* in Section 12-36-90 which states:

> **SECTION 12-36-90.** "Gross proceeds of sales".
>
> *Gross proceeds* of sales, or any similar term, *means the value proceeding or accruing* from the sale, lease, or rental of tangible personal property.
>
> (1) *The term includes*:
>
> (a) the proceeds from the sale of property sold on consignment by the taxpayer, including property sold through a marketplace by a marketplace facilitator;
>
> (b) the proceeds from the sale of tangible personal property without any deduction for:
>
> (i) the cost of goods sold;
>
> (ii) the cost of materials, labor, or service;
>
> (iii) interest paid;
>
> (iv) losses;
>
> (v) transportation costs;
>
> (vi) manufacturers or importers excise taxes imposed by the United States; or
>
> (vii) any other expenses; (emphasis added)

The General Assembly's definition of "proceeding or accruing" plainly refers to the related (i) cost of goods; (ii) the cost of materials, labor or services; (iii) interest; (iv) transportation; (v) losses; (vi) transportation costs; and (vii) excise taxes. A lengthy list, to be sure, but it does not include exempted or excluded (intangibles) items. These are obviously designed to protect the sales tax base. The General Assembly's definition does not include to come forth from a source, spring, arise or originate. Section 12-36-130, which defines "sales price," includes similar

language. It states that "'sales price' means the total amount for which tangible personal property is sold without any deduction for the cost of the property sold, the cost of the materials used, labor service cost, interest paid, losses or other expenses." § 12-36-130.

III. Parade of Horribles – The Supreme Court decision potentially revokes some 80 exclusions and exemptions when a non-taxable item is purchased "proceeding or accruing" a taxable item.

Rightly or wrongly, South Carolina's sales tax base contains numerous exclusions and exemptions. Indeed, § 12-36-120 alone contains some 80 exemptions. As explained in several examples below, the Supreme Court's decision essentially holds that the words "proceeding or accruing from the sale...of tangible personal property" contained in § 12-36-90 override all the sales tax exemptions and exclusions contained in the Sales and Use Tax Act. Under such an interpretation, all the exemptions listed in the Act may be overridden in a bundled transaction if one item, a taxable item, was subject to sales taxes and the second item was not but was purchased concurrently under the tests listed below.

Specifically, § 12-36-2120 contains some 80 exemptions. The Supreme Court has essentially re-written the opening line of the section to read as follows:

> **§ 12-36-2120 Exemptions from Sales Tax**
> Unless it is value proceeding or accruing from the sale of non-exempt property, exempted from the taxes imposed by this chapter are the gross proceeds of sales, or sales price of ...

To take a simple example, suppose a manufacturer builds a facility in South Carolina for a total capital investment of $20 million. It purchases concurrently $8 million of machinery and equipment (M&E) and $2 million of material handling equipment from the same source in the same transaction. The machines are designed to work together and their value proceeds or accrues from the other. Simply put, the manufacturing facility cannot manufacture products without both. Normally M&E would be exempt from sales taxes under § 12-36-2120(17), but material handling

equipment is subject to sales tax as the manufacturer does not qualify for the material handling sales tax exemption under § 12-36-2120(51). Is the sales tax base $2 million (material handling only) or $10 million (material handling and M&E)? Under the Supreme Court's decision, the sales tax base $10 million, as the M&E is value proceeding or accruing from the purchase of non-exempt material handling equipment. (In our example, purchased from the same vendor in the same transaction, all included in one invoice.) And in this example, M&E is an exempted item – the burden of proof falls on the taxpayer to establish the exemption, whereas in Petitioner's case, intangibles are an exclusion and not included in the Sales Tax Act.

