

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT **S.C. SUPREME 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 MOTION TO
STRIKE**

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
October 13, 2020

BACKGROUND

Books-A-Million (“BAM”) seeks this Court’s review of the Administrative Law Court’s and the Court of Appeals’ decisions that the fees charged by BAM for entry into its Millionaire’s Club are subject to sales tax. Both courts ruled that the club membership fee is part of BAM’s “gross proceeds of sales” of “tangible personal property.” Thus, according to the unambiguous provisions of S.C. Code Ann. §§12-36-60 and 12-36-90, BAM should have been remitting sales tax on the membership fees.

Throughout the life of the case, BAM has made a variety of arguments that are extraneous to the application of simple law to undisputed fact. For example, despite at least thirty years’ worth of legal authority supporting the Department’s position, BAM continues to assert that the issue addressed by the Court of Appeals is novel. BAM also continues to assert that it is treated differently than other retailers offering memberships; a contention that, upon review of all relevant sales tax precedent in South Carolina, is simply incorrect. Nevertheless, according to BAM, these disputes warrant granting its Petition for Certiorari.

In its Reply memorandum, for the first time at any stage of the case, BAM has directed the Court to sources of information concerning the various types of retail membership clubs and the size of the membership club market. All of this information is wholly irrelevant to the issues before the Court and, most important for purposes of this motion, were never raised or addressed by either the ALC or the Court of Appeals. Accordingly, these exhibits were not included in the Record on Appeal. BAM’s Reply memorandum Exhibits A, B, and C are magazine or internet articles from consumerreports.org, retailprophet.com, and investopedia.com. For a host of reasons, these would not have been admissible at the trial court. They are obvious hearsay, there is no evidence in the record that they are “learned treatises,” and they were not relied upon by any expert in the case (there was no expert testimony offered at the ALC contested case hearing). See Rules 802, 803, and 703.

For the reasons that follow, Exhibits A, B, and C and the corresponding arguments that appear in BAM's Reply Memorandum on pages 1, 3, and 4 (related to the membership structures of Sam's Club and Costco), should be stricken and not considered by the Court when determining whether to grant the Petition for Certiorari.

ARGUMENT

The Department objects to BAM's improper attempt to introduce to this Court extraneous matters that are not and should not be included in the matters for the Court's consideration. The Exhibits attached to BAM's Reply to the Department's Return opposing the Petition for Certiorari would not have been properly included in the Record on Appeal. BAM should not be able to enter by the backdoor when it could not have done so by the front door. It is clear that BAM would not have complied with Rules 209 and 210 had it tried to include these materials in the Record on Appeal. As this Court has previously recognized, disregard of the Rules of Appellate Practice should not be tolerated. See State v. Harris, 278 S.C. 46, 47, 292 S.E.2d 40 (1982) (criticizing appellate practitioners' violations of the rules governing what matters are properly included in the record on appeal).

Rule 210, SCACR, provides that the Record on Appeal may contain "all matter designated by any party under SCACR Rule 209. . . ." But, of course, "the Record shall not, however, include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR. Counsel for the participants are required to certify that their respective designations of mater to be included in the Record on Appeal "contain no matter which is irrelevant to the appeal." Rule 209(c), SCACR.

Although BAM did not designate any irrelevant or otherwise inappropriate materials for inclusion in the Record on Appeal, BAM has undertaken to avoid Rules 209 and 210 by including documents that were never raised or addressed at the trial court by making them exhibits to its Reply memorandum. This end-run around the Rules is improper. Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902 (Ct. App. 2006). Thus, the Exhibits A,

B, and C and arguments based on those exhibits, should be stricken from the Record and should not be considered by this Court when determining whether to grant BAM's Petition for Certiorari.

CONCLUSION

BAM has offered for this Court's consideration documents and arguments that were not considered or ruled upon by either the ALC or the Court of Appeals. BAM actually concedes this in its Petition for Certiorari. (See Pet. for Cert., p. 5.) Because these arguments and the corresponding exhibits A, B, and C were not – and should not have been – included in the Record on Appeal, it is improper to include them as exhibits to BAM's Reply memorandum. The Court should strike them and not consider the arguments.

Respectfully submitted,



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) 898-5149
Adam.Neil@dor.sc.gov
Sean.Ryan@dor.sc.gov
CourtOrders@dor.sc.gov

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