

REL: September 7, 2018

**Notice:** This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

# ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2018

---

2161077

---

Alabama Department of Revenue

v.

Scholastic Book Clubs, Inc.

Appeal from Montgomery Circuit Court  
(CV-16-900562)

DONALDSON, Judge.

The Alabama Department of Revenue ("the department") appeals from a judgment of the Montgomery Circuit Court ("the trial court") reversing the decision of the Alabama Tax Tribunal ("the tribunal") upholding the final assessment of

2161077

use tax pursuant to § 40-23-60, Ala. Code 1975, et seq., against Scholastic Book Clubs, Inc. ("SBC"). The question presented in this appeal is not whether the State of Alabama may impose an obligation to collect and remit use tax on SBC for the activities it conducts, but whether it did so pursuant to the statutes that were applicable during the period involved in this case as argued by the department. For the reasons set forth below, we hold that SBC's activities did not subject it to an obligation to collect and remit use tax based on the arguments presented, and we affirm the judgment of the trial court vacating the department's assessment of use tax against SBC.

On March 25, 2016, the department entered a final assessment that SBC owed unpaid Alabama use tax of \$815,346.79, including interest for activities of SBC during the tax periods beginning April 1, 2007, and ending March 31, 2013. On March 27, 2014, SBC filed a notice of appeal of the assessment with the Administrative Law Division of the department pursuant to § 40-2A-7(c)(5), Ala. Code 1975, and, pursuant to § 40-2B-2, Ala. Code 1975, the tribunal upon its creation, assumed jurisdiction of the appeal of the final

2161077

assessment. SBC contended that it did not have an obligation to collect and remit use tax under the applicable Alabama statutes. In the alternative, SBC contended that it did not have a constitutional nexus in Alabama sufficient for the state to impose an obligation to collect and remit use tax based on its activities and that the department cannot require SBC, as an affiliate of a in-state vendor, to register to collect and remit use tax for the in-state vendor under the facts of this case. In its answer, the department contended that the final assessment of use tax against SBC was correct based upon § 40-23-68, Ala. Code 1975, and Ala. Admin. Code (Dep't of Revenue), Rule 810-6-2-.90.01(4)(c).

Before the tribunal, the parties filed a joint stipulation of facts that included the following:

"1. SBC is a corporation incorporated under the laws of the State of Missouri and headquartered in Jefferson City, Missouri.

"2. SBC sells books and other educational materials (excluding textbooks) by mail order and via the Internet to Alabama School teachers, Alabama parent educators, Alabama parents, and Alabama students from locations outside of Alabama.

"3. All of SBC's customers are mailed the same catalogs, order forms, and promotional materials by SBC from outside of Alabama.

2161077

"4. SBC has a national business and sells books and educational materials to customers located in all fifty states.

"5. SBC does not have a retail store located in Alabama.

"6. SBC does not have any offices located in Alabama.

"7. SBC is not registered to do business in Alabama.

"8. SBC does not maintain a mailing address or local telephone number in Alabama.

"9. SBC does not own or control any entities doing business in Alabama and has no franchises or licensees in the state.

"10. Alabama schoolteachers and parent educators do not have written contracts with SBC.

"11. SBC distributes catalogues, order forms, and promotional coupons each month to Alabama schools (in care of classroom teachers) and Alabama home schools (in care of parent educators) via the United States Postal Service only from locations outside of Alabama. SBC also provides an online marketplace through its website.

"12. Alabama schoolteachers and parent educators who receive SBC catalogues and order forms each month may disseminate the SBC catalogues and order forms to their students if they wish, but are under no obligation to do so. As described below, orders from schoolteachers, parent educators, and students are sent to SBC together on a single master order form.

"13. If an Alabama schoolteacher or parent educator decides to hand out SBC catalogues and

2161077

order forms in their classrooms to their students, then the Alabama teacher or parent educator is the responsible adult who facilitates the ordering process by consolidating all student, teacher, and parent educator orders onto the single master order form, collecting money for student orders, and mailing the master form and money (including the teacher's/parent educator's money for his or her own orders) to SBC's offices in Missouri for fulfillment of the order.

"14. From its fulfillment center in Missouri, SBC mails the products requested on the master order forms to Alabama classrooms (at the school address) and home-schools to the attention of the responsible adult for each respective transaction (either a schoolteacher or a parent educator). The responsible adult in receipt of the products takes responsibility for accepting and distributing them in his or her classroom, a process in which SBC has no role. Products ordered by schoolteachers and parent educators are mailed by SBC in the same packages as products ordered by the students.

"15. Alabama teachers and parent educators, as the responsible adults, may communicate with SBC with complaints or concerns regarding their classroom orders. For example, they may communicate with SBC should the products received differ from the products requested on the master order form or should there be a discrepancy regarding the amount due for the order.

