STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Alltel Communications, Inc. (and Affiliates),	Docket No. 11-ALJ-17-0603-CC
Petitioner,	**FINAL ORDER AND DECISION**
v.	
South Carolina Department of Revenue,	
Respondent.	

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or court) pursuant to a request for a contested case hearing made by Alltel Communications, Inc. (and Affiliates)[1] (hereinafter referred to as "Alltel"). Alltel challenges the South Carolina Department of Revenue's (Department) determination (Determination) imposing sales tax on the proceeds from Alltel's sale of various protection plans for the handheld communication devices (phones) purchased by Alltel's customers. Alltel filed a Motion for Partial Summary Judgment and the Department filed a cross Motion for Summary Judgment. Alltel's Motion for Partial Summary Judgment seeks an order from the court finding that amounts collected by a retailer for insurance covering tangible personal property is not subject to sales tax. The Department's Motion for Summary Judgment seeks an order from the court finding that amounts collected from a retailer for insurance and warranties covering tangible personal property is subject to sales tax. For the reasons set forth below, the court grants Alltel's Motion for Partial Summary Judgment, denies the Department's Motion for Summary Judgment and remands the case to the Department.

BACKGROUND AND PROCEDURAL HISTORY

[1] In this proceeding, the Petitioner's affiliates include Charleston/North Charleston MSA LP, Greenville MSA LP d/b/a New York Newco, SC RSA 2 Cellular Partnership, SC RSA 3 Cellular Partnership, SC RSA 4 Cellular Partnership, SC RSA 5 Cellular Partnership, SC RSA 6 Cellular Partnership, SC RSA 7 Cellular Partnership, SC RSA 8 Cellular Partnership, and SC RSA 9 Cellular Partnership.

During the sales tax periods at issue, May 1, 2005, through April 30, 2008, (periods at issue), Alltel was in the business of providing wireless communications services and wireless communication devices (devices) to the public in South Carolina. *See* Determination at 1-2; Affidavit of Jean Capehart, January 31, 2013, para. 5. In conjunction with its business, Alltel also made available to its customers two separate, distinct, and optional types of contract offerings pertaining to the devices it sold. *See* Determination at 2; Capehart Aff. at para. 5. One type of contract offering was extended warranty coverage, which provided Alltel's customers with a warranty on a device "against electrical/mechanical malfunction or a manufacturer's defect during and beyond the manufacturer's warranty." *See* Capehart Aff., para. 5, Ex. A at pp.2, 14. This warranty coverage was provided to Alltel's customers by Asurion Warranty services, Inc. *See* Capehart Aff., para. 5, Ex. A pp. 8-9, 21. The assessment of sales tax on the charges for this warranty coverage is not at issue, as Alltel has conceded that these charges are included within the base of the sales tax due for the tax period in question.[2]

The second type of contract offering Alltel made available to its customers was for indemnification coverage in the form of repair or replacement (subject to certain deductibles) in the event a device was "lost, stolen or damaged." This indemnification coverage was available for either four dollars ($4.00) or six dollars ($6.00) per month. *See* Capehart Aff., para. 5, Ex. A p.2.[3] The coverage explicitly excluded indemnification for the replacement of devices if the malfunction was due to defects in materials, workmanship, or wear and tear. *See* Capehart Aff., Ex. D, pp. 8-11, Ex. E, pp. 5-8. If a customer opted to purchase this coverage, Alltel listed this coverage as a

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[2] During the majority of the periods at issue, sales tax applied to "gross proceeds accruing or proceeding form the sale or renewal of warranty, maintenance, or similar service contracts for tangible personal property, whether or not such contracts are purchased in conjunction with the sale of tangible personal property." *See* 2006 S.C. Act No. 386, §21.A, eff. October 1, 2005, later codified as S.C. Code Ann. § 12-36-910(B)(7) (Supp. 2006). *Cf* 2005 S.C. Act No. 161 §19.B, later codified as S.C. Code Ann. § 12-36-910(B)(6) (Supp. 2006) (providing for application of sales tax to warranty contracts for "tangible property"). These sections were later repealed by 2011 S.C. Act No. 32, §2.b, eff. September 1, 2011. On February 1, 2013, Alltel filed with this court and served upon the Department an Offer of Judgment pursuant to Rule 68(b), SCRCP, which, if accepted by the Department, would have resolved the issue of the Department's assessment of sales tax on the charges for the warranty coverage on the devices during the periods at issue and accrued interest. The Department rejected Alltel's offer of judgment and, as a result of the court's determination of the remaining issue in the case adversely to the Department, Alltel has obtained a determination in this case which is at least as favorable as the offer it has made to the Department that was rejected. Accordingly, the Department is required to reduce the amount of sales tax and interest due from Alltel on the sales of warranty coverage by 8% as provided for in Rule 68(b).

[3] The difference in the amount collected reflected differences in the types of devices owned by Alltel's customers. *See* Capehart Aff., Ex. A, p.2.

separate line item on the purchaser's monthly bill it provided to the customer. *See* Capehart Aff., para. 6, Ex. B.

Alltel arranged for this coverage to be made available to its customers as "additional insureds" under commercial inland marine insurance policies covering Alltel. *See* Capehart Aff., para. 8, Ex. D, p.8, Ex. E, p.5. Alltel's insurance agent, Asurion Insurance Services, Inc. (Asurion) provided this coverage to Alltel's customers, and it was underwritten, initially by Insurance Corporation of Hannover (Hannover), and later by Old Republic Insurance Company (Old Republic). *See* Capehart Aff. paras. 5-6, Ex. A. pp.1, 13, Ex. D, p.3, and Ex. E, p.3; *see also* Affidavit of Michael K. Ain, February 4, 2013, paras. 3-6. During the period at issue in this matter, Asurion has been licensed as an insurance agent in South Carolina. *See* A in Affidavit, paras. 3, 7. Hannover and Old Republic were also licensed as insurance companies in South Carolina during the period at issue. *See* Ain aff., para. 7. These insurance agency and underwriter relationships, along with a description of the insurance coverage being provided, were set out in brochures provided to Alltel's customers when they purchased coverage. *See* Capehart Aff. para. 5, Ex. A, pp.1, 13. Pursuant to S.C. Code Ann. § 38-7-20 (2002), Hannover and Old Republic paid premium taxes to the South Carolina Department of Insurance on the amounts collected from Alltel's customers for the insurance coverage they provided. *See* Ain Aff., para. 8; Ex. E. Alltel remitted the monthly premiums its customers paid for the insurance coverage to Asurion, which in turn remitted them to Hannover or Old Republic. *See* Capehart Aff., para. 6 and Ain Aff., para. 8.

The Department conducted an audit of Alltel's sales tax returns for the periods at issue. The Department then issued a Notice of Proposed Assessment to Alltel on September 29, 2009, applying sales tax to the amounts collected by Alltel for both the warranty coverage and the insurance coverage. Alltel thereafter timely submitted its Protest, asserting that the amounts collected for insurance coverage were not subject to sales tax.

On November 7, 2011, the Department issues its Determination, finding that Alltel owed $860,366.35 in additional sales tax and $253,529.41 in interest (through October 17, 2011), for a total amount in dispute of $1,113,895.76 (upon which interest continues to accrue). The Department determined that both the warranty coverage and the insurance coverage Alltel made available to its customers for devices (collectively denominated by the Department as the "overage Plan(s)) were service contracts and therefore "not...insurance contract[s]" and that the amounts collected by Alltel from its customers for remittance to Asurion, and then to the insurance policy

underwriters, were "not subject to the premium tax." Determination at 6. The Department further determined that the amounts Alltel collected for the Coverage Plan were subject to an assessment of sales tax because the plans constituted "tangible personal property" as defined by §12-36-60 and, because Alltel had "excluded from its gross sales receipts" the fees collected on the Coverage Plan and "no sales tax had been paid on these amounts." In support of this conclusion, the Department cited § 12-36-910(B) as the basis upon which sales tax was due and S.C. Code Ann. § 38-78-20(12) (2002) as supplying the applicable definition of a service contract for purposes of applying §12-36-910.

