THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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

Books-A-Million, Inc.,.....Appellant,

v.

South Carolina Department of Revenue,.....Respondent.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

S.C. STATUTES AND REGULATIONS

OTHER AUTHORITIES

OTHER STATES' STATUTES AND GUIDANCE

STATEMENT OF ISSUE ON APPEAL

I. DID THE ADMINISTRATIVE LAW COURT PROPERLY FIND THAT BOOKS-A-MILLION, INC. SHOULD HAVE INCLUDED THE PROCEEDS FROM ITS SALES OF CLUB MEMBERSHIPS, INCLUDING RENEWALS, IN ITS GROSS PROCEEDS OF SALES?[1]

[1]Rule 208(b)(1)(B) of the South Carolina Appellate Court Rules (SCACR) states plainly that "no point will be considered which is not set forth in the statement of the issues on appeal." Books-A-Million, Inc. (the "Taxpayer") did not include a Statement of Issues on Appeal in its initial brief. Thus, under a strict interpretation of the rule, there are no points in Taxpayer's initial brief for the Court to consider. If, however, the Court considers the Taxpayer's brief, the Department frames the issues on appeal as set forth above.

STATEMENT OF THE CASE

The South Carolina Department of Revenue (the "Department") agrees with the Statement of the Case set forth in the Taxpayer's Initial Brief. However, the Department would add the following procedural history: On June 1, 2017, the Administrative Law Court (the "ALC") issued a Final Order and Decision granting the Department's Motion for Summary Judgment. (R. pp. 14 – 24). On June 6, 2017, the ALC issued an Order Vacating Previous Order and Amending Order Granting Respondent's Motion for Summary Judgment (the "Amended Order") to correct a technical error in the Final Order and Decision. (R. pp. 3 – 13). Specifically, the ALC explained that the case should have been adjudicated as a motion for summary judgment. (R. p. 3; Am. Order 1). The Amended Order was captioned so as to reflect that the order granted the Department's Motion for Summary Judgment. (R. p. 3; Am. Order 1).

STATEMENT OF FACTS

The parties stipulated to the facts in this matter, and thus, the facts below are not in dispute. (R. pp. 4 – 5; Am. Order 2 – 3; Stipulations of Fact).[2]

A. The Taxpayer's Business

The Taxpayer is in the business of selling tangible personal property at retail in South Carolina. Specifically, the Taxpayer operates a discount book retail business headquartered in Birmingham, Alabama. The Taxpayer sells books, magazines, collectible supplies, cards, and other gifts in retail stores throughout the country and online. The Taxpayer operates thirteen (13) retail locations in South Carolina.

As part of its business, the Taxpayer offers a discount program to its customers called the

[2]The parties did not stipulate that the Taxpayer has no records establishing that customers pay the Membership Fee without simultaneously purchasing tangible personal property. However, the ALC found that that fact was undisputed. (R. p. 4; Am. Order 2).

Millionaire's Club (the "Club" or "Membership Program"). A customer must pay a $25.00 annual fee to belong to the Club (the "Membership Fee"). A customer will either pay the Membership Fee separately or along with other purchases; however, the Taxpayer has no records establishing that customers pay the Membership Fee without simultaneously purchasing tangible personal property. The Club membership expires one (1) year from the date of payment of the Membership Fee, unless the membership is automatically renewed. The payment of the Membership Fee entitles Club members to the following benefits on purchases made at the Taxpayer's retail and online locations:

(i) 40% off the list price of current hardcover Books-A-Million Store Bestsellers;
(ii) 20% off the list price of all Books-A-Million designated adult hardcover books;
(iii) 10% off the marked Books-A-Million sale price of other eligible items;
(iv) Free Shipping with online purchases;
(v) Up to 40% off bestsellers and featured items online;
(vi) Periodic special promotions online and at Books-A-Million Stores; and
(vii) New members are eligible to receive a $5.00 Reward Card, which expires 30 days after activation.

The Membership Fee may be refunded if cancelled during the first thirty (30) days of a customer's membership term (new or renewal) provided the customer has not used the membership to obtain an applicable discount or benefit. Memberships automatically renew each year for one-year periods unless the customer affirmatively opts out of the automatic renewal or the membership is otherwise cancelled or terminated. So long as the customer does not opt out, the Taxpayer bills the annual Membership Fee to the credit or debit card provided when the customer initially enrolled in the Club. The Taxpayer may unilaterally terminate a customer's membership at any time and without notice for any reason in its sole discretion. The Taxpayer does not collect or remit sales tax on the cost of the Membership Fee.

