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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.

THE DEPARTMENT OF REVENUE'S RESPONSE TO WAREHOUSE HOME FURNISHINGS DISTRIBUTORS, INC.'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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SUMMARY OF ARGUMENT

As the United States Supreme Court Rules recognize, "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." SUP. CT. R. 37.1 (2019). Warehouse Home Furnishings Distributors, Inc. d/b/a Farmers Home Furniture's ("Farmers") proposed *amicus curiae* brief adds nothing significant to the Court's analysis in this case. Farmers readily admits that its business and the basis for its sales tax assessment are different from Books-A-Million ("BAM"). Farmers is not a membership club nor does Farmers offer its customers the chance to join a club similar to BAM's Millionaire's Club. Farmers' proposed brief does not provide any additional material or analysis that will aid this Court in its consideration of the issue in this case. Indeed, Farmers' brief does not address the issue that is actually before this Court – whether membership fees are subject to sales tax. See Wilson v. City of Columbia, Op. No. 28056, Filed September 2, 2021 at 7 n. 7 ("The parties, through their pleadings, determine the issues before the Court. The issues before the Court may not be expanded through amici briefs....")

In short, Farmers should not be granted leave to file the proposed *amicus curiae* brief because (1) Farmers has misapprehended and mischaracterized the Department of Revenue's position in this appeal and (2) Farmers' dispute with the Department is so dissimilar from the Books-A-Million matter that Farmers does not have the requisite interest warranting leave to file the *amicus curiae* brief.

ARGUMENT

"The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term 'amicus curiae' means friend of the court, not friend of a party." Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062,

1063 (7th Cir. 1997). Farmers may be characterized as a friend of BAM or possibly a friend of itself, but there is nothing in its proposed brief that renders it a friend of the Court. Farmers not only parrots BAM's incorrect and misleading arguments but also improperly uses its proposed brief to argue its own dispute with the Department, which is pending in the Administrative Law Court. Neither assists this Court in deciding the limited issue of whether membership club fees are subject to sales tax in circumstances where membership confers discounts on the price of tangible personal property to members, but not to non-members.

I. The Department does not argue that services and intangibles are subject to sales tax simply because they are related to the sale of tangible personal property.

Farmers has mischaracterized the Department's position in its dispute with BAM. Farmers suggests in its proposed brief that:

> 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.

(See Farmers Proposed Br. at 6.)

This dramatically overstates the Department's side in its quarrel with BAM. The crux of the Department's argument is much narrower and is made clear in the "Conclusion" to its Brief.

> 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.... 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.

It is apparent from the most straightforward comparison of the Department's Brief and the proposed *amicus curiae* brief that Farmers' problem is not with the Department; it does not arise from

the spurious claim that the Department's position is "Johnny-come-lately." Rather, Farmers' trouble is with this Court and the Court of Appeals, both of which (along with the Department) have consistently interpreted the Sales Tax Act to allow for taxing the cost of intangible benefits when they are value proceeding or accruing from the sale of tangible personal property.

a. <u>The Department's assertion that Millionaire's Club membership fees are subject to sales tax is in accord with decades-worth of South Carolina authority.</u>

As the Department has made clear at every stage of this appeal, its position in this case, i.e. that Millionaire's Club membership fees are subject to sales tax because the membership allows for product price discounts that are not available to non-members, has been the law of this state for at least 40 years. The Attorney General opined on the application of sales tax in this context as early as 1971 and reiterated this position in 1982, both of which occurred before the Department ever issued its own guidance on sales tax in this context.

Of course, the Department's guidance on the taxability of transactions where a retailer is compensated for a discounted price is also long established. The Department issued its first Revenue Ruling on this issue in 1990. Additional and consistent guidance was provided to taxpayers in a Private Letter Ruling in 1992, another Revenue Ruling in 1998, and Private Letter Rulings in 1999 and 2016.

b. <u>The "but for" standard that Farmers takes issue with was created by the Court of Appeals in 1985.</u>

The Department did not create the "but for" standard as it is applied to sales tax; the Court of Appeals did that in <u>Meyers Arnold:</u>

> 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. For these reasons, this court holds the lay away fees are part of the gross proceeds of sales and subject to the sales tax.

