THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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 REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. STATEMENT OF ISSUES ON APPEAL

A. 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?

II. ARGUMENTS

A. The ALC Erred in Holding that the Amounts Collected by Books-A-Million for the Membership Cards are Subject to Sales Tax.

1. General

The ALC Order held that "Membership Fees" collected by Books-A-Million for the sale of membership cards were subject to sales tax. The Order holds that the Membership Fee is subject to sales tax as gross proceeds of sale because the membership cards are sometimes sold in conjunction with the sale of tangible personal property (books, CDs and the like).

The Department's brief repeatedly states that the sales tax statutes are "plain and unambiguous." (e.g. Respondent's brief at 5.) Indeed they are. The two relevant statutes are section 12-36-90 and section 12-36-130. Where does section 12-36-90 provide that sales tax is charged in a bundled transaction (i.e., the purchase of two or more items) on the sale of an otherwise exempt item (intangible)?

S.C. Code Section 12-36-90 provides in part:

> 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;
   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.

It does not. In fact, the quoted language twice recites gross proceeds means the value proceeding or accruing from the sale of "tangible personal property." Code Section 12-35-140 defines the term "tangible personal property" and reads:

> The term "tangible personal property" means personal property which may be seen, weighed, measured, felt or touched or which is in any other manner perceptible to the senses, except notes, bonds, mortgages or other evidences of debt and stocks and shall include rooms, lodgings or accommodations furnished to transients for a consideration.
>
> For the purposes of this chapter the term "tangible personal property" shall be interchangeable with and apply with equal force and effect to services, accommodations *and intangibles*, including communications, *as are specifically provided for in this chapter.* (Emp. added).

Intangibles "specifically provided for" includes electricity and communications, but not membership cards. So, by necessity, Respondent's entire case rests on the value "proceeding or accruing" language in the statute.

The second relevant statute is section 12-36-130. The Department states it is likewise plain and unambiguous. So does where section 12-36-130 include the sale of intangibles in the sales tax base?

Section 12-36-130, which defines "sales price" 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, losses, 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 excise tax imposed by the United States.
>
> (2) The term does not include:

(a) A cash discount allowed and taken on the sale;

(b) An amount charged for property, which is returned by the purchaser, and the full amount is refunded in cash or by credit;

(c)The value allowed for secondhand property transferred to the vendor in partial payment;

(d) The amount of any tax imposed by the United States with respect to retail sales, whether imposed upon the retailer or consumer, except for manufacturers or importers excise taxes.

Simply put, it does not. It does say sales price includes the total amount without any deduction for the cost of materials used, labor or service costs. The labor or service cost language is the basis for the Court's holding in *Meyers Arnold v. SC Tax Commission*, 285 SC 303, 328 SE2d 920 (1985). The Court held excluding layaway costs from the sales tax base violated the plain, no deduction for labor or service cost, language. Of course, a membership card is not a material, labor or service cost.

Neither statute explicitly addresses bundled transactions. As discussed below, the DOR has addressed this issue on many occasions.

2. Bundled Transactions

A bundled transaction is the sale of tangible personal property as well as a service or intangible. This case involves a bundled transaction as customers in many cases purchased tangible personal property (books) as well as an intangible, (a membership card) (In other cases, i.e. renewals, the customer purchases only an intangible, so the renewals were not bundled transactions.) Appellant did not keep records or capture this information but obviously some people only purchased memberships, for example as gifts during the Christmas.

Respondent's entire case is necessarily based upon the "value proceeding or accruing" the sale of tangible personal property as capturing the sale of intangibles in the sales tax base. But we

know this is not accurate. Customers who purchased a book and a gift card at Books-A-Million are not charged sales tax on the gift card, even though according to the DOR's analysis, the sale produces "value" proceeding or accruing the sale of the book. Customers who purchased a prepaid calling card along with a book similarly were not charged sales tax on it. Why not? They are intangibles, and in a bundled sale, each item purchased is separately examined. To belabor the point, there is no larger retailer than Walmart. Customers buy exempt (unprepared foods[1]) and non-exempt goods at Walmart. Each item is separately analyzed for sales tax purposes in a bundled transaction. Customers don't pay sales taxes on groceries when they also purchase toasters or children's toys as groceries (like intangibles) are exempt. It doesn't matter that the groceries are "value proceeding or accruing" the purchase of the toaster and the children's toys. To further belabor the point, a customer who buys a bushel of apples as well as an apple peeler and an apple juicer only pays sales taxes on the peeler and the juicer, and not on the apples. And this is the law in South Carolina and virtually every other state with a sales tax.

