

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
In a Contested Case Hearing

The Honorable S Phillip Lenski  
Administrative Law Court Judge

---

Docket No. 11-ALJ-17-0603-CC  
Appellant Case No. 2016-000201

---

**RECEIVED**

APR 07 2016

**SC Court of Appeals**

Alltel Communications, Inc. (and Affiliates) ..... Respondent,

v.

South Carolina Department of Revenue, ..... Appellant.

---

INITIAL BRIEF OF APPELLANT

---

Milton G. Kimpson (Bar No. 7917)  
General Counsel for Litigation  
Mary Elizabeth Campbell (Bar No.  
Counsel for Litigation  
Nicole M. Wooten (Bar No. 73594)  
Counsel for Litigation  
PO Box 12265  
Columbia, SC 29211-9979  
(803) 898-5131  
Attorneys for Appellant  
South Carolina Department of Revenue

**TABLE OF CONTENTS**

Table of Authorities ..... ii

Statement of the Issues.....1

Statement of the Case ..... 1

Statement of the Facts ..... 4

Arguments:

I. **DID THE ADMINISTRATIVE LAW COURT ERR IN FINDING THAT THE PROCEEDS FROM THE INCIDENTAL COVERAGE PLANS ARE NOT INCLUDED IN THE TAXPAYER’S GROSS PROCEEDS OF SALES ACCRUING FROM THE SALE OF TANGIBLE PERSONAL PROPERTY?**..... 6

    a. **DID THE ADMINISTRATIVE LAW COURT ERR IN FINDING THAT THE PROCEEDS FROM THE INCIDENTAL COVERAGE PLANS ARE NOT INCLUDED IN THE TAXPAYER’S GROSS PROCEEDS OF SALES ACCRUING FROM THE SALE OF TANGIBLE PERSONAL PROPERTY?** ..... 6

    b. **The Taxpayer’s Gross Proceeds Of Sales Accruing From Its Sales Of Wireless Communications Services And Telephone Equipment Includes Proceeds From The Coverage Plans.** ..... 10

        i. **The Coverage Plans Provided By The Taxpayer Constituted A “Service Or Other Expense” Incidental To The Sale Of Tangible Personal Property That Cannot Be Deducted From The Taxpayer’s Gross Proceeds Of Sales.** ..... 10

        ii) **Whether The Taxpayer Remits Fees Related To The Coverage Plans To A Third Party Insurance Carrier Is Not Determinative.** ..... 12

        iii) **Meyers Arnold v. South Carolina Tax Commission requires that the proceeds from the coverage plans be included in the gross proceeds of sales under § 12-36-90.** ..... 15

II. **WHETHER CERTAIN OF THE ALC’S FINDINGS PERTAINING TO THE TAXPAYER’S RECEIPT AND RETENTION OF FEES FOR INSURANCE PREMIUMS ARE CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE?** ..... 22

Conclusion: ..... 24

## TABLE OF AUTHORITIES

### Statutes:

S.C. Code Ann. § 1-23-610 .....	2
S.C. Code Ann. § 12-36-30 .....	7
S.C. Code Ann. § 12-36-40 .....	7
S.C. Code Ann. § 12-36-60 .....	2, 7, 10, 20
S.C. Code Ann. § 12-36-90 .....	Passim
S.C. Code Ann. § 12-36-130 .....	11
S.C. Code Ann. § 12-36-910 .....	5, 6, 7
S.C. Code Ann. § 12-36-920 .....	16
S.C. Code Ann. § 12-36-950 .....	7
S.C. Code Ann. § 12-36-1310 .....	12
S.C. Code Ann. Regs. 117-307 .....	16
S.C. Code Ann. Regs. 117-313 .....	18

### Cases:

<u>Etiwan Fertilizer Co. v. S. Carolina Tax Comm'n,</u> 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950) .....	21
<u>Meyers Arnold, Inc. v. South Carolina Tax Commission,</u> 285 S.C. 303, 328 S.E.2d 920, 923 (1985) .....	16, 18
<u>State ex rel. Roddey v. Byrnes,</u> 66 S.E.2d 33, 219 S.C. 485 (S.C. 1951) .....	14