Alltel timely filed its request for a contested case hearing with this court on December 2, 2011, seeking to have the Department's Determination overturned. Alltel subsequently filed its Motion for Partial Summary Judgment and the Department filed its Motion for Summary Judgment. In support of its motion, Alltel submitted the affidavits of Jean Capehart, a Senior Tax Consultant and Certified Public Accountant employed by Alltel who was directly involved in the audit performed by the Department, and Michael K. Ain, Esquire, a Senior Director of Governmental Affairs and Regulatory Counsel for Asurion Insurance Services, Inc. Both parties submitted supporting and responsive memoranda with respect to the motions and Alltel also submitted a reply memorandum with respect to its motion.

The cross-motions for summary judgment came before the court for argument on September 18, 2013. Alltel was represented by John M.S. Hoefer, Esquire. The Department was represented by Milton M. Kimpson, Esquire, Chief Counsel for Tax and Regulatory Services, and Timothy C. Thompson, Esquire, Managing Counsel for Litigation.

STANDARD OF REVIEW

ALC Rule 68 provides that "[t]he South Carolina Rules of Civil Procedure may, where practicable, be applied in proceedings before the Court to resolve questions not addressed by these rules." Rule 56(c), SCRCP, provides that summary judgment shall be granted if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also Pittman v. Grant Strand Entm't, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005); *Young v. South Carolina 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).

In determining whether any material issue of fact exists, the evidence and all inferences that can reasonably be drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007). "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). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). "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). Summary judgment should be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *R.J. Hendricks, II v. Clemson Univ.*, 353 S.C. 449, 455, 578 S.E.2d 711, 714 (2003).

LAW AND ANALYSIS

Both parties agree that during the relevant timeframe Alltel was offering two different types of contracts to its wireless communication customers. The first type was a warranty Alltel provided to its customers on devices "against electrical/mechanical malfunction or a manufacturer's defect during and beyond the manufacturer's warranty." For the purposes of this order, such coverage will be referred to as warranty coverage. The warranty coverage is not at issue in this case, as Alltel has conceded that the amount its customers paid for the warranty coverage during the periods at issue should have been included in Alltel's gross proceeds, and taxed accordingly. The second type of contract Alltel provided its customers, which is at issue in this matter, was for indemnification coverage (subject to certain deductibles) in the form of repair or replacement in the event that a device was "lost, stolen or damaged." For the purposes of this order, such coverage will be referred to as insurance coverage.

The court must first determine whether any genuine issues of material fact exist in this case. The Department argues that there are several genuine issues of material fact remaining to be adjudicated, prohibiting the court from granting Alltel's Motion for Partial Summary Judgment.

If any genuine issues of material fact exist, the court must deny both parties' Motions for Summary Judgment.

If the court determines that there are no genuine issues of material fact remaining in the case, then the court must determine the questions of law. The principal question of law to be addressed is whether the insurance coverage purchased by Alltel customers is "tangible personal property" pursuant to S.C. Code Ann. § 12-36-60 such that the amounts collected by Alltel for the insurance coverage constitute "gross proceeds of sales" pursuant to S.C. Code Ann. § 12-36-90, therefore making them subject to sales taxation pursuant to the plain meaning of S.C. Code Ann. § 12-36-910.

I. There is no genuine issue of material fact.

Summary judgment is not proper where genuine issues of material fact still require adjudication. SCRCP Rule 56(c). However, where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," then summary judgement is appropriate. *Alltel Communications, Inc. v. South Carolina Dept. of Revenue*, 399 S.C. 313, 316, 731 S.E.2d 869, 870 (2012). To contest a Motion for Summary Judgment, the non-moving party must set forth specific facts through affidavits showing that a genuine issue of material fact exists. SCRCP Rule 56(e). Beliefs alone cannot form the "specific facts showing that there is a genuine issue for trial" as required by Rule 56(e). *See Ward v. City of North Myrtle Beach*, 457 F. Supp.2d 625, 629 (D.S.C. 2006) (holding that a motion for summary judgment cannot be defeated by reliance on "beliefs, conjecture, speculation, or conclusory allegations....").

The facts pertinent to the cross-motions either cannot be or have not been disputed by the Department. The former is so because the pertinent facts are established by the written documentation submitted by Alltel in support of its motion, the authenticity of which has not been challenged by the Department and from which no contrary inference can be drawn in favor of the Department. The latter is so because The Department has failed to meet the requirement of Rule 56(e), SCRCP, to contest Alltel's motion by affidavits setting forth specific facts showing that a genuine issue for trial exists. Furthermore, consideration of Alltel's motion is proper at this time as The Department has failed to demonstrate grounds for the Court to refuse to consider Alltel's motion under Rule 56(f), SCRCP.

The affidavits submitted by Alltel in support of its motion demonstrate that the coverage made available to its customers against loss of, theft of, or damage to a Device was insurance and not a warranty, maintenance or similar service contract. These affidavits show the following:

A. During the periods at issue, Alltel entered into contractual arrangements with Hannover and then Old Republic for insurance coverage whereby Alltel was insured under commercial inland marine insurance policies, and Alltel's customers could become additional insureds, with respect to the loss of, theft of, or damage to Devices. *See* Capehart Aff., para. 8; Ex. D, p.8, §A.1, Ex. E, p.5, §A.1.

B. These policies provided for repair or replacement of a device that was covered, subject to the payment of a deductible. See Capehart Aff. para. 5, Ex. D, p.11, Sections C and D, p.12, Section F; Ex. E, pp.7-8, Section C, p.9, Section F.

C. These policies explicitly excluded from coverage manufacturing defects, workmanship defects, and wear and tear, which were covered under the separate warranty agreements issued by Asurion Warranty Services, Inc. *See* Capehart Aff., Ex. D, p.10, §B.2.d; Ex. E p.7, §B.2.d.

D. For the insurance coverage provided to them as additional insureds under Alltel's insurance policy, Alltel's customers were required to pay a premium to Hannover or Old Republic. *See* Capehart Aff., Ex. A, pp.3, 15.

E. Alltel collected the premiums from its customers who were additional insureds under the insurance policies at the same time it collected its charges for communications services in monthly billings to these customers; these premiums were remitted to an insurance agent, Asurion Insurance Services, Inc., which in turn remitted them to Hannover or Old Republic. *See* Capehart Aff., para. 6; Ex. D, p.15, §G.11; Ex. E; p.12, §G.11 and Ain Aff., para. 6; Ex. A, p.15, §G.11; Ex. B, p.12, §G.11.

F. Both Hannover and Old Republic were licensed by the South Carolina Department of Insurance (DOI) to issue insurance policies in South Carolina, provided this insurance coverage under commercial inland marine

policies, and paid premium tax on the revenues remitted to them by Alltel for this coverage. *See* Ain Aff., para. 7 and 8, Ex. A, p.3, Ex. B, p.3.]

G. Asurion Insurance Services, Inc. was licensed as an insurance agent in South Carolina, authorized to sell this type of insurance. *See* Ain Aff., para. 3.

These facts establish that the coverage against loss of, theft of, or damage to the devices made available to Alltel's customers constituted insurance under South Carolina law.[4] Insurance is statutorily defined in pertinent part as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." *See* S.C. Code Ann. §38-1-20(19) (2002). Marine insurance is statutorily defined in pertinent part as "every insurance against loss or destruction of or damage to ... mobile machinery and equipment." *See* S.C. Code Ann. §38-120(28) (2002). The South Carolina Department of Insurance has, by regulation, defined inland marine insurance as "[a] contract of indemnity against loss suffered in connection with inland land or water transportation or with communications equipment." *See* 25A S.C. Code of Regulations, 69-3.1.ii (1976). A premium is statutorily defined as "a payment given in consideration of a contract of insurance." *See* S.C. Code Ann. §38-1-20(31) (2002). A policy is statutorily defined as "a contract of insurance." *See* S.C. Code Ann. §38-1-20(30) (2002). An insurance company or insurer is statutorily defined as a person(s) or entity "engaging...as principals in any kind of insurance or surety business." *See* S.C. Code Ann. §38-120(22) and (25) (2002).