Meyers Arnold, Inc. v. S.C. Tax Comm'n, 285 S.C. 303, 307, 328 S.E.2d 920, 923 (Ct. App. 1985).

Remarkably, Farmers posits that

> 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 this expansive view, *the Department contends that the applicable inquiry should be whether "but for" the sale of tangible personal property would he retailer collect the amounts paid for the separate or additional intangible or services.*

(See Farmers Mot. For Leave to File Amicus Curiae Brief at 4) (emphasis added). Nearly everything in Farmers' description of the Department's position is incorrect. First, the Department's stance in this appeal is neither novel nor unilateral. As already discussed *ad nauseum*, the Department's view that club membership fees are subject to sales tax because club members obtain product discounts that are not available to non-members has been part of the Department's guidance to taxpayers since at least 1990[1]. This is obviously not a new position. See Respondent's Br. at 13-16. Furthermore, the Department has not acted unilaterally in adopting this position; the Attorney General came to the same conclusion in 1998, 1982, and 1971. See id. at 17.

Even if (as Farmers suggests) the Court were to consider the "but for" analysis to be the operative issue (the Department does not), it was first espoused by the Court of Appeals in 1985. The Department does not "contend" that this is the appropriate inquiry; the Court of Appeals instructed that this is the correct analysis. Because it was the Court, not the Department, that created the "but for" test, thus the Department has not taken a "unilateral position" here. The Department is simply following established judicial precedent.

[1] Of course, this is not how Farmers describes the Department's position on appeal, but Farmers' description is demonstrably incorrect.

Second, the Department does not now, and has never, asserted 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...." See Farmers' Proposed Br. at 4. This is clearly stated in the Department's brief. For example, professional services are not taxable merely because they are related to the sale of tangible personal property. Respondent's Br. at 11-12. Moreover, the Department describes several tangible and intangible items that are not included as part of the Gross Proceeds of Sales in its Sales and Use Tax Policy Manual (Ch. 6, §§ C & D.) The Department does not even tax all retail stores' club membership fees, which are most likely "related" (in the colloquial sense) to the sale of tangible personal property but not "gross proceeds" of the sale of tangible personal property. The Department, consistent with the holdings in Meyers Arnold and Rent-A-Center East, Inc. v. South Carolina Department of Revenue, 824 S.E.2d 217, 425 S.C. 582 (Ct. App. 2019)[2], deems as taxable only the value that proceeds or accrues from the sale of tangible personal property. Items which are inextricably linked, fundamentally interconnected, or which would not have been collected but for the sale of tangible personal property are properly included in gross proceeds of sales. See Rent-A-Center, 425 S.C. at 592. The Millionaire's Club fees fall clearly within this precedent.

Farmers pays particular attention to this Court's decision in Travelscape, LLC v. South Carolina Dept. of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011), which Farmers characterizes as too narrow to support the Department's position. In fact, Travelscape is consistent with taxing the Millionaire's Club membership fees. Farmers points out that Travelscape's "service and facilitation

[2] It is noteworthy that all of Farmers' arguments were made to both the Court of Appeals and this Court in Rent-A-Center. The arguments were rejected. The Court of Appeals specifically addressed the claim that the Department was overreaching in its interpretations of Meyers Arnold and Travelscape. Rent-A-Center, 425 S.C. at 593, 824 S.E.2d at 223. Therefore, this Court, which dismissed its grant of certiorari in Rent-A-Center after oral argument, is likely already sufficiently familiar with the arguments raised by Farmers.

fees" were properly subject to sales tax, but contends that the Department improperly expands that decision to tax BAM's membership fees. The Supreme Court found that the service fee charged by Travelscape was part of the gross proceeds of renting a hotel room because it was part of "the value proceeding or accruing from the sale, lease, or rental of tangible personal property." Thus, there are two reasons that Travelscape supports the Department and the Court of Appeals' decision in this matter. First, of course Travelscape's service fee was not for any tangible property, but it was still subject to sales tax. Second, although the Travelscape opinion does not explicitly employ the "but for" test, but the analysis is certainly in line with Meyers Arnold. See Rent-A-Center, 425 S.C. at 594, 824 S.E.2d at 223.

