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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The 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.

BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF REVENUE

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ISSUE ON APPEAL

WAS THE COURT OF APPEALS CORRECT IN CONCLUDING THAT BOOKS-A-MILLION, INC. SHOULD HAVE INCLUDED MILLIONAIRE'S CLUB MEMBERSHIP FEES IN ITS GROSS PROCEEDS OF SALES AND REMITTED SALES TAX ACCORDINGLY?

STATEMENT OF THE CASE

The South Carolina Department of Revenue ("the Department") agrees with the Statement of the Case set forth in Books-A-Million's ("BAM") Initial Brief. With respect to the Administrative Law Court's June 6, 2017 Amended Order, additional context may be helpful in understanding the procedural progression of the case. The Amended Order did not change the ALC's substantive decision; rather, it corrected the caption from "Final Order and Decision" (a title which the ALC typically uses after an evidentiary contested case hearing) to "Order Vacating Previous Order and Amending Order Granting Respondent's Motion for Summary Judgment." This revision to the caption accurately reflected the disposition of this matter after both parties moved for summary judgment.

BAM appealed the ALC's decision to the Court of Appeals on July 11, 2017. The Court of Appeals held an oral argument on March 9, 2020 and issued its opinion affirming the ALC's decision on April 29, 2020. BAM's Petition for Rehearing was denied on July 14, 2020. This Court granted BAM's Petition for Certiorari on March 26, 2021.

STANDARD OF REVIEW

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 appellate courts "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). Section 1-23-610(B) provides the bases for which an appellate court may "reverse of modify the decision" of the ALC. This Court should affirm the ALC's decision that BAM owes sales tax on the Millionaire's Club membership fees because (1) the language of the statute at issue in this case is plain and unambiguous and there is no error of law and (2) application of the sales tax to the Club membership fees is consistent with the applicable statutory law and is supported by substantial and largely undisputed evidence in the record.

When a statute is unambiguous, a court must look to the "plain meaning rule" and rely on the usual and customary meaning of the words in the statute when reading said statute. "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).

Lastly, as the agency charged with administering the statute at issue, the Department's construction of the statute is entitled to deference and should not be disregarded in the absence of compelling reasons. Kiawah Development Partners, II v. South Carolina Dep't of Health and Environ. Control, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014). For over thirty years the Department has consistently applied this taxing statute in the same manner it applied the statute to BAM. Therefore, this Court should affirm the ALC's decision.

STATEMENT OF FACTS

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 ("Club"). The Club costs customers $25 and affords those who pay the membership fee discounts not available to customers that do not join the Club. While a member could, in theory, pay the fee separately or along with other purchases, BAM

presented no evidence to the ALC establishing that any customers pay the membership fee without also purchasing tangible personal property.[1]

Club membership buys BAM customers the following discounts – all of which relate exclusively to the sale of tangible personal property:

(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 membership fees. (R. p. 439.)

South Carolina's Sales and Use Tax Act is found in Chapter 36 of Title 12. "A sales tax, equal to [six][2] percent of the gross proceeds of sales, is imposed upon every person engaged or continuing

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[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 Club membership fee is not combined with the price of other merchandise sold; it 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 merchandise and the related discount membership club are taxable. Moreover, because bundled transactions are not at issue, BAM's argument that the Court of Appeals' interpretation of "gross proceeds of sales" undercuts other statutory sales tax exemptions fails.

[2] Although §12-36-910 still says the sales tax is five percent, §12-36-1110 imposes an additional one percent sales tax beginning on June 1, 2007.

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. Section 12-36-90 defines "Gross proceeds of sales" as "the value proceeding or accruing from the sale, lease, or rental 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 and the corresponding penalties and interest. (R. p. 438.)

ARGUMENTS

I. INTRODUCTION

The Court of Appeals' decision, which upholds the ALC's Order and the Department's conclusion, correctly interprets the applicable statutory language and is exactly congruent with the historical understanding of the sales tax base in this state. Moreover, it is the correct decision from a policy standpoint because it prevents tax avoidance. When a retailer creates a club, charges a fee to join it, and then provides discount prices exclusively to club members the membership fee is unquestionably part of "the value proceeding or accruing from the sale, lease, or rental of tangible personal property . . . ." S.C. Code Ann. § 12-36-90. Taxing the membership fee in this narrow context prevents tax avoidance because the retailer cannot shift otherwise taxable sales of merchandise to

membership fees thereby frustrating the collection and remittance of sales tax.

