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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
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 29, 2020)
Supreme Court Case No. 2020-001102

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

v.

South Carolina Department of Revenue, ...Respondent.

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF ON BEHALF OF WAREHOUSE HOME FURNISHINGS DISTRIBUTORS, INC.

Pursuant to Rule 213 of the South Carolina Appellate Court Rules ("SCACR"), Warehouse Home Furnishings Distributors, Inc. d/b/a Farmers Home Furniture ("Farmers"), by and through undersigned counsel, respectfully requests leave to file an *amicus curiae* brief in this case. The proposed brief is attached as Exhibit A to this motion and is being conditionally filed in accordance with Rule 213, SCACR.

INTEREST OF *AMICUS CURIAE*

Founded in 1949, Farmers is a furniture and home goods retailer, with over 250 locations throughout the Southeast, including 33 locations in South Carolina.[1] In its stores, Farmers sells a

[1] In accordance with Rule 240(c)(3), SCACR, the facts set forth herein and Farmer's proposed *amicus curiae* brief are supported by the affidavit of Sam Moore, who is Treasurer for Farmers, a copy of which is attached as Exhibit B to this motion.

variety of items used in the home, including furniture, decorative items, appliances, and electronics ("Furnishings"). Pertinent here, Farmers collects and remits to the Department of Revenue ("DOR" or "Department") sales tax on the revenues derived from its sales of Furnishings.

The instant appeal is of significant interest to Farmers because the Department recently assessed sales taxes, penalties, and interest against Farmers for certain intangible items related to Farmer's sale of Furnishings on credit, all of which the Department concedes do not constitute tangible personal property or one of the few services specifically taxable under the applicable statutory provisions. Farmers timely protested this proposed assessment, which was rejected by the Department in a July 7, 2021, determination. On August 5, 2021, Farmers filed for a contested case in the Administrative Law Court challenging the Department's determination.

Although the facts of this appeal are different from Farmers' pending contested case and involve different intangibles on which the Department seeks to impose sales tax—buyers' club memberships in the instant appeal versus credit insurance premiums and other financing-related charges in Farmers' contested case—both cases involve the same interpretation of the South Carolina Sales and Use Tax Act, S.C. Code Ann. § 12-36-5 *et. seq.* (the "Tax Act"), and, more specifically, the meaning of "gross proceeds of sales" and "value proceeding or accruing from" the sale of tangible personal property under S.C. Code Ann. § 12-36-90. Accordingly, a ruling by this Court as to the proper interpretation of S.C. Code Ann. § 12-36-90 likely will impact Farmers' pending contested case. *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J.) ("An amicus brief should normally be allowed when . . . the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case)…."). And, as is more fully explained in its proposed brief, it is Farmers' position that the Department is

advocating for an interpretation of the applicable statutory provisions that (1) exceeds the plain language and purpose of the Tax Act, and (2) is not applied consistently by the Department, creating an ambiguity that is required to be resolved in favor of taxpayers.

Farmers also has a particular interest in this appeal because the Petitioner and Department discuss in their respective briefs the Administrative Law Court's decision in *Alltel Communications, Inc. v. S.C. Dept. of Revenue*, 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015), which found that the cost of insurance (*i.e.*, insurance premiums) covering wireless devices purchased by Alltel's customers did not constitute gross proceeds of sales because the insurance was not tangible personal property or an otherwise taxable service and the sale of insurance did not proceed or accrue from the sale of tangible personal property.[2] However, the Department does not accurately describe the *Alltel* decision (nor DOR's position in that case) in its brief and, in what appears to be an effort to downplay the expansiveness of the application of its interpretation of the Tax Act, makes statements to this Court that directly contradict its position in Farmers' pending contested case. Indeed, a fair reading of DOR's brief in this matter is that its interpretation of "gross proceeds of sales" or "value proceeding or accruing from" sales of tangible personal property does not go as far as to subject insurance premiums to sales tax. *See* Br. of Resp't at 22 ("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."). But that is the exact opposite of the position DOR is taking in Farmers' contested case.

Farmers, therefore, has a direct interest in this matter due to its pending contested case. Farmers also has a general interest as a South Carolina taxpayer in the proper interpretation of the

[2] Counsel for Farmers represented the taxpayer in the *Alltel* matter.

provisions of the Tax Act as well as the fair and consistent application of those provisions by the Department.

