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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Honorable John D. McLeod, Administrative Law Judge

Case No. 16-ALJ-17-0113-CC
Appellate Case No. 2017-001519
Opinion No. Op. 5721 (S.C. Ct. App. Filed April 20, 2020)
Supreme Court Case No. 2020-001102

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

v.

South Carolina Department of Revenue, ... Respondent.

THE DEPARTMENT OF REVENUE'S RETURN TO PETITION FOR REHEARING

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The South Carolina Department of Revenue ("Department") submits this Return in opposition to the Petition for Rehearing filed by Books-A-Million, Inc. ("BAM"). For the reasons that follow, the Supreme Court correctly found that the membership dues associated with BAM's Millionaire's Club were subject to sales tax because the dues proceed or accrue from the sale of tangible personal property.

STANDARD OF REVIEW

When considering a Petition for a Rehearing this Court has stated "The purpose of such a petition is to aid the court in deciding correctly a case heard by it. The petition must show, according to the rule, 'the points supposed to have been overlooked or misapprehended by the Court.' The purpose of a petition for rehearing is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing is not just to have the case tried in this court a second time." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933). Moreover, the Court should not consider any argument that is presented for the first time in a petition for rehearing. *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001).

Remarkably, BAM did not reference these or any other standard for evaluating whether the Court should grant or deny a Petition for Rehearing. Perhaps this is because BAM's Petition does not direct the Court "with particularity [to] the points supposed to have been overlooked or misapprehended by the court" in its September 14, 2022 opinion. *See* Rule 221, SCACR. In fact, of the nineteen pages of argument in BAM's Petition, six are virtually verbatim from BAM's Initial Brief to this Court; and approximately 2 ½ pages are lifted almost exactly from BAM's Reply Brief. In other words, roughly half of BAM's Petition for Rehearing is an echo of arguments that it already made and that a majority of this Court considered and rejected. BAM has not raised any point in the Petition that was not directly addressed by the Court's opinions.

A Petition for Rehearing should not be granted when the Petitioner's only support is a regurgitation of previously made and failed arguments. In this instance, the Court considered and addressed each of BAM's arguments in its Opinion. While BAM may not agree with the result, it cannot be said that the Court "overlooked or misapprehended" any point raised in the Petition for Rehearing. Thus, the Petition should be denied.

ARGUMENT

The basic flaw in BAM's Petition is that it over-applies the Court's decision. As the Court recognized during the oral argument, the parade of horribles described by BAM is highly unlikely. BAM has attributed arguments to the Department that it did not make and ramifications of the Court's decision that cannot be true. The Department will address each of BAM's arguments in the order they were presented.

I. The Court has not blurred the line between tax exemptions and tax exclusions.

BAM correctly observes that exclusions and exemptions are treated differently for purposes of proving their application to a particular taxpayer or transaction. BAM incorrectly maintains that the sales tax can only ever apply to sales of tangible personal property. This is incorrect. For example, in *Rent-A-Center v. Dep't of Revenue*, 425 S.C. 582, 824, S.E.2d 217 (Ct. App. 2019), the Court of Appeals found that the state's sales tax applied to both tangible (furniture and appliances) and intangible (damage liability waivers) items. *Id.* at 592-93. *See also Meyers Arnold, Inc. v. S.C. Tax Comm'n*, 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985).

The second defect in this argument is that this case addresses neither an exclusion nor an exemption. According to BAM's "Question Presented" in its opening brief, the issue is whether club membership fees should have been included in BAM's gross proceeds of sales. Pet'r Br. at 1. BAM sells tangible personal property and, of course, it does not argue that those sales are exempt or excluded from sales tax. Its current position – that something exempt or excluded if sold alone should

also be free from sales tax even when its sale is inextricably linked to the sale of tangible personal property – is as unpersuasive now as it was when this Court considered it the first time. "Contrary to Taxpayer's argument, ruling that the membership is not taxable is the result most likely to produce havoc. Under the position advanced by taxpayer, books could be sold at a 90% or 99% discount as a benefit of membership. This is unquestionably tax avoidance and is not legally distinguishable from lesser discounts as present here." Op. at 6 n. 5.

The Court described BAM's argument as "positing that if an individual in 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." Op. at 6. The Court rejected this argument. "No interpretation or argument advanced by the Department in this case would change that distinction or connect the purchase of gift cards with the taxable items bought along with them in the original transaction simply because they were purchased at the same time." *Id.* at 7. The Court further recognized in a footnote that BAM acknowledged that retailers routinely sell taxable and non-taxable items in the same transaction and are able to navigate that situation without difficulty. *Id.* n. 7.

