THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
Sep 11 2020
S.C. SUPREME COURT

---

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable John D. McLeod, Administrative Law Judge

---

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

---

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

v.

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

---

# RESPONDENT SOUTH CAROLINA DEPARTMENT OF REVENUE'S RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

---

Adam J. Neil (Bar No. 69594)
Managing Counsel for Litigation
Sean G. Ryan (Bar No. 76585)
Counsel for Litigation
P.O. Box 12265
Columbia, SC 29211-9979
(803) 898-5110
Adam.Neil@dor.sc.gov
Sean.Ryan@dor.sc.gov
CourtOrders@dor.sc.gov

Attorneys for Respondent South Carolina Department of Revenue

Columbia, South Carolina
September 11, 2020

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**



**Statutes:**

**Other Authorities:**



**Rules:**

## QUESTION PRESENTED FOR REVIEW

Was the Court of Appeals correct to affirm the Administrative Law Court's decision and hold that the membership fee for Books-A-Million's Millionaire's Club is subject to sales tax because "gross proceeds of sales includes all value that comes from or is a direct result of the sale of tangible personal property" and "[t]he Membership Fee is a direct result of the sale of tangible personal property"?

## STATEMENT OF THE CASE

The South Carolina Department of Revenue ("Department") does not take exception to the Statement of the Case set forth in Books-A-Million's Petition for a Writ of Certiorari.

## STATEMENT OF FACTS

Books-A-Million ("BAM") operates a discount book retail business headquartered in Birmingham, Alabama. BAM sells books, magazines, collectible supplies, cards, and other gifts in thirteen retail locations across South Carolina. The general public is allowed to shop at BAM stores; BAM also offers a discount program to customers called the Millionaire's Club. A BAM customer must pay a $25.00 annual fee to BAM to belong to the Club. While a member could, in theory, pay the fee separately or along with other purchases, BAM has no records establishing that customers pay the membership fee without also purchasing tangible personal property.[1]

[1] BAM argues extensively that the sale of the Millionaire's Club membership along with other items is a bundled transaction. Although not defined in South Carolina outside of the "transmission of the voice or messages", a "bundled transaction" is routinely defined as a transaction involving distinct taxable and non-taxable items, which are sold for one *non-itemized* price. See, e.g. WISC. STAT. §77.51(1f); OHIO REV. CODE ANN. §5739.012; Vermont Formal Ruling 2016-04; KAN. STAT. ANN. §79-3686 (2015); NEB. REV. STAT. §77-2701.48; WASH. REV. CODE §82.08.190; Indiana Dep't of Revenue Info. Bulletin #94 (June 2020). A "non-itemized" price is also a requirement for a bundled transaction according to the Multistate Tax Commission and the Streamlined Sales Tax Governing Board. The Millionaire's Club membership fee is not combined with the price of other merchandise sold; each item is priced separately. (R. p. 438.) Therefore, the sale of the Millionaire's Club along with other merchandise is not a bundled transaction. Both the

Millionaire's Club members are entitled to discounts on purchases made at BAM's retail and online locations. These discounts are not available to the general public. Aside from the following discounts, there is no other benefit to being a member of the Millionaire's Club. The available discounts, which relate exclusively to the sale of tangible personal property, are:

(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.

(R. p. 438.) BAM has never collected or remitted sales tax on the cost of the membership. (R. p.439.)

South Carolina's sales tax structure is found in Chapter 36 of Title 12. "A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail." S.C. Code Ann. §12-36-910(A). BAM is a "retailer" selling "tangible personal property." See S.C. Code Ann. §§12-36-70 and 12-36-60. Therefore BAM is required to remit sales tax in South Carolina. S.C. Code Ann. §12-36-90 defines "Gross proceeds of sales" as "the value proceeding or accruing from the sale, lease, or rental of tangible personal property."

---

merchandise and the related discount membership club are taxable. Moreover, because there is no bundled transaction at issue, BAM's argument that the Court of Appeals' interpretation of "gross proceeds of sales" undercuts other statutory sales tax exemptions is unsupportable.