These facts further demonstrate that the coverage against loss of, theft of, or damage to the devices made available to Alltel's customers did not constitute a service contract under South Carolina law which would be subject to sales tax under §12-36-910(B)(7). To support its conclusion to the contrary in its Determination, the Department relied upon S.C. Code Ann. §38-78-20 (12) (2002), which defines a service contract as:

> a contract or agreement for a separately stated consideration for a specific duration to perform the repair, replacement, or maintenance of property or indemnification for repair, replacement, or maintenance, for the operational or

[4] The statutory provisions in effect during the Periods at Issue apply in this matter. *Cf. South Carolina National Bank* v. *S.C. Tax Commission*, 297 S.C. 279, 281 , 376 S.E.2d 512, 513 (1989)(holding that statutes are not to be applied retroactively unless legislative language clearly compels that result without doubt). However, the Court notes that the subsections of the statutory provisions cited in sub-parts a-g of this order above were renumbered by virtue of 2009 S.C. Act No. 69. The language of four of the cited provisions has not been changed in any way. *Cf.*, S.C. Code Ann. §38-1-20 (Supp. 2012), subsections 25 (defining "insurance"), 40 (defining "marine insurance"), 46 (defining "premium"), and 45 (defining "policy"). The substance of the definitions of "insurer" and "insurance company" have not changed, but have effectively been combined by simply having one refer to another. *Cf.*, S.C. Code Ann. §38-1-20(28) and (33) (Supp. 2012).

> structural failure due to a defect in materials, workmanship, or normal wear and tear, with or without additional provisions for incidental payment of indemnity under limited circumstances including, but not limited to, towing, rental, and emergency road service. Service contracts may provide for the repair, replacement, or maintenance of property for damage resulting from power surges and accidental damage from handling.

However, by its plain terms, that statute defines a service contract as one which provides for repair or replacement of a device in the event that it no longer operates due to a manufacturing or workmanship defect, or as a result of normal wear and tear during the contract period; this is exactly the coverage provided for under the enhanced warranty contract offered to Alltel's customers (which, again, Alltel has conceded was subject to the sales tax assessed by the Department). *See* Capehart Aff., Ex. A, pp.9, 21, §1. Conversely, the coverage provided to Alltel's customers for their devices as additional insureds under the Hannover and Old Republic insurance policies for loss, theft, or damage specifically excludes manufacturing defects or wear and tear. *See* Capehart Aff., Ex. D, pp.9-10, §B.2.D and Ex. E, pp.6-7, §B.2.D.[5] Therefore, this court finds that insurance coverage fundamentally differs from a service contract, as a matter of fact and law, and rejects this portion of the Department's Determination.

Alternatively, the Department argues that "Alltel's motion must be denied because it impermissibly seeks to adjudicate disputed facts."[6] In support of this argument, the Department states its "belief that the amounts characterized by Alltel as 'deductibles' paid by Alltel subscribers to a third party are actually processing fees or a condition of processing the claims rather than a deductible." Thus, the Department contends, the Coverage Plans "may not provide Alltel subscribers with indemnification coverage, but rather the plans provide Alltel subscribers with a hassle-free service of replacing their phones." *See* DOR Mem. in Resp., pp.8-9.

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[5] The Department asserts that no such exclusion exists based upon the Department's contention that the insurance coverage and warranty coverage are one and the same and not separate. *See* DOR Mem. in Opp. at 8. However, the brochures, insurance policies, and customer bills appended to the affidavits submitted in support of Alltel's motion clearly establish that the two coverages are separate and distinct and can be purchased separately, alone, or not at all. Therefore, they cannot be considered one and the same. The Department submitted nothing demonstrating otherwise.

[6] The Department's own motion for summary judgment, however, authorizes the court to assume that there is no genuine issue of material fact. *See Alltel Communications, Inc. v. Department of Revenue, supra*, n.2, *citing Harrison W. Corp. v. Gulf Oil Co.* 662 F.2d 690, 692 (10th Cir. 1981) ("[c]ross motions for summary judgments do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties"). Further, the Department did not address the question of whether disputed facts exist in its oral argument to the court on these motions. Nonetheless, this court will address the Department's argument that a genuine issue of material fact is in dispute.

The court rejects the Department's argument in this regard for several reasons. First, the Department's "belief" is insufficient to form the "specific facts showing that there is a genuine issue for trial" as required under Rule 56(e). *See Ward v. City of North Myrtle Beach*, 457 F.Supp.2d 625, 628 (D.S.C. 2006) (holding that a motion for summary judgment cannot be defeated by reliance on "beliefs, conjecture, speculation, or conclusory allegations"). Second, the plain language of the insurance policies reflects that Alltel customers who choose to become additional insureds are entitled to indemnification in the form of either repair or replacement of a device that is covered.[7] *See* Capehart Aff., Ex. "D," p.11, Section C, p.12, Section F; Ex. E, pp.7-8, Section C, p.9, Section F. Third, (the Department did not articulate this explicitly) the Department's arguments in this regard suggest that a reasonable inference should be drawn from the facts presented by Alltel that the coverage in dispute is not insurance. This court declines to do so as the Department offers the court no reason draw such an inference. Even accepting as true the Department's contention that Alltel customers who choose to become additional insureds may find the coverage under the insurance policies to be "a hassle-free service of replacing their phones," that alone does not alter the nature of the contractual relationship that arises from the payment of a premium for insurance coverage under the two policies that were in force during the periods at issue. That relationship is one of insured and insurer as a matter of fact and law and the Department has failed to demonstrate any reason why this court should infer otherwise from the facts established by Alltel.[8]

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[7] As noted above, §38-1-20(19) defines insurance to mean "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." The word indemnify has not been defined by the General Assembly in Chapter 1 of Title 38 or by DOI in its regulations. Accordingly, the term is required to be given its plain meaning. *See Alltel Communications, supra*, 399 S.C. at 319-320, 731 S.E.2d at 872-873. The plain meaning of undefined statutory language may be derived from secondary sources, including legal dictionaries, in the absence of a statutory or regulatory definition. *See Sonoco Products Company v. S.C. Department of Revenue*, 378 S.C. 385, 391, 662 S.E.2d 599, 602 (2008). According to Black's Law Dictionary 769 (6th ed. 1990), the word "indemnify" means "[t]o restore the victim of a loss, in whole or in part, by payment, repair, or replacement." The coverage available to Alltel customers who choose to become additional insureds under the insurance policies described above provides for the insurance companies to repair or replace devices in the event of a covered loss upon the payment of a deductible. This fits within the definition of indemnify as the insureds' losses are restored in part by repair or replacement of a device. Furthermore, the Department has offered no definition of the word indemnify or the word indemnification which suggests a different meaning. Moreover, the Department has acknowledged that an insurance policy provides indemnification. *See* DOR Memo. in Resp. at 8 ("Alltel's contention that ProductGuard Plus and PlatinumGuard Plus provide indemnification coverage (i.e., policies of insurance) cannot be resolved on a motion for summary judgment").

[8] Similarly, the Department has provided no reason why this court should accept its belief that there is no deductible under the insurance policies and thereby draw an inference from the facts presented that there is no indemnification and, therefore, no insurance. The policy provides for the payment of a deductible by the insureds and

The Department further argues that a dispute exists as to whether Alltel subscribers "'were required to pay a premium to the [underwriter(s)].'" DOR Mem. in Resp. at p.9. The Department contends that this is evidenced by the fact that Alltel's subscribers "paid for the protection through their monthly contracts with Alltel," "were not involved in the transaction between Alltel and [the] underwriter(s)," and "do[] not interact with the underwriter or its agent." *Id.* Thus, according to the Department, "Alltel's assertion that [the Alltel subscribers' purchase of insurance and warranty coverage] are two separate transactions is not supported by the facts." *Id.* This court rejects this argument.

As has been noted, the Department submitted no opposing affidavit to contradict the plain language of the documentation submitted with Alltel supporting affidavits. The customer brochures (describing the two separate and optional contractual coverages made available to Alltel's customers and the customers' obligation to pay a separate premium for insurance coverage and to coordinate claims with the insurers' or their agent), the customer bill form (demonstrating separate line item billing for warranty coverage and separate line item billing for insurance coverage), and the insurance policies (containing provisions excluding as covered events circumstances which give rise to coverage under the warranty and providing that coverage is only available upon payment of a premium) contradict the Department's assertions. Each of these documents demonstrate that two separate transactions were involved and that Alltel customers did pay premiums to a licensed insurance company for inland marine insurance coverage under a policy recognized under South Carolina law. No reasonable inference to the contrary arises from the facts established by the affidavits submitted by Alltel and none can be created by the unsupported statements of the Department purporting to contradict them.

