

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Books-A-Million, Inc.,)	Docket No. 16-ALJ-17-0113-CC
)	
Petitioner,)	
)	ORDER VACATING PREVIOUS ORDER
Vs.)	AND AMENDING ORDER GRANTING
)	RESPONDENT'S MOTION FOR
South Carolina Department of Revenue,)	SUMMARY JUDGMENT
)	
Respondent.)	
)	
)	
)	

APPEARANCES: Petitioner: Burnet R. Maybank, Esquire and James P. Rourke, Esquire
Respondent: Lauren Acquaviva, Esquire and Sean G. Ryan, Esquire

This Amended Order Granting Respondent’s Motion For Summary Judgment is being issued to correct the previous order that was issued on June 1, 2017, which was incorrectly adjudicated as a Final Order and Decision rather than as a motion for summary judgment.

STATEMENT OF THE CASE

This matter comes before the Administrative Law Court (“ALC” or “Court”) pursuant to Books-A-Million, Inc.’s (“Petitioner”) request for a contested case hearing under S.C. Code Ann. § 12-60-460 (2014). The issue before the ALC is whether the proceeds from the Petitioner’s South Carolina sales of Millionaire’s Club Memberships should have been included in the Petitioner’s gross proceeds of sales and, therefore, subject to sales tax. The parties filed Stipulations of Fact with the Court on September 13, 2016. On March 6, 2017, both parties filed motions for summary judgment. The parties agree that no material facts are in dispute but disagree as to the application of the law to the undisputed facts. The Petitioner argues that the South Carolina Department of Revenue (“Department”) incorrectly included the Petitioner’s Millionaire’s Club Membership Fees (“Membership Fees”) in the Petitioner’s gross proceeds of sales. The Department, on the other hand, asserts that based on a plain reading of S.C. Code Ann. §§ 12-36-910(A) and 12-36-90 (2014), applicable case law, previous administrative decisions, and longstanding administrative policy, the Membership Fees are includable in the Petitioner’s gross proceeds of sales and, thus, subject to sales tax. A Motions Hearing was held before this Court on May 9, 2017. After careful

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consideration of the arguments made by the parties, the Court upholds the Department's Determination.

MATERIAL FACTS NOT IN DISPUTE

The following material facts are not in dispute:

1. The Petitioner is in the business of selling tangible personal property at retail in South Carolina. Specifically, the Petitioner operates a discount book retail business headquartered in Birmingham, Alabama. The Petitioner sells books, magazines, collectible supplies, cards, and other gifts in retail stores throughout the country and online. The Petitioner operates thirteen (13) retail locations in South Carolina.
2. The Petitioner offers a discount program to its customers called the Millionaire's Club (the "Club" or "Membership Program"). A customer must pay a \$25.00 annual fee to belong to the Club (the "Membership Fee"). A customer will either pay the Membership Fee separately or along with other purchases; however, the Petitioner has no records establishing that customers pay the Membership Fee without simultaneously purchasing tangible personal property. The Club membership expires one (1) year from the date of payment of the Membership Fee, unless the membership is automatically renewed as described in paragraph 3 below. The payment of the Membership Fee entitles Club members to the following benefits on purchases made at the Petitioner's retail and online locations:
 - (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.
3. The Membership Fee may be refunded if cancelled during the first 30 days of a customer's membership term (new or renewal) and if the customer has not used the membership to obtain an applicable discount or benefit. Memberships automatically

renew each year for one-year periods unless the customer affirmatively opts out of the automatic renewal or the membership is otherwise cancelled or terminated. So long as the customer does not opt out, the Petitioner bills the annual Membership Fee to the credit or debit card provided when the customer initially enrolled in the Club. The Petitioner may unilaterally terminate a customer's membership at any time and without notice for any reason in its sole discretion.

4. The Petitioner does not charge sales tax on the cost of the Membership Fee.
5. On December 11, 2014, the Department sent the Petitioner a letter informing it that its sales and use tax returns for the period beginning January 1, 2012 and ending August 31, 2015 (the "Audit Period") were selected for audit.
6. In connection with the Department's audit, the Petitioner provided copies of its income statements for the Audit Period. The Department's auditor compared the Petitioner's gross proceeds of sales from the income statements to the gross proceeds of sales reported on the Petitioner's Sales and Use Tax returns (Form ST-3). During this audit, the Department discovered that the Petitioner was not charging sales tax on the cost of the Membership Fees.
7. On September 16, 2015, the Department issued a Notice of Proposed Assessment to the Petitioner in the amount of \$226,310.70 due in sales tax on the cost of the Membership Fees for the Audit Period (plus \$15,703.13 in interest and \$63.14 in penalties, which will continue to accrue until this matter is resolved).
8. The Petitioner timely protested the Proposed Assessment by letter dated December 14, 2015.
9. The Department issued its Determination in this matter on March 15, 2016.
10. The Petitioner timely requested a contested case hearing on April 7, 2016.