Despite BAM's repeated arguments to the contrary, this case is not about mandatory fees versus optional fees, improperly taxing intangibles, or taxing a membership card. This case, as recognized by the ALC and the Court of Appeals, is about the commonsense application of section 12-36-90 and longstanding Department policy designed to capture sales tax on all value exchanged to the retailer for the sale of tangible personal property regardless of the timing or form of the compensation.

II. THE SALES AND USE TAX ACT REQUIRES THAT BAM INCLUDE THE PROCEEDS FROM ITS SALES OF MILLIONAIRE'S CLUB MEMBERSHIPS, INCLUDING RENEWALS, IN ITS GROSS PROCEEDS OF SALES.

A. Millionaire's Club Membership Fees Constitute Value Proceeding or Accruing from the Sale of Tangible Personal Property.

All tangible personal property is subject to sales tax on the full gross proceeds of sales. "Tangible personal property," is "personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses." S.C. Code Ann. § 12-36-60 (2014). BAM sells books, magazines, collectible supplies, cards, and other gifts – i.e. tangible property – in retail stores throughout South Carolina and online. The ALC and the Court of Appeals correctly concluded that the Millionaire's Club membership fees are part of BAM's gross proceeds of sales because the fees are a substitute for or an advanced payment on the subsequently discounted merchandise.

Section 12-36-90 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.

Thus, in addition to the actual sale price of the tangible personal property, *all other value* that proceeds or accrues from the sale of the tangible personal property must be included in a taxpayer's gross

proceeds of sales for the purpose of calculating the sales tax due. Membership fees are a portion of BAM's gross proceeds of sales because they are part of the ultimate value that BAM realizes as a result of the sale of tangible personal property. (R. pp. 7, 9–10.) The only purpose of joining the Millionaire's Club is to obtain discounts on the sales price of BAM's sales of books and other merchandise; the Club simply would not exist but for the sale of tangible personal property. (R. pp. 11–12.) The proceeds from BAM's sale of Club memberships (initial and renewal) are so closely associated with the sale of tangible personal property that the fees must be included in BAM's gross proceeds of sales. The customers must pay the membership fee in order to receive these benefits and the benefits are only available to those who pay the fee. 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.) Therefore, respectfully, 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).

B. Section 12-36-90 is unambiguous.

BAM argues, contrary to the findings of the ALC and the Court of Appeals, that section 12-36-90 is ambiguous and should be construed to exclude the Membership Fees from BAM'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). If the language of a statute only has one reasonable interpretation, then it is unambiguous and the court need not apply any rules of statutory construction.

Here, the language in section 12-36-90 has only one reasonable interpretation – gross proceeds of sales include *all* value that proceeds or accrues to a taxpayer from the sale of tangible personal

property. If only the "sticker price" of tangible personal property were subject to sales tax, the statutory definition of "gross proceeds of sales" should be "the ~~value proceeding or accruing from~~ *price of* the sale, lease, or rental of tangible personal property." More than just the price of the merchandise is taxable; *any* value that accrues to the seller constitutes the seller's gross proceeds of sales.

Even when common dictionary definitions are placed into the statute, "gross proceeds of sales" still means any value that comes from or is a direct result of the sale of tangible personal property.[3] BAM has failed to suggest any other reasonable interpretation of section 12-36-90. To the contrary, BAM's interpretation effectively deletes the phrase *proceeding or accruing* from the statute and inexplicably narrows the definition of *value* to simply "purchase price." Any interpretation requiring one to ignore words in the statute is inherently unreasonable. CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (noting "we must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous…").

[3] In addition to the definition of "inextricable," *infra*, defining "proceed" and "accrue" is also important to this analysis. The Merriam-Webster Dictionary defines "proceed" as "to come forth from a source" and "accrue" as "to come as a direct result of some state or action." See Proceed, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/proceed and Accrue, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/accruing (last visited May 20, 2021).

Nevertheless, BAM argues the Millionaire's Club membership is an intangible[4] and proceeds from the sale of memberships are not gross proceeds of sales and should not be taxed.[5] As explained previously, section 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, BAM's reading of section 12-36-90 requires deleting from the statute the phrase "proceeding or accruing." This interpretation must fail because it renders the "value proceeding or accruing" language meaningless. When reading section 12-36-90 so as to give meaning to all the words in the statute, it is clear that section 12-36-90 is broad and encompasses all value gained by BAM on a sale, not simply the sales price.