### Other Authorities:

S.C. Tax Comm'n Decision #90-38 .....	16
S.C. Comm'n Decision S-D-174 .....	21
S.C. Tax Comm'n Decision S-D-179 .....	16

## STATEMENT OF THE ISSUES

- I. DID THE ADMINISTRATIVE LAW COURT ERR IN FINDING THAT THE PROCEEDS FROM THE INCIDENTAL COVERAGE PLANS ARE NOT INCLUDED IN THE TAXPAYER'S GROSS PROCEEDS OF SALES ACCRUING FROM THE SALE OF TANGIBLE PERSONAL PROPERTY?**
- II. WHETHER CERTAIN OF THE ALC'S FINDINGS PERTAINING TO THE TAXPAYER'S RECEIPT AND RETENTION OF FEES FOR INSURANCE PREMIUMS ARE CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE.**

## STATEMENT OF THE CASE?

Alltel Communications, Inc. (Taxpayer) is in the business of selling wireless communications services and mobile telephone equipment with retail locations in South Carolina. In conjunction with its business of providing wireless communications and telephone equipment, Taxpayer also provides its subscribers with the following optional coverage plans: (1) ProductGuard; (2) PlatinumGuard; (3) ProductGuard Plus; (4) PlatinumGuard Plus and (5) extended warranty (collectively "Coverage Plans").<sup>1</sup> The South Carolina Department of Revenue (Department) conducted an audit examination of Taxpayer's sales tax returns for the periods from May 1, 2005 through April 30, 2008 (Audit Period). As will be explained, the Department determined that there were deficiencies in the Taxpayer's reporting and remission of sales taxes on its proceeds from Coverage Plans. The Department thereafter issued a Proposed Notice of Assessment to the Taxpayer. The Taxpayer

---

<sup>1</sup>While the term "Coverage Plans" will continue to be used, prior to the hearing in this matter, the Taxpayer submitted an Offer of Judgement admitting that sales taxes were owed on the extended warranty product so that the instant dispute concerns only (1) ProductGuard; (2) PlatinumGuard; (3) ProductGuard Plus, and (4) PlatinumGuard Plus coverages.

timely protested the proposed assessment and the Department issued its final Department Determination. The Taxpayer thereafter requested a contested case hearing at the Administrative Law Court (ALC). After a hearing on the parties' cross motions for Summary Judgment, the ALC found in favor of the Taxpayer on the disputed issues. The Department thereafter filed a Motion for Reconsideration which the ALC denied on January 5, 2016. The Department filed its Notice of Appeal with this Court on February 2, 2016.

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review. Olson v. S.C. Dep't of Health & Env'tl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500-501 (Ct. App. 2008); Turner v. S.C. Dep't of Health & Env'tl. Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). S.C. Code Ann. § 1-23-610(B) (Supp. 2013) provides the applicable standard:

(B) The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the Appellant has been prejudiced because of the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse

of discretion or clearly unwarranted exercise of discretion.

Additionally, the standard for review in summary judgment cases is pertinent:

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005)

(internal citation omitted).

Resolution of the issues in this case depends upon the rules of statutory construction and when construing a statute, the cardinal rule is to ascertain the intent of the Legislature. Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003). “All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” Id. at 23, 579 S.E.2d at 336. The words of the statute “must be given their plain and ordinary meaning without resort[ing] to subtle or forced construction to limit or expand [the statute's] operation.” Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (internal citations omitted). Finally, “[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.” Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting Dunton v. S.C. Bd. of Examin'rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)); see also Nucor Steel v. S.C. Pub. Serv. Comm'n, 310 S.C. 539,

543, 426 S.E.2d 319, 321 (1992) (recognizing that where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason).

Here, the Department submits that the ALC's decision is in violation of pertinent statutory provisions and/or affected by other errors of law and further, certain findings are clearly erroneous in view of the reliable, probative, and substantial evidence.