CONCLUSIONS OF LAW

I. General Conclusions

A. Jurisdiction and Burden of Proof

S.C. Code Ann. § 12-60-30 et seq. (2014) grants jurisdiction to this Court to hear contested cases under the Administrative Procedures Act. Specifically, S.C. Code Ann. § 12-60-460 (2014) grants this Court the authority to conduct contested case hearings in matters concerning taxes. The burden of proof is with the party asserting the affirmative in an adjudicatory administrative

proceeding. See Ford v. Atl. Coast Line R. Co., 169 S.C. 41, 168 S.E. 143, 167 (1932) (“The general rule is, in the absence of valid statutory enactment to the contrary, that the burden of proof rests upon him who has the affirmative of the issue. . . .”); see also Leventis v. Dep’t of Health and Env’tl. Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000). Since the Petitioner requested a contested case hearing to challenge the Department's Determination, I conclude that the Petitioner asserts the affirmative and must prove by a preponderance of the evidence that the Department’s Determination is incorrect. See, e.g., Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 346, 415 S.E.2d 384, 388 (1992) (“Findings of fact based upon a ‘preponderance’ of the evidence are those supported by the greatest ‘weight, amount, credibility or truth’ as reflected by the whole of the evidence before the court, or ‘evidence which convinces as to its truth.’”).

B. Summary Judgment

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Young v. S.C. Dep't of Disabilities & Special Needs, 374 S.C. 360, 649 S.E.2d 488 (2007); Henderson v. Allied Signal, Inc., 373 S.C. 179, 644 S.E.2d 724 (2007); Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); Eagle Container Co., LLC v. County of Newberry, 366 S.C. 611, 622 S.E.2d 733 (Ct. App. 2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004). In determining whether any genuine issue as to any material fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the non-moving party. Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 642 S.E.2d 751 (2007); Med. Univ. of S.C. v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Moore v. Weinberg, 373 S.C. 209, 216, 644 S.E.2d 740, 743 (Ct. App. 2007); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). “A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). I find that the material facts listed above are not in dispute, and those facts viewed in the light most favorable to the Petitioner establish that the proceeds from the

Petitioner's South Carolina sales of Millionaire's Club memberships are subject to sales tax. For the reasons discussed below, I grant the Department's Motion for Summary Judgment.

C. Statutory Construction

"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). In other words, when a statute is unambiguous, a court must rely on the plain meaning of the words in the statute when reading said statute. This rule of statutory construction is known as the "plain meaning rule." 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). Thus, if the language of a statute only has one reasonable interpretation, then the statute is unambiguous and the court need only apply the plain meaning rule.

The Petitioner argued that §§ 12-36-910(A) and 12-36-90 are ambiguous and, thus, should be construed in favor of the taxpayer. However, other than pointing out that the Department reads the statutes differently from the Petitioner, the Petitioner failed to point to any ambiguity in either § 12-36-910(A) or § 12-36-90. As discussed more fully below, I conclude that §§ 12-36-910(A) and 12-36-90 are unambiguous, and thus, the plain meaning rule applies. Furthermore, I conclude that the application of the plain meaning rule to the terms in the statutes at issue demonstrates that the Membership Fees are includable in the Petitioner's gross proceeds of sales, and thus, subject to sales tax.

II. Applicable Law

A. The Petitioner is Engaged in the Business of Selling Tangible Personal Property at Retail and, thus, is Subject to Sales Tax

Under South Carolina law, "[a] sales tax, equal to [six]¹ percent of the gross proceeds of sales, is imposed upon every person² engaged or continuing within this State in the business of selling tangible personal property at retail." Section 12-36-910(A). Tangible personal property, as defined under the South Carolina Sales and Use Act, means "personal property which may be seen,

¹ S.C. Code Ann. § 12-36-1110 (2014) imposes an additional one percent sales tax beginning on June 1, 2007.

² For sales and use tax purposes, the term person "includes any individual, firm, partnership, limited liability company, association, corporation, receiver, trustee, any group or combination acting as a unit, the State, any state agency, any instrumentality, authority, political subdivision, or municipality." S.C. Code Ann. § 12-36-30 (2014).

weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also means services and intangibles . . . the sale or use of which is subject to tax under this chapter” S. C. Code Ann. § 12-36-60 (2014). The Department argued that a plain reading of the statute demonstrates that all persons engaged in the sale of tangible personal property at retail are liable for sales tax on their gross proceeds of sales. The Petitioner, however, argued that § 12-36-910(A) only imposes a sales tax on the sale of tangible personal property. In making such argument, the Petitioner failed to apply the plain meaning rule. Instead, the Petitioner’s reading of the statute requires the deletion of the words “persons engaged in the business of.” A reading of a statute that requires eliminating words within the statute is not reasonable and does not comport with the plain meaning rule. Therefore, I agree with the Department and conclude that § 12-36-910(A) imposes a sales tax on all *persons* engaged in the business of selling tangible personal property at retail. The Petitioner is engaged in the business of selling books, magazines, collectible supplies, cards, and other gifts in retail stores throughout the country, including South Carolina, and online. Those items that the Petitioner sells constitute tangible personal property, thus the Petitioner is engaged in the business of selling tangible personal property at retail and is subject to sales tax on its gross proceeds of sales.