DESIRABILITY OF BRIEF OF *AMICUS CURIAE*

Farmers and its counsel have developed a deep familiarity with the Tax Act and the Department's interpretation and application of the provisions of the Tax Act through Farmers' compliance with its sales tax obligations as a retailer in this State and Farmers' pending contested case involving the same statutory provisions and terms as are at issue in this matter. As discussed above, Farmers' counsel also represented the taxpayer in the *Alltel* litigation addressed in both parties' briefs in this appeal. Through the involvement in these matters, and as more fully explained in Farmers' proposed brief, Farmers and its counsel have identified the following:

1. A continuously expanding view by the Department of what constitutes "gross proceeds of sales" or "value proceeding or accruing from" the sale of tangible personal property that, Farmers submits, extends the reach of the Tax Act far beyond what was intended by the General Assembly as reflected in its plain language; and

2. Deviations created by the Department to—and material inconsistencies in—the Department's application of its broad interpretation of the Tax Act that have no basis in the Tax Act, cannot be reconciled with the plain language or purpose of the applicable statutory provisions, demonstrate the unworkability of the Department's interpretation, and result in an ambiguity which must be construed in favor of taxpayers.

Farmers respectfully submits that this additional information as well as the perspective of a taxpayer in a different business than Petitioner would be beneficial to the Court as it considers the important and far-reaching issue in this case. *Ryan*, 125 F.3d at 1063 ("An amicus brief should normally be allowed … when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.").

CONCLUSION

For the reasons explained above, we respectfully request that the Court grant Farmers' motion for leave to file the accompanying *amicus curiae* brief in this case.

Respectfully submitted,

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Columbia, South Carolina
August 25, 2021

EXHIBIT A

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BRIEF OF *AMICUS CURIAE* WAREHOUSE HOME FURNISHINGS DISTRIBUTORS, INC.

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INTEREST OF AMICUS CURIAE

Founded in 1949, Warehouse Home Furnishings Distributors, Inc., d/b/a Farmers Home Furniture ("Farmers") is a furniture and home goods retailer with over 250 locations throughout the Southeast, including 33 locations in South Carolina.[1] Farmers sells a variety of items used in the home, including furniture, decorative items, appliances, and electronics ("Furnishings"). Pertinent here, Farmers collects and remits to the Department of Revenue ("DOR" or "Department") sales tax on the revenues derived from its sales of Furnishings. The instant appeal is of significant interest to Farmers because the Department recently assessed sales taxes, penalties, and interest against Farmers for certain intangible items related to Farmers' sale of Furnishings on credit.

Specifically, like many retailers, Farmers provides its customers the option of purchasing Furnishings on a cash basis (*i.e.*, by paying the full price up front) or on an installment basis involving the extension of credit by Farmers to its customers. Regardless of the option selected, the price for the Furnishings is the same. Certain of Farmer's customers that purchased Furnishings on credit also purchased optional credit insurance policies. Under these policies, benefits (depending on the coverage chosen) covering the customer's installment payment obligations were payable to Farmers in the event the customer died, became injured or ill, became unemployed, or the Furnishings were destroyed or damaged due to theft, loss, or accident. These policies were underwritten by insurance companies licensed by the South Carolina Department of Insurance ("DOI") and whose premiums were established by order of DOI. Farmers also collected from customers (a) fees for the option of making monthly installment payments pursuant their financing

[1] The facts set forth herein are supported by the affidavit of Sam Moore, Treasurer for Farmers, attached as Exhibit B to Farmers' Motion for Leave to File an *Amicus Curiae* Brief.

agreement via telephone or internet ("Convenience Fees") and (b) fees for untimely installment payments under their financing agreement ("Late Fees"). Farmers did not remit sales tax to the Department on the amount of the credit insurance premiums, Convenience Fees, and Late Fees it collected.

The Department concedes that credit insurance premiums, Convenience Fees, and Late Fees do not constitute tangible personal property or one of the few services specifically taxable under the applicable statutory provisions. Nevertheless, the Department assessed Farmers sales tax on these items based primarily on the contention that these items are within the definition of "gross proceeds of sales" set out in S.C. Code Ann. § 12-36-90 because they constitute "value proceeding or accruing from" the sale of tangible personal property. Farmers timely protested the Department's proposed assessment, which was rejected by the Department in a July 7, 2021, determination. On August 5, 2021, Farmers filed for a contested case in the Administrative Law Court challenging the Department's determination.