### **STATEMENT OF FACTS**

During the Audit Period, the Taxpayer's subscribers could also add Coverage Plans to protect the telephone equipment they purchased from the Taxpayer. (R., p. \_\_\_\_; Capehart Affidavit, para. 5). Only the Taxpayer's subscribers could purchase the Coverage Plans. Id. Determining the cost of the Coverage Plans depends upon the cost of the telephone equipment purchased. When a subscriber opted for the coverage, the Taxpayer included the charges for the Coverage Plan in the subscribers' regular monthly service statement. Id. at para. 6. The subscriber paid the cost of its communications service and Coverage Plan fee as one lump sum. Id. (R., p. \_\_\_\_; Exhibit B). The Taxpayer then remitted the Coverage Plan fees, less an undisclosed commission, to a third party.<sup>2</sup> To this end, Taxpayer partnered with third parties regarding certain

---

<sup>2</sup>The Coverage Plan product brochures contained the following language:

Product Guard Plus and Platinum Guard Plus: How much does this cost? A low monthly fee based on your wireless device will be added to the cost of your wireless phone bill. No separate invoices or checks to write. This fee includes the cost of your insurance premium payable to the Old Republic Insurance Company and administration fees payable to Asurion Insurance Service, Inc., and Alltel.

aspects of the Coverage Plans, including the underwriting of the plans and the servicing of claims submitted under the plans. Upon receiving the telephone equipment from Taxpayer, the subscribers could either contemporaneously or subsequently add the Coverage Plans to their wireless communications service purchased from the Taxpayer, provided certain requirements were met. (R.,p. \_\_\_; Capehart Affidavit., Exhibit A). The Coverage Plan fees varied depending upon the type of equipment covered, and the terms of the Coverage Plans. Id. These Coverage Plans provided the Taxpayer's subscribers with protection against loss, theft, accidental damage, and malfunction depending on the level of coverage. Id. Despite the fact that the Taxpayer's subscribers paid for the Coverage Plans as part of their monthly bills, the Taxpayer excluded the sales proceeds from the Coverage Plans from its gross proceeds of sales as reported to the Department. Therefore, the Taxpayer failed to pay sales tax on such amounts during the Audit Period. The Department concluded that the proceeds from the Coverage Plans were subject to sales tax, and the Department issued the Taxpayer Notices of Proposed Assessment on September 29, 2009. (R., p. \_\_\_; ALC Order, p. 3 )

By letter dated November 29, 2009, Taxpayer protested the proposed assessments

---

(R., p. \_\_\_; Capehart Affidavit, Exhibit A.; See also, R., p. \_\_\_; Tr., 20, lines 14-23). Though the Taxpayer has argued at times that it remits all of the proceeds received for Coverage Plans to a third party, the customer brochure explaining the Coverage Plan indicates otherwise. Furthermore, the exhibits to the Affidavit of Michael K. Ain, indicate that during the time Hanover was the insurance carrier, the customer was charged \$4.00 for coverage, but the actual premium paid to the insurance company was \$3.16 per month; for a customer who paid \$6.00 for insurance, the premium was listed as \$5.16 per month. (Ain Affidavit, Exhibit A, p. 3) This same level of detail is absent in the information from Old Republic where the premiums are reported as being the same amounts the Taxpayer collected from its customers. (R., p. \_\_\_; Ain affidavit, Exhibit B, p. 3). As will be explained below, the evidence suggests, despite the ALC's findings, the Taxpayer retains at least part of the proceeds from the Coverage Plans.

claiming that the Coverage Plans were insurance policies not subject to sales tax because the underwriter of the plans is responsible for an insurance premium tax in the State of South Carolina. (R., p. \_\_\_\_; Capehart Affidavit, para. 7, Exhibit C). The Department issued a determination concluding that the proceeds from the Coverage Plans were subject to sales tax. (R., p. \_\_\_\_; ALC Order, pages 3-4) The Taxpayer requested a contested case hearing.<sup>3</sup> After a hearing on the parties' cross motions for summary judgment, the ALC determined that the Taxpayer's Coverage Plans were not subject to sales tax. (R., p. \_\_\_\_; ALC Order, page 27). In so holding, the ALC found the Coverage Plans: (1) constituted insurance sold to the Taxpayer's subscribers and (2) that the Coverage Plans were not tangible personal property. (R., pp. \_\_\_\_\_, \_\_\_\_\_; ALC Order, pages 7-9; 16-18).