C. The "inextricable link" test shows that Club membership fees are properly included in BAM's gross proceeds of sales.

The ALC and the Court of Appeals correctly found that the Club membership fee is inextricably linked to the discounted sale of tangible personal property. "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." Books-A-Million, Inc. v. S.C. Dep't of Revenue, 430 S.C. 388, 394, 844 S.E.2d 399, 402 (Ct. App. 2020) (emphasis added). Merriam Webster's Dictionary defines "inextricable" as "incapable of being disentangled or untied."

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[4] BAM states that the Department has conceded that the club membership is an intangible. (Appellant's Br., p. 6.) The Department has made no such concession and previously made that clear in its opposition to BAM's Petition for Certiorari. Of course a membership cannot be held or sensed, but "intangible" in the tax context is a term of art that is inapplicable here. See Rent-A-Center East, Inc. v. S.C. Dep't of Revenue, 425 S.C. 582, 824 S.E.2d 217 (2019). In any event, 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. In fact, a video club membership, a rental damage waiver, and lay-a-way fees are also intangible, but they are subject to sales tax. See e.g. Meyers Arnold and Rent-A-Center, *infra.*

[5] BAM compares its Club membership to a gift card, for example. However, unlike gift cards, the club membership is not an alternative form of consideration. Membership, in and of itself, cannot be exchanged for merchandise. When a gift card is used to purchase merchandise, sales tax is charged at the time of the transaction on the merchandise. If a gift card is used to purchase non-taxable items, it would be improper to tax the gift card. The type of consideration does not make the tangible personal property more or less taxable.

See Inextricable, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/inextricable (last visited May 18, 2021). The Millionaire's Club cannot be "disentangled or untied" from the discounted sales of tangible personal property because discount pricing is the only purpose of joining the Club. This inextricable link between the membership fee and the sales price discount conclusively establishes that the Membership Fee is value proceeding or accruing from the sale of tangible personal property.

Nevertheless, BAM misconstrues the ALC's Order and contends "the ALC Order is premised on the notion that sales of [Club memberships] are 'inextricably linked' to sales of tangible personal property." (Appellant's Brief, 28). This is simply untrue; the sale of tangible personal property at BAM is available to members and non-members alike. It is the *discounted price* that is inextricably linked to the Millionaire's Club membership. The ALC (and by way of affirmation the Court of Appeals) did not base its decision on the fact that the Club membership is inextricably linked to BAM's sale of *all* tangible personal property. Rather, the "inextricable link" analysis is simply a tool for demonstrating how the membership fee is value proceeding or accruing from the sale of tangible personal property. (R. p. 12.)

The "inextricable link" analysis for the purposes of sales tax goes back at least to the ALC's 2014 decision in Southeast Cinema Entertainment, Inc. v. Dep't of Revenue, 2014 WL 2417715 (May 28, 2014). There, the ALC found that sales tax was due on the sale of cinema equipment from IMAX. Southeast requested a refund of approximately $71,000 in sales tax paid because it claimed that part of the price was for "untaxable, intangible property." Id. at *1. The Department denied the refund request and ALC upheld the denial. According to the Sales Agreement, IMAX agreed to sell an "IMAX® Digital MPX Projection System and Trademark License." Although the ALC agreed that the purchase of the trademark license was an intangible, IMAX correctly charged sales tax on the total purchase price. "[T]he benefit of the trademark is granted only by virtue of purchasing the system....

In sum, because the plain language of the Agreement provided the purchase price was solely for the system, and the alleged intangibles were inextricably linked to the purchase of the system, I find the initial purchase price represents the gross proceeds of sale and is subject to sales tax." Id. at *6 (citing Meyers Arnold, Inc. v. S.C. Tax Comm'n, 285 S.C. 303, 305, 328 S.E.2d 920, 922 (Ct. App. 1985)).

Employing a similar analysis here, the ALC correctly concluded and the Court of Appeals affirmed that the proceeds from the membership fees come from the sale of tangible personal property and should have been included in BAM's gross proceeds of sales. (R. p. 12.) In other words, just like the sale of the license in Southeast, the benefits of the Millionaire's Club are only granted by virtue of purchasing books or other tangible personal property from BAM.

Although all authority is to the contrary, BAM argues that the "inextricable link" analysis should not be the applicable test because the Department ignores similar connections in numerous other situations. But BAM's analysis misunderstands when the inextricable link analysis should be applied in the transaction: the link is not the *opportunity* to purchase TPP, it is the *discounted purchase price* of the TPP that is connected to the membership.