"16. Alabama classrooms whose teachers or parent educators serve as responsible adults for SBC transactions receive bonus points that may be redeemed for educational materials and books to be used solely in the classroom. Should a teacher leave a school for any reason, including for a new teaching position at a different school, bonus points remain with the classroom that earned them. [SBC] explains in its catalogues that bonus points

2161077

cannot be used to obtain items for the personal use of teachers or parent educators.

"17. Alabama teachers and parent educators receive notifications from SBC regarding the points balance earned by their classrooms from placing paid orders with SBC.

"18. Bonus points may be redeemed online, by phone, or by mail or fax.

"19. Products distributed as a result of bonus point redemption are sometimes mailed to the classroom in the same box as paid purchases and are sometimes mailed to the classroom separately.

"20. Bonus point orders that are shipped separately are, like products paid for by teachers and students, mailed to Alabama classrooms to the attention of the Alabama teacher or parent educator assigned to that classroom.

"21. The number of Alabama schools, including public, private, Catholic, and home schools, that placed orders with SBC during the years included in the final assessment are as follows: 1,933 in 2007; 1,955 in 2009; 1,942 in 2010; 1,909 in 2011; 1900 in 2012; and 1,832 in 2013.

"22. The number of Alabama classrooms, including public, private, Catholic, and home school classrooms, that placed orders with SBC during the years included in the final assessment are as follows: 13,977 in 2007; 12,936 in 2008; 11,439 in 2009; 11,527 in 2010; 10,581 in 2011; 9,917 in 2012; and 9,518 in 2013.

"23. The number of bonus points awarded to Alabama classrooms, including public, private, Catholic, and home school classrooms, that placed orders with SBC during the years included in the final assessment are as follows: 23,657,826 in 2007;

2161077

20,898,209 in 2008; 15,848,168 in 2009; 20,528,393 in 2010; 15,915,048 in 2011; 16,625,173 in 2012; and 16,167,437 in 2013.

"24. The number of bonus points redeemed by Alabama classrooms, including public, private, Catholic, and home school classrooms, during the years included in the final assessment are as follows: 20,889,833 in 2007; 18,156,113 in 2008; 15,770,772 in 2009; 19,288,736 in 2010; 16,065,543 in 2011; 15,114,790 in 2012; and 16,315,310 in 2013.

"25. The value, both fair market and cost, of goods distributed as a result of the redemption of bonus points by Alabama classrooms, including public, private, Catholic, and home school classrooms, during the years included in the final assessment are as follows: \$961,330 (market value) and \$163,426 (cost) in 2007; \$832,987 (market value) and \$141,608 (cost) in 2008; \$673,114 (market value) and \$114,429 (cost) in 2009; \$798,314 (market value) and \$135,713 (cost) in 2010; \$507,923 (market value) and \$86,347 (cost) in 2011; \$424,069 (market value) and \$72,092 (cost) in 2012; and \$488,281 (market value) and \$83,008 (cost) in 2013.

"26. The value, both fair market and cost, of goods distributed as a result of the redemption of bonus points by Alabama home school classrooms during the years included in the final assessment are as follows: \$5,686 (market value) and \$967 (cost) in 2007; \$4,649 (market value) and \$790 (cost) in 2008; \$3,464 (market value) and \$589 (cost) in 2009; \$4,008 (market value) and \$681 (cost) in 2010; \$2,737 (market value) and \$465 (cost) in 2011; \$1,813 (market value) and \$308 (cost) in 2012; and \$2,626 (market value) and \$446 (cost) in 2013.

"27. Scholastic Inc. is SBC's parent corporation. SBC is wholly-owned by Scholastic Inc.

2161077

"28. Scholastic Inc. entered into a contract with the State of Alabama through its Board of Education to furnish certain math-related textbooks and programs from June 1, 2012, through May 31, 2018. None of the products sold in connection with this contract are offered for sale or sold by SBC. This contract did not indicate that subsidiaries or affiliates of Scholastic Inc. were registered for or collecting and remitting Alabama taxes.

"29. Scholastic Inc. is Scholastic Book Fairs, Inc.'s parent corporation. Scholastic Book Fairs, Inc. is wholly-owned by Scholastic Inc.

"30. Scholastic Book Fairs, Inc., which is located in Lake Mary, Florida, supplies books for book fairs held at schools throughout the United States, including in Alabama.

"31. On or about September 11, 2013, the Department entered a Preliminary Assessment against SBC for the periods from April 1, 2007, through March 31, 2013, for consumer's use tax.

"32. SBC timely filed a Petition for Review of the Preliminary Assessment with the Department challenging the grounds for the Preliminary Assessment on or about October 10, 2013.