The Department did not submit any affidavit to refute the foregoing facts as is required by Rule 56(e), SCRCP. In fact, the affidavits submitted with the Department's response to the Alltel motion failed to address any of the enumerated facts asserted by Alltel. The Department's affidavits are not even mentioned in the portion of its responsive memorandum asserting that material facts are in dispute. Mr. Donovan's affidavit pertains only to his belief that information provided by Alltel to the Department's auditor during the audit underlying this matter included within the base of revenues subject to sales tax under §12-36-910(B)(7) all warranty coverage sold

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the fact that the deductible is paid to a third party when the covered property is replaced or repaired by the insurer's "authorized service center" gives this court no basis to infer that there is no deductible.

during the tax period in question when (he asserts) it did not. *See* Donovan Aff., paras. 6-8, DOR Mem. in Resp. at p.7, n. 10, n.12. In addition to admittedly not being based upon personal knowledge as required by Rule 56(e), SCRCP, Mr. Donovan's statement is not relevant to the question raised by Alltel's motion, which is whether the charges collected by Alltel from its customers who purchased optional insurance coverage against loss of, theft of, or damage to their Devices were subject to sales tax.[9] Mr. Donovan's statement does not challenge the authenticity of either the customer brochures and customer bill form appended to Ms. Capehart's affidavit or the insurance policies appended to the affidavits of Ms. Capeheart and Mr. Ain. Nor does he assert that any reasonable inferences may be drawn from these documents that contradict Alltel's factual assertions based upon the content of these documents. *Cf. Epstein, supra.* Thus, Mr. Donovan's affidavit is not sufficient to satisfy the Department's obligation to set forth specific facts in response to Alltel's motion. *See David v. McLeod Reg'l Med. Ctr., supra.*

Similarly, the affidavit of Mr. Gutting does not address the factual assertions set out in Alltel's spporting affidavits. Instead, the Department contends that this affidavit supports its assertion under Rule 56(f), SCRCP, that it cannot present by affidavit facts essential to justify its opposition to Alltel's motion. The Department takes this position because "DOR has not had a full and fair opportunity to conduct discovery in this case and, therefore, Alltel's Motion for Partial Summary Judgment is premature." DOR Mem. in Resp. at pp.10-13. According to the Department, if it were allowed to conduct additional discovery, it would be able to supply information to its "expert in insurance," who was consulted by the Department on December 14, 2011, and "engaged shortly thereafter," which would permit him to "to review the terms of

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[9] Alltel has suggested that the affidavit of Mr. Donovan was intended to provide a factual basis upon which the Department could seek a remand of this matter to develop additional facts bearing upon the amount of tax due on charges for warranty coverage collected by Alltel from its customers during the tax period in question. Alltel Reply Mem. at p.20, n.14. While remand is procedurally proper in circumstances where a taxpayer has not provided the Department all of the facts relied upon by the taxpayer to establish its position before this court, and has thus failed to exhaust its prehearing remedies under S.C. Code Ann. §12-60-510(a)(1) (Supp. 2012), that procedure is not applicable here. This court finds that Alltel has not asserted any fact in support of its motion for partial summary judgment that it did not assert in its protest to the Department. *See* Capehart Aff., Ex. C. Furthermore, the Department has not requested a remand on this basis and, as Alltel contends, the assessment of additional sales tax on warranty coverage charges which may not have been included in the Department Determination in this matter would be time-barred. Alltel Mem. in Supp. p.2, n.1. Thus, the remand ordered by this court today is solely for the purpose of allowing the Department to calculate interest on the amount of tax assessed by the Department for the sale of warranty coverage after taking into account the reduction in interest under Rule 68, SCRCP. Finally, regardless of the Department's reasoning in this regard, Mr. Donovan's affidavit is insufficient to create a genuine issue of material fact with respect to Alltel's motion for partial summary judgment simply because it does not address the pertinent facts involving the provision of insurance coverage.

ProductGuard Plus and PlatinumGuard Plus" and to testify that "the handheld protection plans at issue in this case may not provide indemnification dependent ...on whether or not the plans were sold simultaneously with the tangible personal property and whether or not the losses were paid in cash or in kind." Gutting Aff. at p.2, para. 4. In applying the requisite legal standards,[10] the court finds that the Department has failed to meet its burden of showing that it has not had a full and fair opportunity to complete discovery and that relief under Rule 56(f), SCRCP, is appropriate. The reasons for this finding are several.

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[10] South Carolina courts have held that summary judgment should not be granted until the party opposing the motion has had "a full and fair opportunity to complete discovery." *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991), citing, 10A Wright & Miller, *Federal Practice and Procedure* §2741, p. 543 (1983) (further citations omitted). What constitutes the requisite opportunity to engage in discovery, however, necessarily depends on the facts and circumstances of the subject litigation. *See* 10B Wright & Miller, *Federal Practice and Procedure* § 2741, pp. 428-429 (1998)(stating "[q]uite logically, what constitutes an adequate opportunity for discovery to oppose a summary-judgment motion will vary depending on the subject matter and other circumstances of the action."); *see e.g. Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479-480, 465 S.E.2d 765, 771 (Ct. App. 1995)(affirming summary judgment against claims of non-movant that it did not have a full and fair opportunity to conduct discovery when non-movant advanced "no good reason why four months was insufficient time under the facts of the case to develop documentation in opposition to the motion for summary judgment."); *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009)("[a] party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case....").

Additionally, a party claiming to have been denied a sufficient opportunity to conduct discovery cannot merely advance such an allegation, but must also "demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is "not merely engaged in a 'fishing expedition.'" *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003), quoting *Baughman*, at 112, 410 S.E.2d at 544. In *Dawkins*, our Supreme Court held, in spite of claims by the non-movant that more discovery was needed, that the trial court properly granted summary judgment because any further discovery was unlikely to create any issue of genuine fact. *Dawkins*, at 71, 580 S.E.2d at 440; *Guinan*, at 54-55, 677 S.E.2d at 36 (same); *see also CEL Products, LLC v. Rozelle*, 357 S.C. 125, 131, 591 S.E.2d 643, 646 (Ct. App. 2004) (affirming summary judgment and finding that non-movant's request for a continuance for additional discovery was properly denied because non-movant failed to demonstrate that additional discovery would be helpful to her case).

Similarly, the rules for ensuring sufficient opportunity for discovery are not designed to protect parties who have been dilatory in pursuing discovery. *See* 10B Wright & Miller, *Federal Practice and Procedure* § 2741, p. 429 (1998); *see also Springs Window Fashions LP v. Novo Indus., L.P.*, 323 F.3d 989 (2003)("When a party fails to secure discoverable evidence due to his own lack of diligence, it is not an abuse of discretion for the trial court to refuse to grant a continuance to obtain such information.")(further citations and punctuation omitted); *Jensen v. Redevelopment Agency of Sandy City*, 998 F.2d 1550, 1554-1555 (10th Cir. 1993) (affirming district court's denial of Rule 56(f) affidavit when proponent was dilatory in pursuing discovery and when the party had an opportunity to engage in discovery, but just chose not to do so); *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 597 F.Supp. 1199, 1202 (S.D.N.Y. 1984), *affirmed in part, reversed in part* by *Burlington Coat Factory Wrhse. v. Esprit De Corp.*, 769 F.2d 919 (2nd Cir. 1985) (dilatory plaintiff cannot rely on Rule 56(f)).