Although the facts of this appeal are different from Farmers' pending contested case and involve different intangibles on which the Department seeks to impose sales tax—buyers' club memberships in the appeal versus credit insurance premiums and other financing-related charges in Farmers' case—both matters involve the interpretation of the South Carolina Sales and Use Tax Act, S.C. Code Ann. § 12-36-5 *et. seq.* (the "Tax Act"), and, more specifically, the meaning of "gross proceeds of sales" and "value proceeding or accruing from" the sale of tangible personal property under S.C. Code Ann. § 12-36-90. Accordingly, a ruling by this Court as to the proper interpretation of S.C. Code Ann. § 12-36-90 likely will impact Farmers' pending contested case.

Farmers and its counsel also have developed a deep familiarity with the Tax Act and the Department's interpretation and application of the provisions of the Tax Act through Farmers'

compliance with its sales tax obligations as a retailer in this State and Farmers' pending contested case involving the same statutory provisions and terms as are at issue in this matter. Farmers' counsel also represented the taxpayer in the Administrative Law Court case, *Alltel Communications, Inc. v. South Carolina Department of Revenue*, 2015 WL 7681302 (S.C. Admin. Law Ct. Nov. 13, 2015), which is discussed in the parties' respective briefs and concerned similar issues as this case. Through the involvement in these matters, and as more fully explained below, Farmers and its counsel have identified the following:

1. A continuously expanding view by the Department of what constitutes "gross proceeds of sales" or "value proceeding or accruing from" the sale of tangible personal property that, Farmers submits, extends the reach of the Tax Act far beyond what was intended by the General Assembly as reflected in its plain language; and

2. Deviations created by the Department to—and material inconsistencies in—the Department's application of its broad interpretation of the Tax Act that have no basis in the Tax Act, cannot be reconciled with the plain language or purpose of the applicable statutory provisions, demonstrate the unworkability of the Department's interpretation, and result in an ambiguity which must be construed in favor of taxpayers.

STATEMENTS AND STANDARD OF REVIEW

Farmers concurs in and adopts by reference the "Question Presented," the "Statement of the Case," the "Statement of Facts," and "Standard of Review" set forth in the Brief of Petitioner.

ARGUMENT

I. The Department's ever-expanding interpretation of "gross proceeds of sales" of tangible personal property impermissibly extends the reach of the Tax Act far beyond what was intended by the General Assembly's plain language.

The Tax Act imposes a sales tax of six percent on the "gross proceeds of sales" of tangible personal property and certain enumerated services and intangibles. S.C. Code Ann. §§ 12-36-910(A), -1110. S.C. Code Ann. § 12-36-90, in turn, defines "gross proceeds of sales" as "the value

proceeding or accruing ***from*** the sale … of tangible personal property[,]" including "the proceeds from the sale of tangible personal property without any deduction for: (i) the cost of goods sold; (ii) the cost of materials, labor, or service; … (vii) any other expenses." (Emphasis supplied). In short, retailers must collect and remit sales taxes on the amounts paid by customers in exchange for tangible personal property and cannot reduce such amounts by the cost to the retailer of delivering such tangible personal property to the customer. There would not appear to be anything particularly confusing or unclear about these provisions, especially considering the Tax Act is plainly intended to impose sales tax on the sale of ***tangible*** personal property. *See, e.g.*, S.C. Code Ann. § 12-36-910 (imposing sales tax only on "tangible personal property" and certain enumerated services defined to constitute "tangible personal property" for sales tax purposes).

However, in recent years, the Department has injected ambiguity and confusion into these statutory provisions by taking a unilateral position that any amounts paid for anything and everything ***related*** to the sale of tangible personal property constitute "value proceeding or accruing from" the sale of tangible personal property and are subject to sales tax. This means that intangibles and other services not expressly subject to tax under the applicable statutory provisions are now being pulled within the ambit of the Tax Act. In support of its expansive view, the Department contends that the applicable inquiry should be whether "but for" the sale of tangible personal property would the retailer collect the amounts paid for the separate or additional intangible or services. Br. of Resp't at 13, 18-19. This view has no support in the statutory language and is not supported by the appellate decisions relied upon by the Department. As explained in Section II, the numerous exceptions to and inconsistencies in the Department's application of this view also demonstrate the error in and unworkability of the Department's position.