Hellerstein & Hellerstein, *State Taxation* discusses bundled transactions at length, although it primarily deals with the sale of tangible personal property and the sale of a service (and not intangible). Hellerstein §12.08 [1][c] accordingly states:

> [c] **Services Coupled With a Transfer of Separate Property**
>
> In deciding whether a transaction involves the sale of tangible personal property or the sale of services, courts sometimes confuse services that are *separate and apart from the property* transferred or licensed with services *that are embodied in the property*. One may illustrate this point by comparing two different types of transactions – the licensing of motion picture films by producers to exhibitors, and transactions engaged in by landscape designers. Motion picture producers employ a large amount of expensive talent in producing films, including directors, actors, and others. Since the results of such work are embodied in the films that

[1] Unprepared foods are exempt from sales taxes, section 12-36-2128(75).

> are delivered to exhibitors, however, most states tax motion picture rentals as licenses to use tangible personal property.
>
> Landscape designers also use services in preparing the land and planting trees, shrubs, and flowers. Although they transfer shrubs, trees, and plants to their customers, the services are not embodied in those articles in the typical case in which landscape designers purchase trees and shrubs from a nursery. The trees and shrubs are thus separate and apart from the services, except for the service involved in planting them, in contrast to the motion picture negative and prints, which embody the services. Consequently, if a landscape designer separates the price of the trees and shrubs from the planting and other service charges, the sales tax will apply only to the price of those articles. No sales tax will be payable on the general landscaping work or the planting of trees and shrubs.

South Carolina follows the rules stated in Hellerstein. As argued at length on pgs. 21-23 of Appellant's Initial Brief, South Carolina does not include service charges in the sales tax base. When Vets sell pricey dog good, Ophthalmologists sell eye glasses, jewelry repairmen sell jewelry, barbershops and beauty shops sell shampoos, undertakers sell caskets or interior decorators sell mirrors or curtains, sales tax is imposed on the tangible personal property and not on the services, even if they charged in the same transaction. And this is so regardless if it is all contained in one bill, i.e. the value proceeding or accruing from the sale of the mirrors and curtains includes interior decorating services. And it doesn't matter if they are "inextricably linked," i.e. the customer wouldn't have purchased the mirror or curtains but for the interior decorator's services, or the services constitute value proceeding or accruing the sale of tangible personal property.

Hellerstein, *Id.*, also notes:

> Some courts have recognized that the "true object" test (whatever its merit) should be applied only to cases in which the services are embodied in the tangible article transferred to the buyer. A bankruptcy case involving a California sales tax assessed against a correspondence school raised that question. The taxpayer offered a large number of courses in drafting, electrical service, radio and television repair, and other trades. As part of each course, the student received books, printed lessons, and, where applicable,

training kits and tools. The taxpayer charged tuition for each course, without separate charges for such items.

The taxpayer contended:

> that the true object of its contracts was the educational service rather than the personal property transferred, and that a single contract calling for both the rendition of services and the transfer of property cannot be taxable in part and nontaxable in part. Debtor argued that if the transaction is severed, the true object test would be rendered meaningless; it would no longer be necessary to determine the overall object of the mixed contract, as each part would then be treated separately.

The court disagreed:

> The Debtor's reliance on the true object test is misplaced. The test is appropriate where the services rendered are inseparable from the property transferred that is, where the services, so to speak, find their way into the property. All the examples used in Regulation 1501 to illustrate the true object test involve transactions in which the services become an integral part of the property; e.g. the artist's skill and labor are embodied in his painting; the record keeping, tax, and similar services of a firm which performs business advisory services are embodied in the forms, binders, and other property transferred during the course of the transactions...
>
> Thus, the true object test should be used where the services and the property are inseparable and is inapplicable where these two elements are distinct.

The correspondence school rendered services that were separate and apart from, and not embodied in, the books, lessons, or other tangible personal property provided. These services included grading examinations, monitoring the students' progress, and consulting with instructors by mail or telephone. The court sustained the tax only on the "deemed retail prices" of the property furnished to the students.

South Carolina follows this as well. Sales tax is imposed on the dog food, eye glasses, jewelry, shampoo, caskets, and mirrors. But the sales tax base only includes the tangible personal property and not the services.