BAM compares itself to veterinarians' offices, doctors' offices, and other similar professionals who provide services that are wholly distinct from the sale of tangible personal property and who do not offer discounts on purchases that are connected to the provision of a non-taxable service. For example, a veterinarian may sell pet food and supplies without offering veterinarian services. Conversely, a veterinarian does not have to offer pet supplies in order to complete its veterinarian services. Finally, in BAM's example, the veterinarian does not link a price discount for TPP to its untaxed veterinarian services. The same is true for ophthalmologists and funeral homes. Thus, a proper application of the "inextricable link" test demonstrates that the sale of tangible personal property and the provision of services by these professionals are not inextricably linked. No price

discount is associated with the provision of professional services. Therefore, BAM's concerns over inequitable application of this analysis are unfounded.

BAM also suggests that the Regulations concerning sales tax charged by professional service providers and service-providing retailers cast doubt on whether the Court of Appeals correctly interpreted section 12-36-90. The guidance provided by Regulations 117-308 and -309 is not applicable to BAM's situation. BAM is not comparable 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 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 keeps a stock of medication and regularly sells it at retail then the doctor must remit sales tax on those sales. See S.C. Code Ann. Regs. 117-308.3 (2012). BAM, unlike a doctor, is not in the business of providing a service. Rather, BAM is engaged in the business of selling tangible personal property at retail and *offering a discount program to its customers.* BAM is not a service provider and these regulations do not address membership fees in exchange for reduced pricing so Regulation 117-308 has no bearing on this matter.

Similarly, Regulation 117-309 is irrelevant. Regulation 117-309 applies to retailers that may also provide separate services. Generally, Regulation 117-309 explain that when a retailer provides services in addition to the sale of merchandise, 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. But again, the issue in this case is not whether to tax services along with tangible property, it is whether to tax a discount club membership fee when the membership affords members discount pricing on the sale of merchandise. As previously explained, BAM's

Membership Program has no purpose aside from providing discounted pricing on the sale of tangible personal property. Therefore, because the BAM does not provide separate services that could exist on their own, Regulation 117-309 has no bearing on this matter.[6] Accordingly, the ALC properly found that, among other things, the Membership Program is inextricably linked to the sale of tangible personal property and, thus, the Membership Fees are includable in its gross proceeds of sales.

III. THE DEPARTMENT'S LONGSTANDING INTERPRETATION AND APPLICATION OF THE SOUTH CAROLINA SALES AND USE TAX ACT IS ENTITLED TO DEFERENCE.

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 section 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.

Over thirty years ago, in Revenue Ruling 90-6, 1990 WL 10001837, the South Carolina Tax Commission (the Department's predecessor agency) 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 Revenue Ruling the Tax Commission explained that membership fees paid for the privilege of receiving free or discounted tangible personal property should be included in a taxpayer's gross proceeds. Thus, for thirty years the Department has consistently applied the sales tax to all fees paid to obtain future discounts on sales of taxable items.

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[6] BAM also compares its Membership Program to an extended warranty. The key difference between the Membership Program and an extended warranty is that any business can sell an extended warranty on a product sold by another business. 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 BAM can offer its Membership Program because only BAM can discount its products and ship its products for free.

The Tax Commission considered this issue again in Private Letter Ruling 92-11[7] when asked whether sales tax should be charged for various types of memberships at a "membership-only warehouse." 1992 WL 12001179. 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 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 over the last thirty years when the question was posed, the Department concluded that if the taxpayer is compensated for a customer's merchandise discount, the sales tax is charged on the undiscounted price. Furthermore, even in contexts that are only analogous (rather than congruent) to the matter at hand, the Department's position has been consistent: if the retailer is compensated for providing a discount the sales tax applies to the undiscounted price.

In Revenue Ruling 98-15, the Department considered what the sales tax base should be in the context of coupons and discount cards. 1998 WL 34058104. The Ruling first distinguished "manufacturer's coupons" (where the store is reimbursed for the discount) from "self-redeeming

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[7] 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.

coupons" (where the store is not reimbursed). The Department determined that sales tax is owed on the discounted purchase price paid by the consumer when presenting a self-redeeming coupon because the retailer is not compensated for the discount. But the retailer owes sales tax on the "full" price of the merchandise when the customer uses a manufacturer's coupon because the manufacturer pays part of the purchase price on behalf of the consumer. 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. In this context, a member of the Millionaire's Club is in the same shoes as a manufacturer because the member is purchasing a future discount via the membership fee. The fee is the retailer's reimbursement for the difference between the full price and the discounted price.