B. The Audit.

On December 11, 2014, the Department sent the Taxpayer a letter informing it that its sales and use tax returns for the period beginning January 1, 2012 and ending August 31, 2015 (the "Audit Period") were selected for audit. In connection with the Department's audit, the Taxpayer provided copies of its income statements for the Audit Period. The Department's auditor compared the Taxpayer's gross proceeds of sales from the income statements to the gross proceeds of sales reported on the Taxpayer's Sales and Use Tax returns (Form ST-3). During this audit, the Department discovered that the Taxpayer was not charging sales tax on the cost of the Club membership.

On September 16, 2015, the Department issued a Notice of Proposed Assessment to the Taxpayer in the amount of $226,310.70 due in sales tax on the cost of the Club membership for the Audit Period (plus $15,703.13 in interest and $63.14 in penalties, which continued to accrue until the Administrative Law Court (the "ALC") issued its order and the Taxpayer paid its liability in full).

ARGUMENTS

In an appeal from the decision of an administrative agency, the "review of the administrative law judge's order must be confined to the record," and this Court "may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-610(B) (Supp. 2014). This Court may not reverse the ALC's decision unless it is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Id. This Court should affirm the ALC's decision because, as will be discussed throughout this brief, it is supported by substantial evidence in the record.

The issue in this case is whether the ALC correctly determined, factually, that the Membership Fee (initial and renewal) constitutes value proceeding or accruing from the Taxpayer's sale of discounted tangible personal property. Resolving this issue involves determining whether the ALC correctly applied the facts to the law. Whether the facts of a case are correctly applied to a statute or whether activities meet a statutorily defined term is a question of fact subject to the substantial evidence standard. Thus, because the issue before the Court is factual and the ALC's decision is supported by substantial evidence in the record, this Court should affirm the ALC's decision.

Additionally, this Court should affirm the ALC's decision because there is no error of law. The language of the statute at issue in this case is plain and unambiguous. The Taxpayer argues that the court should employ certain rules of statutory interpretation, but these rules are inapplicable where—as here—the language of the statute at issue is plain and unambiguous. Moreover, because the Department is charged with administrating the statute at issue, the Department's construction of the statute is entitled to deference and should not be overruled absent compelling reasons. The Department has long and consistently applied this taxing statute the same way it applied the statute to the Taxpayer. Therefore, this Court should affirm the ALC's decision.

I. THE ADMINISTRATIVE LAW COURT PROPERLY FOUND THAT THE TAXPAYER SHOULD HAVE INCLUDED THE PROCEEDS FROM ITS SALES OF CLUB MEMBERSHIPS, INCLUDING RENEWALS, IN ITS GROSS PROCEEDS OF SALES.

Under South Carolina law, "[a] sales tax, equal to [six][3] percent of the gross proceeds of sales, is imposed upon every person[4] engaged or continuing within this State in the business of

[3]S.C. Code Ann. § 12-36-1110 (2014) imposes an additional one percent sales tax beginning on June 1, 2007.

[4]For sales and use tax purposes, the term person "includes any individual, firm, partnership, limited liability company, association, corporation, receiver, trustee, any group or combination

selling tangible personal property at retail." S.C. Code Ann. § 12-36-910(A) (2014). Tangible personal property, as defined under the South Carolina Sales and Use Act, means "personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also means services and intangibles . . . the sale or use of which is subject to tax under this chapter . . . ." S.C. Code Ann. § 12-36-60 (2014). The Taxpayer is in the business of selling books, magazines, collectible supplies, cards, and other gifts in retail stores throughout the country, including South Carolina, and online. Accordingly, the Taxpayer is in the business of selling tangible personal property at retail, and the Taxpayer's business is subject to South Carolina sales tax. Pursuant to § 12-36-910(A), the measure of tax is based on the taxpayer's gross proceeds of sales. Therefore, the issue to be determined here is whether the ALC properly found that the Taxpayer's Membership Fees are includable in its gross proceeds of sales.

S.C. Code Ann. § 12-36-90 (2014) defines "gross proceeds of sales" as follows:

> [T]he **value proceeding or accruing** from the sale, lease, or rental 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) manufacturer's or importer's excise taxes imposed by the United States; or (vii) any other expenses.