Lastly, Hellerstein, *Id.*, discusses the bundled transaction further as follows:

> Citing this treatise, the California Court of Appeal similarly distinguished between "mixed transactions" and transactions in which the nontaxable service or intangible is "inseparably bundled" with the taxable sale of tangible personal property. The case involved optional service contracts sold along with computer products for a single lump-sum price. When placing orders, however, customers could select from a menu of options either to "upgrade" or "downgrade" a standard package. For example, a typical computer purchase package might include a standard service contract in the lump-sum price, but the purchaser could opt out of the service and reduce the lump-sum price by a specified amount. Similarly, the purchaser could agree to increase the purchase price by a specified amount in order to extend the service contract time period or to receive premium services. The effect of these selections on the lump-sum price was identified to the consumer during the order process but was not separately stated on the final receipt or invoice.
>
> ****
>
> The determinative inquiry, according to the court, was whether the transactions were bundled or mixed. If bundled, the entire lump sum would be a taxable sale of tangible personal property, assuming that the "true object" of the transaction could be found to be the sale of a computer product, as argued by both Dell and the SBE. If, however, the transactions were mixed, then "the separate elements of the transaction are analyzed as separate transactions for tax purposes. The tangible property aspect of the transaction is taxed and the service aspect of the transaction is not taxed.
>
> ****
>
> Thus, the court held:
>
> > [T]he proper approach under California law is to tax the computer (tangible personal property) and not the service contract (service or intangible). As other courts have recognized, "when there is a fixed and an ascertainable relationship between the value of the article and the value of the services rendered, and each is a consequential element capable of a separate

> and distinct transaction, then the elements must be analyzed as separate transactions for tax purposes.

This discussion is only partially on point, but it uses the same "inextricable link" as the DOR brief and the ALC decision. Our case does not involve the sale of tangible personal property and a related service, but rather the sale of tangible personal property and a completely separate intangible. The only link is that they are sometimes purchased in the same transaction.

A classic bundled transaction is found in SC Private Letter Ruling #92-5 wherein customers purchased a package deal for one price of a dinner theater consisting of a four-course meal and a "wild 1800's" show. At issue was whether admissions and sales taxes were imposed on the entire ticket price. The PLR noted "there is not one true object, but two – the sale of a meal and the sale of entertainment. They are sold together, and one is not incidental to the other." The PLR held that "ABC will only be required to remit the sales tax on that portion of the charge representing the price of the meal and the admissions tax on that portion of the charge representing the price of admission, provided the price breakdown is reasonable..." The former Tax Commission distinguished *Meyers Arnold* as follows:

> In addition, ABC is distinguishable from the above cited cases and decision of *Meyers Arnold v. South Carolina Tax Commission, supra*; Regency Towers Association, Inc. v. South Carolina Tax Commission [maid service at hotel], supra; and Commission Decisions #90-38 and #91-64 [engraving charges as part of the sale of trophies]. These cases and decisions fall into the class of transactions whereby "the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold..." As such, "the vendor is engaged in the business of selling at retail, and the tax which he pays ... [is measured by the total cost of article and services]."

Accordingly, the value of the "wild 1880's" service (or intangible) was not included in the sales tax base, notwithstanding that it appeared on the same ticket receipt, i.e. it was value

proceeding or accruing the sale, and was inextricably linked, i.e. you couldn't have one without the other.

To repeat, the above is a bit confusing – they all involve the sale of a service rather than the sale of an intangible but the issue is the same: should the cost of an intangible be included in the sales tax base of the tangible? Hellerstein and the DOR agree, each should be analyzed separately. Intangibles are exempt from sales taxes and the DOR concedes a membership card is an intangible.

3. The Department Fails to Distinguish between the Sales at Issue in this Case and Sales of Other Memberships.

The thrust of the ALC Order is as follows:

> Customers pay the Membership Fee to obtain discounts and free shipping on their purchases of tangible personal property. Thus, the Membership Fee is a direct result of the sale of tangible personal property. But for the [Appellant]'s sale of tangible personal property, the Appellant's would not be able to sell Millionaire's Club memberships and, therefore, would not collect Membership Fees.

But the "direct result" test is not followed by the DOR. Chapter 6, page 9 of the DOR's South Carolina Sales and Use Tax Manual (2017 Ed.) states that sales of certain memberships are not included in the sales tax base.

> 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;[57]

(emphasis added). In the very recent 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 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, this would make it less subject to sales taxes than a "membership-only warehouse."