### ARGUMENTS

**I. THE ADMINISTRATIVE LAW COURT ERRED IN FINDING THAT THE PROCEEDS FROM THE INCIDENTAL COVERAGE PLANS ARE NOT INCLUDED IN THE TAXPAYER'S GROSS PROCEEDS OF SALES ACCRUING FROM THE SALE OF TANGIBLE PERSONAL PROPERTY.**

**a. Sales Tax Is Imposed Upon The Retailer's Gross Proceeds Of Sale.**

A sales tax is imposed on the gross proceeds of sales of "every person engaged or continuing within this State in the business of selling tangible personal property at retail."

S.C. Code Ann. § 12-36-910(A) (2014) (emphasis added).<sup>4</sup> Therefore, if a person is in

---

<sup>3</sup>The Taxpayer's Offer of Judgment admitted its liability for sales taxes on its sales of enhanced warranty plans so that the issues during the contested case were limited to whether the Taxpayer's sales of the remaining Coverage Plans were subject to sales tax. (R., p. \_\_\_\_; ALC Order, p. 2).

<sup>4</sup>For sales tax purposes, "tangible personal property" is defined as:

the business of selling tangible personal property at retail, it follows that the gross proceeds of sales generated by the sale of such property is subject to the sales tax.<sup>5</sup> The Taxpayer is in the business of selling tangible personal property – wireless communications service and telephone equipment – to the public at retail and therefore, must remit sales taxes on its gross proceeds of sales. S.C. Code Ann. § 12-36-950 (2000).<sup>6</sup>

---

. . . 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.

S.C. Code Ann. § 12-36-60 (2014) (emphasis added).

The term tangible personal property includes the sale or use of intangibles, including communications that are subject to South Carolina sales or use taxes under Chapter 36 of Title 12. Communications are therefore subject to sales taxes. See § 12-36-910(B)(3) ("gross proceeds accruing or proceeding from the charges for the ways or means for the transmission of the voice or messages" are subject to sales tax). In addition, "[i]t is presumed that all gross proceeds are subject to the tax until the contrary is established." S.C. Code Ann. § 12-36-950.

<sup>5</sup>For the purposes of sales tax, the term "person" includes "...any individual, firm, partnership, limited liability company, association, corporation, receiver, trustee, any group or combination acting as a unit, the State, any state agency, any instrumentality, authority, political subdivision, or municipality." S.C. Code Ann. § 12-36-30. S.C. Code Ann. § 12-36-40 defines "taxpayer" as "any person liable for taxes under this chapter [Chapter 36]."

<sup>6</sup>The Department respectfully points out the General Assembly's use of the language "[tangible personal property] 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." The General Assembly's inclusion of services in the definition of tangible personal property bespeaks of a broader reach for "tangible personal property" than allowed by the ALC. Section 12-

In pertinent part, the term "gross proceeds of sales" is defined in S.C. Code Ann.

§ 12-36-90 as follows:

Gross proceeds of sales, or any similar term, means the value proceeding or accruing from the sale, lease, or rental of tangible personal property.

(1) The term includes:

\* \* \*

(b) the proceeds from the sale of tangible personal property without any deduction for:

(i) the cost of goods sold;

(ii) the cost of materials, labor, or service;

\* \* \*

(vii) any other expenses;

(Emphasis added).

Thus, the term "gross proceeds of sales" includes "the value proceeding or accruing from the sale ... of tangible personal property . . . without any deduction for . . . the cost of service ...or any other expenses[.]" Section 12-36-90(1)(b)(ii,vii). Section 12-36-90 provides that the tax base for sales tax purposes is the "value proceeding or accruing from" the sale of tangible personal property.

The ALC incorrectly interpreted the "value proceeding or accruing" language explicitly contained within the definition of gross proceeds of sales found in Section 12-36-90. In interpreting Section 12-36-90 the ALC created a limitation wherein that section only applies to expenses incurred by the taxpayer. In so holding the ALC stated that to include anything beyond expenses incurred by the taxpayer would "sanction the application of a sales tax in circumstances where it is far from clear that the sales tax

---

36-910(A) contains no limiting language for the inclusion of intangibles within the definition of tangible personal property except that the term cannot encompass "stocks, notes, bonds, mortgages, or other evidences of debt."

applies." Alltel Communications, supra. 22. The ALC's interpretation requires a complete disregard of the first line of Section 12-36-90. 12-36-90 explicitly states that gross proceeds "means the value proceeding or accruing from the sale" of tangible personal property. Subsection 1 then explicitly specifies some items that are included with gross proceeds. The ALC's interpretation transforms that list from being examples of what is included into an exclusive list whereby anything not on that list is not included. Moreover the ALC's interpretation disregards the "value proceeding or accruing" language that proceeds Subsection (b)(1). Instead the ALC's interpretation requires changing that language to read "[g]ross proceeds of sales or any similar term means the cost or expense incurred by the taxpayer from the sale, lease, or rental of tangible personal property. " Such interpretation is clearly not correct and constitutes an error of law.