Both South Carolina case law and Departmental policy statements instruct that membership fees are subject to sales tax when club membership affords purchase price discounts to members that are not available to other, non-member consumers. Because the fee is paid in exchange for merchandise discounts, it is part of the gross proceeds of sales of tangible personal property.

On December 11, 2014, the Department informed BAM that it would audit BAM's sales and use tax returns filed between January 1, 2012 and August 31, 2015. During the audit, BAM provided its income statements for the audit period. The Department's auditor compared BAM's gross proceeds of sales from the income statements to the gross proceeds of sales reported on BAM's Sales and Use Tax returns. The audit revealed that BAM was not charging sales tax on the Millionaire's Club membership fees. (R. p. 439.) Accordingly, on September 16, 2015, the Department issued a Notice of Proposed Assessment to BAM in the amount of $226,310.70, which represented the unpaid sales tax on the Club membership fees for the audit period.[2] (R. p. 438.)

## ARGUMENTS

### I. Petitioner has not established any basis for granting its Petition for Certiorari under Rule 242(b).

Rule 242, SCACR, provides that "A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered." The rule then identifies five factors that the Court will review when determining whether to grant the petition. Although the list of considerations in Rule 242 are not exhaustive, with one limited exception discussed below, the Department is not aware of any additional considerations that this Court has recognized. None of the Rule 242 factors weigh in favor of granting BAM's Petition.

[2] The assessment also included interest and penalties.

### A. **There is no novel question of law.**

Contrary to BAM's representations in its Petition, the issue presented to the ALC and the Court of Appeals is not novel. In fact, the issue has been dealt with both by the Department and the courts for many years and as recently as this year.

The Department's longstanding view of the proper application of sales tax is based on our courts' broad interpretation of "gross proceeds of sales," which is defined in S.C. Code Ann. §12-36-90. Since the 1985 Court of Appeals decision in Myers Arnold, infra, the analysis has been whether the sale of the thing the Department contends is subject to sales tax would occur "but for" the sale of the tangible personal property. Because the sale of Millionaire's Club memberships would not occur but for BAM's sale of tangible personal property (there is no other benefit to membership besides discounts on BAM's merchandise), the membership fee must be included in the gross proceeds of sales. BAM incorrectly suggests that §12-60-90 means that only tangible personal property is subject to sales tax and that because the club membership is intangible[3] it cannot be taxed. This suggestion, however, is inconsistent with the definition of "gross proceeds of sales." See e.g., Travelscape, LLC v. South Carolina Dep't of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011). If only tangible personal property were subject to sales tax, the definition could have been simplified to "the ~~value proceeding or accruing from~~ *price of* the sale, lease, or rental of

[3] BAM states that the Department has conceded that the club membership is an intangible. (Pet. For Cert., p. 6.) The Department has made no such concession. Of course a membership cannot be held or sensed, but "intangible" in this context is a term of art that relates to bundled transactions, which are not at issue here. See Rent-A-Center East, Inc. v. South Carolina Dep't of Revenue, 425 S.C. 582, 824 S.E.2d 217 (2019) (discussing "bundled transactions" at issue in Boggero v. South Carolina Dep't of Revenue, 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015)). Furthermore, the tangible versus intangible analysis is a red herring. The membership fee is value proceeding or accruing from the sale of tangible merchandise, so its status as tangible or intangible is of no moment.

tangible personal property." More than just the price of the merchandise is taxable; any value that accrues to the seller is part of the sales tax base.

Therefore, under certain conditions a membership fee is part of the consideration paid, i.e. the gross proceeds of sales, for tangible personal property, and in those cases the fee is taxable. The basic question that underlies all of the analyses described below is whether the retailer is compensated in exchange for the consumer's discount. If the retailer is reimbursed or compensated for the discount, sales tax is due on the full, undiscounted price; but if the retailer gives the discount to the customer for nothing, sales tax is owed only on the discounted price. BAM is compensated for club member discounts by way of the Millionaire's Club fee.