II. Farmers does not have an appropriate interest in the outcome of this appeal to justify its proposed amicus curiae brief.

At first glance, it is perplexing that Farmers—a furniture store with no membership club—would assert in this appeal—addressing the sales tax implications of a membership club—the plainly erroneous and out-of-place arguments discussed above. However, Farmers' discussion in its brief of its ongoing dispute with the Department belies the true reason for its *amicus curiae* brief. In the Farmers matter that is currently before the ALC, Farmers has asserted that the Department has overreached in assessing sales tax on certain credit insurance related fees, "convenience fees", and late payment fees. Although these issues are distinct from the narrow issue before the Court in the case at bar, it appears that Farmers has attempted, under the guise of an impartial *amicus curiae*, to offer arguments and briefing in support of its position in another pending case. That is not only improper, but it is directly contrary to the appropriate role of an amicus curiae. See Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974) (describing an amicus curiae brief as a "'friend of the court' as distinguished from an advocate before the court"); see also 3B C.J.S. Amicus Curiae § 1 (2020) ("An amicus is one who, not as party but just as any stranger might, gives information for the assistance

of the court on some matter of law in regard to which the court might be doubtful or mistaken rather than one who gives a highly partisan account of the facts.").

This is especially true because Farmers' proposed brief spills significant ink discussing its own dispute with the Department and attempting to equate that dispute with this one by suggesting the Department is in the practice of overreaching and switching positions in effort to support tax assessments for taxes that were never owed. Not only is this a ridiculous assertion that has no place in either case, it is nothing more than the argument of another party in litigation against the Department. Farmers' attempt to present such argument as that of an impartial amicus curiae is simply improper.

III. Farmers discussion of the ALC's decision in *Alltel Communications, Inc. v South Carolina Department of Revenue* is inapposite to this matter.

Farmers suggests to this Court that the Department has incorrectly characterized the import of ALC's decision in Alltel Communications, Inc. v South Carolina Department of Revenue, 2015 WL 7681302 (2105). Farmers is incorrect, but assuming *arguendo* that Farmers is correct, that decision is irrelevant to the analysis in the dispute between BAM and the Department.[3] According to the ALC, the issue in Alltel was whether the indemnification coverage charge paid by Alltel's customers was tangible personal property. *Id.* at *4. Unlike the issue before this Court, the ALC did not consider whether the charge was "value proceeding or accruing from the sale, lease or rental of tangible personal property." *Id.* at *12. The ALC concluded that because the insurance policy was not tangible personal property that it could not be subject to sales tax. *Id.* at *13.

The Department contended at the time of the Alltel decision that the ALC's conclusion was incorrect. In fact, based on established preceded of this Court and the Court of Appeals, the

[3] If the Alltel decision is relevant to this matter at all it is relevant because it shows that Farmers should not be allowed to skip forward in its sales tax dispute from the ALC directly to the Supreme Court. To the extent that the Department is incorrect in its application of the Sales and Use Tax Act, the ALC is capable of safeguarding Farmers' position.

Department adhered to the position before Alltel that costs of intangible items are subject to sales tax if those costs constitute "value proceeding or accruing from the sale…of tangible personal property." See e.g., Meyers Arnold and Travelscape, infra. However, if there were any doubt as to the correctness of that authority after Alltel, it is certainly beyond dispute now as a result of the Court of Appeals' recent decision in Rent-A-Center. It is not necessary for all "value proceeding or accruing from the sale…of tangible personal property" to be a direct cost of tangible personal property in order for the sales tax to apply.

In any event, the ALC's decision in Alltel is neither biding nor precedential on this Court just like it is neither binding nor precedential in any decision of the ALC. See SCALC Rule 70(f). Thus, Farmers discussion of the decision, even if correct, is immaterial to the dispute between BAM and the Department.

CONCLUSION

According to Judge Posner, "judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal." Ryan, 125 F.3d at 1064. Farmers will have every opportunity to litigate its case before the ALC and, perhaps, in front of this Court. However, in its proposed *amicus curiae* brief, Farmers has offered nothing more than an echo of the arguments already provided by BAM. Therefore, the Motion For Leave to File an *Amicus Curiae* Brief should be denied.

<Signature page to follow>

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