Example Two: Suppose a retailer goes out of business and sells its six stores in South Carolina to a former competitor. Sale one is a store with a real estate value of $1.2 million dollars together with furniture, fixtures and equipment (FF&E) of $60,000. Sales taxes are owed on the FF&E. Is the sales tax base $1,260,000 (real and tangible personal property) or $60,000 (tangible personal property only)? Real property is not subject to sales taxes as the Sales Tax Act only includes tangible personal property. Assuming the closing statement includes both the real and personal property, the Supreme Court's decision states the sales tax base is $1,260,000 as the real property was purchased as value proceeding and accruing from the sale of tangible personal property, and the items are related and their value proceeds and accrues from each other.

A poor example? No – the Court of Appeals' decision in this case includes this exact example! The decision cites *Tronco's Catering, Inc. v. S.C. Department of Revenue*, 2010 WL 5871622 (S.C. Admin. Law Ct. Apr. 12, 2010) with approval, noting the "court held 'the value of the sale of catered meals includes service, labor, *and room charges* [because] [s]uch charges are incidental to and merely enhance the value of the sale of catered meals'" and that "'[§ 12-36-920] further expressly states that the value of the sale must include costs for materials, labor, service,

transportation, *or for any other expense*." *Books-A-Million*, 430 S.C. at 394, 844 S.E.2d at 402 (emphasis added) (Historically, "any other expenses" would not include exempted or excluded items).

The ALC – noted approvingly by the Court of Appeals – held in *Tronco* that the rental of real property was included in the sales tax base! If the *rental* of real property is included in the sales tax base, so is the *sale* of real property if it is value proceeding and accruing from the sale of tangible personal property. The ALC expanded the General Assembly's sales tax limitation of tangible personal property to include real property, just as the Supreme Court has expanded the limitation in this case to include intangibles. So in our example, the sales tax base is $1,260,000!

The same logic applies to services, which are normally excluded from the sales tax basis. The classic example of a service is a visit to the vet to example a dog's hot spot. Many veterinaries now sell high-end dog food, collars and non-prescription medicine for the hot spot. A person who takes his dog to the veterinarian for a checkup is told by the veterinarian to purchase diet dog food and pet medicine. The dog food and medicine is subject to sales taxes but not the vet services, even though the vet services are "inextricably linked" to the sale of dog food and medicine, are related, and their value proceeds or accrues from each other. (In many cases, the dog owner wouldn't be in the vet office but for the services.) According to the Supreme Court's logic in this case, if a customer purchased dog food and medicine at the same time he got vet services, then the cost of the vet services should be included in the sales tax bill.

The DOR recognizes that many businesses both sell at retail (for which sales tax is owed) as well as render nontaxable labor and services which proceed from the sale of services. For example, ophthalmologists and optometrists who sell eye glasses owe sales taxes on the sale of eye glasses but not on related services, see Reg. 117-308.7, even though the services and sale of

eye glasses are inextricably linked and their value proceeds or accrues from each other. Jewelry repairmen who also sell jewelry are not liable for sales taxes on their repair services. S.C. Regs. 117-308.11. Barber and beauty shops that sell tangible personal property (cosmetics, shampoos, etc.) are not liable for sales taxes on the services they perform, *see* S.C. Regs. 117-308.13, although sales tax is owing on the shampoo and cosmetics. S.C. Regs. 117-309.8 relating to undertakers states:

> Caskets, grave vaults, shrouds, and other tangible personal property furnished by undertakers and funeral directors in rendering burial services are sold by them at retail. These sales are subject to the sales tax.
>
> Where there is a separation of services from the sale of tangible personal property in invoices rendered, and where receipts from sales and receipts from services are properly identified on the books and records of the undertaker, the sales tax will not apply to receipts accruing from the rendering of such services as embalming, hearse service, transportation of family, etc.
>
> In complying with the provision for the separation of charges, a detailed itemization is not required.