(emphasis added). Thus, the value of the tangible personal property plus all value that proceeds or accrues from the sale of the tangible personal property must be included in a taxpayer's gross proceeds of sales. As will be discussed in more detail throughout this brief, the ALC properly found that the Membership Fee constitutes value that proceeds or accrues from the Taxpayer's sale of tangible personal property. The ALC applied the plain meaning rule when reading § 12-36-90 and properly concluded that gross proceeds of sales includes the value that comes from or is a

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acting as a unit, the State, any state agency, any instrumentality, authority, political subdivision, or municipality." S.C. Code Ann. § 12-36-30 (2014).

direct result of the sale of tangible personal property. (R. pp. 7, 9 – 10; Am. Order 5, 7 – 8). The ALC then analyzed the facts of this case and correctly found that the Membership Program would not exist but for the Taxpayer's sale of tangible personal property. (R. pp. 11 – 12; Am. Order 9 – 10). The ALC also correctly found that the Membership Program is inextricably linked to the Taxpayer's sale of tangible personal property. (R. p. 12; Am. Order 10). Based on this factual analysis, the ALC properly concluded that the proceeds from the Membership Fees come from the sale of tangible personal property and should have been included in the Taxpayer's gross proceeds of sales. (R. p. 12; Am. Order 10).

A review of the Taxpayer's brief demonstrates that the Taxpayer misunderstands the issue before the Court. The Taxpayer focuses on other states' sales tax laws and other factual scenarios. However, other states' sales tax laws have no bearing on this matter. As will be discussed below, the language in § 12-36-90 is plain and unambiguous. Therefore, the Court needs to look no further than the plain language of § 12-36-90 to see that the ALC properly read the statute. Additionally, other factual scenarios have no bearing on this matter. As will be explained below, the ALC properly applied the facts *in this case* to the law, and the ALC's decision is supported by substantial evidence in the record. The application of facts not before the ALC to the law does not change the fact that the Membership Fees should have been included in the Taxpayer's gross proceeds of sales. Accordingly, the Court should affirm the ALC's decision and disregard the Taxpayer's discussion of other states' sales tax laws and other sets of facts.

A. The ALC Properly Concluded that Gross Proceeds of Sales Include the Value that Comes From or is a Direct Result of the Sale of Tangible Personal Property.

Gross proceeds of sales includes "the value proceeding or accruing from the sale, lease, or rental of tangible personal property . . . ." Section 12-36-90. A plain reading of § 12-36-90 demonstrates that the ALC properly concluded that gross proceeds of sales include the value that

comes from or is a direct result of the sale of tangible personal property. (R. pp. 7, 9 – 10; Am. Order 5, 7 – 8). "The language of a tax statute must be given its plain ordinary meaning in the absence of an ambiguity therein." Beach v. Livingston, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1966). "When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning." Strother v. Lexington Cty. Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998); see also Hughes v. W. Carolina Reg'l Sewer Auth., 386 S.C. 641, 649, 689 S.E.2d 638, 643 (Ct. App. 2010) (turning to the dictionary to determine the common meaning of the term inflammable). In other words, when a statute is unambiguous, a court must rely on the usual and customary meaning of the words in the statute when reading said statute. This rule of statutory construction is known as the "plain meaning rule."

The ALC properly applied the plain meaning rule when reading the text of § 12-36-90. (R. pp. 7, 9 – 10; Am. Order 5, 7 – 8). A plain reading of § 12-36-90 demonstrates that gross proceeds of sales includes the value that comes from the sale of tangible personal property *in addition to* the value of the tangible personal property itself. The Merriam-Webster Dictionary defines "proceed" as "to come forth from a source" and "accruing" as "to come as a direct result of some state or action." See Proceed, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/proceed (last visited Mar. 7, 2017) and Accruing, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/accruing (last visited Mar. 7, 2017). Thus, applying the usual and customary meaning of the terms "proceeding" and "accruing" demonstrates that § 12-36-90 requires taxpayers to include the value that comes from or is a direct result of the sale of tangible personal property in their gross proceeds of sales. Accordingly, the ALC properly concluded that "gross proceeds of sales includes **all** value that comes from or is a direct result of the sale, lease, or rental of tangible personal property, including proceeds from fees

related to incidental services, intangibles, or other benefits." (R. p. 10; Am. Order 8) (emphasis added).

