

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 16-ALJ-17-0113-CC
Appellate Case No. 2017-001519

RECEIVED
MAY 14 2020
SC Court of Appeals

Books-A-Million, Inc.

Appellant,

v.

South Carolina Department of Revenue.....

Respondent.

APPELLANT BOOKS-A-MILLION, INC.'S PETITION FOR REHEARING

INTRODUCTION

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Books-A-Million, Inc. ("BAM") seeks rehearing of the Court's opinion in the above-captioned case filed on April 29, 2020. As explained below, the Court overlooked and misapprehended several things when it ruled that, as a matter of law, that BAM was liable for sales taxes on the sale of memberships as well as the renewal of memberships.

BRIEF FACTUAL SUMMARY

BAM operates a discount book retail business. BAM sells books, magazine, collectible supplies, cards, and other gifts in retail stores throughout the country and online. BAM operates thirteen retail locations in South Carolina. Customers pay a \$25 annual fee (“Membership Fee”) to belong to the Millionaire’s Club (the “Club”). Customers can pay the Membership Fee separately or along with other store purchases. Club Memberships expire one year from the date of payment of the Membership Fee, unless the membership is automatically renewed. Club Memberships automatically renew each year for a one-year period unless customers affirmatively opt out of the automatic renewal or the Club Membership is otherwise cancelled or terminated. If customers do not opt out, BAM bills the annual Membership Fee to the credit or debit care provided when the customer initially enrolled in the Club. BAM does not charge sales tax on the cost of either the Membership Fee or the renewals.

Both the ALC and the Court of Appeals’ decision held that both the Membership Fees and the renewals are subject to sales taxes.

ARGUMENT

I. The Amounts Collected by BAM are not Subject to Sales Taxes Issue

The Court of Appeals’ decision essentially holds that the words “proceeding or accruing from the sale...of tangible personal property” contained in S.C. Code Ann. § 12-36-90 override all the sales tax exemptions and exclusions contained in the South Carolina Sales Tax Act (§ 12-36-10 *et seq.*). (Intangible property is not subject to sales tax (an exclusion) as the Act only taxes tangible personal property.) The Sales Tax Act also contains numerous exemptions. Are all the exemptions overridden in a bundled transaction if one item is subject to sale taxes and the others are not?

Section 12-36-2120 contains some 80 exemptions. The Court of Appeals has essentially

re-written the opening line of the section to read as follows:

§12-36-2120 Exemptions from Sales Tax

Unless it is value proceeding or accruing from the sale of non-exempt property, exempted from the taxes imposed by this chapter are the gross proceeds of sales, or sales price of....

To take a simple example, suppose a manufacturer builds a facility in South Carolina for a capital investment of \$20 million. It purchases \$8 million of machinery and equipment (M&E) and \$2 million of material handling equipment from the same vendor in the same transaction. Normally M&E would be exempt from sales taxes under § 12-36-2120(17) but material handling equipment is subject to sales tax as the manufacturer does not qualify for the material handling sales tax exemption under § 12-36-2120(51). Is the sales tax base \$2 million (material handling only) or \$10 million (material handling and M&E)? Under the Court of Appeals' decision, the sales tax base \$10 million, as the M&E is value proceeding or accruing from the purchase of non-exempt material handling equipment. (In our example, purchased from same vendor in the same transaction, all included in one invoice.) And in this example, M&E is an exempted item – the burden of proof falls on the taxpayer to establish the exemption, whereas in BAM's case, intangibles are an exclusion and not included in the Sales Tax Act.

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

property.

A ridiculous example? (“Lawyer Maybank, you ain’t gonna convince the Court with absurd examples!”) No – the Court of Appeals’ decision includes this exact example! The decision cites *Tronco’s Catering, Inc. v. S.C. Department of Revenue*, 2010 WL 5871622 (S.C. Admin. Law Ct. Apr. 12, 2010) with approval, noting the “court held ‘the value of the sale of catered meals includes service, labor, and room charges [because] [s]uch charges are incidental to and merely enhance the value of the sale of catered meals’” and that “[§ 12-36-920] further expressly states that the value of the sale must include costs for materials, labor, service, transportation, or for any other expense.” *Books-a-Million, Inc. v. S.C. Dep’t of Rev.*, Op. No. 5721 (S.C. Ct. App. filed April 29, 2020 Shearouse Adv. Sh. No. 17 at 50-51) (emphasis added).

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

II. Renewal of Memberships Issue

The Court of Appeals erred in holding that the sale of an intangible—the renewal of a membership fee twelve months after the sale of tangible personal property—is subject to sales tax. The General Assembly states that consideration “proceeding or accruing from the sale... of tangible personal property” is included in the sales tax base. § 12-36-90. No Department policy documents, regulation or case (Administrative Law Court, Court of Appeals, or Supreme Court case) has ever held that twelve months later is “proceeding or accruing” under § 12-36-90. (Obviously it is not proceeding, so the question is whether it is “accruing”.)