As such undertakers are not required to include the cost of their services in the retail sales tax base for sale of caskets. S.C. Regs. 117-309.10 deals with interior decorators. It states:

> Interior decorators are generally engaged in the business of selling home or office furnishings of which many, such as portieres, curtains, draperies and seat and slip covers, are made to a customers' specifications. The total charge for such made-to-order merchandise is subject to the tax without any deduction for fabrication labor whether such labor is performed by the decorator or by others for the decorator's account.
>
> * * * *
>
> It may also be necessary to remodel interiors such as by painting or papering walls, hanging mirrors, pictures and lighting fixtures or other accessories, or replacing floor coverings. Labor for these purposes is not subject to the tax provided it is separately shown from the sales price of tangible personal property on the invoice to the customer. Other exempt charges when separately invoiced to

> the customer are consultation fees and reimbursement for travel expenses.

Again, interior decorators who sell such items as mirrors, curtains and draperies are not required to include in that sales tax base the cost of such services as hanging the mirrors, curtains and draperies, nor for painting or papering walls, even though they are inextricably linked and proceed and accrue from the same transaction.

The Supreme Court addresses Petitioner's "parade of horribles" involving a grocery store as follows:

> Consistent with its parade-of-horribles scenario, Books-A-Million also argues that grocery stores will be impacted by the decision in this case, posting that if an individual line at a grocery store check-out has one item exempt from tax – a gift card, for example – then the Department's interpretation of the "proceeding or accruing" language would render the entire purchase taxable. Because the pertinent language is "proceeding" and not "preceding," this argument is unavailing.

Id. at p. 6.

The Supreme Court gives as its only example the purchase of an exempt gift card and notes that sales tax will be incurred when the gift card is used. Two other examples better exemplify the issue. The Supreme Court order holds that the purchase of chicken wings (exempt under § 12-36-212-(75) as unprepared food) in the same transaction as peanut oil and a Fry Daddy (taxable) renders the chicken wings subject to sales tax.

The Supreme Court order states that "the term 'proceeding' is critical," Order at p. 3, and defines it as "to come forth from a source," and synonyms include arise, rise, originate, derive. *Id.* at 3-4. The exempt chicken wings come from the same source, arise, rise, originate, and derive as the peanut oil and Fry Daddy. In footnote 6 the Court states "[t]iming is incidental; it must be the relationship between the two items being purchased and that is dispositive of whether one item's value proceeds or accrues from another." *Id.* at p. 6. The exempt chicken wings, peanut oil and Fry

Daddy cannot be more directly related – they are being purchased to cook the exact same meal.

The Court using the gift card example finally states "between the items in the grocery basket [gift cards and non-exempt groceries], there is no relationship such that one is deriving value from another. Therefore, value does not proceed or accrue in the way this Court has determined is necessary to levy a tax..." *Id.* at pp. 6-7. There is a direct relationship between the chicken wings, peanut oil and Fry Daddy – being purchased to cook the same meal and the Fry Daddy and peanut oil probably would not have been purchased but for the chicken wings.

A more serious—but identical—transaction would be the purchase of an exempt prescription drug from a drug store. In addition to purchasing the exempt drug, the customer purchases pain medicine, nausea medicine for the prescription's side effect as directed by her doctor to deal with the prescription's side effects, and a plastic box with the days of the week on it to help her remember when to take the medicine. Only the prescription drug is exempt. All are purchased at the same time in the same cash register receipt. The Order holds the prescription drugs lose their exemption: (1) they come from the same source, originate and derive from the purchase of the non-exempt goods; (2) all the items are related – being purchased for the same medical condition; (3) there is a relationship and the nausea medicine and plastic box directly relate to the prescription, i.e. would not have been purchased but for the prescription; and (4) there is a direct relationship – the non-exempt items derive value from the prescription (and have no other value) and would not have been purchased but for the prescription.