"33. The Department held a conference regarding SBC's Petition for Review of the Preliminary Assessment on or about December 11, 2013.

"34. On or about February 10, 2014, the Department mailed SBC a letter indicating that the audit liability should remain due as assessed.

"35. On or about February 25, 2014, the Department entered the Final Assessment against SBC for the periods from April 1, 2007, through March 31, 2013, for consumer's [use] tax in the amount of \$815,346,79.



2161077

"36. SBC timely filed its Notice of Appeal with the Alabama Tax Tribunal.

"37. The parties stipulate to the admission of the documents they have identified as exhibits on lists previously exchanged in accordance with the scheduling order in this case."

The department submitted testimony of an auditor employed by the department. SBC submitted testimony of an employee of SBC, as well as affidavits of three Alabama teachers who described the way they use SBC's program. The teachers stated that they were not under any obligation to use SBC's program.

A hearing was held before the tribunal on August 27, 2015. See § 40-2B-2(k), Ala. Code 1975. At the hearing, a sales and use tax auditor with the Foreign Audit Section of the department testified that, after his requests for information from SBC were not answered, he used sales data published in an article to calculate the use tax owed to Alabama. The auditor testified that he did not use the published data for calculation of the final assessment because a representative of SBC later contacted him and provided additional information. After an informal conference, representatives of the department offered to limit the audit period to three years. Representatives of SBC provided the

2161077

department and the auditor with SBC's sales information for the three preceding years, but SBC refused to pay the calculated assessment resulting from the audit for the three-year period. The auditor testified that, as a result, he conducted an audit for a six-year period that established the amount of use tax the department contends that SBC owes. The calculations made by the auditor in the audit for the six-year period were undisputed by SBC.

The vice president of finance for SBC, Michael White, testified at the hearing before the tribunal that SBC and its parent company, Scholastic, Inc. ("Scholastic"), do not share common directors or managers and have different business plans. White testified that SBC pays to use Scholastic's trademark in SBC's promotional materials. White testified that SBC interacts with school teachers through a "teacher advisor program," described by White as a "focus group," in which SBC selects certain teachers from across the country to attend a meeting in New York to "discus[s] the classroom landscape around reading and what [the teachers] are trying to accomplish in their classrooms." SBC reimburses the selected teachers for their travel expenses but does not compensate the

2161077

teachers for their attendance at the meeting. White testified that he did not know if any SBC teacher advisors were from the State of Alabama during the six-year audit period.

White testified that SBC provides form letters to classroom teachers, which the teachers may choose to include with SBC catalogues distributed to students, and that any returns by students of purchased merchandise are handled by the teacher and processed through SBC's Jefferson City, Missouri, facility.

White testified that individual classrooms earn "bonus points" for purchases made using the classroom teacher's unique identification code. Those bonus points can be redeemed by the teachers for products from SBC catalogues or for gift cards redeemable at various retailers from which, White testified, teachers often purchase classroom supplies. White acknowledged that the retailers also sell items that are not related to classroom activities and that SBC does not monitor what teachers purchase using the gift cards. White testified that 85 to 90 percent of bonus points are redeemed for books from SBC. Bonus points are also available to home-school educators. SBC also sells education materials online, and the

2161077

teacher's identification code must be entered before purchases can be made. Those purchases are shipped to the school for the teacher to deliver to the student.

On March 25, 2016, the tribunal entered a final order affirming the department's assessment of "[use] tax and interest of \$815,346.79, plus applicable interest from the date the final assessment was entered, February 25, 2014."

The tribunal summarized its final order as follows:

"[B]y agreeing to distribute [SBC's] materials to their students, the teachers are in substance soliciting or at least promoting sales on behalf of [SBC]. The fact that the teachers are not required to do so, may not personally benefit from their [SBC]-related activities, may also purchase items from [SBC], and are motivated to help their students and not [SBC], is irrelevant. The teachers also do substantially more than just distribute [SBC]'s materials. They gather the completed order forms and compile them on a master order form. They then mail the master form and the purchase money to [SBC], receive and distribute the items purchased to the appropriate parties, and then communicate and work with [SBC] to resolve any problems that may arise concerning the transactions. The teachers are in substance a voluntary sales force whose activities in Alabama are essential and necessary for [SBC] to make sales in Alabama. The presence and activities of the teachers on behalf of or that benefit [SBC] thus established a physical presence for [SBC] in Alabama sufficient to establish Commerce Clause nexus under existing U.S. Supreme Court guidelines."