1. Appellate Court Decisions

In Meyers Arnold, Inc. v. South Carolina Tax Com'n, 285 S.C. 303, 328 S.E.2d 920 (1985), the Court of Appeals addressed whether lay away fees were subject to sales tax. Like the membership fees at issue here, the lay away fees were optional, since a customer could buy the item without using lay away. The statute at issue is unchanged from 1985 and it is unambiguous. See Rent-A-Center, infra. The Court of Appeals held that the lay away fees are subject to sales tax because Meyers Arnold was engaged in selling tangible personal property at retail and the lay away fees are included in their gross proceeds of sales. "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." Meyers Arnold, 285 S.C. at 307, 328 S.E.2d at 923. Like lay away fees, membership fees are part of the gross proceeds of sales and are taxable according to S.C. Code Ann. §12-36-90. However, if BAM's argument that only tangible personal property is taxable and the Millionaire's Club membership is an intangible was correct, the Meyers

Arnold ruling would have been far different[4]: it would have involved a strained analysis of bundled transactions and inextricable links, which is simply unnecessary.

The Court of Appeals reached a similar conclusion in Rent-A-Center East, Inc. v. South Carolina Dep't of Revenue, 425 S.C. 582, 824 S.E.2d 217 (2019).[5] Rent-A-Center is in the business of renting electronics and appliances to consumers. When a customer rents an item, the customer may also choose to purchase a "liability waiver" from Rent-A-Center. "The Waiver gave the customer the option to pay an additional fee along with the rental term payment.... If a customer chose to pay the Waiver fee, Taxpayers would waive the customer's liability for the value of the rental." Id. at 585. The dispute was about whether the waiver fee was subject to sales tax.

First, the Court of Appeals concluded that the statutes at issue – S.C. Code Ann. §§12-36-90 and 12-36-910 – were unambiguous. Id. at 588. Surprisingly, BAM ignores this clear statement from the Court. (Pet. for Cert., pp. 7, 10-11.) Second, the Court of Appeals succinctly restates the historical interpretation of gross proceeds of sales:

> In our view, because substantial evidence supports the ALC's finding that the Waivers were merely incidental to the Rental Agreements, the Waivers must also be subject to the sales tax as gross proceeds of the Rental Agreements. Put differently, because the Waivers and Rental Agreements were inextricably linked, the value proceeding from the Rental Agreements included the value Taxpayers received from the Waivers, and the Waivers are not exempt from the sales tax.

Id. at 592 (internal citations omitted).

---

[4] The holding in Meyers Arnold also contradicts BAM's argument that Millionaire's Club renewal fees should not be subject to the sales tax because the fee is charged automatically and does not necessarily involve the purchase of any merchandise. The lay away fees in Meyers Arnold were non-refundable. Id. at 307. Thus, even if the customer failed to consummate the merchandise sale, the lay away fee was still subject to the sales tax.

[5] This Court initially granted Rent-A-Center's Petition for Certiorari and held oral argument in the case. However, the Court dismissed the Writ of Certiorari as improvidently granted on February 19, 2020.

The decision in Rent-A-Center is critical and ultimately fatal to BAM's arguments in this case. First, there is no meaningful difference between a club membership and a liability waiver for sales tax purposes. The Court of Appeals did not treat the liability waiver as the sale of an intangible for tax purposes; rather, it was simply part of the gross proceeds of the rental of tangible personal property. The Millionaire's Club membership fee should be treated the same. Both are intangible in the sense that they are not a physical asset, but both are also inextricably linked to the tangible personal property that is the true object of the sale. In the case of an appliance rental, no one buys a liability waiver unless they also buy the appliance. For BAM, no one buys a membership to a discount club unless they use the discount when buying merchandise.