Additionally, the Petitioner argued that its Membership Program is comparable to the services provided by veterinarians and other professional service providers and, thus, is not taxable. I find that the Petitioner’s Membership Program is factually distinct from the services provided by a veterinarian and other professional service providers. Specifically, in all of the examples set forth by the Petitioner in its Motion and supporting memoranda and at the hearing, the provision of services and sales of tangible personal property are clearly separable. The services provided by the businesses referenced by the Petitioner are capable of surviving even if those businesses no longer offered tangible personal property for sale. Similarly, those businesses’ sales of tangible personal property could continue even if they stopped providing services. If the Petitioner, on the other hand, were to stop selling tangible personal property, its Membership Program would not be able to survive as the Membership Program only exists as a means to provide discounts on the Petitioner’s sales of tangible personal property. Because the Membership Program cannot exist without the Petitioner offering tangible personal property for sale, I conclude that the Petitioner’s Membership Program and sales of tangible personal property are inseparable.

Thus, I conclude that the Petitioner is in the business of selling tangible personal property at retail, and that the Petitioner's business is subject to South Carolina sales tax.

B. Gross Proceeds of Sales Includes All Value That Comes From or is a Direct Result of the Sale, Lease, or Rental of Tangible Personal Property

Pursuant to § 12-36-910(A), the measure of tax is based on a taxpayer's gross proceeds of sales. "Gross proceeds of sales" is defined as:

[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.

Section 12-36-90 (emphasis added). The Merriam-Webster Dictionary defines "proceed" as "to come forth from a source" and "accruing" as "to come as a direct result of some state or action." See Proceed, Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/proceed> (last visited Mar. 7, 2017) and Accruing, Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/accruing> (last visited Mar. 7, 2017). Thus, gross proceeds of sales includes the value that comes from or is a direct result of the sale, lease, or rental of tangible personal property.

The Petitioner argued that gross proceeds of sales includes only the value of the tangible personal property. The Department argued that gross proceeds of sales includes (1) the proceeds from the sale of tangible personal property *and* (2) the value proceeding or accruing from the sale of tangible personal property. Because the Petitioner's reading requires deleting the phrase "proceeding or accruing" from the statute, I conclude that the Petitioner's reading of § 12-36-90 violates the plain meaning rule. When applying the plain meaning rule to the words in the statute, it is clear that the statute is broad and encompasses the total value of a sale, not simply the amount paid for tangible personal property. Moreover, a review of the case law demonstrates that gross proceeds of sales can include the value of services and intangibles that are derived from the sale of tangible personal property. See e.g., Travelscape, LLC v. S.C. Dept. of Revenue, 391 S.C. 89,

98, 705 S.E.2d 28, 33 (2011); Meyers Arnold v. S.C. Tax Comm'n, 285 S.C. 303, 307, 328 S.E.2d 920, 923 (Ct. App. 1985); Textile Restoration Services, Inc. v. S.C. Dept. of Rev., 2015 WL 7443800, at *4 (S.C. Admin. Law Ct. 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. S.C. Dept. of Rev., 2010 WL 5781622, at *3 (S.C. Admin. Law Ct. 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."). Therefore, I agree with the Department and conclude 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, including proceeds from fees related to incidental services, intangibles, or other benefits.

C. South Carolina Case Law Supports this Court's Reading of Section 12-36-90

South Carolina courts have analyzed the definition of gross proceeds of sales several times and have 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. Specifically, the South Carolina Court of Appeals addressed the definition of gross proceeds of sales in the Meyers Arnold decision. One of the issues in Meyers Arnold involved whether lay away fees paid in conjunction with lay away sales of tangible personal property were includable in gross proceeds of sales for sales tax purposes. Meyers Arnold, 285 S.C. at 307, 328 S.E.2d at 923. In determining whether the lay away fees were includable in gross proceeds of sales, the Court reasoned that but for the lay away sales Meyers Arnold would not receive any lay away fees, therefore the lay away fees were included in the gross proceeds of sales and subject to tax. Id. In more general terms, Meyers Arnold holds that if a taxpayer could not collect a fee but for the sale of tangible personal property, then that fee is includable in the taxpayer's gross proceeds of sales. Thus, the Court in Meyers Arnold held that the layaway fees were taxable.