2161077

SBC filed a notice of appeal with the trial court on April 22, 2016. See § 40-2B-2(m). On June 1, 2016, SBC and the department filed a "Joint Request for Review on Record by Consent," seeking to have the trial court conduct its review on the record and transcript as transmitted by the tribunal. See § 40-2B-2(m)(4) ("With the consent of all parties, judicial review may be on the administrative record and transcript.").

Both SBC and the department filed briefs with the trial court setting forth their arguments. On August 18, 2017, the trial court entered a final judgment vacating the department's assessment of use tax against SBC. The trial court found, in part:

"This matter is before this Court as the result of a timely appeal filed by [SBC], under Ala. Code § 40-2B-2(m). SBC appealed from the Final Order of [the tribunal] in Docket No. S. 14-374, entered on March 25, 2016, which upheld the final assessment entered by [the department], of Alabama seller's use taxes and interest against SBC. The material facts are not in dispute; either SBC or the [d]epartment is entitled to judgment as a matter of law. Based upon the pleadings, briefs and evidentiary materials submitted by the parties (including the Joint Stipulation of Facts and affidavits of three Alabama school teachers) and the arguments presented at the bench trial, the Court is of the opinion that SBC is not required to collect Alabama's seller's use tax and thus the final assessment against SBC is

contrary to the law and void. The Court orders and enters its final judgment as follows:

"1. The primary dispute between the parties relates to whether SBC is required to collect and remit Alabama's seller's use tax under Ala. Code § 40-23-68(b). For the reasons set forth in SBC's Brief and Reply Brief, this Court finds that SBC's contacts with Alabama are not included within any of the enumerated categories under Ala. Code § 40-23-68(b) and thus it has no obligation to collect and remit use tax on its sales to Alabama school children, teachers, and parents. Specifically, this Court finds that the Alabama school teachers and parent educators were not acting on behalf of or under the authority of SBC and were not retained under contract by SBC. Rather, the Alabama school teachers and parent educators were acting on behalf of their students in helping them place orders.

"2. The [tribunal] also found that the activities of teachers and parent educators did not fall within the statutory definition of a sales agent or representative under Ala. Code § 40-23-68(b)(3) 'because the Alabama teachers were not employed by or under contract with [SBC] during the subject period.' Final Order, p. 5. Despite this finding, the [tribunal] erroneously concluded that the actions of teachers (and parent educators) constituted 'other activity' under Ala. Code § 40-23-68(b)(9), the catchall clause, that was sufficient to pass constitutional muster. The [tribunal]'s interpretation does not comport with Alabama's longstanding rules of statutory construction because such interpretation ignores the plain language of the (b)(9) provision, which specifically only applies to 'any other contact' not described elsewhere in the statute (including Ala. Code § 40-23-68(b)(3) that does not apply to SBC), and would thus render the remainder of the statute meaningless. Further, the [tribunal]'s interpretation would nullify the 1991 amendment to

2161077

Ala. Code § 40-23-68(b) to expressly require a contract for in-state representatives in order to trigger an obligation to collect the seller's use tax."

The department filed a timely notice of appeal from the trial court's judgment. This court has jurisdiction pursuant to § 12-3-10, Ala. Code 1975.

#### Standard of Review

"The circuit court reviews de novo an order of an administrative law judge in the State Department of Revenue; however, the order is presumed prima facie correct and the burden is on the appealing party to show otherwise. § 40-2A-9(g)(2), Ala. Code 1975 [now codified at § 40-2B-2(m)].

"[The] standard of review [on appeal] is different from that applied by the circuit court in reviewing an administrative law judge's order. When reviewing a case in which the trial court sat without a jury and heard evidence in the form of stipulations, briefs, and the writings of the parties, this Court sits in judgment of the evidence; there is no presumption of correctness. Old Southern Life Ins. Co. v. Williams, 544 So. 2d 941, 942 (Ala. 1989); Craig Constr. Co. v. Hendrix, 568 So. 2d 752, 756 (Ala. 1990). When this [c]ourt must determine if the trial court misapplied the law to the undisputed facts, the standard of review is de novo, and no presumption of correctness is given the decision of the trial court. State Dep't of Revenue v. Garner, 812 So. 2d 380, 382 (Ala. Civ. App. 2001); see also Ex parte Graham, 702 So. 2d 1215 (Ala. 1997). In this case the trial court based its decision upon the stipulations, briefs, writings, and arguments of the parties' attorneys. No testimony was presented. Therefore, we must sit

2161077

in judgment of the evidence, and the trial court's ruling carries no presumption of correctness."

Bean Dredging, L.L.C. v. Alabama Dep't of Revenue, 855 So. 2d 513, 516-17 (Ala. 2003).