III. Walmart/Costco are not Subject to Sales Taxes – But BAM is - The Statutes are Ambiguous Issue

The General Assembly, by adoption of the Sales Tax Act, has not once mentioned the taxation of membership fees, other than to exclude intangibles. The Sales Tax Act is silent.

The Department in a policy document states that membership fees by a member-only warehouse is exempt from the sales tax base. *See* South Carolina Sales and Use Tax Manual (2017 ed.), chapter 6, at 9. Accordingly, WalMart (Sam's Club) and Costco are exempt from sales tax on their sale of membership fees – but BAM is not. And where does the Sales Tax Act give WalMart and Costco a huge (up to 9%, considering state and local sales taxes) competitive advantage over retailers offering voluntary membership programs?

The Court of Appeals' decision does not address the WalMart/Costco competitive advantage, other than to cite an irrelevant example contained in a footnote of the Department's Sales and Use Tax Manual, where the "membership fee is the sales price for tangible personal property." *Books-a-Million, Inc.*, Op. No. 5721, at 54.

Yet, virtually every quote in the decision says BAM should stand in the same shoes as WalMart/Costco. For example, the Court of Appeals finds:

South Carolina case law provides that gross proceeds of sales includes all value that comes from or is a direct result of the sale of tangible personal property. The Membership Fee is a direct result of the sale of tangible personal property because BAM would not be able to sell Club Memberships but for BAM's sale of tangible personal property.

Id. WalMart (Sam's Club) and Costco could not sell membership fees but for their sale of tangible personal property:

“Because the [Club Membership] cannot exist without [BAM] offering tangible personal property for sale, I conclude [BAM's Club Membership] and sales of tangible personal property are inseparable.”

Id. at 49 (emphasis in original). Sam's Club and Costco are even more inseparable—a customer cannot get in the door without a membership card! Hard to be more inseparable than that.

The Court of Appeals' decision also notes:

In *Myers Arnold, Inc. v. South Carolina Tax Commission*, 285 S.C. 303, 307, 328 S.E.2d 920, 923 (Ct. App. 1985), the issue was whether a layaway fee was part of the gross proceeds of sales. The court reasoned that “[b]ut for the lay away [sic] sales, Meyers Arnold would not receive the law away [sic] fees. The fees are obviously charged for the service rendered in making lay away [sic] sales.

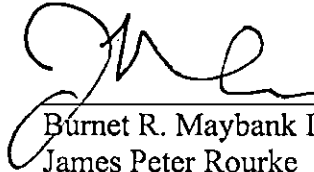
Id. at 50. “But for” the sale of tangible personal property, neither Sam's Club nor Costco could sell memberships.

The Sales Tax Act and specifically § 12-36-90 do not mention membership fees. Neither the Department, the Administrative Law Court, nor the Court of Appeals provides a rationale why if membership fees (an intangible) are to be included in the sales tax base, optional membership fees are included but mandatory fees charged by membership-only warehouses (Sam's Club/Costco) are not. Mandatory fees are obviously more inseparable than voluntary fees, and but for the purchase of a membership, a customer cannot get in a membership-only warehouse to purchase tangible personal property. By definition, the statute is therefore ambiguous and the ambiguity must be resolved against the government. *See Alltel Comms., Inc. v. S.C. Dep't of Rev.*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012).

CONCLUSION

For all of the above reasons, Appellant requests that its Petition for Rehearing be granted and that the Court rehear and amend its decision.

Respectfully submitted this 13th day of May, 2020.



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PROOF OF SERVICE

This is to certify that the foregoing Appellant's Petition for Rehearing was sent via US
Mail addressed as follows this 13th day of May, 2020:

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Member

May 13, 2020

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The Honorable Jenny Abbott Kitchings
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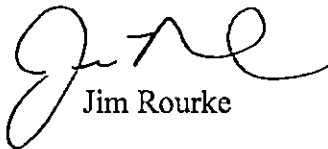
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Case No. 16-ALJ-17-0113-CC
Appellate Case No. 2017-001519

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of *Appellant's Petition for Rehearing*, along with a \$50.00 filing fee. Please file the original and return one file-stamped copy to our office in the enclosed postage paid envelope. Also enclosed is a proof of service, showing that opposing counsel have been served with this petition.

Thank you for your consideration in this matter.

Very truly yours,


Jim Rourke

JR/mw

Enclosures

cc: Sean G. Ryan, Esquire
Adam J. Neil, Esquire

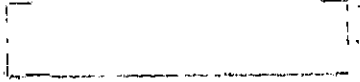
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