Nevertheless, BAM reasserts this concern in its Petition for Rehearing suggesting that "proceeding or accruing" is merely a temporal connection between the tangible personal property and the ancillary item.[1] BAM offers no support or explanation for this argument, which the Court clearly rebuffed. Op. at 6 n. 6. Accordingly, because the Court neither overlooked nor misapprehended BAM's position, this is not a proper basis for the Court to rehear the matter.

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[1] In its amicus curiae brief, Warehouse Home Furnishings Distributors, Inc. d/b/a Farmers Home Furniture's (Farmers) advanced a similar argument, claiming "the Department's position is that if an otherwise non-taxable service or intangible is provided in conjunction with or is merely related to the sale of tangible personal property, the amounts collected for such items become 'taxable . . .'" *See* Farmer's Br. at 6. As the Department made clear in its response to Farmers' brief, this dramatically overstates the Department's position in this case. *See* Dep't Mem. in Opp'n to Farmers' Amicus Curiae Br. at 1.

II. The Court's Opinion is not inconsistent with the General Assembly's concept of "proceeding or accruing".

There is no definition of "proceeding or accruing" in Title 12. Yet, BAM asserts that "the General Assembly provides a lengthy definition of 'proceeding or accruing' in Section 12-36-90...." This argument was previously made (almost verbatim) in BAM's Reply Brief. *See* Pet'r Reply Br. at 4-5. The reappearance of this argument is surprising because § 12-36-90 simply uses, but does not define, "proceeding or accruing." Section 12-36-90 actually defines "gross proceeds of sales." The crux of BAM's argument is that in this definition the General Assembly identified seven costs that are not to be deducted from the sales price of tangible personal property for the purpose of calculating the sales tax base. According to BAM, because intangibles are not included in that list, it is improper to charge sales tax on the membership fees.

Unfortunately for BAM, one does not logically follow the other. Section 12-36-90(1)(b) is a list of costs that a retailer might deduct from the sales price of tangible personal property in order to determine the net profit associated with the sale. This section prohibits retailers from deducting those costs from the sales price before calculating the sales tax owed. This statute, therefore, is unrelated to the issues before the Court.

Moreover, seemingly in response to this argument, the Court, in both the majority opinion and the two dissents, spent considerable time analyzing the "proceeding or accruing" language. The majority found that sales tax is due when there is a relationship between the two things on which the Department seeks to impose the tax "such that one is deriving value from another." Op. at 7. It cannot be said that value is derived from the costs identified in § 12-36-90(1)(b) because they actually deduct from value. The Millionaire's Club membership fee, on the other hand, creates value for BAM and should be subject to the sales tax. Not even the dissents accept that § 12-36-90 defines "proceeding or accruing." Justice James looked to the dictionary definitions of those terms and Justice Kittredge's dissent notes only that "proceeding or accruing" is a phrase appearing in the definition of gross

proceeds of sales. Nevertheless, important to the consideration of the Petition for Rehearing, all opinions address head-on the definition of "proceeding or accruing" and none of them adopt the meaning attributed by BAM.

Since this issue was raised and explicitly ruled upon by the Court, BAM has again failed to raise an issue that was overlooked or misapprehended by the Court.

III. All statutory sales tax exemptions remain intact.

Among the floats in BAM's parade of horribles is one in which the Court's decision preempts all statutory sales tax exemptions. This is a strawman argument. Neither the Department nor the Court have asserted that the "proceeds or accrues" language in § 12-36-90 should be interpreted to read § 12-36-2120 out of the code book. The flaws in this argument are more fully addressed in sections I., II., and V. of this return.

As with every argument raised by BAM in support of its Petition, this is a rehash of an argument that the Court considered and declined to follow. It is not proper support for a petition for rehearing.

IV. The Court properly rejected Tennessee law.

BAM contended in its original briefing, *see* Pet'r Initial Br. at 11, and at oral argument that the unpublished Tennessee Court of Appeals' decision in *Barnes & Noble v. Huddleston*, 1996 WL 596955 (Tenn. Ct. App. 1996), should serve as a guidepost for this Court. However, the Tennessee sales tax statute is very different from the South Carolina statute at issue here. The Court correctly recognized the distinction and rejected Tennessee's judgment. Op. at 4.