1. The ALC Properly Relied on Meyers Arnold, Travelscape, and Other Cases.

South Carolina courts have analyzed the definition of gross proceeds of sales several times and have concluded that gross proceeds of sales includes *all* value that comes from or is direct result of the sale, lease, or rental of tangible personal property. This Court analyzed the meaning of "gross proceeds of sales" in Meyers Arnold v. S.C. Tax Comm'n, 285 S.C. 303, 307, 328 S.E.2d 920, 923 (Ct. App. 1985). One of the issues in Meyers Arnold involved whether lay away fees paid in conjunction with lay away sales of tangible personal property were includable in gross proceeds of sales. Meyers Arnold, 285 S.C. at 307, 328 S.E.2d at 923. In determining whether the lay away fees were includable in gross proceeds of sales, the Court reasoned that but for the lay away sales Meyers Arnold would not receive any lay away fees; therefore, the lay away fees were included in the gross proceeds of sales and subject to tax. Id. In more general terms, Meyers Arnold holds that if a taxpayer could not collect a fee but for the sale of tangible personal property, then that fee is includable in the taxpayer's gross proceeds of sales. Furthermore, the Meyers Arnold decision suggests that "service fees or benefits that are incident to the sale of tangible personal property are part of the gross proceeds of sales and subject to sales tax." Southeastern Cinema Entertainment v. S.C. Dept. of Rev., 2014 WL 2417715, *5 (S.C. Admin. Law Ct. May 28, 2014). Accordingly, the ALC properly relied on Meyers Arnold in support of its conclusion that "[b]ut for the [Taxpayer's] sale of tangible personal property, the [Taxpayer] would not be able to sell Millionaire's Club memberships and, therefore, would not collect the Membership Fees." (R. pp. 11 – 12; Am. Order 9 – 10).

The South Carolina Supreme Court also addressed the inclusion of associated fees in gross proceeds of sales. In Travelscape, LLC v. S.C. Dept. of Revenue, 391 S.C. 89, 98, 705 S.E.2d 28, 33 (2011), the issues before the Supreme Court included whether the facilitation fee and service fee that Travelscape added to the net rate of the room being rented were includable in the taxpayer's gross proceeds of sales. Id. The Supreme Court explained that "[t]he facilitation and service fees are retained by Travelscape as compensation for its role in [furnishing accommodations]." Id. at 95, 705 S.E.2d at 31. Thus, Travelscape's customers were paying for accommodations, and the fee for the taxpayer's reservation service was merely incidental to the purchase of the accommodations. The Supreme Court concluded "the fees charged by Travelscape for its services are subject to sales tax under the plain language of section 12-36-920(A)[5] as gross proceeds." Id. at 98, 705 S.E.2d at 33. Here again, the Court included a fee in the taxpayer's gross proceeds of sales that was not the amount charged for the taxable item – accommodations. Therefore, based on the analysis in Travelscape, the ALC properly concluded that because the "Membership Fees are payment for services or benefits that are incident to the sale of tangible personal property," such are includable in the Taxpayer's gross proceeds of sales. (R. p. 12; Am. Order 10).

2. The Taxpayer Fails to Read the Plain Language of Section 12-36-90.

Despite the above, the Taxpayer argues that the plain language of § 12-36-90 does not support the ALC's order. Specifically, the Taxpayer argues that gross proceeds of sales only include the amount charged for the tangible personal property. The Taxpayer argues that because

[5]Even though this statute only said "gross proceeds," the Court used the definition of "gross proceeds of sales" found in § 12-36-90 when interpreting this statute. Accordingly, the Supreme Court's analysis of the term "gross proceeds" and "gross proceeds of sales" is instructive here.

the Membership Program is an intangible, proceeds from the sale of the Membership Program cannot be included in its gross proceeds of sales.[6] As explained previously, § 12-36-90 states "gross proceeds of sales" means "the value proceeding or accruing from the sale, lease, or rental of tangible personal property . . . ." Thus, the Taxpayer's reading of § 12-36-90 requires deleting from the statute the phrase "proceeding or accruing." As our Supreme Court has held, "a statute should be construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . ." Matter of Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). Therefore, the Taxpayer's reading of § 12-36-90 must fail as it renders the "value proceeding or accruing" language meaningless. When reading § 12-36-90 so as to give meaning to all the words in the statute, it is clear that § 12-36-90 is broad and encompasses the total value of a sale, not simply the amount paid for the tangible personal property. As such, the Taxpayer, not the ALC, fails to read the plain language of § 12-36-90.

Moreover, a review of South Carolina case law demonstrates that gross proceeds of sales include the value of services and intangibles that are derived from the sale of tangible personal property. See e.g., Travelscape, 391 S.C. at 98, 705 S.E.2d at 33; Meyers Arnold, 285 S.C. at 307, 328 S.E.2d at 923; Textile Restoration Services, Inc. v. S.C. Dept. of Rev., 2015 WL 7443800 *4 (S.C. Admin. Law Ct. Nov. 12, 2015) (finding the Department properly included the charges incident to the dry cleaning service in the taxpayer's gross proceeds of sales); Southeastern Cinema Entertainment v. S.C. Dept. of Rev., 2014 WL 2417715 (S.C. Admin. Law Ct. May 28, 2014) (finding that "service fees or benefits that are incident to the sale of tangible personal property are