Second, the Rent-A-Center opinion undercuts BAM's argument that optional charges, like membership fees, should not taxed. (Pet. for Cert., p. 10.) The Court approved of the ALC's application of the Travelscape and Meyers Arnold decisions, which "show mandatory costs associated with the sale of tangible goods may be taxable" and that "merely being optional does not prevent one part of a transaction from being subject to sales tax." Rent-A-Center, 425 S.C. at 594. Of course this is true. Whether a purchase is optional or mandatory does not affect its connection to the purchase of the tangible personal property. The test is whether "but for" the purchase of the tangible personal property, would the customer also join the Millionaire's Club. Meyers Arnold, 285 S.C. at 307. As noted repeatedly, the only function of the membership is to provide discounts on other purchases. Thus, but for the purchase of books, magazines, and other products, no one would pay to join the Millionaire's Club. This establishes the inextricable link required by Rent-A-Center.

The issues raised in this matter are not novel to South Carolina courts. The decisions concerning what constitutes gross proceeds of sales are consistent and were properly applied by the Administrative Law Court. The Petition for Certiorari should be denied.

2. The Department's Expressions of Sales Tax Policy

This issue was addressed by the Department's predecessor agency as far back as 1990. In Revenue Ruling 90-6, 1990 WL 10001837, the South Carolina Tax Commission concluded that "Membership fees paid to a video rental 'club' are subject to the sales tax as part of the consideration paid for the rental of tangible personal property, pursuant to Code Section 12-36-910, only if the payment of such fee entitles the purchaser to 'free' or discount movie rentals." In that instance, the discount resulting from club membership was paid for by the fee charged to be a member of the club. Thus, for thirty years the Department has consistently held the position that fees paid for "discount memberships" are subject to sales tax.

Similarly, and directly relevant to the matter at bar, in Private Letter Ruling[6] 92-11, 1992 WL 12001179, the Tax Commission considered whether sales tax should be charged for various types of memberships at a "membership-only warehouse." The warehouse offered three kinds of membership: the Advantage Card Membership, the Business Card Membership, and the 90 Day Free Membership. In order to be an Advantage or a Business member, the customer had to pay a $25 fee to the warehouse. These members paid a "wholesale price" for merchandise. The Free members, of course, paid nothing to be a member, but the merchandise price was the "wholesale price…plus a 5% surcharge." Regardless of the type of membership, customers paid sales tax on

[6] A private letter ruling is "private" because the identity of the person or entity requesting the letter ruling is not disclosed. However, the content of private letter rulings is published by the Department. Redacted private letter rulings are available on the Department's website (dor.sc.gov/policy/index) and Westlaw.

the purchase price of merchandise. The Commission concluded that the warehouse should charge sales tax on the $25 fee for Advantage and Business memberships because these members "receive a benefit that the other type of membership...does not receive." The "membership fees at [the warehouse], like the membership fees discussed in SC Revenue Ruling #90-6, are a part of the consideration paid by the member for tangible personal property."

In every instance where the question was posed, the Department has concluded that if the taxpayer is compensated for a customer's merchandise discount, the sales tax is charged on the undiscounted price. This is true even in contexts that are only analogous to the matter at hand. In Revenue Ruling 98-15, 1998 WL 34058104, the Department considered what the sales tax base should be in the context of coupons and discount cards. The Ruling first distinguished "manufacturer's coupons" (where the store is reimbursed for the discount) from "self-redeeming coupons" (where the store is not reimbursed). The Department determined that sales tax is owed on the actual purchase price paid by the consumer when presenting a self-redeeming coupon, but the retailer owes sales tax on the "full" price of the merchandise when the customer uses a manufacturer's coupon. The analysis is the same for "discount card programs." When a retailer is reimbursed for discounts on merchandise the "gross proceeds of sales" includes the reimbursement, meaning the sales tax is owed on the full price of the merchandise regardless of the discount to the consumer. "The source of the amount received or earned is irrelevant. What matters is whether the amount is received or earned as the result of a retail sale. For example, if a manufacturer were to pay ('manufacturer's rebate') a retailer 15 cents for each sale by the retailer of the manufacturer's product and the retailer received 85 cents from the customer, the amount subject to the sales tax would be $1.00, the 15 cents received from the manufacturer and the 85 cents received from the customer." Id. at 6. Other discounts associated with discount cards will

reduce the sales tax base because the gross proceeds of sales is only the purchase price paid by the consumer.