#### Discussion

After completion of the record and submission of the principal briefs, this court invited the parties to submit letter briefs addressing any effect of South Dakota v. Wayfair, Inc., \_\_\_ U.S. \_\_\_, 138 S. Ct. 2080 (2018), which was decided after submission of the principal briefs, on this case. Each party submitted a letter brief in response.<sup>1</sup> In Wayfair, the United States Supreme Court held, among other

---

<sup>1</sup>SBC notes in its letter brief that the department, on July 3, 2018, announced that

"[t]he Department of Revenue's existing 'nexus rule' 810-6-2-.90.03, which took effect in January 2016, will be applied prospectively for sales made on or after October 1, 2018. While this rule technically was effective January 1, 2016, its validity was in question pending the outcome of the Wayfair decision."

That announcement, entitled ADOR Announces Sales and Use Tax Guidance for Online Sellers, was made available on the department's website at: <https://revenue.alabama.gov/2018/07/03/>. The court expresses no opinion on whether SBC will be subject to the obligation to collect and remit use tax after October 1, 2018, based on the amount of sales it makes in the State of Alabama.



2161077

things, that the physical-presence rule established in National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967), and Quill Corp. v. North Dakota, 504 U.S. 298 (1992), was "unsound and incorrect," and the court overruled Quill. \_\_\_ U.S. \_\_\_, 138 S. Ct. at 2099.

"In [those] two earlier cases the [Supreme] Court held that an out-of-state seller's liability to collect and remit the tax to the consumer's State depended on whether the seller had a physical presence in that State, but that mere shipment of goods into the consumer's State, following an order from a catalog, did not satisfy the physical presence requirement."

Wayfair, \_\_\_ U.S. \_\_\_, 138 S. Ct. at 2087-88 (citing National Bellas Hess, supra; and Quill, supra).

The department contends that Wayfair strengthens its position in this appeal, arguing that

"[t]he Wayfair decision is relevant to the current case because it establishes the test to determine whether an out-of-state seller's connections with a taxing jurisdiction creates substantial nexus under the Commerce Clause of the United States Constitution." The department further asserts that "[t]he constitutional protection against taxation does not prohibit Alabama from taxing an out-of-state retailer, such as [SBC], that has extensive business connections and an immense presence in the state of Alabama. Because SBC has substantial nexus with Alabama, it has a statutory duty to collect and remit use tax on its Alabama sales pursuant to § 40-23-68."

2161077

SBC, in its letter brief, contends that application of the holding in Wayfair is unnecessary because, it argues, this case should be decided on statutory grounds alone, stating that "SBC did not meet Alabama's statutory criteria for imposing use tax collection and remittance obligations on out-of-state retailers." We agree with SBC that we should first examine whether the department's specific interpretation and application of the Alabama taxing statutes in this case imposed an obligation on SBC to collect and remit use tax on SBC's activities. If the statutes, as interpreted and applied by the department, did not impose an obligation on SBC to collect and remit use tax, we need not address the permissible reach of Alabama's taxing authority.

Section 40-23-68(b), provides, in pertinent part:

"(b) Every seller or person engaged in making retail sales of tangible personal property for storage, use or other consumption in this state, who alternatively:

"(1) Maintains, occupies, or uses, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business;

2161077

"(2) Qualifies to do business or registers with the state to collect the tax levied by this chapter;

"(3) Employs or retains under contract any representative, agent, salesman, canvasser, solicitor or installer operating in this state under the authority of the person or its subsidiary for the purpose of selling, delivering, or the taking of orders for the sale of tangible personal property or any services taxable under this chapter or otherwise solicits and receives purchases or orders by any agent or salesman;

". . . .

"(9) Maintains any other contact with this state that would allow this state to require the seller to collect and remit the tax due under the provisions of the Constitution and laws of the United States; or

"(10) Distributes catalogs or other advertising matter and by reason thereof receives and accepts orders from residents, within the State of Alabama,

shall be subject to all the provisions of this chapter [i.e., Chapter 23 of Title 40, Ala. Code 1975] and shall, except as otherwise provided in subsection (f), on or before the 20th day of the month following the close of each month file with the department a return for the preceding month in such form as may be prescribed by the department showing the total sales price of the tangible personal property sold by such seller, the storage, use, or consumption of which became subject to the tax imposed by this article [i.e., Article 2 of Chapter 23] during the preceding month and such

2161077

other information as the department may deem necessary for the proper administration of this article."

In support of its argument that SBC's activities subjected it to an obligation to collect and remit use tax under § 40-23-68, the department specifically points to subsections (b) (9) and (b) (10).