First, the Department has failed to demonstrate that it has not had an adequate opportunity to conduct discovery, and in fact, the evidence before the court in this regard establishes the contrary. By virtue of the Department's receipt of the court's December 9, 2011, Notice of Assignment and the operation of Rule 21, RPALC, the court's consent scheduling order issued March 2, 2012, and the Court's three subsequent amended consent scheduling orders issued on March 23, 2012, June 8, 2012, and July 26, 2012, the Department initially had at least until October 1, 2012, or approximately ten months within which to complete discovery in this matter after the case was assigned. This is in excess of three times the length of time within which discovery is normally required to be completed under Rule 21, RPALC. Furthermore, and contrary to the Department's contention, this court's October 9, 2012 consent order continuing this matter until January 2, 2013, and its subsequent January 8, 2013, electronic mail correspondence with the parties did not hold discovery in abeyance until February 1, 2013. Rather, this order and related correspondence confirm that, as a result of the failure of the parties to settle this matter, the deadlines were no longer being held in abeyance. Therefore, the Department had almost one additional month to conduct any further discovery that it desired or to submit a motion to compel discovery responses by Alltel prior to the filing of Alltel's motion for partial summary judgment on February 6, 2013. The Department did neither and has supplied this court with no reason why it could not have.[11]

Second, the Department's own prehearing statement in this matter reflects that information regarding the terms and conditions of coverage under the two insurance policies (as well as the warranty contracts) was in the Department's possession and available for review by its retained expert far in advance of the filing of Alltel's motion. *See* DOR Prehearing Statement, January 12, 2012, para. 7.b.ii. (identifying Alltel customer brochure as a potential hearing exhibit). Alltel asserts in response to Mr. Gutting's affidavit that this brochure was in the Department's possession as early as May of 2010, which was approximately 18 months prior to Alltel's filing of a request for this contested case. *See* Hoefer Aff., para. 9. Further responding to Mr. Gutting's affidavit, Alltel asserts that in the course of discussing stipulations and settlement in this matter, it provided copies of the insurance policies, customer brochures, and customer bill form to the Department in

[11] Notwithstanding the Department's contention that it has not had a full and fair opportunity to engage in discovery, this court notes that the Department itself failed to cooperate in discovery as it never responded to Alltel's interrogatories, requests for production, and requests to admit. *See* Alltel Reply Mem., p.18; Hoefer Aff., para. 7.

April and May of 2012. *See* Hoefer Aff., paras. 3-4. The Department has not refuted this assertion. Therefore, this court concludes that the Department and its retained expert has had over one year to review the contents of the Alltel customer brochures describing the warranty and insurance coverages on devices available to Alltel's customers and at least eight months to review the actual insurance policies before Alltel filed its motion. The facts asserted in support of Alltel's motion are based upon the language of the brochures and the insurance policies and the content of Alltel's customer bill form. Therefore, no documents have been submitted by Alltel with its supporting affidavits that were not in the Department's possession well in advance of the filing of Alltel's motion. Given the foregoing, this court cannot conclude that additional discovery would have an impact upon the Department's ability to respond to Alltel's motion.

Furthermore, this court notes that while Alltel had not formally responded to the Department's August 23, 2012, request for production, Alltel effectively did respond, albeit informally, when it voluntarily delivered documents to the Department during the course of the parties' negotiations regarding settlement and stipulations. *See* Hoefer Aff., paras. 3-4 and 8-10, Exhibits A, B, F, G, and H. Moreover, Alltel formally cooperated in discovery by responding to the Department's interrogatories on August 16, 2012, therein describing every witness and every document relied upon by Alltel in support of its motion for partial summary judgment. *See* Hoefer Aff., para. 5, Exhibit C. In view of these facts, the court again fails to apprehend how additional discovery would have aided the Department in responding to Alltel's motion. Therefore, this court denies the Department's efforts to obtain relief under Rule 56(f). *See Dawkins v. Fields, supra.* [12]

[12] The contention that a letter from the Department's retained expert "indicates that further discovery to uncover additional evidence relevant to the issue of whether [the Coverage Plans] provide Alltel subscribers with indemnity coverage" is not supported by the referenced letter as the court can find no such indication. *See* DOR Mem. in Resp., p.12 and Ex. I. Moreover, the Department's assertion that additional discovery is needed to provide information to its expert as to "whether or not the plans were sold simultaneously with the tangible personal property and whether or not the losses were paid in cash or in kind" (*see* Gutting Aff., para. 4 and DOR Mem. in Resp., p.12) is specious since that information is contained in the customer brochures and insurance policies provided to the Department by Alltel. The brochures explicitly provide that both warranty and insurance coverage could be purchased when a customer purchases a device or thereafter (*see* Capehart Aff., Ex. A, pp.3, 8, 15, and 20) and that no cash payments are made, with reimbursement being made by repair or replacement of a device. *See* Capehart Aff., Ex. A, pp.4, 8, 16, and 21. Consistent with the language of the brochures, the insurance policies also clearly provide that insurance coverage could be acquired at the time a device was purchased or thereafter (*see* Capehart Aff., Ex. D, p.3, Ex. E, p.3) and that repair or replacement are the sole duty of the insurer in the event of a covered event. *See* Capehart Aff., Ex. D, p.11, §C, p.12, §F and Ex. E, pp.7-8, §C, p.9, §F. Moreover, by Mr. Gutting's own acknowledgment, this information was provided to the Department's expert. *See* Gutting Aff., paras. 2 and 5. Yet, no opposing affidavit from the Department's expert was submitted to this court. The court finds it reasonable to conclude from this that the additional discovery the Department now asserts is necessary would have served no useful purpose as to the Department's ability to respond by opposing affidavit.

Third, the Department delayed in conducting discovery. The Department waited until July 11, 2012, to propound interrogatories to Alltel. *See* Hoefer Aff., para. 5. This is seven months after this contested case was assigned. Moreover, this was after two separate consent orders had been issued by this court extending the discovery deadlines and more than two months after Alltel had voluntarily produced documents to the Department. Alltel timely responded to these interrogatories on August 16, 2012, and identified to the Department the witnesses whose affidavits have been submitted in support of its motion and the various documents relied upon by Alltel to support the motion, all of which were in the possession of the Department. Notwithstanding this, on August 23, 2012, the Department served a request for production on Alltel consisting of 15 separate requests. As noted above, Alltel acknowledges that it did not respond to this discovery request. However, the Department did not move to compel any response by Alltel to this discovery request.

In view of the foregoing, this court concludes that the Department has had a full and fair opportunity to conduct discovery in this matter. The Department could not possibly have been surprised by anything asserted by Alltel in support of its motion given its substantial cooperation during discovery, both formally and informally, which disclosed to the Department both the witnesses and documents Alltel now relies upon in support of its motion. Similarly, the affidavit of the Department's former counsel in this matter provides no reason why the Department has been prevented from developing facts "essential to justify [its] opposition" to Alltel's motion as required by Rule 56(f).

For the reasons discussed above, the court concludes that the undisputed facts establish that the coverage against the loss of, theft of, or damage to a device provided to Alltel's customers constituted insurance under South Carolina law. The court further concludes that the Department has failed to set forth any specific fact showing that there is a genuine issue of material fact for trial with regard to the averments of fact by Alltel in support of its motion and is not excused from doing so by operation of Rule 56(f).

II. The amounts collected by Alltel for the insurance coverage are not subject to sales tax.

This court must now address whether the amounts collected by Alltel for the insurance on the devices were subject to sales tax. The Department argues that the amounts collected for

insurance coverage are subject to sales tax as gross proceeds of sale because the coverage was sold in conjunction with the sale of tangible personal property. Alltel asserts that under the plain meaning of §12-36-910, the insurance coverage amounts collected are not subject to sales tax because insurance is not tangible personal property under §12-36-60, and therefore the amounts collected for insurance on the devices cannot constitute gross proceeds of sales under §12-36-90. Based upon the plain meaning of the applicable provisions of Chapter 36 of Title 12, the court concludes that these amounts are not gross proceeds of sales.