[6]The Taxpayer attempts to compare the Membership Program to a gift card, for example. Unlike gift cards or other similar intangibles, the Membership Program is not an alternative form of consideration. Thus, the fact that alternative forms of consideration are not included in gross proceeds of sales is irrelevant.

part of the gross proceeds of sales and subject to sales tax"); and Tronco's Catering, Inc. v. S.C. Dept. of Rev., 2010 WL 5781622 *3 (S.C. Admin. Law Ct. Apr. 12, 2010) (finding "the value of the sale of catered meals includes service, labor, and room charges. Such charges are incidental to and merely enhance the value of the sale of catered meals.").[7] Despite all the cases that support the ALC's decision here, the Taxpayer relies on the ALC's incorrect and distinguishable decision in Alltel v. S.C. Dept. of Rev., 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015).[8] Specifically, the Taxpayer seems to rely heavily on the ALC's conclusion in Alltel that because the indemnification coverage at issue was not tangible personal property, then proceeds from the sale of the indemnification coverage do not proceed or accrue from the sale of tangible personal property.[9] In other words, the Taxpayer and the ALC in Alltel read § 12-36-90 to apply only to the amount paid for tangible personal property.[10] Specifically, the ALC in Alltel incorrectly focused on whether the indemnification coverage met the definition of tangible personal property. 2015 WL 7681302 *12. However, as discussed above, § 12-36-90 does not define gross proceeds of sales as only the amount paid for tangible personal property. Rather, gross proceeds of sales

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[7]A review of the case law also demonstrates that the Department has long construed § 12-36-90 so as to include in gross proceeds of sales the value of services and intangibles that are derived from the sale of tangible personal property. Such construction should be "accorded the most respectful consideration and [should] not be overruled absent compelling reasons." Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (internal citation omitted).

[8]The Department appealed the ALC's decision in Alltel; subsequent to filing the appeal, the parties resolved the matter and the Department withdrew the appeal.

[9]The ALC in Alltel misunderstood the transaction at issue – the sale of wireless communication services and devices, which falls under the definition of tangible personal property, with the addition of insurance/indemnification coverage. 2015 WL 7681302 *1.

[10]See the Taxpayer's Initial Brief on page 6 wherein the Taxpayer states "in order to ascertain whether gross proceeds of sales exist, this court must first ascertain whether the membership itself constitutes tangible personal property."

include the proceeds from the sale of tangible personal property as well as the value proceeding or accruing from such sale. See § 12-36-90. Accordingly, the Taxpayer's reliance on the Alltel decision is misplaced.

Because the vast majority of South Carolina case law does not support the Taxpayer's argument, the Taxpayer urges this Court to follow other states despite these states having drastically different sales tax statutes. The Taxpayer cites decisions and policies from Tennessee, Florida, and Virginia. These decisions and policies provide no persuasive guidance because the statutes in those states are much narrower than South Carolina's sales tax statutes. Specifically, Tennessee only includes "the total amount for which . . . tangible personal property is sold . . ." in its tax base, Florida only includes "the total amount paid for tangible personal property . . ." in its tax base, and Virginia only imposes sales tax on "the transfer of title or possession of tangible personal property . . . for a consideration." See Tenn. Code Ann. § 67-6-102(25) (1994); Technical Assistance Advisements 89(A)-022 (Apr. 12, 1989) (citing former Fla. Stat. § 212.02(17)); and Commonwealth of Virginia Department of Taxation Letter to Books-A-Million, Inc. (Feb. 4, 2009) (citing the then current version of the definition of "sale" found in Va. Code § 58.1-602 and VA Public Document #84-89 (7/3/84)). Contrary to the Taxpayer's assertion, the aforementioned statutes are not similar to South Carolina's statutes. Section 12-36-90 is much broader and includes the value proceeding or accruing from the sale of tangible personal property. Similarly, § 12-36-910(A) is much broader, imposing sales tax on all persons in the business of selling tangible personal property, not merely on the sale of tangible personal property. Thus, any analysis from Tennessee, Florida, or Virginia provides no guidance in this matter.

3. Section 12-36-90 is Not Ambiguous.

The Taxpayer also argues that § 12-36-90 is ambiguous and, thus, the ALC should have construed the statute to exclude the Membership Fees from the Taxpayer's gross proceeds of sales. When determining whether a statute is ambiguous, courts look at whether *the language in the statute* can have more than one reasonable interpretation. See Kennedy v. S.C. Retirement System, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001). Thus, if the language of a statute only has one reasonable interpretation, then the statute is unambiguous and the court need not apply any rules of statutory construction.