The department contends that SBC "[m]aintains any other contact" with Alabama as provided in § 40-23-68(b) (9) by using Alabama teachers to act as its salesmen in conducting the activities described. The department cites Ex parte Newbern, 286 Ala. 348, 239 So. 2d 792 (1970), which interpreted a predecessor statute to § 40-23-68, and argues that our supreme court has held that a "technical legal relationship" between SBC and the teachers is not required for SBC to be subject to the obligation to collect and remit use tax under § 40-23-68(b) (9). In Ex parte Newbern, our supreme court stated:

"We do not think the statute requires a 'legal relationship' between seller and solicitor. The main thrust of Title 51, § 792(c), [Ala. Code 1940 (1958 Recomp.)], seems to us simply to require solicitation of orders for the seller by persons within the state who are characterized as 'agents or salesmen.' We do not think that the legislature intended a seller conducting such solicitation to avoid collecting the use tax merely by showing that its salesmen failed to come within some technical

2161077

definition of 'salesman' or lacked some legal relationship with the out-of-state seller not articulated in the statute."

286 Ala. at 352, 239 So. 2d at 796 (emphasis added).

We note that Ex parte Newbern was decided before § 40-23-68(b)(3) was amended in 1991 to include the express reference to agents "[e]mploy[ed] or retain[ed] under contract." Section 40-23-68(b)(3) requires a seller to collect and remit use tax if the seller

"[e]mploys or retains under contract any representative, agent, salesman, canvasser, solicitor or installer operating in this state under the authority of the person or its subsidiary for the purpose of selling, delivering, or the taking of orders for the sale of tangible personal property or any services taxable under this chapter or otherwise solicits and receives purchases or orders by any agent or salesman."

The joint stipulation of facts establishes that SBC does not retain any employees or agents under contract in the State of Alabama. The department does not contend that subsection (b)(3) requires SBC to collect use tax and submit it to the State of Alabama because SBC has representatives, agents, salesmen, canvassers, solicitors, or installers operating under a contract but, rather, relies on § 40-23-68(b)(9) to

2161077

assert that SBC is responsible for collecting and remitting use tax based on an implied-agency theory.

We note that the tribunal specifically found that § 40-23-68(b)(3) would not be applicable to SBC, stating: "[The tribunal] agree[s] that subparagraph (b)(3) does not apply to [SBC] because the Alabama teachers were not employed by or under contract with [SBC] during the subject period." The department did not challenge that finding before the trial court, and it does not appear the trial court was asked to determine whether the phrase "or otherwise solicits and receives purchases or orders by any agent or salesman" found within § 40-23-68(b)(3) creates a second category of agents or salesmen that would not have to be "[e]mploy[ed] or retain[ed] under contract." The department does not advance that construction of subsection (b)(3) on appeal, and we express no opinion as to the validity of such a construction.

As stated by the trial court, interpreting subsection (b)(9) to impose an obligation to collect and remit use tax based on activities of a salesman or agent would not be "other contact" as described in subsection (b)(9), but would be the same contact described in subsection (b)(3) if that section is

2161077

construed to require agents to be employed or under contract.

A contrary interpretation, the trial court held

"does not comport with Alabama's longstanding rules of statutory construction because such interpretation ignores the plain language of the (b) (9) provision, which specifically only applies to 'any other contact' not described elsewhere in the statute (including Ala. Code § 40-23-68(b) (3) that does not apply to SBC), and would thus render the remainder of the statute meaningless."

"Because the statute in question is a taxing statute, it must be 'strictly construed against the taxing power'; and '[w]here the language of a taxing statute is reasonably capable of two constructions, the interpretation most favorable to the taxpayer must be adopted.'" Yelverton's, Inc. v. Jefferson Cty., 742 So. 2d 1216, 1222 (Ala. Civ. App. 1997) (quoting Alabama Farm Bureau Mut. Cas. Ins. Co. v. City of Hartselle, 460 So. 2d 1219, 1223 (Ala. 1984)). If the department's position were to be accepted, the catchall clause of § 40-23-68(b) (9) would operate to render the language of § 40-23-68(b) (3) a nullity and ineffective.

""There is a presumption that every word, sentence, or provision [of a statute] was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used."" Ex parte Uniroyal Tire Co., 779 So. 2d 227,

2161077

236 (Ala. 2000) (quoting Sheffield v. State, 708 So. 2d 899, 909 (Ala. Crim. App. 1997))."

Surtees v. VFJ Ventures, Inc., 8 So. 3d 950, 970 (Ala. Civ. App.), aff'd, Ex parte VFJ Ventures, Inc., 8 So. 3d 983 (Ala. 2008).

The department also argues that "it is undisputed that, during the audit period," SBC's activities were taxable pursuant to § 40-23-68(b)(10), because, the department asserts, SBC "'[d]istributed catalogs or other advertising matter' to Alabama residents and 'receive[d] and accept[ed] orders from residents, within the State of Alabama.' Thus, SBC unequivocally had a statutory duty to collect and remit seller's use tax to Alabama pursuant to § 40-23-68(b)(10)."