As discussed by the Department and recognized by the Court, there is only one reason to be a member of the Millionaire's Club: discount prices and free shipping on the tangible personal property the BAM sells. Therefore, the cost of a Millionaire's Club membership is actually an advanced payment which entitles a club member to access the product discounts. In South Carolina it is well-recognized

that separate fees related to the sale of merchandise are part of the value that proceeds or accrues from the sale of tangible personal property. *Meyers Arnold, Inc. v. S.C. Tax Comm'n*, 285 S.C. 303, 305, 328 S.E.2d 920, 922 (Ct. App. 1985); *Rent-A-Center East, Inc. v. S.C. Dep't of Revenue*, 425 S.C. 582, 824 S.E.2d 217 (Ct. App. 2019). On the other hand, Tennessee's sales tax statute explicitly excludes any discount from the sales tax base. Tennessee's sales tax applies to the "sales price" of the goods for sale. "Sales price" is a defined term and the Tennessee legislature chose to explicitly leave out "cash discounts allowed and taken on sales...." Tenn. Code Ann. § 67-6-202(a).

This argument was raised by BAM, considered by this Court, and rejected. Thus, it is not a valid basis for granting the Petition for Rehearing.

V. *Travelscape, LLC v. Department of Revenue* supports the Court's analysis.

In its fifth point, BAM repeats the argument it first made in its Reply Brief, *see* Pet'r Reply Br. at 13, that this Court's decision in *Travelscape, LLC v. Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), is too narrow to have any applicability to the case at bar. Once again, the Court directly addressed this argument and rejected it. In writing for the majority and citing *Travelscape*, Justice Hearn notes, "This Court has interpreted our tax code to have broad language which inextricably links value to sales." Op. at 4. Thus, contrary to BAM's suggestion, *Travelscape* should not be read to apply only to accommodations taxes. The *Travelscape* Court found that "gross proceeds," which the Court equated to "gross proceeds of sales," are subject to sales tax including any "service and facilitation fees" because those fees are derived from the rental of a hotel room. *Id.* at 98.

BAM has asserted throughout this litigation that the Millionaire's Club membership fees cannot be subject to tax because they are an intangible, which is not subject to sales tax. The *Travelscape* court rejected this claim by finding that service fees were taxable when they "proceed or accrue" from the rental of the hotel room. *Id.* Although the *Travelscape* decision turns on the specific prohibition against deducting costs, there was no need for the Court to get to that prohibition if the service fees

were not, from the outset, part of the "gross proceeds." Thus, *Travelscape*, which is to be broadly applied, stands for the proposition that the value associated with an intangible may be subject to sales tax when its value proceeds or accrues from the sale of tangible personal property. The sales tax is not imposed directly on the intangible, rather, to the extent value proceeds or accrues to a retailer because an intangible is inextricably linked to the sale of tangible personal property, that value is subject to sales tax.

Like the others, this argument was raised, considered, and ruled upon by the Court. The Court should not rehear the case merely to give BAM a second bite at the apple.

VI. There is a long-standing and readily apparent difference between BAM and membership only warehouses.

The Department has consistently maintained that the Millionaire's Club is different from warehouse club memberships.[2] In a nutshell, the difference involves whether the retailer charges separate prices for its merchandise or just one. In a typical warehouse club membership all shoppers at the warehouse club pay the same price for the same product. That price may be discounted as compared to other retailers, but the full price charged by the warehouse club is taxed.[3] BAM follows

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[2] With only a few irrelevant exceptions, S.C. Code Ann. § 12-54-240 prohibits an employee of the Department from publically disclosing any information about a taxpayer "[e]xcept in accordance with a proper judicial order or as otherwise provided by law." Thus, although BAM was free to speculate about whether specific warehouse clubs may or may not be charging sales tax on membership fees, the Department is not free to respond to any specific claim without running afoul of § 12-54-240. However, in a generic sense, the Department's position on the taxability of warehouse club membership fees has been unchanged since 1992 when the Department issued Private Letter Ruling 92-11. There the Department instructed that a warehouse club's membership fees for the two membership tiers that provided for product discounts were subject to sales tax. A third tier, in which the member received no discount, was not subject to sales tax.

[3] At oral argument the Court noted a common belief that warehouse club memberships are attractive because they offer lower prices than other more traditional retailers. While the Department acknowledges this is how warehouse clubs market themselves, BAM put no evidence into the record about how warehouse clubs actually price their merchandise.

a different model. For the same merchandise, BAM charges one price to members and another to non-members.