One other DOR Policy document makes this plain. At issue in SC PLR #90-8 was

> At what point, if at all, are transactions related to XYZ's "Travel Program" program subject to the sales and accommodations taxes – upon sale of the travel points or upon their redemption?

XYZ Resorts Travel Company, as part of its "Travel Program", was selling memberships to the general public in a travel club. Participants entered into an agreement with XYZ to purchase travel points, redeemable at the company's various resort facilities, and with companies that have contracted with XYZ. The travel points were valid for five years and could be used, in lieu of cash, for overnight accommodations, meals, greens fees and various services. The points could also be used for automobile rentals and airline tickets.

The DOR held that the travel points were not subject to sales taxes *until redeemed*:

> Here, the "consideration" is not the cost of the points in that, no transfer of tangible personal property or accommodations has taken place at the time tie points are purchased.
>
> The transfer (exchange, etc.) of tangible personal property or accommodations takes place when the travel points are redeemed. The original purchase price of the travel points is the value of the "consideration."
>
> The transactions that are subject to the sales and accommodations taxes are those in which travel points are redeemed for tangible personal property or accommodations.

4. The ALC's and Department's Reliance on *Meyers Arnold* is Misplaced.

The ALC Order holds that notwithstanding the lack of statutory language subjecting membership cards to sales tax, the amounts collected for membership cards become subject to sales tax as gross proceeds of sale because the membership card was sold in conjunction with the sale of tangible personal property. The ALC Order and Respondent's Brief principally relies on *Meyers Arnold v. S.C. Tax Commission*, 285 S.C. 303, 328, S.E.2d 920 (1985), in support of its contention. Respondent's Brief at p. 9 states:

> 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.

In *Meyers Arnold*, the taxpayer was a merchandise retailer who allowed customers to purchase its merchandise either outright or under a layaway plan, for which the retailer charged a non-refundable layaway fee. *Id.* at 307, 303 S.E.2d at 923. The retailer "retain[ed] the goods purchased until the full price [of the retail merchandise was] paid." Id. The retailer paid sales tax on the layaway fees and sought a refund from the Tax Commission. *Id.* at 304, 307, 303 S.E.2d at 921, 923. The pertinent question before the Court of Appeals was whether the "fees charged by Meyers Arnold on sales made under its lay away plan are subject to sales tax." *Id.*

The parties in *Meyers Arnold* entered into a Stipulation of Facts (Appellant's Correspondence to Judge McLeod dated May 26, 2017 Enclosing Proposed Order and Portions of *Meyers Arnold* Record at pp. 24-25; R. p. 92-3. The Stipulation stated in relevant part:

> 6. The customer selects the merchandise he desires to purchase and elects to pay the full price in cash or by charge and take delivery, or not pay the full price and not take delivery by paying for the item on the lay away plan. If the lay away plan is elected, Meyers Arnold agrees to hold the merchandise for a period of time, while the customer makes monthly payments on the account.
>
> 7. The customer makes payments, and when the purchase price has been paid in full, the customer is entitled to possession of the merchandise.

The Tax Commission ruled against the Taxpayer on this issue, stating:

> The final issue concerns the taxability of the gross proceeds from layaway sales. If a customer wishes to make a purchase and pay for the item over a period of time, Meyers-Arnold provides a layaway plan in which the property is kept by the store and the customer makes periodic payments until the full purchase price is paid. Upon final payment, the customer receives the property. The customer pays a One Dollar, nonrefundable fee which is included on the layaway form as a separate charge.
>
> We find that the lay-away fee of One Dollar is subject to the sales tax. The tax is measured against the gross proceeds of sales and §12-35-30 states that gross proceeds of sales mean the value proceeding from the sale of tangible personal property *and that no reduction shall be given for the cost of labor or service or any other expense whatsoever*. Here the One Dollar fee is to cover the cost of the layaway plan and is part of the gross proceeds of sales and no reduction of the gross proceeds is allowed. The One Dollar is charged on all layaway sales and is nonrefundable.
>
> *We find further support for our position in §12-35-120 which defines sales price as including any services that are a part of the sale*. Here the One Dollar charge is made on all sales under the layaway plan and the evidence shows that a sale would not be made unless the One Dollar fee were charged. Thus the statutory definition of sales price requires the inclusion of the One Dollar since such charge is a required part of the sale. R. pp. 89-90.