Footnote 7 (Order at p. 7) notes that this parade of horribles is not an issue as the Point of Sale machine is programmed to make the demarcations. But the Point of Sale machine must first be programmed to follow the demarcations outlined by the General Assembly – prescription drugs and chicken wings exempt, nausea medicine, peanut oil, Fry Daddy and medicine counter non-

exempt. The Supreme Court's decision totally rewrites the Point of Sale software. The Point of Sale software is now going to have to ascertain: (1) are the exempt items proceeding the sale of non-exempt items, do they come from the same source, arise, rise and originate together (the answer to this will always be yes as they are being run up in the same transaction); (2) what is the relationship between the items, does the value of the exempt item proceed or accrue from the non-exempt (in our chicken wing example, if the customer purchased exempt wings, peanut oil and Fry Daddy, exempt hamburger meat and exempt milk, there may be no relationship between the hamburger meat and milk, but there is a clear relationship between the wings, peanut oil and Fry Daddy); and (3) is the relationship such that one is deriving value from another.

Under the Court's ruling, the grocery store Point of Sale system is going to have to be programmed to ask all these questions. Under the Court's decision, clearly the purchase of the peanut oil and Fry Daddy is going to make the chicken wings subject to sales taxes, as well as the prescription drugs.

The Supreme Court's decision also distinguishes museums and zoos as follows:

> The generic private golf club charges a membership fee as a requirement to play on its course or buy items in its pro shop. This is a conditional retail agreement whereby the membership provides not for discounts, but for use. Museums and zoos are similarly distinguishable. Though most museums and zoos are open to the public, many charge membership fees for discounted admission. This is not discounted retail and is charged under a different section of the South Carolina tax code that does not contain the "proceeding or accruing" language at issue here. *See generally,* S. C. Code Ann. § 12-21-2420 (2017) (making no mention of a tax on "gross proceeds of sales" and thereby no reference to the "proceeding or accruing" language).

Order at p. 6.

This paragraph cites the admissions tax statute, § 12-21-2420. The decision overlooks the fact that many museums and zoos have gift shops which sell retail goods subject to sales taxes.

EdVenture and Riverbanks Zoo have membership programs in the Midlands (Petitioner's Memorandum of Law in Opposition to DOR's Motion for Summary Judgment at p. 5 and Exhibit A p. 1; App. pp. 226 and 237).

EdVenture Children's Museum offers "special member shopping discounts and events in EdCetera, the museum's gift shops." Appendix at p 268. Riverbanks Zoo offers a "10% discount in Zoo and Garden shops" to its optional membership. *Id.* at p. 277. These gift shops sell merchandise and are subject to sales taxes. Do EdVenture and Riverbanks Zoo have to include their optional membership fees in their sales tax base?

IV. *Barnes & Noble v. Huddleston* is directly on point.

The Tennessee Court of Appeals (along with a number of other authorities) held that sales of memberships were exempt. In *Barnes & Noble Superstores, Inc. v. Huddleston*, 1996 WL 596955 (Tenn. Ct. App. 1996), a bookstore sold "Reader's Choice" membership cards to customers. This membership program entitled customers for the annual fee of $10.00 to 10% discount on the bookstore's merchandise in stores across the country. Customers could either present the membership card or give the membership number and expiration date of the card to utilize the membership. Based on these facts, the Court held that "the true object of the subject transactions... is to bestow upon club members the intangible right to receive a discount on merchandise." *Id.* at 2. The court found the membership card was "merely an indicia of that intangible right and incidentally aids in the exercise of that right." The Supreme Court distinguished *Barnes & Noble* as follows:

> Other states have unique statutory language that yields different results. The [Tennessee] statute defines "sales price" as "the total amount for which a taxable service or tangible personal property is sold...provided, that cash discounts allowed and taken on sales shall not be included..." *In Tennessee, the legislature specifically sought to calculate the tax base as a number exclusive*

of discounts. In South Carolina, the legislature tied together taxable tangible goods with related intangible assets. (Emphasis added)

Order at p. 4. Section 12-36-130 defines "sales price" as exclusive of discounts. It states:

> "Sales price" means the total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, loses, or any other expenses.
>
> (1) The term includes:
>
> (a) Any services or transportation costs that are a part of the sale, whether paid in money or otherwise; and
>
> (b) Any manufacturers or importers exercise tax imposed by the United States.
>
> (2) *The term does not include:*
>
> *(a) A cash discount allowed and taken on the sale;*
> (Emphasis added)

Section 12-36-90(2) plainly states:

> Gross proceeds of sales, or any similar term, means the value proceeding or accruing from the sale, lease or rental of tangible personal property.
>
> (1) The Term includes:
>
> * * *
>
> (2) *The term does not include:*
>
> *(a) a cash discount allowed and taxed on sales.*

§ 12-36-90(2) (emphasis added).