The ALC relied on the holding of Meyers Arnold in its decision in Southeastern Cinema Entertainment v. S.C. Dept. of Rev., 2014 WL 2417715 (S.C. Admin. Law Ct. May 28, 2014). In Southeastern Cinema the ALC examined whether the proceeds from both the sale of an IMAX theater cinema and the associated intangible trademarks were subject to sales tax. In making its determination, the ALC stated that "Meyers Arnold suggests that **service fees or benefits that are incident to the sale of tangible personal property are part of the gross proceeds of sales and subject to sales tax.**" Southeast Cinema, 2014 WL 2417715, at *5 (emphasis added). Using that

logic, the ALC concluded that the intangible trademarks were inextricably linked to the tangible personal property and, thus, taxable.

Furthermore, the South Carolina Supreme Court addressed an issue involving the inclusion of associated fees in gross proceeds of sales in the Travelscape decision, which is instructive here. One of the issues in Travelscape involved whether the facilitation fee and service fee that the taxpayer added to the net rate of the room being rented were includable in the taxpayer's gross proceeds of sales. Id. "The 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, the taxpayer's customers were paying for accommodations, and the fee for the taxpayer'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)³ as gross proceeds." Id. at 98, 705 S.E.2d at 33 (emphasis added). Thus, even though the fees at issue in Travelscape were for services and not for tangible personal property, the Supreme Court still concluded the proceeds from those fees were includable in the taxpayer's gross proceeds of sales. As such, South Carolina case law demonstrates that gross proceeds of sales includes all value that comes from or is a direct result of the sale, lease, or rental of tangible personal property.

D. The Petitioner's Sales of Club Memberships are Includable in the Petitioner's Gross Proceeds of Sales

After applying the plain meaning of the words in § 12-36-90 and the logic used by the courts in Meyers Arnold, Southeast Cinema, and Travelscape to the undisputed facts here, I conclude that the Membership Fees constitute value proceeding or accruing from the sale of tangible personal property. Here, the parties stipulated that the Membership Fees allow members to receive discounts on books and free shipping on online purchases. Nonmembers do not receive these same benefits. 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. But for the Petitioner's sale of tangible personal property, the Petitioner would not be able to sell Millionaire's Club memberships and, therefore, would not

³ Even though this statute only said "gross proceeds," the Court used the definition of "gross proceeds of sales" found in § 12-36-90 when applying this statute. Thus, the Supreme Court's analysis of the term "gross proceeds" and "gross proceeds of sales" is instructive here.

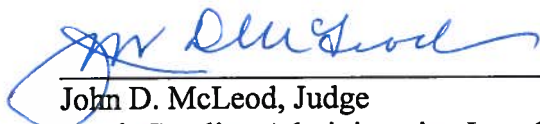
collect Membership Fees. The Membership Fees are payment for services or benefits that are incident to the sale of tangible personal property. Moreover, the Membership Fees are inextricably linked to, and incapable of being separated from, the sale of tangible personal property. See Walden Books Co. v. Ariz. Dept. of Rev., 12 P.3d 809, 813 (Ariz. Ct. App. 2000) (holding that the taxpayer’s “Preferred Reader Program membership fees . . . were taxable as ‘services that are a part of the sales.’”). Because the Membership Fees are so intertwined with and inseparable from the Petitioner’s sales of tangible personal property, such are part of the sales of that tangible personal property. Id. Said differently, the Membership Fees are a direct result of the Petitioner’s sales of discounted tangible personal property. Thus, based on a plain reading of § 12-36-90 and the holdings in Meyers Arnold, Southeastern Cinema, and Travelscape, I conclude that the Petitioner’s Membership Fees are includable in the Petitioner’s gross proceeds of sales and are subject to sales tax.⁴

WHEREFORE, for the reasons set forth more fully herein, the Petitioner’s sales of Club Memberships should have been included in its gross proceeds of sales and are subject to sales tax.

THEREFORE, IT IS HEREBY ORDERED that the Department’s Motion For Summary Judgment is **GRANTED** and the Department’s Determination proposing an assessment in the amount of \$226,310.70 plus penalties and interest is affirmed in its entirety.⁵

AND IT IS SO ORDERED.

June 6, 2017
Columbia, S.C.



John D. McLeod, Judge
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⁴ The Petitioner argued that the Department does not consistently apply the plain meaning of the taxing statutes at issue because the Department’s policy is not to tax membership fees for membership-only warehouses. See S.C. Priv. Ltr. Rul. #16-1 at p. 5. Regardless of the Department’s inconsistency, the statutes at issue here are unambiguous.

⁵ Interest shall continue to accrue until the Petitioner’s tax liability is paid in full.

CERTIFICATE OF SERVICE

I, Christopher P. Whitehead, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

June 6, 2017
Columbia, South Carolina



Christopher P. Whitehead
Judicial Staff Attorney

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