Here, the language in § 12-36-90 has only one reasonable interpretation – that gross proceeds of sales include the value that proceeds or accrues from the sale of tangible personal property. When dictionary definitions are placed into the statute "gross proceeds of sales" means the value that comes from or is a direct result of the sale of tangible personal property. Based on that reasonable interpretation, the ALC properly applied the facts at issue to the law and determined that the Membership Fees were includable in the Taxpayer's gross proceeds of sales. The Taxpayer failed to set forth any reasonable interpretation of § 12-36-90. To the contrary, the Taxpayer's interpretation requires deleting the words "proceeding or accruing" from the statute. Any interpretation that requires deletion of words is inherently not reasonable.

Despite the plain language of the statute, the Taxpayer asserts, without citing any authority, that if the application of different sets of facts to the statutory language creates different results, then the statute is ambiguous. To support this assertion, the Taxpayer points to the section in the Department's Sales and Use Tax Manual that addresses a different set of facts than the facts at issue here. Specifically, the Taxpayer focuses on the section where the Department excluded from gross proceeds of sales the membership fees of membership-only warehouses where all

membership types receive the same benefits. S.C. Sales and Use Tax Manual, ch. 6, p. 9 (2016 Ed.).[11] The Department's exclusion of membership fees of certain membership-only warehouses from gross proceeds of sales is irrelevant as these facts are not before the Court. Moreover, the fact that the application of different sets of facts to the statutory language may result in different outcomes does not render the statute ambiguous. The Department's application of other facts to § 12-36-90 has no bearing on the plain language of the statute or the application of the facts before this Court to the statute. As such, this Court should affirm the ALC's conclusion that § 12-36-90 unambiguously provides that gross proceeds of sales include the value that comes from or is a direct result of the sale of tangible personal property.

B. The ALC Properly Found that the Membership Fees Constitute Value Proceeding or Accruing from the Sale of Tangible Personal Property.

The proceeds from the Taxpayer's sales of Club memberships (initial and renewal) come from or are a direct result of the sale of tangible personal property and, thus, are includable in the Taxpayer's gross proceeds of sales. The Taxpayer sells books, magazines, collectible supplies, cards, and other gifts. The Taxpayer also offers a Membership Program to its customers that allows only Club members to receive discounts on books and free shipping on online purchases. The Taxpayer's customers must pay the Membership Fee in order to receive these benefits. Moreover, the Membership Program exists solely because of the Taxpayer's sales of tangible personal property. If the Taxpayer did not sell tangible personal property it could not offer the Membership Program as that program focuses entirely on discounts on purchases and free shipping of tangible personal property sold by the Taxpayer. The Taxpayer could not offer discounts and free shipping

[11]The Taxpayer also ignores the section of the manual that mirrors the facts in this case and concludes that membership fees that entitle the purchaser to discounted tangible personal property or that allow one type of member to receive different benefits than other members or nonmembers are taxable. See S.C. Sales and Use Tax Manual, ch. 6, p. 3.

if it did not have tangible personal property to discount and ship. As such, the ALC properly found that "the Membership Fees are . . . intertwined with and inseparable from the [Taxpayer's] sales of tangible personal property . . . ." (R. p. 12; Am. Order 10). Accordingly, the Membership Program and associated Membership Fees are a direct result of the Taxpayer's sale of tangible personal property. The ALC then properly applied those facts to the law and determined that because the Membership Fees come from or are a direct result of the Taxpayer's sale of tangible personal property, the Membership Fees constitute value proceeding or accruing from the sale of tangible personal property and are includable in the Taxpayer's gross proceeds of sales. Therefore, because the substantial evidence in the record supports the ALC's conclusion, this Court should affirm the ALC's decision. See Boggero v. S.C. Dept. of Revenue, 414 S.C. 277, 280, 777 S.E.2d 842, 843 (Ct. App. 2015) (holding that whether the facts of a case are correctly applied to a statute or whether activities meet a statutorily defined term is a question of fact subject to the substantial evidence standard).

1. The ALC Properly Found that the Membership Program is, Among Other Things, Inextricably Linked to the Sale of Tangible Personal Property.