SBC responds that our supreme court previously rejected a similar argument in State v. Lane Bryant, Inc., 277 Ala. 385, 171 So. 2d 91 (1965), which like Ex parte Newbern, interpreted a predecessor statute to § 40-23-68. In that case Lane Bryant catalogues were printed in and mailed from New Jersey. It was undisputed that Lane Bryant catalogues were received by Alabama residents and that orders were placed by Alabama residents after receipt of the catalogues. Those orders were fulfilled and mailed from a location in Indiana.



2161077

Our supreme court examined former Title 51, Sections 790 and 792, Ala. Code 1940 (Recomp. 1958), which imposed an obligation to collect and remit use tax on "[e]very seller engaged in making retail sales of tangible personal property for storage, use or other consumption in this State who ... distributes catalogs or other advertising matter and by reason thereof receives and accepts orders from residents, within the State of Alabama." 277 Ala. At 386, 171 So. 2d at 93 (quoting § 790). Our supreme court, quoting and adopting the decree entered by the trial court, stated that

"[s]ections 790 and 792 are replete with reference to activities "in this State" and "within the State of Alabama," indicating clearly that the legislature intended to impose an obligation to collect use taxes only on a seller who had established some distinct connection with the State of Alabama, sufficient to have submitted himself to the jurisdiction of the State of Alabama for tax purposes."

277 Ala. At 387, 171 So. 2d at 93. Our supreme court, again quoting the trial court's decree, further stated that,

"[q]uite apart from the constitutional barriers, it is inconceivable, moreover, that the legislature sought to make an out-of-state business contribute to the support of the Government of Alabama when that business concern had no property, agent or independent contractor in Alabama and when the business received no protection or benefit whatever from any aspect of the government of the

2161077

State of Alabama or any of its subdivisions. Surely such a strained construction of legislative intent should not be read into the statute with all of the concomitant constitutional infirmities inherent in such an interpretation.'"

277 Ala. At 387-88, 171 So. 2d at 93-94 (emphasis added).

Section 40-23-68(b)(10) has language similar to former Title 51, § 790, stating that a seller will be subject to an obligation to collect and remit use tax if the seller "[d]istributes catalogs or other advertising matter and by reason thereof receives and accepts orders from residents, within the State of Alabama." (Emphasis added.) As in Lane Bryant, SBC mails catalogues, order forms, and promotional materials from locations outside the State of Alabama and SBC ships orders received from locations outside the state of Alabama. Under the holding of Lane Bryant, the department's interpretation of § 40-23-68(b)(10) cannot be applied to SBC because SBC distributes its catalogues and receives orders at a location that is not "within the State of Alabama." The department does not argue that the teachers' delivery of SBC catalogues to students constitutes "[d]istribut[ion] [of] catalogs or other advertising matter ... within the State of Alabama" for the purposes of imposing a duty upon SBC to

2161077

collect and remit use tax pursuant to § 40-23-68(b)(10). Accordingly, we express no opinion as to whether § 40-23-68(b)(10) could be interpreted and applied in such a manner by the department so as to impose a duty upon SBC to collect and remit use tax under the facts of this case.

Thus, we do not reach the question of the permissible reach of Alabama's taxing authority under Wayfair, because the department's specific interpretation and application of the Alabama taxing statutes, in this case, did not impose an obligation to collect use tax on SBC based on its activities. We express no opinion on whether, under a different interpretation of the Alabama taxing statutes, Alabama may constitutionally impose an obligation to collect and remit use tax on the activities conducted by SBC following the Wayfair decision.

The department also argues that SBC is subject to the obligation to collect and remit use tax because of its relationship to Scholastic, pursuant to § 40-23-190, Ala. Code 1975. At all times pertinent to this case, § 40-23-190 provided:

2161077

"(a) An out-of-state vendor has substantial nexus with this State for the collection of both state and local use tax if:

"(1) The out-of-state vendor and an in-state business maintaining one or more locations within this state are related parties; and

"(2) The out-of-state vendor and the in-state business use an identical or substantially similar name, tradename, trademark, or goodwill, to develop, promote, or maintain sales, or the in-state business and the out-of-state vendor pay for each other's services in whole or in part contingent upon the volume or value of sales, or the in-state business and the out-of-state vendor share a common business plan or substantially coordinate their business plans, or the in-state business provides services to, or that inure to the benefit of, the out-of-state business related to developing, promoting, or maintaining the in-state market.