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 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 exactly 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.

Despite the Department's consistency on this issue, 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. But BAM overlooks the key difference between these two types of memberships. BAM likens the Millionaire's Club fees to any other membership fee overlooking that membership in the Millionaire's Club entitles members to product price discounts not available to non-member customers. Additionally, BAM forgets that the Department's Sales and Use Tax Manual distinguishes between warehouse clubs and discount clubs in the very same chapter that BAM relies on to support its position. 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. As explained above, when a retailer sells memberships into a program allowing member-customers different purchasing power than non-member customers, the cost of the membership is really just a pre-payment on the ultimate purchase price. The Manual is consistent with the Department's application of the sales tax since at least 1990.

Of course, agency deference is only available when the agency's decision is worthy of it. The Department's position regarding sales tax of membership fees is entitled to deference because it is consistent with the position of the Attorney General and of appellate court decisions (discussed below). The Attorney General has twice 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 had 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, no analytical difference exists between that scenario 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 could 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 impermissibly lowering the sales tax obligations.

IV. ALL APPLICABLE SOUTH CAROLINA CASE LAW SUPPORTS THE INCLUSION OF THE MILLIONAIRE'S CLUB MEMBERSHIP FEES IN BAM'S GROSS PROCEEDS OF SALES.

South Carolina courts have analyzed the definition of gross proceeds of sales several times and have always 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.[8] The Court of Appeals 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). The statute at issue (section 12-36-90) is unchanged from 1985 and it is unambiguous. See Rent-A-Center, infra. In Meyers Arnold, the Court of Appeals addressed whether lay away fees were subject to sales tax. Id. Like the membership fees at issue here, the lay away fees were optional, since a customer could buy the item outright without using lay away. 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."

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[8] Although not binding on this Court, the ALC has regularly found 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., Textile Restoration Servs., Inc. v. Dep't of Revenue, 2015 WL 7443800 *4 (Nov. 12, 2015) (finding the Department properly included the charges incident to the dry cleaning service in the taxpayer's gross proceeds of sales) and Tronco's Catering, Inc. v. Dep't of Revenue, 2010 WL 5781622 *3 (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.").

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 section 12-36-90. In light of our courts' consistency and our statute's uniformity over the last 40 years, BAM's argument that only tangible personal property is taxable and the Millionaire's Club membership is an intangible fails.[9]

This Court also addressed the inclusion of associated fees in gross proceeds of sales in Travelscape, LLC v. S.C. Dep't of Revenue, 391 S.C. 89, 98, 705 S.E.2d 28, 33 (2011). Travelscape involved whether the facilitation fee and service fee that Travelscape added to the net rental rate should have been included in the Travelscape's gross proceeds of sales. Id. This 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 Travelscape'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)[10] as gross proceeds." Id. at 98, 705 S.E.2d at 33. Consistent with the Court of Appeals' decision 26 years earlier in Meyers Arnold, this Court included a fee in the taxpayer's gross proceeds of sales that was in addition to the amount charged for the taxable price of accommodations because it was value proceeding from the taxable sale. According to Travelscape, the ALC properly concluded that because

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[9] 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.

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

the "Membership Fees are payment for services or benefits that are incident to the sale of tangible personal property," such are includable in BAM's gross proceeds of sales. (R. p. 12.)

Finally, the Court of Appeals recently reached a similar conclusion in Rent-A-Center East, Inc. v. S.C. Dep't of Revenue, 425 S.C. 582, 824 S.E.2d 217 (2019).[11] 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.

The Court of Appeals concluded that sections 12-36-90 and 12-36-910 were unambiguous. Id. at 588. Surprisingly, BAM ignores this clear statement from the Court. Also, 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).

The decision in Rent-A-Center is ultimately fatal to BAM's arguments in this case. First, when considering the value proceeding from the sale or rental of tangible personal property, there is no meaningful difference between the money Rent-A-Center collects for a liability waiver and the money BAM collects in advance of the sale of their merchandise by way of Millionaire's Club membership fees. The Court of Appeals did not treat Rent-A-Center's liability waiver as the sale of an intangible

[11] 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.

for tax purposes; rather, it was simply part of the gross proceeds of the rental of tangible personal property. Id. at 591. The Millionaire's Club membership fee should be treated the same. Both are intangible in the sense that they are not physical assets, 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 customer buys a liability waiver unless they also rent the appliance. For BAM, no customer buys a membership to a discount club unless they use the discount when buying merchandise.