Again in Private Letter Ruling 99-4, 1999 WL 33574555, the Department found that "allowances received by Retailer from suppliers based on past purchases, negotiations or other factors which are not directly related to Retailer's sales are not includible in Retailer's gross proceeds of sales." This particular retailer had a "discount card program" in which customers were given purchase price discounts that were based on discounts given to the retailer by its suppliers. Because the supplier's discounts were simply passed on to consumers and the retailer was not reimbursed for the discounts, the "supplier allowances" were not subject to sales tax.

Finally, in Private Letter Ruling 16-1, 2016 WL 8794164, the Department concluded that annual membership fees paid to an online retailer "that allow members to receive the benefits listed...are subject to South Carolina sales tax as part of the consideration paid for the purchase of tangible personal property...." Id. at 2. Consistent with its longstanding position, the Department advised the retailer, "Since the membership fee also entitles members to receive discounts on the purchase price and cost of delivery of items that are subject to the sales and use tax, and these benefits are not available to nonmembers, the membership fee is subject to South Carolina sales and use tax. The fact that the membership fee entitles the member the right to receive certain benefits that may not be subject to sales and use tax does not change the result." Id. at 6. This is precisely the situation that was before the ALC and the Court of Appeals who correctly concluded that BAM should have paid sales tax on the Millionaire's Club membership fees.

Ignoring the Department's longstanding position and citing to the Department's Sales and Use Tax Manual, BAM argues that the Department does not charge sales tax on membership fees for "warehouse clubs" and, therefore, should not charge sales tax on Millionaire's Club fees. BAM

contends that the Millionaire's Club fees are no different than any other membership fee, which fails to consider the product discounts available to members only. BAM fails to point out that the Manual recognizes the distinction between warehouse clubs and discount clubs in the very same chapter of the Manual. Sales tax is proper for "Membership fees charged by a membership only warehouse offering a selection of brand name merchandise to business owners and others where one type of member receives a benefit that another type of membership does not receive." SCDOR Sales and Use Tax Manual, Chap. 6, p. 4. The logic displayed in the Manual is consistent with the Department's application of the sales tax since at least 1990.

3. The Attorney General has opined in favor of the Department's position

In April 1998, then House of Representatives member Herbert Kirsh requested an opinion from the Attorney General on Food Lion's practice of charging sales tax on the full amount of a sale without regard to any price discount resulting from the use of a discount card. Before he requested an opinion from the Attorney General, the Department advised Rep. Kirsh that,

> if a grocery store discounts product prices as a result of coupons which will be reimbursed by the manufacturer, the grocery store is required to collect the sales tax on the amount of sales as if the coupons had not been presented. In the case of a grocery store which uses a bonus card and reduces the cost of the goods purchased by a percentage, but is not reimbursed for the reduction, the sales tax applies to the reduced amount.

The Attorney General agreed with the Department and suggested that this had been the law in South Carolina since May 1982 when, in another opinion, the Attorney General noted, "There is nothing in the sales tax statutes or regulations permitting a seller to deduct from his gross proceeds an amount paid by a third party to or for the benefit of a purchaser, even though the purpose of the payment is to reimburse the purchaser for a part of the purchase price." 1982 S.C. Op. Atty. Gen. No. 82-30, 1982 WL 155000 (citing S.C. Op. Atty. General dated October 27, 1971 to James A. Walton, 1971 WL 22728).