The Tax Commission argued in its brief before the Court of Appeals that the charge was a service fee for the sale of merchandise, and thus taxable. On pp. 4-5 of its brief (Appellant's Correspondence to Judge McLeod dated May 26, 2017 Enclosing Proposed Order and Portions of *Meyers Arnold* Record at pp. 57-58; R. p. 125-26) the Tax Commission argued:

> *The statutory definition specifically states that the value proceeding from the sales shall not be reduced by "any deduction on account of ***labor or service cost***or any other expenses whatsoever***." Such a definition is very broad and includes the service of a lay-away plan provided by Meyers Arnold.* The fee for the lay-away service is charged to cover additional expenses incurred by Meyers Arnold for such items as storage and additional paperwork associated with a sale on lay-away. Thus, if the lay-away fee is part of "the value proceeding or accruing from the sale," then such fee is part of gross proceeds and may not be reduced by the expenses which the lay-away fee represents. (Emp. added).

The Court of Appeals ruled in favor of the Tax Commission, stating:

> The question which must be resolved is whether the lay away fee charged is part of the gross proceeds of sales.
>
> Section 12-35-30 defines gross proceeds of sales as "the value proceeding or accruing from the sale of tangible personal property ... *without any deduction for service cost.*" But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds of sales and subject to the sales tax. (285 S.C. at 307, 328 S.E.2d at 923)(Emp. added).

Meyers Arnold simply follows the rules contained in section 12-36-90, gross proceeds includes "The proceeds from the sale of tangible personal property without any deduction for: The cost of materials, labor, or service" and section 12-36-130, "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, losses, or any other expenses." The DOR so describes *Meyers Arnold* in Chapter 6, pgs. 1-2 of its Sales and Tax Manual, as follows:

> In calculating gross proceeds or sales price, the retailer may not deduct the following (whether or not such costs are passed on to the customer or separately stated on the bill to the customer):
>
> - The cost of goods sold;
> - The cost of materials, labor, or service;
>
> ****
>
> One of the guiding principles of what is includable in "gross proceeds" was established in *Meyers Arnold, Inc. v. South Carolina Tax Commission*, 285 S.C. 303, 328 S.E.2d 920 (1985). In that case,

> the Court of Appeals of South Carolina held the element of service involved in a lay away sale was subject to tax as being part of the sale of tangible personal property. The test used by the court was as follows:
>
> > But for the lay away sales, *Meyers Arnold* would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds and subject to the sales tax.
>
> Accordingly, the total amount charged in conjunction with the sale or purchase of tangible personal property is subject to the tax. This test used by the court would also apply this principle to the use tax in determining what is includable in "sales price."

The DOR similarly describes it in SC PLR #92-5:

> In addition, ABC is distinguishable from the above cited cases and decision of *Meyers Arnold v. South Carolina Tax Commission, supra*; Regency Towers Association, Inc. v. South Carolina Tax Commission [maid service at hotel], supra; and Commission Decisions #90-38 and #91-64 [engraving charges as part of the sale of trophies]. These cases and decisions fall into the class of transactions whereby "*the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold...*" As such, "the vendor is engaged in the business of selling at retail, and the tax which he pays ... [is measured by the total cost of article and services]." (Emp. added).

This rule is simply designed to prevent gaming or reduction of the sales tax base as follows:

Suppose Brooks Brothers sells a $1200 suit with the bill as follows:

> Suit - $800
>
> Tailoring - $200
>
> Cost of materials - $200

The sales tax base is $1200 – not $800.

Your cell phone bill is chock full of add-ons. Your bill states:

> Cell phone service - $200

Regulatory recovery - $100

Telecommunication taxes are imposed on the $300 – not the $200. Filling stations could bill as follows:

Gallon of gas - $1.10

Environmental recovery - $0.60

Gas taxes would be imposed on $1.70 – not $1.10. Alternatively, if the filling station customer paid for beer, snacks and gasoline, he would pay alcohol taxes on the beer, gas taxes on the gas, and sales taxes on the snack – notwithstanding that the gas and beer were value accruing or proceeding the purchase of the snack. Each would be analyzed separately at the cash register.

5. Inextricably Linked

As stated above, the ALC Order is premised on the notion that sales of Memberships are "inextricably linked" to sales of tangible personal property. Membership fees are not subject to sales taxes even if they "are inextricably linked to the sale of tangible personal property." With the exception of certain statutory exceptions, unrelated services, like intangibles, are not subject to sales taxes even when they are performed in connection with the sale of tangible personal property. Even the DOR concedes that many services which are inextricably linked to the sale of tangible personal property are not included in the sales tax base.