While the Department maintains that BAM is not purposefully engaged in tax avoidance, that model, unlike the warehouse club model, lends itself to concern over potential abuse. For example, suppose that a retailer created a club in which the membership cost $100. Membership in the Club entitled members to 90% off the regular price of merchandise up to a total value of $111. The Club member would pay $11 for the merchandise and $100 for the membership. A non-member would pay $111 for the merchandise and $0 for the membership. The retailer received $111 from both customers and both customers received $111 worth of merchandise. But, if BAM's argument succeeds, the member would pay sales tax on $11 and the non-member would pay sales tax on $111.

This dilemma is not present for a warehouse club. Everyone who is eligible to purchase merchandise does so at the same price because non-members are unable to purchase anything from the warehouse club. Using a similar hypothetical as above, every club member would pay $50 for a membership and a single established price for a particular item of tangible personal property. Every member pays the same amount for the item, including the same amount of sales tax. A non-member would not pay for a membership and, thus, has no opportunity to purchase the item or pay sales tax. The warehouse club has not created a system that allows for sales tax avoidance.[4]

Lastly, BAM continues to assert the false argument that mandatory fees (warehouse clubs) are not taxable, while optional fees (Millionaire's Club) are taxable. For sales tax purposes, the distinction between the taxability of these two fees has nothing to do with whether they are mandatory or optional. The distinction is the effect of the membership on merchandise pricing. For all of the reasons

[4] Some members of the Court expressed concern that the Department did not offer any reason for the distinction between the Millionaire's Club and a warehouse club. While the Department did not use this example, this distinction was described in the Respondent's Brief beginning at page 14. It was also discussed beginning at 20:30 in the archived oral argument.

noted above, there is a cogent and longstanding reason why a discount club is treated differently from a warehouse club.

This further explanation of the distinction between BAM and warehouse clubs should clarify the difference between the two types of memberships. But even if it does not, the majority properly concluded that the distinction is irrelevant. Op. at 5. The issue before the Court was whether Millionaire's Club dues were subject to sales tax. The sales tax treatment of non-parties does not change the correct result in this case.

Ultimately this issue was raised and vociferously argued by BAM. The Court fully considered it to the point of accepting as true the ostensible unequal treatment of BAM vis-à-vis warehouse clubs. Yet, the Court found that the Department properly charged sales tax on the Millionaire's Club fees. Therefore, this is not a proper ground on which to grant the Petition for Rehearing.

VII. Renewals should be treated like first-time memberships.

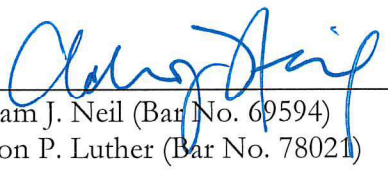
There is nothing in the record in this case that demonstrates a distinction between the benefits associated with a first-time membership in the Millionaire's Club and a renewal membership. Either one entitles the member to product discounts and free shipping, but there is no other benefit. Thus, if a first-time membership is taxable, the renewal membership is also taxable. Furthermore, despite BAM's argument that renewals are "rarely done in connection the purchase of tangible personal property," there is no evidence in the record supporting this contention. "[T]he Petitioner has no records establishing that customers pay the Membership Fee without simultaneously purchasing tangible personal property." R. at 4.

BAM has not and cannot present any evidence to the Court contradicting this finding by the ALC. "[T]his Court should not consider appellants' previously unpresented evidence when deciding whether to grant the petition for rehearing." *Kennedy*, 349 S.C. at 532. Accordingly, the Petition for Rehearing should be denied.

CONCLUSION

BAM did not raise a single point in its Petition for Rehearing that a majority of this Court did not explicitly consider and reject. The Petition for Rehearing should be limited, as required by the rule, to raising points that were either "overlooked or misapprehended by the Court." The majority certainly did not overlook BAM's arguments. As demonstrated above each was analyzed by the Court and addressed in the majority opinion. Several of these points were also addressed in the dissents, which further demonstrates that they were neither overlooked nor misapprehended. Moreover, in every instance, the Court – regardless of whether part of the majority opinion or either dissent – cited to authority and logic as support for the conclusion. While BAM may disagree with the Court's decision, it cannot assert with a straight face that any argument was overlooked or misapprehended. Therefore, BAM's Petition for Rehearing is without a proper foundation and should be denied.

Respectfully Submitted,



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