As explained by the Supreme Court in *Alltel Communications, Inc., supra*,

> "The usual rules of statutory construction apply to the interpretation of tax statutes." *Multi–Cinema, Ltd. v. S.C. Tax Comm'n,* 292 S.C. 411, 413, 357 S.E.2d 6, 7 (1987). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Media Gen.*, 388 S.C. at 147, 694 S.E.2d at 529 (quoting *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)) (internal quotations omitted). "Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute." *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n,* 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010). "Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.*

399 S.C. at 319-320, 731 S.E.2d at 872-873.

In order to determine whether the amounts collected for the coverage provided under the insurance contract are gross proceeds of sales subject to sales tax under §12-36-910, the statutory definition of that term must be applied.[13] That definition is provided by §12-36-90, which defines gross proceeds of sales as "... the value proceeding or accruing from the sale, lease or rental of tangible personal property." Therefore, in order to ascertain whether gross proceeds of sales exist, the court must first ascertain whether the insurance policy covering the devices constitutes tangible

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[13] *See Goldston v. State Farm Mut. Auto Ins. Co.*, 358 S.C. 157, 594 S.E.2d 511, (Ct. App.2004) (cert den., August 18, 2005), *citing Fruehauf Trailer Co. v. South Carolina Electric and Gas Co.*, 223 S.C. 320, 325, 75 S.E.2d 688, 690 (1953) (holding that "'[t]he lawmaking body's construction of its language by means of definition of the terms employed should be followed in the interpretation of the act or section to which it relates and is intended to apply'"); *see* also *Purvis v. State Farm Mutual Automobile Insurance Company*, 304 S.C. 283, 288, 403 S.E.2d 662, 665 (1991) (holding that "[t]he General Assembly has the power to prescribe legal definitions by statute, and such definitions are binding upon courts and should prevail").

personal property. In order for the insurance coverage amounts collected by Alltel to be subject to sales tax, these insurance contracts must fit within the definition of tangible personal property under §12-36-60. That statute defines the terms as follow:

> "Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity, the sale or use of which is subject to tax under this chapter and does not include stocks, notes, bonds, mortgages, or other evidences of debt. Tangible personal property does not include the transmission of computer database information by a cooperative service when the database information has been assembled by and for the exclusive use of the members of the cooperative service.

The Department acknowledges that "[t]here are no South Carolina sales and use tax provisions specifically relating to insurance companies" (*see* Determination at 5) and "freely admit[s]" that there is not "a statute that says insurance policies are subject to sales tax." Hearing Transcript, September 18, 2013, p.41, ll. 13-15. Furthermore, the Department has conceded that "insurers are not selling tangible personal property." *See* DOR Mem. in Supp. at 10. Therefore, applying the plain meaning of §§ 12-36-60, 12-36-90(1)(b), and 12-36-910(A), the amounts collected by Alltel for insurance do not meet the definition of gross proceeds because insurance policies are not tangible personal property as a matter of law since no provision of Chapter 36 of Title 12 subjects insurance to sales tax.[14] Because this court is required to give effect to the plain meaning of the statute, it is Alltel, and not the Department, that is entitled to summary judgment. *See Alltel Communications, supra.*

The Department's contrary argument is that notwithstanding the lack of statutory language specifically subjecting insurance to sales tax, the amounts collected for insurance coverage become subject to sales tax as gross proceeds of sale because the coverage was sold in conjunction with the sale of tangible personal property (i.e., communications service). At oral argument, the

[14] By contrast, laundry and dry cleaning, electricity, communications, and accommodations are all subject to tax under Chapter 36 of Title 12. *See* §12-36-910 and §12-36-920. To ignore this qualifying language in §12-36-60 would render it meaningless, which this court may not do. *See Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) ("[t]his court will not construe a statute in a way which...renders it meaningless").

Department characterized "gross proceeds of sale almost as a bucket with regard to the sale of tangible personal property" and that "anything associated with that sale of tangible personal property goes into the bucket of gross proceeds." Tr., p.15, ll. 13-19. In response to this court's query regarding the optional nature of a purchase of insurance, the Department asserted that its position reflected the agency's "long applied" view that "all of those proceeds go for the payment of the tangible personal property and any services associated are incidental to that and, therefore, become part of the gross proceeds of sale." Tr. p.23, ll. 16-23. The Department cites *Meyers Arnold, supra,* in support of its contention. The Department argues that because the insurance contracts in question incorporate South Carolina law, the coverage against loss, theft or damage on a device could not have constituted insurance because it was not previously regulated as such by the State of South Carolina. Tr. p.26, l. 11 – p.28, l.3. The court rejects these arguments.

As a threshold matter, the Department's argument is not supported by the plain language of the statutes, which make clear that only the gross proceeds of sales are subject to sales tax. Under the statute, tangible personal property includes only two categories: "personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses" and "services and intangibles ... the sale ... of which is subject to tax under this chapter." *See* §12-36-60. Nothing in Chapter 36 of Title 12 specifically subjects insurance to sales tax because as the Department concedes, it is not tangible personal property. Thus, the amounts charged for insurance on devices cannot constitute "value proceeding or accruing from the sale ... of tangible personal property" under the plain meaning of the language enacted by the General Assembly.

In order to accept the Department's argument that the statute requires that any amounts of revenue collected by a retailer at the same time it receives revenue from the sale of tangible personal property be subjected to sales tax, the court would be required to read language into the statute that is absent. This violates the plain meaning rule. *See Alltel Communications, Inc., supra.* Additionally, acceptance of the Department's argument would require the court to read out of the statute language that limits the application of sales tax to "services and intangibles ... the sale ... of which is subject to tax" under Chapter 36 of Title 12. This, too, violates the plain meaning rule. *Id.* Even if this court were to agree with the Department on this point, however, the Department would not prevail because the statute would then be rendered ambiguous and therefore inapplicable to Alltel. *Id.*

The Department next contends that because the purchase of insurance by Alltel's subscribers was incidental to the purchase of communications service, the amounts collected for insurance are included in gross proceeds of sales subject to sales tax in accordance with the Department's longstanding application of the statute. *See* DOR Mem. in Supp., p.7,p.10, n.14; Tr. p.21, l. 5-12, p.23, ll. 16-23, p.40, l.3 – p.41, l.2. Alltel responds by pointing out that there are no statutory provisions subjecting to tax the sale of items which do not constitute tangible personal property, and that only by reading language into the statute can the sale of such items be subject to tax. *See* Alltel Mem. in Resp. at 7. Therefore acceptance of the Department's argument in this regard would again render the statute ambiguous. *Id.*

This court agrees with Alltel. There simply is no provision of the statute which provides for the imposition of sales tax on anything other than tangible personal property as defined in §12-36-60. As Alltel notes, the reference to the sale of wrapping paper "incident to delivery of tangible personal property" in *Meyers Arnold* does not require a contrary conclusion because wrapping paper is itself tangible personal property under the definition in §12-36-60 (i.e., it is personal property that is perceptible to the senses) which would be subject to sales tax if it were not statutorily exempted by S.C. Code Ann. §12-36-2120(14) (2000). The Department has conceded that there is no statutory provision that subjects insurance policies to sales taxes. Tr. p.41, ll. 13-15. Therefore, no statutory exemption is needed in order for insurance policies to be excluded from the imposition of sales tax. Only by reading into the statute language that includes within the base of the sales tax items not constituting tangible personal property, but sold incident to the sale of tangible personal property, can the Department's position be accepted. This court declines to do so as for such an interpretation goes beyond the plain meaning of the statutory language. And, as already noted, doing so would still entitle Alltel to prevail under *Alltel Communications, Inc., supra*, due to the resulting ambiguity.

In response to the Department's incident to sale argument, Alltel points out that the Department does not require an automobile repair shop selling parts at retail (which are subject to sales tax) to also pay sales tax on the labor used to install the parts when the retailer makes the repair. Tr. p.35, l.17 – p.36, l.4. Therefore, Alltel asserts, the Department does not consistently impose sales tax on a separate charge for a service that is not specifically subject to sales tax. This court agrees with Alltel's assertion in this regard. Although not cited by either party, the Department's Regulation 117-313.3 specifically provides that "charges for installation incident to

the sale of tangible personal property" which are "separately stated from the sales price of the property" and documented by records and accounts "show[ing] the reasonableness of such labor in relation to the sales price of the property" are not subject to sales tax.