The Department's expansive view primarily derives from its misreading of the 1985 decision of the Court of Appeals in *Meyers Arnold v. South Carolina Tax Commission*, 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985), which found that lay away fees paid to the retailer for lay away sales were part of the gross proceeds of sales and subject to sales tax. In making its determination, the Court of Appeals stated:

> Section 12–35–30 defines gross proceeds of sales as 'the value proceeding or accruing from the sale of tangible personal property . . . without any deduction for service cost.' But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales.

Meyers Arnold, 285 S.C. at 307, 328 S.E.2d at 923 (referencing former S.C. Code Ann. § 12-35-30, the predecessor to S.C. Code Ann. § 12-36-90). Of course, there is nothing remarkable about this statement as the Court of Appeals clearly determined as a factual matter that the cost of a lay away sale was a cost of service to the retailer of providing the tangible personal property, and the statutory definition of gross proceeds of sales expressly excludes any deduction for the cost of services incurred by the retailer to provide the tangible personal property. S.C. Code Ann. § 12-36-90(1)(b). Simply put, the lay away fees were paid by the customer to the retailer to obtain the tangible personal property (*i.e.*, without paying the lay away fees to compensate the retailer for the overhead, storage, or carrying costs of making a lay away sale, the customer could not obtain possession or title to the tangible personal property at a later date). In making the statement quoted above, the Court of Appeals was not addressing the different scenario in which a separate service or intangible is provided ***in addition to*** (rather than as part of) the sale of tangible personal property.

The Department similarly relies on this Court's decision in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), which ruled that the service

and facilitation fees charged by an online travel agency for online hotel room reservations were part of the gross proceeds derived from the furnishing of hotel room rentals and therefore subject to accommodations tax. Again, this conclusion is perfectly in line with the statutory language because, as this Court specifically recognized, the statutory definition of gross proceeds expressly excludes any deduction for "cost of services." *Travelscape*, 391 S.C. at 98, 705 S.E.2d at 33. The facilitation and service fees were paid by the customer to obtain a hotel room rental. These fees were not paid for a separate service or an intangible purchased ***in addition to*** the hotel room rental. Accordingly, such fees "proceed[ed] or accru[ed] ***from***" the sale of hotel room rentals.

The decisions in *Meyers Arnold* and *Travelscape* simply confirmed the plain meaning of S.C. Code Ann. § 12-36-90 (and its predecessor) and the statutory restriction against deducting the costs of the retailer from "gross proceeds of sales." The statutory language, as confirmed by these decisions, serves as a shield against retailers artificially reducing their sales tax liability by deducting from the price of tangible personal property the costs of the retailer to provide such tangible personal property to the customer. The problem is the Department is now using these decisions and the so-called "but for" test as a sword to subject otherwise non-taxable intangibles and services provided ***in addition to*** the sale of tangible personal property (rather than as a part of) to sales tax. Essentially, the Department's position is that if an otherwise non-taxable service or intangible is provided in conjunction with or is merely related to the sale of tangible personal property, the amounts collected for such items become taxable as "value proceeding or accruing from" the sale of tangible personal property, which is far beyond the reach of the Tax Act.

An example of the Department wielding this sword is the 2015 *Alltel* case before the Administrative Law Court, which is discussed in both parties' briefs.[2] In *Alltel*, the Department, relying largely on *Meyers Arnold*, contended that premiums for insurance covering wireless devices purchased by Alltel's customers should be subject to sales tax because "but for" the customer's purchase of tangible personal property, the customer would not purchase, and Alltel would not collect, the insurance premiums. *Alltel*, 2015 WL 7681302, at 15-17. The Department conceded that the insurance policies were not tangible personal property but nevertheless claimed the premiums paid for those policies were subject to sales tax because the policies were "sold in conjunction with the sale of tangible personal property." *Id*. at 11. The Administrative Law Court correctly rejected the Department's position, ruling that neither the plain language of S.C. Code Ann. § 12-36-90 nor *Meyers Arnold* supports such a broad interpretation. *See id.* at 17 ("Therefore, to read *Meyers Arnold* as the Department asserts would sanction the application of sales tax in circumstances where it is far from clear that the sales tax applies."). The Administrative Law Court found that sales tax applies to tangible personal property and certain services enumerated under the Tax Act and that, because the insurance policies were neither, the amounts collected for insurance premiums did not constitute "value proceeding or accruing from the sale … of tangible personal property" under the plain meaning of the statutory language. *Id*. at 13. Notwithstanding