The Order, as stated above, noted that "[i]n Tennessee, the legislature specifically sought to calculate the tax base as a number exclusive of discounts." Order at p. 5. The South Carolina General Assembly did the exact same thing!

The Florida Department of Revenue has ruled that a similar membership program involved a sale of intangible personal property, and thus was not subject to Florida sales tax. In Technical

Assistance Advisements 89(A)-022, the Florida Department of Revenue addressed whether the following discount card program, as described by the taxpayer at issue in the ruling, was subject to sales tax:

> Corporation A is a discount bookseller operating various stores in Florida. As a part of our sales and marketing of books and other merchandise, Corporation A offers its customers a discount card. Customers purchase the discount card in order to purchase merchandise at additional discounted prices offered by Corporation A. The card has an established price of $10 with an annual renewal fee of $10.

During the periods at issue, Florida assessed a sales tax on the total selling price of tangible personal property sold at retail in Florida. Fla. Stat. § 212.05. Florida statutes defined the term "sales price" as "the total amount paid for tangible personal property . . . discounts allowed and taken at the time of sale shall not be included with the purview of this [definition]." Fla. Stat. § 212.02(17).

The Florida Department of Revenue found the sale of the discount card was "not the sale of tangible personal property but rather the sale of intangible property." According to that agency, "[t]he discount card has no value in and of itself but only has worth when used in conjunction with the purchase of merchandise from Corporation A."

The Virginia Department of Taxation came to a similar result in guidance provided to Petitioner in 2009. As described by the Virginia agency:

> [Petitioner] sells annual memberships in a discount card program called the Millionaire's Club. The Millionaire's Club membership entitles the member to discounts on purchases of the [Petitioner] through the use of a discount card. Sales Tax was assessed on the [Petitioner's] sales of Millionaire's Club memberships.

The Virginia Department of Taxation based its findings on Virginia's definition of "sale," which included the "transfer of title or possession of tangible personal property or the rendition of

a taxable service for a consideration." Citing two prior agency rulings, the agency determined the sale of the Millionaire's Club membership "did not include the transfer of tangible personal property or the provision of a taxable service." Based on the foregoing, the Virginia Department of Revenue concluded the Appellant's sales of Millionaire's Club memberships were exempt from Virginia's sales and use tax. *See also* Tenn. Rev. Rul. #14-08; *Dine Out Tonight Club v. Dep't of Revenue Servs.*, 210 Conn. 567 (1989); *State v. Amn. West Comty. Promotions, Inc.*, 645 N.W.2d 196 (2002); and Oklahoma Rev. Rul. #14-001.

V. *Travelscape* does not support this Court's decision.

The Order (p. 4) states:

> This Court has interpreted our tax code to have broad language which inextricably links value to sales. *See Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 97,705 S.E. 2d 28, 32 (2011) (finding hotel fees, charged by the taxpayer exclusively for services, were subject to sales tax under the plain language of section 12-36-920(A) as gross proceeds because the service was incidental to the purchase of accommodations).

In *Travelscape, LLC v. Department of Revenue*, 391 S.C. 89, 705 S.E. 2d 28 (2011), an online travel agency alleged that it was not required to pay accommodations sales tax on the service and facilitation fees it retained from online hotel reservations because such fees are "derived from" the services it provides, not from the rental charge for the hotel rooms. The room reservations were subject to accommodations taxes and so the issue was the accommodations sales tax base. In evaluating the case, the South Carolina Supreme Court applied the plain meaning rule to § 12-36-920(A), which imposes a tax on the "gross proceeds derived from the rent charge for any room." The Court then looked to § 12-36-90(1)(b)(ii), which explicitly defined gross proceeds as "the value obtained from the rental of accommodations *without deduction for the cost of services*" (emphasis added). Thus, given the explicit language of the statutes in relation to services, the Court applied the plain meaning rule and decided service and facilitation fees retained from online hotel

reservations were subject to sales tax. *Travelscape* in no way supports the Court's decision. The accommodations tax statute clearly encompassed all the related charges including services related to hotel reservations. By contrast, no Sales Tax statute includes intangibles.