B. The ALC Erred in Holding that Renewals of Memberships are Subject to Sales Taxes.

As stated above, renewals of memberships are generally automatic (unless either the customer or the store cancels the membership). Such renewals are not inextricably linked to the sale of merchandise nor are they value proceeding or accruing from the sale of tangible personal property. Accordingly, renewals would not be included in the sales tax base even if the original membership purchase was so included. Neither the ALC Order nor Respondent's Brief argue that

renewals are subject to sales tax. Indeed, even the DOR concedes that lay away fees are not subject to sales tax where there is not an accompanying sale of tangible personal property. In PLR #11-4, dealing with sales taxation of Layaway Sales, Layaway fees and Partial Payment Sales, the DOR states:

> The non-refundable layaway fee is only subject to the sales tax if there has been a layaway sale – a transfer of title or possession of the tangible personal property to the customer. If the layaway agreement is nullified because the customer failed to make a required payment and therefore no layaway sale occurs (no transfer of title or possession of tangible personal property occurs), then the non-refundable layaway fee and any layaway payments received are not subject to the sales tax.
>
> Note: If the layaway fee were refundable (i.e. the layaway fee is returned to the customer if the layaway sale does not occur), the application of the sales tax to the layaway fee would be the same as described in the above conclusion. In other words, if a layaway sale occurs (transfer of title or possession of tangible personal property occurs), then the layaway fee and the layaway payments received would be subject to the sales tax. If no layaway sale occurs (no transfer of title or possession of tangible personal property occurs), then the refundable layaway fee and any layaway payments received would not be subject to the sales tax.

C. The ALC Erred in Holding that the Statutes are Not Ambiguous.

In the context of a tax statute, it is a settled rule that ambiguities are resolved "against the government and in favor of the taxpayer."

At the oral argument in this case, the Department could provide no rationale why membership fees charged to customers of membership-only warehouses are not included in the sales tax base, whereas sales of memberships by Books-A-Million are included. The Department's attorney plainly stated at the Oral Argument:

> But again, we have to look at the factual differences between a membership only warehouse where you're paying just to get into the door and the petitioner where your membership gets you discounted tangible personal property. And it gets back to whether there is an inextricable link. Is there really an inextricable link between paying

> what's basically like an admission fee to get into the door from that tangible personal property? Maybe, maybe not. But the Department determined in its policies that there was not an inextricable link between those two and therefore that example wasn't subject to sales tax. *Maybe the Department's policy is too narrow. Because again, if you apply the plain meaning of the statutes here, I would argue that that example actually should be included in the sales tax base.* But again, there's no analysis in our policy documents, so we don't really know where the Department drew that factual distinction. But it really comes down to in this case, is there an inextricable link between a membership that gives you discounted tangible personal property and the tangible personal property? R. p. 419, line 17 – p. 420, line 18.

The Department's brief simply states, "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 only different set of facts is that Sam's Club/Costco memberships are mandatory and Appellant's are optional. Where do the two sets of statutes include optional memberships and exclude mandatory? Obviously, a mandatory membership is more inextricably linked than an optional membership.

III. CONCLUSION

Walmart is the largest retailer in the United States. Walmart sells taxable goods, exempt goods (groceries) and services (optician services, services performed by pharmacy). A person who purchases groceries (exempt unprepared food), a crock pot to cook the groceries, and an eye exam at Walmart is charged sales taxes only on the crock pot, regardless of whether they are rung up in the same transaction at the cash register. It doesn't matter if the groceries were value proceeding or accruing the purchase of the crock pot or if the purchases were inextricably linked.

The Department is correct – sections 12-36-90 and 12-36-130 are plain and unambiguous. Both only tax intangibles "as are specifically provided for in this chapter" (section 12-35-140) and

neither tax intangible membership cards. And certainly neither exempt "warehouse-only" membership clubs but tax optional memberships. No basis exists to exempt membership only warehouses which are indeed inextricably linked to retail purchases and tax optional membership cards. *Meyers Arnold* simply stands for the proposition that you can't lower the sales tax base by separately itemizing cost of materials or services inextricably linked to the tangible personal property. It in no way stands for the proposition that the purchase of an entirely separate intangible is included in the sales tax base.

As stated in Appellant's initial brief, sales of memberships in the United States is huge. Many retailers, including museums and art galleries, offer discounts to those who purchase optional memberships. Are they all required to add membership fees when one purchases a discounted item at e.g. Riverbanks Zoo gift shop?

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