Although both of these opinions deal with a situation where the retailer is reimbursed by a third-party, there is no analytical difference between that and a consumer purchasing a discount by joining a club. In either scenario, the retailer is compensated or reimbursed for the discount available to its customer. To find otherwise would allow a retailer to use a discount club as a means to avoid payment of sales tax. Rather than charging actual retail price for the merchandise, a retailer like BAM would simply sell a coupon or club membership that provides extensive discounts to the consumer and then only charge sales tax on the greatly reduced purchase price. Even BAM has agreed that this would be an improper itemization of charges to "lower the sales tax base" (Pet. For Cert., p. 19), but accepting BAM's position in this matter would endorse this exact method of lowering the sales tax obligations.

The Courts, the Department, and the Attorney General have all determined that if a retailer is reimbursed for discounts to the consumer, the sales tax base is the full retail price. By way of a Millionaire's Club membership, BAM was reimbursed for the discount by the consumer that purchased the discounted merchandise. The ALC and the Court of Appeals got it right. This is not a novel position; it has been the law in South Carolina *since at least 1982*. Therefore, the Petition for Certiorari should be denied.

### B. There was no dissent in the Court of Appeals.

The Court of Appeals' decision was unanimous in this case. Moreover, the Court of Appeals decision in Rent-A-Center East, Inc. v. South Carolina Dep't of Revenue, 425 S.C. 582, 824 S.E.2d 217 (2019), which, for the reasons discussed above is very persuasive authority, was also unanimous. Quite simply, as noted above, there has been no dissenting voice among the entities that have considered this issue for nearly forty years.

### C. The Court of Appeals' decision does not conflict with a prior decision of the Supreme Court.

Earlier this year, this Court dismissed, as improvidently granted, a writ of certiorari in Rent-A-Center East, Inc. v. South Carolina Dep't of Revenue, 429 S.C. 464, 839 S.E.2d 882 (2020). Thus, the Court of Appeals decision became final with the assent of this Court. There is no other Supreme Court decision on this topic so the Court of Appeals decision does not conflict with the law as expressed by this Court.

### D. There is no constitutional issue in this litigation.

In deciding whether to grant a petition for certiorari, this Court may consider whether "substantial constitutional issues are directly involved." BAM raises the specter of a constitutional issue, but it fails to describe why that issue is "substantial." More importantly, however, the supposed constitutional issue is not a genuine issue.

BAM contends that, "although strenuously argued at both the ALC and Court of Appeals level, neither Court addressed the obvious due process question of why Walmart (Sam's Club) and Costco's mandatory membership fees are not included in the sales tax base but BAM's optional fees are."[7]

First, to the extent that an issue is raised but not ruled upon by a lower court it is not preserved for review. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004). Therefore, the issue should not serve as a basis for granting BAM's Petition.

Second, this argument ignores the obvious differences between a membership club and BAM, which are described above. Membership clubs require a fee before a customer can enter the

[7] The concepts of due process and equal protections are sometimes intertwined when dealing with issues concerning protected classes of individuals. However, in the context described by BAM, if there is any constitutional question, it must involve equal protection and not due process.

club, but once inside, all members pay the same price for anything that the club has for sale. This means that the sales tax paid on items purchased from a membership club is the same for all shoppers. The Millionaire's Club, on the other hand, creates a preferred tier of customers who pay a discounted price for merchandise that is available to non-members at a higher price. Millionaire's Club members, therefore, pay lower sales tax on an item than a non-member shopper who purchases the same item. An equal protection claim is not available to BAM because BAM is not similarly situated to membership clubs because the transactions at issue are very different. GTE Sprint Communications Corp. v. Public Serv. Com'n of South Carolina, 288 S.C. 171, 181, 341 S.E.2d 126, 129 (1986) ("The constitutional guarantee of equal protection of the laws requires that all persons be treated alike *under like circumstances and conditions*, both in privileges conferred and liabilities imposed." (emphasis added) (quoting Marley v. Kirby, 271 S.C. 122, 123-124, 245 S.E.2d 604, 605 (1978)).

### E. This matter does not involve a federal question.

Certiorari is appropriate where the case involves a federal question and the Court of Appeals' decision conflicts with a decision of the United States Supreme Court. BAM has not raised any federal question in this case.