Furthermore, the Rent-A-Center decision negates BAM's argument that optional charges, like membership fees are not subject to sales tax. The Court of Appeals 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. In this statement, the Court of Appeals reiterated the longstanding principal that whether a purchase is optional or mandatory does not affect its connection to the purchase of BAM's merchandise. The test is whether, "but for" the discounts on the purchase of tangible personal property, would the customer also join the Millionaire's Club. Meyers Arnold, 285 S.C. at 307. As previously noted, the only function of the Club membership is to provide discounts on member's future purchases. Thus, "but for" the purchase of books, magazines, and other products, none of BAM's customers would pay the $25 fee to join the Millionaire's Club. This establishes the inextricable link required by Rent-A-Center.

In spite of significant authority supporting the Department's conclusion, the ALC's decision, and the Court of Appeals' opinion, BAM contend that this Court should follow the ALC's decision in Alltel v. S.C. Dept. of Rev., 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015).[12] The Alltel

[12]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.

case is not persuasive authority because it is factually distinguishable from the case at bar and even if it could be construed as relevant, it is an outlier on this issue. In Alltel the Department concluded that the cost of insurance covering wireless devices purchased by Alltel's customers was part of Alltel's gross proceeds of sales. The ALC ultimately disagreed and BAM relies on the ALC's conclusion in Alltel that the insurance policy costs at issue were not tangible personal property and the proceeds from the sale of the insurance did not proceed or accrue from the sale of tangible personal property.

In the Alltel litigation, the Department did not contend that insurance policy premiums are taxable, but argued that the insurance should be deemed a taxable "service contract." On the other hand, Alltel did not dispute that service contracts were taxable, but argued that the coverage on the wireless devices was insurance, which was not subject to sales tax. Once the ALC determined that the Alltel customers purchased insurance, not a service contract, the conclusion that Alltel did not owe sales tax was inevitable. In dicta, the ALC also noted that the insurance purchased by subscribers was not subject to sales tax because it was not tangible personal property. However, unlike the Millionaire's Club memberships, the insurance purchased by Alltel's customers did not affect the cost of the wireless devices that were subject to sales tax. Accordingly, BAM's reliance on the Alltel decision is misplaced.

Because South Carolina case law contradicts BAM's position, BAM urges this Court to look to other states even though these states having drastically different sales tax statutes. The decisions and policies from Tennessee, Florida, and Virginia provide no persuasive guidance because the statutes imposing the sales tax in those states are much narrower than South Carolina's sales tax statutes. Tennessee only includes "the total amount for which . . . tangible personal property is sold . . ." in its tax base. Tenn. Code Ann. § 67-6-102(25) (1994). Florida only includes "the total amount paid for tangible personal property . . ." in its tax base. Technical Assistance Advisements 89(A)-022 (Apr. 12, 1989) (citing former Fla. Stat. § 212.02(17)). Virginia only imposes sales tax on "the transfer of title or

possession of tangible personal property . . . for a consideration." 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)). These statutes are so dissimilar to South Carolina's sales tax structure that the authority from those states is irrelevant.

CONCLUSION

BAM's Millionaire's Club membership fee subsidizes the discounted future purchase price of its merchandise. All value that is gained by Books-A-Million upon the sale of its merchandise is subject to sales tax. It does not matter that the value is paid in the form of a club membership instead of the sales price because the membership fee is effectively a prepayment or a substitute payment for the subsequent discounted sales price. The Courts, the Department, and the Attorney General have all determined that reimbursement to a retailer for discounts to the consumer should be included in the gross proceeds of sales. By way of BAM's Millionaire's Club membership, BAM was reimbursed for the discount redeemed by the consumer at the time of the sale when the customer purchased the discounted merchandise. Millionaire's Club members simply paid for the price discount in advance through the membership fee.

The ALC and the Court of Appeals got it right. Since at least 1982 the law in South Carolina has been that club membership fees are taxable when the benefit of membership is discount pricing on merchandise available for sale. Therefore, respectfully, this Court should affirm the Court of Appeals' decision, which is legally correct and supported by substantial evidence in the record, and find BAM's Millionaire's Club membership fees are part of its gross proceeds of sales and are subject to South Carolina's sales tax.

<Signature page to follow>

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May 21, 2021
Columbia, South Carolina