The Department attempted to counter Alltel's assertion by citing to decisions of the Administrative Law Court in *Hamby's Catering v. S.C. Department of Revenue*, Docket No. 08-ALJ-17-0041 and *Tronco's Catering v. S.C. Department of Revenue*, Docket No. 09-ALJ-17-0089 wherein the Department's refusal to apply R. 117-313.3 was sustained.[15] However, both of these contested case decisions are distinguishable from the present one. Both involved efforts by food caterers to exclude charges made by the caterers to customers. The charges included event functions and facility set ups and breakdowns, food preparation, wait-staff, and bartender services provided as "charges for installation incident to the sale of tangible personal property" under R.117-313.3. In each case the court concluded, *inter alia*, that the caterer could not exclude from the revenues it received from the customer the charges the caterer made for the labor provided because, under the plain meaning of R.117-313.3, the labor did not involve installation of tangible personal property. The conclusion reached in these two contested cases supports Alltel's position, and not the Department's position.

The language of §12-36-90(b) defining "gross proceeds of sale" expressly prohibits a retailer from deducting from the proceeds of the sale of tangible personal property the cost of labor or services incurred by the retailer in providing the tangible personal property to the purchaser.[16] By contrast, R.117-313.3 pertains to the sale of tangible personal property which can be purchased without any accompanying labor or service and recognizes that the labor needed to install tangible personal property is not subject to sales tax as the labor or service could be performed by the purchaser or another service provider of whom neither would be subject to sales tax. The Department's promulgation of this regulation excluding labor in these circumstances is only permissible because it is consistent with the plain meaning of §12-36-90(b). If it were otherwise,

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[15] This court is not bound by the decisions made by another Administrative Law Judge. *Cf.* Rule 70(f), RPALC (providing issues addressed in an en banc decision of the Administrative Law Court are binding on all Administrative Law Judges). *See also South Carolina Administrative Practice and Procedure*, 3rd ed., S.C. Bar 2013, p.200.

[16] This prohibition is implicitly recognized by the portion of R.117-313.3 requiring that the charge for labor associated with the installation of tangible personal property be reasonable in relation to the charge for the tangible personal property. In other words, even under R.117-313.3, a retailer cannot deduct its cost of labor that is not associated with the actual installation of tangible personal property.

this regulation would be unenforceable since the Department has no authority to exempt by regulation from taxation that which the General Assembly has included in the tax base by statute. *See Home Medical Systems, Inc. v. South Carolina 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").[17]

Furthermore, in both of these contested cases the portion of the charges paid by the purchaser of the tangible personal property (i.e., food) sought to be attributed to the labor provided by the seller's employees was retained by the seller. Here, the amounts collected for insurance sought to be taxed by the Department were not retained by Alltel. *See* Ain Aff., para. 6. Moreover, as the Department acknowledged during its argument to this court, the purchase of insurance was optional and not necessary for a customer to be able to purchase the tangible personal property (i.e., Alltel's communications services). Tr. p.22, l.21 – p.23, l.11. By contrast, the purchasers of food in the *Hamby's Catering* and *Tronco's Catering* cases required the labor of the caterers' employees to prepare and serve the food purchased in the circumstances presented.

The Department next contends that *Meyers Arnold* supports the conclusion that "the total amount charged in conjunction with the sale or purchase of tangible personal property is subject to sales tax, unless otherwise exempt." *See* Dep't Mem. in Supp. at p.9. However, the court does not find this to be a holding of *Meyers Arnold*. Moreover, *Meyers Arnold* is inapposite in view of clear factual differences between that case and this one. Finally, if the Department's reading of *Meyers Arnold* is correct, it reveals an ambiguity in the sales tax statute, which again must be construed in Alltel's favor under *Alltel Communications, supra*.

In *Meyers Arnold*, the taxpayer was a merchandise retailer who allowed customers to purchase its merchandise under a layaway plan, for which the retailer charged a non-refundable lay away fee. *Id.*, 285 S.C. at 307, 303 S.E.2d at 923. The retailer "retain[ed] the goods purchased until the full price [of the retail merchandise was] paid." *Id.* The retailer paid sales tax on the layaway fees and sought a refund from the Tax Commission. *Id.*, 285 S.C. at 304, 307, 303 S.E.2d at 921, 923. The pertinent question before the Court of Appeals was whether the "fees charged by

[17] By contrast, the General Assembly has clear authority to exempt various types of tangible personal property from sales tax and has done so in S.C. Code Ann. §12-36-2120 (2000, as amended). *See Bodman v. State of South Carolina*, 403 S.C. 60, 742 S.E.2d 363 (2013).

Meyers Arnold on sales made under its lay away plan are subject to sales tax." *Id.* (emphasis supplied).

In discussing the holding in this case, the Department's memorandum quotes a portion of one paragraph of the Court of Appeals' opinion, which the Department characterizes as "the *Meyers Arnold* test," and asserts that this test resolves the instant controversy in its favor as a matter of law. *See* DOR Mem. in Supp. at p.8, n.11 & pp.10-11.[18] However, the opinion contains additional language preceding that cited by the Department that this court finds pertinent. Together, the opinion's preceding paragraph and the full paragraph from which the Department has quoted in part read as follows:

> It is undisputed that [the taxpayer] is in the business of making retail sales of tangible personal property when it sells to a customer under [a] lay away plan. The question which must be resolved is whether the lay away fee charged is part of the gross proceeds of sales.
>
> 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.

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[18] The quoted portion of the Court of Appeals opinion that the Department contends creates the *Meyers Arnold* test reads as follows: [b]ut 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."

Alltel notes that *Meyers Arnold* has not been cited by any appellate court in South Carolina since its issuance for any proposition. The Supreme Court has considered the meaning and application of §12-36-90(1)(b)(ii) in its opinion in *Travelscape, supra* but did not mention *Meyers Arnold.* Moreover, the only foreign appellate court which appears to have cited the opinion addressed only its holding pertaining to the taxability of "gift wrapping charges." *See A.D. Store Co., Inc. v. Exec. Dir. of Dept. of Revenue of State of Colorado*, 19 P.3d 680 (Colo. 2001). The Department asserts that *Meyers Arnold* has been cited in certain of its advisory opinions, most notably Revenue Ruling 93-1, and that this reflects a long-established agency interpretation of the sales tax statute. *See* Tr. p.23, ll. 16-23. Because this court concludes that the plain meaning of the statutory provisions at issue does not include charges collected for insurance as gross proceeds of sale of tangible personal property for the reasons stated above, the advisory opinions issued by the Department which may adopt the *Meyers Arnold* test advanced by the Department cannot be considered by this court. *See Alltel Communications, supra.*

Meyers Arnold, supra, 285 S.C. 307, 328 S.E.2d at 923. Reading these two paragraphs together and in their entirety, the court concludes that this holding in *Meyers Arnold* does not support the Department's argument. Instead, this holding reflects that the Court of Appeals was applying the definition of gross proceeds found in S.C. Code Ann. §12-35-30 (1976), which is "the value proceeding or accruing from the sale of tangible personal property...without any deduction for service cost." *Meyers Arnold, supra* (emphasis supplied).[19] In other words, the Court of Appeals' holding in *Meyers Arnold* addresses an attempt by a taxpayer to exclude from gross proceeds a cost of service provided by the retailer in the sale of tangible personal property. Here, Alltel has not excluded any costs associated with the selling of its communications services from its revenues.

The retailer in *Meyers Arnold* charged its customers non-refundable fees for the service it provided to them of holding retail merchandise on lay away until the full purchase price for the merchandise had been paid. *Id.*, 285 S.C. at 307, 328 S.E.2d at 923. The retailer retained the fees for this service. *Id.* From this, the Court of Appeals concluded that the fee for this service constituted gross proceeds of sales under the statutory definition, which expressly precluded any deduction from revenues for service costs. *Id.*[20]

The facts in *Meyers Arnold* and *Travelscape* both involve the imposition of sales tax on fees retained by a retailer providing a service where the fees were inextricably intertwined with the sale of tangible personal property or accommodations. In *Meyers Arnold*, the customer could not purchase the lay away merchandise without paying the subject fee. Likewise, in *Travelscape*, the customer could not purchase the accommodation without paying the fee.

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[19] The definition of gross proceeds found in §12-36-90(1)(b) (which applied during the tax periods in question and remains in effect today) contains a similar proscription against "any deduction for ...the cost of ... service."