[2] Notably, in its brief to this Court, the Department does not accurately describe the *Alltel* decision (nor DOR's position in that case) and, in what appears to be an effort to downplay the expansiveness of the application of its interpretation of the Tax Act, makes statements to this Court that directly contradict its position in Farmers' pending case. Indeed, a reading of DOR's brief in this matter would have you believe that its interpretation of "gross proceeds of sales" or "value proceeding or accruing from" sales of tangible personal property does not go as far as to subject insurance premiums to sales tax. *See* Br. of Resp't at 22 ("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."). But that is the exact opposite of the position DOR is taking in Farmers' contested case. The fact that the Department feels the need to avoid explaining its actual position in *Alltel* in its briefing to the Court in this appeal is telling.

this well-reasoned decision rejecting the Department's position,[3] the Department has continued its efforts to impose its expansive view (even with respect to insurance policies).

In *Rent-A-Center East, Inc. v. South Carolina Department of Revenue*, 425 S.C. 582, 824 S.E.2d 217 (Ct. App. 2019), the Department contended that the amounts paid to the retailer for optional damage waivers purchased by customers of Rent-A-Center in conjunction with the customer's electronics or appliance rentals were subject to sales tax because "but for" the rentals, Rent-A-Center would not sell the damage waivers. The Court of Appeals correctly recognized that the *Meyers Arnold* and *Travelscape* cases were not analogous to Rent-A-Center's appeal because "they involve[d] attempts to deduct service fees" rather than the taxation of a separate service or intangible. *Rent-A-Center*, 425 S.C. at 594, 824 S.E.2d at 223. However, the Court of Appeals ruled in favor of the Department and affirmed the Administrative Law Court's order on the basis that, under the applicable standard of review, substantial evidence supported the Administrative Law Court's finding that the damage waivers were "inextricably linked" to the rentals of tangible personal property. *Id*. at 590-92, 824 S.E.2d at 221-22. While *Rent-A-Center* turned on the specific evidence presented and applicable standard of review, and its import is accordingly limited, the Department nevertheless contends in this appeal and in Farmers' pending contested case that the Court of Appeals' "inextricably linked" discussion supports its use of the "but for" test. Br. of Resp't at 20-21.

Specifically, in Farmers' pending contested case, the Department contends that insurance premiums collected by Farmers for credit insurance policies sold by third-party licensed insurers are subject to sales tax (in addition to being subject to premium tax paid to DOI) as are the

[3] The Department appealed this decision but reached a settlement with Alltel and withdrew its appeal prior to obtaining any decision from the Court of Appeals or this Court. The Administrative Law Court's decision in *Alltel* was not, however, vacated as a result of that settlement.

Convenience Fees and Late Fees charged pursuant to Farmers' financing agreements with its customers. All of these items indisputably relate to the credit financing arrangements and are only charged (if at all) to customers that purchase Furnishings on an installment basis. Accordingly, the Department's position that these items are subject to sales tax creates the absurd scenario in which customers who purchase Furnishings on an installment basis pay more sales tax than a customer who purchases the same Furnishings for the same price with cash. The Department contends this absurdity (and unfairness to customers that may need to purchase on credit) is required because the credit insurance premiums, Convenience Fees, and Late Fees are "inextricably linked" with the Furnishings and "but for" the sale of the Furnishings, Farmers would not collect these amounts.[4] That is, under the Department's interpretation of S.C. Code Ann. § 12-36-90, these otherwise non-taxable services and fees become taxable simply because they are ***related*** to the sale of tangible personal property by Farmers.

Relying on its misreading of both *Myers Arnold* and *Travelscape*, the Department, therefore, has greatly expanded the application of the Tax Act in a manner contrary to its plain language and purposes. S.C. Code Ann. § 12-36-90 defines "gross proceeds of sales" as "the value proceeding or accruing from" the sale of tangible property, not "the value proceeding or accruing from the sale of tangible personal property ***and from other services and intangibles offered in addition to the sale of tangible personal property***." This Court should, therefore, reject the Department's interpretation and its proposed "but for" test to subject otherwise non-taxable intangibles or services to sales tax.

[4] As was the case with the insurance premiums collected in *Alltel*, the premiums Farmers collects are paid to the licensed insurance carriers. Farmers retains a commission for the sale of insurance products by its employees who are licensed insurance agents of the insurance companies.