Despite the ALC's Order being soundly based on the plain language in § 12-36-90 and applicable case law, the Taxpayer attempts to use two statements[12] in the ALC's Order to assert that "the ALC Order is premised on the notion that sales of [Club memberships] are 'inextricably linked' to sales of tangible personal property." (Init. Brief of Appellant 20). However, the ALC did not base its decision solely on the fact that the Membership Program is inextricably linked to the Taxpayer's sale of tangible personal property. Rather, the ALC used the "inextricable link"

[12]The ALC Order provides, in part, that "the Membership Fees are inextricably linked to, and incapable of being separated from, the sale of tangible personal property" and "the Membership Fees are so intertwined with and inseparable from the [Taxpayer's] sales of tangible personal property . . . ." (R. p. 12; Am. Order 10).

analysis as one of many ways to analyze the facts and explain its finding that the Membership Fee constitutes value proceeding or accruing from the sale of tangible personal property. Specifically, the ALC looked at the plain language of § 12-36-90 and applicable case law and answered the following four questions to determine if the Membership Fee constitutes value proceeding or accruing from the sale of tangible personal property: (1) Was the Membership Fee a direct result of the sale of tangible personal property? (2) But for the Taxpayer's sale of tangible personal property, would the Taxpayer receive the Membership Fees (or could the Membership Program exist)? (3) Are the Membership Fees merely payment for services or benefits that are incident to the sale of tangible personal property? (4) Are the Membership Fees inextricably linked to, and incapable of being separated from, the sale of tangible personal property?[13] In answering those four questions, the ALC found that the Membership Program exists solely because of the Taxpayer's sale of tangible personal property and that the Membership Program could not be separated from the Taxpayer's sale of tangible personal property. (R. pp. 11 – 12; Am. Order 9 – 10). As such, the ALC properly found that the Membership Fees are includable in the Taxpayer's gross proceeds of sales. (R. p. 12; Am. Order 10).

2. An Inextricable Link Between the Sale of Tangible Personal Property and the Provision of a Service, Benefit, or Intangible Exists When the Two are Incapable of Being Separated.

The ALC properly found that the Membership Program is inextricably linked to the Taxpayer's sale of tangible personal property. (R. p. 12; Am. Order 10). Merriam Webster's Dictionary defines "inextricable" as being "impossible to separate" or "incapable of being disentangled or untied." See Inextricable, Merriam-Webster Dictionary, http://www.merriam-

[13]These four questions are just different ways of asking if the Membership Fees constitute value proceeding or accruing from the sale of tangible personal property.

webster.com/dictionary/inextricable (last visited Apr. 5, 2017). The Membership Program is incapable of being separated from the Taxpayer's sales of tangible personal property, for everything Club membership provides its members is tied to the sale of tangible personal property. This inextricable link is one of the factors that demonstrates the Membership Fee constitutes value proceeding or accruing from the sale of tangible personal property. See supra section I.B.1.

Despite the above, the Taxpayer argues that the "inextricable link" analysis cannot be the applicable test because, according to the Taxpayer, the Department ignores such link in numerous examples. However, the Department does not ignore the inextricable link in the examples cited by the Taxpayer. Rather, no inextricable link exists between the sale of tangible personal property and the services provided by the businesses the Taxpayer references. The fact that the Taxpayer believes such a link does exist in its examples demonstrates that the Taxpayer does not understand what creates an inextricable link between the sale of tangible personal property and an incidental service, benefit, intangible, etc. Specifically, the businesses the Taxpayer attempts to compare itself to – veterinarians' offices, doctors' offices, and other similar service providers – provide services that are completely separate from the sale of tangible personal property. A veterinarian could sell pet food and supplies without offering veterinarian services. Numerous pet supply chains in existence demonstrate the viability of a pet supply only business. Similarly, a veterinarian does not have to offer pet supplies in order to complete its veterinarian services. Because the two lines of business can be separated such are clearly not inextricable.[14] An

[14]It is also important to note that South Carolina law explicitly treats veterinarians differently from the Taxpayer. Pursuant to S.C. Code Ann. § 12-36-110(1)(*l*) (2014), "veterinarians are deemed to be the users or consumers of the property whether used in the rendering of professional services or sold outright as part of the veterinarian practice and not furnished as a part of professional services rendered." In other words, in the case of veterinarians, the retail sale occurs when the veterinarian purchases tangible personal property, not when it sells

ophthalmologist can sell glasses and sunglasses without offering ophthalmological services. At the same time, an ophthalmologist could only offer eye exam services and not offer to sell glasses or sunglasses. Because the two lines of business can be separated, such are clearly not inextricable. A funeral home could sell funeral related supplies such as caskets and urns without also offering mortuary services. This is demonstrated by the fact there are companies, which are not mortuaries, that are in the business of selling caskets and urns. At the same time, it is possible for funeral homes to offer mortuary services without being the entity that sold the casket or urn, or perhaps for those where no casket or urn is necessary. Because the two lines of business can be separated, such are clearly not inextricable. Thus, a proper application of the definition of "inextricable" demonstrates that the sale of tangible personal property and the provision of services by the businesses the Taxpayer references are not inextricably linked. As such, any attempt by the Taxpayer to compare said businesses to its own business is misguided.