[20] Similarly, in Travelscape v. S.C. Dep't of Revenue, supra, the Supreme Court held that various fees charged by an online travel company engaged in the business of furnishing accommodations via a reservation service website constituted "gross proceeds of sales" for purposes of the sales tax imposed under §12-36-920(A). In so holding, the Supreme Court noted that the fees were (i) included in the price of the hotel room that was paid to the travel company by the guest and (ii) retained by the online travel company; thus, the Court held that these fees were included in "gross proceeds" (as defined by §12-36-90(1)(b)) as they were part of "the value obtained from the rental of accommodations *without deduction for the cost of services*." *Id.*, 391 S.C. at 98, 705 S.E.2d at 33 (*emphasis in original*). Therefore, unless a customer purchased "additional guest services" (*see* §12-36-920(B)), the customer paid no charges for the accommodations beyond the price it paid to the online travel company. *Id.*, 391 S.C. at 95, 705 S.E.2d at 31. Based upon these facts, the Supreme Court found "the fees retained by Travelscape for its services are taxable as gross proceeds." *Id.*

In contrast to the facts in both *Meyers Arnold* and *Travelscape*, in this case communications services could be purchased by customers from Alltel regardless of whether they bought insurance. Furthermore, Alltel had no interest in the premiums for the insurance coverage purchased by some of Alltel's customers, could not retain them, and was required to remit all premiums to the agent for the insurance companies. *See* Capehart Aff. and Ain Aff. at ¶6.[21] Moreover, it is undisputed that Alltel did not provide the insurance service or insurance to these customers and that these were provided to the customers by the licensed insurance agent and licensed insurance company, respectively. *Id.* Therefore, unlike the taxpayer in *Meyers Arnold*, Alltel is not seeking to avoid sales tax on gross proceeds it derived from a service which it provided to a customer and for which it has been compensated by a customer. Accordingly, the Department's contention that "but for the sale of the wireless communications, Alltel would not have received the charges for ProductGuard Plus and PlatinumGuard Plus" (*see* Dep't Mem. in Supp. of Mot. for Summ. J. at p.10, emphasis supplied) is unsupported by the undisputed facts of this case. Therefore, even assuming that the Department is correct that *Meyers Arnold* established a "but for test," that test is inapplicable in this case.

According to the Department, the holding in *Meyers Arnold* sets forth a test for determining whether sales tax applies that focuses on fees received by a retailer in conjunction with a sale of tangible personal property. If the Department's reading of *Meyers Arnold* is correct, then, the Court of Appeals' decision must be construed as reading into §12-36-90(1)(b) a proscription against deducting revenues in the form of fees received for taxable services rendered. Such a reading turns §12-36-90(1)(b) on its head as the entire subsection pertains only to deductions from gross proceeds of costs, taxes and expenses incurred by a retailer, not the exclusion from gross proceeds of revenue received by a retailer. Therefore, to read *Meyers Arnold* as the Department asserts would sanction the application of a sales tax in circumstances where it is far from clear that the sales tax applies. This court declines to accept the Department's interpretation. *Cf. Alltel Communications, supra.*[22]

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[21] The insurance policies clearly state that Alltel did not have ownership of any of the collected premiums remitted to the agent and then to the insurance companies. *See* Ain. Aff. Ex. "A" p.15, ¶ 11(b), Ex. "B", p.12, ¶11(b) ("[i]f the First Named Insured [Alltel] provides monthly bill and collection services for the Agent, all funds collected by the First Named Insured are our property"). This same language is included in the policy summary provided to customers in the brochure made available by Alltel. *See, e.g.,* Capehart Aff. Ex. A, p.7, ¶11(b).

[22] Alltel asserts that the Department reads *Meyers Arnold* too broadly. As noted by the Court of Appeals "[i]t [was] undisputed that Meyers Arnold [was] in the business of making retail sales of tangible personal property when

The Department contends that the coverage against loss, theft, or damage for devices does not constitute insurance but is simply a service contract. In support of this contention, the Department cited 2012 S.C. Act No. 172, which has been codified as S.C. Code Ann. §§38-97-10, *et seq.* (Supp. 2012), and may be cited as the "Portable Electronics Insurance Act" (the "Act"). Tr. p.26, l.7 – p.28, l.3. The Department contends that the Act, which became effective on January 1, 2013, "specifically addresses insurance that would be sold by cell phone carriers." The Department further asserts that because the insurance policies covering devices contained provisions conforming them to the law of the State of South Carolina, the fact that the Act was not in force during the tax period in question somehow leads to the conclusion that "these things characterized and nominated *(sic)* as insurance policies were nothing more than service contracts which were regulated as service contracts and therefore subject to sales tax. Tr.p.27, l.7 - p.28, l.3. The Court disagrees with this argument for several reasons.

First, the Act can have been of no direct application in this matter since, as acknowledged by the Department, its effective date is five years after the end of the tax period in question. Moreover, the Act specifically excludes "a service contract governed by Section 38-78-20(12)" from the definition of "[p]ortable electronics insurance." Further, the policy language referenced by the Department[23] deals with the conformity of the policy terms with state law, not regulation of the sale of insurance by a vendor of portable electronic devices, which is the purpose of the Act. See S.C. Code Ann. §38-97-20(8) (Supp. 2012) (defining a "vendor" as "a person ... engaged in the business of portable electronics transactions") and §38-97-30 (requiring a "vendor" to obtain a license to sell or offer portable electronics insurance). Finally, nothing contained in the Act changes the statutory provisions cited by Alltel which support the conclusion that the coverage against theft, loss or damage for a device constituted insurance. *See* discussion at Part II.A.1, *supra*. There is no repeal provision contained in the Act and the only reference to the statutory provisions governing the sale of insurance is that found in §38-97-30(D) which, again, reflects the

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it [sold] to a customer under the lay away plan." *Meyers Arnold,* 285 S.C. at 307, 328 S.E.2d at 923. Although the Court of Appeals resolved in the affirmative "[t]he question [of] whether the layaway fee charged is part of the gross proceeds of sales," it did not attribute an argument in that regard to the retailer. Rather, the argument attributed to the retailer in this portion of the opinion was that the lay away fees were finance charges not subject to tax under a Tax Commission regulation. Alltel submits that this Court should read *Meyers Arnold* in this light and reject a reading that creates an ambiguity in the sales tax statute.

[23] *See* Capehart Aff. Ex. "D," p.15, Ex. "E," p.12 ('[w]e agree that any terms of this policy not in conformity with the statutes of the state in which this policy is issued are amended to conform to those applicable state statutes").

Legislature's recognition that the sale of portable electronics insurance could be deemed to be subject to regulation under existing provisions of law governing the sale of insurance.[24]

In view of the foregoing, the Court concludes that this argument by the Department is without merit.

CONCLUSION AND ORDER

For the reasons set forth above, the court finds that Alltel is entitled to partial summary judgment and the Department is not entitled to summary judgment.

IT IS THEREFORE ORDERED THAT the Determination of the Department is overturned to the extent that it includes within the base of the sales tax assessed amounts collected by Alltel for insurance on devices during the periods at issue.

IT IS FURTHER ORDERED THAT this matter is remanded to the Department for a calculation of the total amount of sales tax and interest due from Alltel on the fees for warranty coverage as previously assessed by the Department, which is to be reduced by an amount equaling eight (8%) percent interest accruing from and after the date Alltel offered judgment to the Department under Rule 68(b), SCRCP.

AND IT IS SO ORDERED.

S. Phillip Lenski
Administrative Law Judge

November 13, 2015
Columbia, South Carolina

[24] The court notes that the Department failed to present any evidence refuting the affidavit of Mr. Ain on behalf of Alltel, which reflects that the two insurance companies considered themselves regulated by, and paid premium taxes to the Department of Insurance with respect to the commercial inland marine insurance coverage on devices provided to Alltel's customers as additional insureds. Were the court to accept the Department's argument in this regard, at a minimum a situation would exist where refunds of insurance premium tax would be due to the insurance companies and insurance coverage to Alltel customers voided. This the court declines to accept the Department's argument.

CERTIFICATE OF SERVICE

I, Edye U. Moran, 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).

Edye U. Moran
Judicial Law Clerk

November 13, 2015
Columbia, South Carolina