II. The numerous Department-created exceptions to and inconsistencies in the Department's position confirm its error and unworkability and give rise to an ambiguity.

In its oral argument to this Court in *Rent-A-Center*, the Department stated that warranty coverage sold to an owner of tangible personal property by a warranty coverage vendor (*i.e*., not the retailer) was not subject to sales tax because warranty coverage sold by a third party vendor was a non-taxable service that did not give rise to "value proceeding or accruing from" the sale of tangible personal property as contemplated by S.C. Code Ann. § 12-36-90 as it involved two transactions.[5] In that same oral argument, the Department also acknowledged that it permits certain forms of "service," specifically the cost of labor charged when a retailer performs an oil change, to be excluded from the imposition of sales tax—even though that oil change involved the sale of tangible personal property and services in a single transaction.[6] This latter concession by DOR is unsurprising as it has in fact adopted regulations specifically providing that labor services supplied by a retailer may be excluded from sales tax if the amount for labor services are shown as a separate item on invoices detailing the charges for parts (*i.e*., tangible personal property). *See,* e.g., 10 S.C. Code Regs. 117-306 and 117-306.2. Similarly, S.C. Code Regs. 117-313.3 provides that "charges for installation ***incident*** to the sale of tangible personal property when such charges are separately stated from the sales price of the property on billing to customers" are ***not*** subject to sales tax. (Emphasis supplied.).[7] And S.C. Regs. 117-318.2 provides, in part:

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[5] *See* https://media.sccourts.org/videos/2019-000670.mp4 beginning at 24:28 and ending at 25:30 of the Department's oral argument in *Rent-A-Center*.

[6] *See* https://media.sccourts.org/videos/2019-000670.mp4 beginning at 19:34 and ending at 20:53 of the Department's oral argument in *Rent-A-Center*.

[7] *But see* Br. of Resp't at 19-20 (arguing that "because 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." (Emphasis supplied)). Thus, while its own regulations recognize that services provided "incident" to the sale of tangible personal property are not necessarily subject to sales tax, that is exactly the bright-line rule the Department is asking this Court to adopt in the instant appeal.

> Where the[] seller has an established cash price and when selling on an extended payment basis, adds a separate charge for financing, the additional charge is ***not*** to be included in gross proceeds of sales.

(Emphasis supplied).

These statements and regulations are all consistent with S.C. Code Ann. § 12-36-90, which, as discussed, subjects the sale of tangible personal property to sales tax but does not impose sales tax on additional or separate services or intangibles simply because they are provided in conjunction with the sale of tangible personal property. And, of course, as a matter of law, the Department has no authority to adopt regulations which depart from the provisions of the Tax Act with respect to the taxability of tangible personal property and services. *See Home Medical Systems, Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009), *citing Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d, 531, 532 (1995) ("'Regulations authorized by the Legislature have the force and effect of law.' Nonetheless, a regulation may not alter or add to a statute"); *see also Heyward v. S.C. Tax Comm'n*, 240 S.C. 347, 355-6, 126 S.E.2d 15, 20 (1962). These Department statements and regulations are completely ***inconsistent***, however, with the Department's broad interpretation of the Tax Act and proposed "but for" test. Indeed, applying the Department's "but for" or "inextricably linked" test would seemingly ***require*** sales tax to be paid for third-party warranty coverage, oil change services, installation services, and finance charges and would mean the Department's regulations violate the Tax Act. The fact that the Department's proposed interpretation of the Tax Act cannot be universally applied and the Department has unilaterally created exceptions to its interpretation confirms it is wrong. It also demonstrates that, as applied by the Department with respect to additional services or intangibles offered in conjunction with sales of tangible personal property, the Tax Act is at the very least

ambiguous as the Department's interpretation and "but for" test cannot be squared with its own regulations.

A great example of the unworkability of the Department's interpretation is its conflicting positions in Farmer's pending contested case. The credit insurance premiums, Convenience Fees, and Late Fees collected by Farmers on which the Department seeks to impose sales tax are all paid pursuant to the credit financing agreements between Farmers and its customers. Interest is also charged pursuant to these credit financing agreements. The Department's position is that the credit insurance premiums, Convenience Fees, and Late Fees are all subject to sales tax, but the interest is not. Farmers agrees that interest is not subject to sales tax as the interest accrues from the ***financing*** transaction, not the sale of tangible personal property. But there is no basis for treating the credit insurance premiums, Late Fees, and Convenience Fees—all of which also accrue from the ***financing*** transaction (and, in the case of insurance premiums, the separate insurance purchase transaction)—any differently; nor is there a basis to support the argument that these amounts are "inextricably linked" to the sale of tangible personal property but interest is not.