VI. Big Box Stores

The Supreme Court rejected Petitioner's argument that sales of memberships are not included in the sales tax base because of the DOR's position regarding sales of memberships at "big box" stores. Petitioner has never argued equal protection/unfair competition/fairness as a legal argument. However, Petitioner *has* argued that the legal basis for the tax espoused by the ALC/Court of Appeals – inextricable link between the sale of memberships and books/CDs were erroneous under the DOR's own analysis regarding membership fees at big boxes. The same holds true for the Supreme Court's "proceeding" analysis. The sale of memberships at big box stores proceeds—by definition—the purchase of tangible personal property at such stores (i.e., you can't get in the door without a membership card). As stated below, the DOR explicitly says that mandatory membership fees are not included in the sales tax base. Then how are optional Books-A-Million fees included in the tax base?

Chapter 6, page 9 of the DOR's South Carolina Sales and Use Tax Manual (2021 Winter Edition) states that sales of certain memberships are not included in the sales tax base. The Manual first states:

> Examples of charges not includable in "gross proceeds" or "sales price" and therefore not subject to the sales and use tax are:
>
> * * *
>
> **Membership fees charged by a membership-only warehouse** offering a selection of brand-name merchandise to business owners and others where all membership types receive the same benefits;[62]

In SC Private Letter Ruling #16-1, the DOR similarly stated:

> In certain circumstances, the Department has determined that membership fees related to the anticipated sales of tangible personal property are not includable in gross proceeds of sales and, therefore, are not subject to the sales and use tax. Examples include:
>
> 1. A retailer sells its product only to members and charges a membership fee that is in lieu of a security deposit or constitutes only a nominal processing fee.
>
> 2. A retailer sells its product only to members and charges a membership fee that allows all members to purchase the tangible personal property at the same lower price.

Books-A-Million offers a selection of brand-name merchandise to business owners and others where all membership types receive the same benefits. It does not have a "membership-only warehouse" but under the ALC's "inextricable link" analysis, or the Supreme Court's "proceeding" analysis, this would make it less subject to sales taxes than a "membership-only warehouse."

Footnote 62 cited above further provides that "[a] membership fee would be includable in gross proceeds and subject to the tax if the membership fee is the sales price for the tangible personal property," and then provides an example:

> For example, if a direct mail movie rental company charged an annual or month[ly] fee to receive movies for short term use of movies and no other charges are paid by the customers to receive the movies, then the annual or monthly fee is the sales price of the tangible personal property and subject to the tax.

This footnote in the Sales and Use Tax Manual addresses the Court's concerns contained in Footnote 5 of the Order (p. 6) that the purchase of a membership might allow a customer to purchase goods at a 90 or 99% discount. This logic makes sense and is consistent with the statute's intent to capture value proceeding or accruing from the sale of personal property. In the example, the customer only pays a monthly fee for the ability to access movie rentals, so that monthly fee should be taxable because it is essentially, as the Department provides, "the sales price for the

tangible personal property." In the example, what the seller characterizes as a "membership fee" is really just a proxy for the sales price. In Petitioner's case, the Membership Fee is not directly connected to the sale or receipt of tangible personal property. The member could separately purchase 1,000 books as a member, or he could purchase 0 books.