## II. Petitioner has not established any exceptional circumstances that would justify granting the Petition for Certiorari.

"[A] writ of certiorari may be issued when exceptional circumstances exist." Laffitte v. Bridgestone Corp., 381 S.C. 460, 471, 674 S.E.2d 154, 160 (2009) (citing In re Breast Implant Product Liability Litigation, 331 S.C. 540, 503 S.E.2d 445 (1998)). The Breast Implant Court provided additional guidance on what circumstances are so exceptional to warrant a writ of certiorari:

> Although we will not generally accept matters on a writ of certiorari that can be entertained in the trial court or on appeal, a writ of certiorari may be issued when exceptional circumstances exist. This matter presents such a case. Novel questions of law concerning issues of significant public interest that are contained in numerous state and federal actions are involved in this matter. A decision by this Court would serve the interests of judicial economy by eliminating numerous inevitable appeals raising these issues.

Breast Implant, 331 S.C. at 543 n.2.

In a civil action, this Court has only granted a writ of certiorari twice using the exceptional circumstances standard. In Laffitte, this Court employed the exceptional circumstances test to grant certiorari because the trial court had order production of confidential information ostensibly protected by the South Carolina Trade Secrets Act. This Court found that the trial court erred in ordering production of the trade secrets: "the plain language of § 39–8–60(B) clearly indicates that trade secrets may be protected during discovery not only in misappropriation cases, but in 'any civil action' where trade secrets are sought during discovery." Exceptional circumstances were obviously present in that case. If the trial court's order had stood and Bridgestone had been forced to disclose trade secrets, that genie could not have been put back in the bottle even if the trial court's order was ultimately overturned. Moreover, at that time the issue before the Court, i.e. whether the protections afforded by S.C. Code Ann. §39-8-60 applied to any civil action, was truly novel in that it had never been considered by any South Carolina Court.

Similarly, in the Breast Implant Product Liability Litigation, the Supreme Court was faced with considering appeals of numerous product liability cases, all of which had been affected by a single order of the assigned judge. Even the trial judge recognized the need for guidance from the Supreme Court and he "certified" questions to the Supreme Court. Simultaneously, some Defendants filed a Petition for Certiorari based on the trial court's denial of a motion to dismiss.

The Supreme Court denied the certification from the Supreme Court, but issued the writ of certiorari based on the exceptional circumstances.

According to the above-referenced criteria, this matter does not meet the exceptional circumstances threshold. The issue presented here is not novel. There are no other similar tax disputes pending in the judicial system and, in fact, the only other potentially similar case was dismissed by this Court earlier this year. Finally, there is no risk that BAM will be subjected to irreparable harm if the petition is denied. The Petition for a Writ Certiorari should be denied.

## CONCLUSION

There are five enumerated reasons why the Supreme Court might grant a Petition for Writ of Certiorari. BAM cannot demonstrate that any of those considerations is applicable to its dispute with the Department of Revenue. The Department, the ALC, and the Court of Appeals all correctly applied the longstanding law of this state as it relates to the application of sales tax to the gross proceeds of sales. BAM should have remitted sales tax on the membership fees associated with its Millionaire's Club. Club membership is inextricably linked to the sale of BAM's merchandise because the only purpose of the membership is to provide purchase price discounts. Finally, while the considerations set forth in Rule 242, SCACR are not exhaustive, there are simply no exceptional circumstances that would justify granting BAM's petition in this case. Accordingly, the Petition for Certiorari should be denied.

*<Signature page to follow>*

Adam J. Neil (Bar No. 69594)
Managing Counsel for Litigation
Sean G. Ryan (Bar No. 76585)
Counsel for Litigation
P.O. Box 12265
Columbia, SC 29211-9979
(803) 898-5110
Adam.Neil@dor.sc.gov
Sean.Ryan@dor.sc.gov
CourtOrders@dor.sc.gov

Attorneys for Respondent South Carolina Department of Revenue

Columbia, South Carolina
September 11, 2020