These exceptions and inconsistencies demonstrate Department's expansive view of the Tax Act is erroneous. The Department has developed an overly broad interpretation that imposes sales tax on items the General Assembly never contemplated would be subject to sales tax. It has then created deviations to this broad interpretation that are inconsistent with and have no support in the statutory language. And the Department's conflicting positions result in additional sales taxes being imposed on purchasers of tangible personal property who must rely on credit to afford their purchases—a result which effectively discriminates in favor of purchasers who do not need credit and can hardly have been the intent of the General Assembly.

CONCLUSION

This Court should reject the Department's proposed interpretation of the Tax Act and so-called "but for" test. The Tax Act should be construed in accordance with its plain language and purposes to subject sales of tangible personal property to sales tax but not to impose sales tax on additional services or intangibles simply because they are provided in conjunction with or related to the sale of tangible personal property.

Respectfully submitted,

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v.

South Carolina Department of Revenue, ...Respondent.

AFFIDAVIT OF SAM MOORE

PERSONALLY APPEARED BEFORE ME **Sam Moore**, who deposes and says as follows:

1. I am over 18 years of age, and I am qualified and competent to make this affidavit.

2. I make this affidavit based upon my personal knowledge, except as to those matters stated upon information and belief and, as to those matters, I believe them to be true.

3. I am the Treasurer for Warehouse Home Furnishings Distributors, Inc. d/b/a Farmers Home Furniture ("Farmers").

4. Pursuant to Rule 240(c)(3), SCACR, I am submitting this affidavit in conjunction with Farmers' Motion for Leave to File *Amicus Curiae* Brief.

5. Farmers, founded in 1949, is a furniture and home goods retailer with over 250 locations throughout the Southeast, including 33 locations in South Carolina.

6. Farmers sells a variety of items used in the home, including furniture, decorative items,

appliances, and electronics ("Furnishings").

7. Farmers collects and remits to the South Carolina Department of Revenue ("DOR" or "Department") sales tax on the revenues derived from its sales of Furnishings in South Carolina.

8. The Department recently assessed sales taxes, penalties, and interest against Farmers for certain credit insurance premiums, convenience fees, and late fees collected by Farmers from customers that purchased Furnishings on an installment basis pursuant to credit financing agreements entered into with Farmers.

9. Farmers timely protested the Department's proposed assessment, which was rejected by the Department in a July 7, 2021, determination.

10. On August 5, 2021, Farmers filed for a contested case in the Administrative Law Court challenging the Department's determination.

11. Farmers provides its customers the option of purchasing Furnishings on a cash basis (*i.e.*, by paying the full price up front) or on an installment basis involving the extension of credit by Farmers to customers. Regardless of the option selected, the price for the Furnishings is the same.

12. Certain of Farmer's customers that purchased Furnishings on credit also purchased optional credit insurance policies. Under these policies, benefits (depending on the coverage chosen) covering the customer's installment payment obligations were payable to Farmers in the event the customer died, became injured or ill, became unemployed, or the Furnishings were destroyed or damaged due to theft, loss or accident. These policies were underwritten by insurance carriers licensed by the South Carolina Department of Insurance ("DOI") and whose premiums were established by order of DOI. The premiums Farmers collects from customers are paid to the licensed insurance carriers. Farmers retains a commission for the sale of the insurance products by its employees who are licensed insurance agents of the insurance companies.

13. Farmers also collected from customers and retained (a) fees for the option of making their monthly installment payment pursuant their financing agreement via telephone or internet ("Convenience Fees") and (b) fees for untimely installment payments under their financing agreement ("Late Fees").

14. Farmers did not remit sales tax to the Department on the amount of the credit insurance premiums, Convenience Fees, and Late Charges it collected.

Sam Moore

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 24 DAY OF
August 2021.

Notary Public for the State of Georgia

My commission expires March 6, 2022

[SEAL]

AMANDA BROWN LOGUE
NOTARY PUBLIC
WASHINGTON COUNTY
GEORGIA
EXPIRES
MARCH 6, 2022