VII. Renewals

The Court of Appeals erred in finding Petitioner's renewals of membership cards are subject to sales taxes because the renewals are automatic, rarely done in connection with the purchase of tangible personal property, and are automatically renewed twelve months after purchase. According to the Stipulations of Facts, "[m]emberships automatically renew each year for one-year periods unless the customers affirmatively opts out of the automatic renewal.... So long as the customer does not opt out, the Petitioner bills the annual membership fee to the credit or debit card provided when the customer initially enrolled in the Club." App. pp. 4-5, 439. Such renewals are not inextricably linked to the sale of merchandise nor is their value proceeding or accruing from the sale of tangible personal property. Accordingly, renewals should not be included in the sales tax base even if the original membership purchase was so included.

The General Assembly states that consideration "proceeding or accruing from the sale... of tangible personal property" is included in the sales tax base. § 12-36-90. No Department policy documents, regulation or case (Administrative Law Court, Court of Appeals, or Supreme Court case) has ever held that twelve months later is "proceeding or accruing" under § 12-36-90.

The Court of Appeals decision holds without explanation that the renewal twelve months later is "proceeding or accruing." Read literally, every purchase of exempt goods twelve months after the purchase of a taxable item is subject to the sales tax base. The Court of Appeals' decision holds that the purchase of a toaster, canned goods and an exempt prescription in the same

transaction renders not only the initial purchase of the prescription in the same transaction subject to sales tax but also the regular renewal of the prescription for the next year!

The Supreme Court decision failed to address renewals (even though it was briefed and argued).

VIII. Conclusion

All sides agree that a membership is an intangible. It is undisputed that intangibles are excluded by the General Assembly's wording in the Sales Tax Act. A majority of the Supreme Court held that an item excluded by the General Assembly is nevertheless subject to sales tax if purchased proceeding or accruing a non-exempt item. To get there a majority of the Supreme Court ignores the General Assembly's definition of "proceeding or accruing" found in § 12-36-90 and substitutes a dictionary definition. The Court then inserts – for the first time in any case – a new "proceeding or accruing" test. This proceeding or accruing test subjects 80 otherwise exempt items to sales taxes as well as excluded items such as real estate and services.

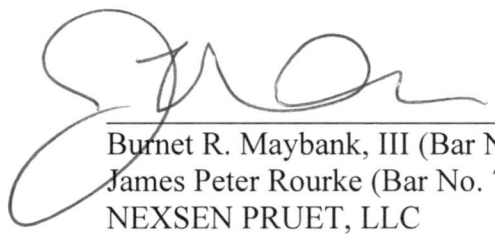
In addition to creating a new proceeding or accruing test for sales tax, a majority of the Supreme Court held that "[t]his Court has interpreted our tax code to have broad language which inextricably links value to sales;" "gross proceeds includes *all* value that comes from or is [the] direct result of the sale, lease or rental of tangible personal property" (emphasis in original); and "our sales tax [is] . . . more inclusive than those of other states." Order at pp. 4, 7. The Supreme Court has never made these declarations before.

Given the need for new fact-based determinations looking years into the past and future simultaneously, what is a retailer to do? Perhaps a retailer should simply collect the sales tax on all transactions. Surely that would protect the retailer, right? Wrong. Under § 12-54-196(A), the Department can determine the retailer collected *too much* sales tax—for example, the proceeds

from an otherwise exempt or excluded sale were not "proceeding or accruing" enough. Armed with this statute, the Department, at its "sole discretion," § 12-54-196(D), can assess a 150% penalty on that overcollection.

Based on the foregoing, the Petitioner respectfully requests this Court grant this Petition and permit additional argument. Alternatively, this Court should withdraw its prior Order and issue a new decision in favor of Petitioner for the reasons cited above.

Respectfully submitted:



Burnet R. Maybank, III (Bar No. 3699)
James Peter Rourke (Bar No. 79879)
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
P. O. Box 2426
Columbia, South Carolina 29202-2426
Phone: 803-771-8900
Facsimile: 803-253-8277
bmaybank@nexsenpruet.com
jrourke@nexsenpruet.com

Attorneys for Petitioner
Books-A-Million, Inc.