"(b) Two entities are related parties under this section if one of the entities meets at least one of the following tests with respect to the other entity:

"(1) One or both entities is a corporation, and one entity and any party related to that entity in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of Section 318 of the Internal Revenue Code owns directly, indirectly, beneficially, or constructively at least 50 percent of the value of the corporation's outstanding stock;

"(2) One or both entities is a limited liability company, partnership, estate, or trust and any member, partner, or beneficiary, and the limited liability company, partnership, estate, or trust and its members, partners, or beneficiaries own directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the profits, or capital, or stock, or value of the other entity or both entities; or

"(3) An individual stockholder and the members of the stockholder's family, as defined in Section 318 of the Internal Revenue Code, owns directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the value of both entities' outstanding stock."<sup>2</sup>

This argument was not addressed by the tribunal or the trial court. The department argues that the assessment should be upheld because SBC and Scholastic are "related parties for purposes of § 40-23-190(b)" and that "Scholastic, Inc. maintains an Alabama presence and that Scholastic, Inc. and SBC use a substantially similar name, tradename, and trademark, which aids in developing, promoting, and maintaining the in-state market." SBC responds that the

---

<sup>2</sup>Section 40-23-190 was amended by Act No. 2018-539, § 1, effective June 1, 2018, and what was § 40-23-190(b) is now codified at § 40-23-190(c). For the purposes of this opinion, we refer to the pertinent subsection as § 40-23-190(b).

2161077

evidence showed that it was a separate entity from Scholastic and that any in-state activities of Scholastic, Inc. cannot be attributed to SBC. The department does not address § 40-23-190 in its reply brief. Even assuming that the facts asserted by the department are true, we are not directed to an argument or explanation of how the assessment against SBC must be upheld based on that statute. See Colony Homes, LLC v. Acme Brick Tile & Stone, Inc., 243 So. 3d 278, 283 (Ala. Civ. App. 2017) (quoting Schiesz v. Schiesz, 941 So. 2d 279, 289 (Ala. Civ. App. 2006)) ("[I]t is not the function of this court to advocate a position on behalf of an appellant or to create a legal argument for the appellant.").

Finally, the department argues that SBC has a duty to collect and remit use tax pursuant to § 41-4-116, Ala. Code 1975. Section 41-4-116 provides:

"(a) For the purpose of this division [i.e. §§ 41-4-110 through 41-4-116], the following terms shall have the respective meanings ascribed by this section:

"(1) Affiliate. A related party as defined in subsection (b) of Section 40-23-190 as that provision exists on January 1, 2004.

"(2) State department or agency. Every state office, department, division, bureau,

2161077

board, or commission of the State of Alabama.

"(b) A state department or agency may not contract for the purchase or lease of tangible personal property from a vendor, contractor, or an affiliate of a vendor or contractor, unless that vendor, contractor, and all of its affiliates that make sales for delivery into Alabama or leases for use in Alabama are properly registered, collecting, and remitting Alabama, state, and local sales, use, and lease tax, as provided for by Chapter 12, Article 4, and Chapter 23, Articles 1 and 2 of Title 40 or by any local act or ordinance.

"(c) Each vendor, contractor, or affiliate of a vendor or contractor that is offered a contract to do business with a state department or state agency shall be required to certify that the vendor or affiliate is appropriately registered to collect and remit sales, use, and lease tax as required by this section and submit to that state department or agency certification required by the Alabama Department of Revenue.

"(d) Every bid submitted and contract executed by the state shall contain a certification by the bidder or contractor that the bidder or contractor is not barred from bidding for or entering into a contract under this section and that the bidder or contractor acknowledges that the contracting state agency may declare the contract void if the certification completed is false.

"(e) Each vendor or contractor that sells or leases tangible personal property to a state department or agency, and each affiliate of that vendor or contractor that makes sales for delivery into Alabama, shall be required to collect and remit the Alabama sales, use, or lease tax on all its sales and leases into the state."

2161077

The department argues that SBC and Scholastic are "affiliates" for the purposes of § 41-4-116(a)(1) and, thus, that Scholastic had a duty to certify that SBC was "properly registered to collect and remit sales, use, and lease tax as provided for by ... Chapter 23, Articles 1 and 2 of Title 40." § 41-4-116(b) (emphasis added). As discussed above, we have determined that the department has not shown that SBC was subject to the obligation to collect and remit use tax under § 40-23-68, and therefore, we do not find a basis to reverse the judgment and reinstate the assessment under § 41-4-116 as that argument is presented in this appeal.

#### Conclusion

Because we have determined that the department did not establish that SBC's activities during the period under review fell within the enumerated activities listed in § 40-23-68, and because no other basis has been established to impose the tax assessment under any other statute, we affirm the trial court's judgment vacating the assessment against SBC.

AFFIRMED.

Thompson, P.J., and Pittman and Moore, JJ., concur.



2161077

Thomas, J., recuses herself.