In a further attempt to convince this Court that the inextricable link analysis does not apply, the Taxpayer cites several regulations under S.C. Code Ann. Regs. 117-308 (2012) and S.C. Code Ann. Regs. 117-309 (2012). The Taxpayer cannot compare itself to any of the businesses to which the cited regulations pertain. Regulation 117-308 applies to service providers who may also sell tangible personal property at retail. Generally, Regulation 117-308 and the subsections thereunder explain that while the provision of services is not subject to sales tax (unless the tax is specifically imposed by statute on the particular service), any service provider who also sells tangible personal property must obtain a retail license and report sales tax on such sales. For example, doctors do not have to remit sales tax on drugs they use as part of the provision of their service, but if a doctor

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the tangible personal property. Therefore, pursuant to statute, veterinarians are not retailers and not subject to collecting and remitting sales tax.

keeps a stock of drugs and regularly sells such drugs at retail then the doctor must remit sales tax on such drug sales. See S.C. Code Ann. Regs. 117-308.3 (2012). The Taxpayer, unlike a doctor, is not in the business of providing a service. Rather, the Taxpayer is engaged in the business of selling tangible personal property at retail and offering a discount program to its customers. Thus, because the Taxpayer is not a service provider, Regulation 117-308 has no bearing on this matter.

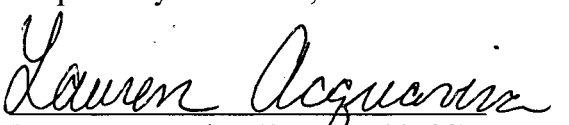
Similarly, Regulation 117-309 has no bearing on this matter. Regulation 117-309 applies to retailers that may also provide separate services. Generally, Regulation 117-309 and the subsections thereunder explain that when a retailer also provides separate services, those separate services are not includable in gross proceeds of sales. In other words, when the service can be separated from the sale of tangible personal property, the service is not taxable. For example, photographers are primarily engaged in the business of selling tangible personal property – photographs. Such sales are taxable. However, in cases where the photographer is just providing a service, such as tinting or coloring pictures, "the receipts from such tinting or coloring would not be subject to tax . . . ." S.C. Code Ann. Regs. 117-309.2 (2012). Similarly, undertakers often sell tangible personal property in conjunction with rendering burial services. Such sales are subject to tax. However, because an undertaker could sell tangible personal property without rendering burial services and vice versa, the receipts from the services are not taxable when separately stated on the invoice. See S.C. Code Ann. Regs. 117-309.8 (2012). The Taxpayer, unlike photographers and undertakers, is not engaged in the business of selling at retail and providing a separate service. As previously explained, the Taxpayer's Membership Program is tied to and could not exist without the Taxpayer's sale of tangible personal property. Therefore, because the Taxpayer does not provide separate services that could exist on their own, Regulation 117-309 has no bearing on

this matter.[15] Accordingly, the ALC properly found that, among other things, the Membership Program is inextricably linked to the Taxpayer's sale of tangible personal property and, thus, the Taxpayer's Membership Fees are includable in its gross proceeds of sales.

CONCLUSION

For the reasons explained more fully above, or for any ground appearing in the record on appeal, this Court should affirm the ALC's decision as the decision was supported by substantial evidence and the ALC did not make any errors of law that affected the decision.

Respectfully Submitted,



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[15]The Taxpayer also attempts to compare its Membership Program to an extended warranty. One key difference exists between the Membership Program and an extended warranty, though, which makes an extended warranty capable of being separated from the sale of tangible personal property. Any business can sell an extended warranty on a product sold by another business as long as that business can provide the service that goes along with the warranty. For example, a mechanic could sell extended vehicle warranties without selling the vehicle because a mechanic can service the vehicle pursuant to the warranty. Unlike an extended warranty (or any other similar service contract), only the Taxpayer can offer its Membership Program as only the Taxpayer can discount its products and ship its products for free. As such, the Membership Program is not comparable to an extended warranty or any similar service contract.

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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

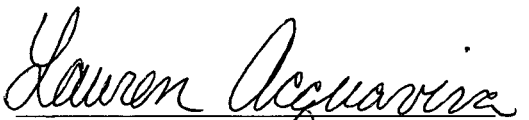
Books-A-Million, Inc.,.....Appellant,

v.

South Carolina Department of Revenue, ...Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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