The ALC's interpretation and the holding reached from that interpretation, fails to grasp the fundamental principles behind a sales tax based upon gross proceeds. A sales tax based upon the gross proceeds of sales is aimed at taxing the full amount of value associated with a given transaction. The "value proceeding or accruing" language is intentionally broad so as to include all aspects of a transaction regardless of title given to any specific part. Gross proceeds are not limited to just those items that constitute expenses to the taxpayer. To the contrary Section 12-36-90 delineates those items so that they cannot be excluded simply because they are expenses to the taxpayer and not necessarily amounts retained by the taxpayer. The Coverage Plans at issue here constitute value that proceeds or accrues as a result of the sale of tangible personal property. Pursuant to the explicit terms of Section 12-36-90 such value is included

within gross proceeds of sales and therefore subject to sales tax. The ALC's interpretation of Section 12-36-90 is incorrect and its holding based upon that incorrect interpretation constitutes an error of law.

b. The Taxpayer's Gross Proceeds Of Sales Accruing From Its Sales Of Wireless Communications Services And Telephone Equipment Includes Proceeds From The Coverage Plans.

The ALC believed the salient question in this case to be "whether the insurance coverage purchased by the Taxpayer's subscribers is 'tangible personal property' pursuant to S.C. Code Ann. § 12-36-60....". (R., p. \_\_\_; R., p. \_\_\_; ALC Order p. 6, 17). The Department respectfully submits that this is an incorrect inquiry. Instead, the proper question here is whether the cost of insurance is included within the Taxpayer's gross proceeds of sales. The Department submits that this question must be answered in the affirmative inasmuch as the definition of gross proceeds of sales includes the proceeds from the sale of tangible personal property without any deduction for the "cost of service ... or other expenses." Section 12-36-90 (1)(b)(ii, vii).

i. The Coverage Plans Provided By The Taxpayer Constituted A "Service Or Other Expense" Incidental To The Sale Of Tangible Personal Property That Cannot Be Deducted From The Taxpayer's Gross Proceeds Of Sales.

The Taxpayer is in the business of selling wireless communications services and telephone equipment. (R., p. \_\_\_; ALC Order, p. 2). It is undisputed that the Taxpayer's subscribers who opted to obtain the Coverage Plans at issue here paid the Taxpayer for such Plans. While the ALC makes reference to "[Taxpayer's subscribers being] required to pay a premium to Hannover or Old Republic" (R., p. \_\_\_; ALC Order, p. 7), subscribers made payments for Coverage Plans only to the Taxpayer. The record contained an example of the Taxpayer's bill sent to its subscribers. The charge for the

Coverage Plan fee, although a separate line item, is included within the total charge to the subscriber. (R., p. \_\_\_; Capehart Affidavit, Exhibit B). The subscriber makes one payment to the Taxpayer for all of the items purchased. Although the Taxpayer utilized a third party insurance carrier to complete the Coverage Plans, the fact remains that for the purposes of the sales transactions at issue – the sales between the Taxpayer and its customers - the subscriber purchased everything he or she received from the Taxpayer. The subscribers did not make any payment to, or purchase anything from, any third party insurance carrier. The Department submits that the contractual relationship between the Taxpayer and insurance carrier is of no legal significance for the purposes of this transaction, which is between the Taxpayer and its subscribers. In essence, the Taxpayer has done nothing more than subcontract the service offered to its subscriber to another provider. This contractor - subcontractor relationship cannot absolve the Taxpayer of its duty to remit sales taxes on the gross proceeds resulting from its retail sales.

In this instance, the value accruing from the sale of Taxpayer's wireless communications services and telephone equipment includes the charges collected for the Coverage Plans. Such proceeds are incidental to and enhance the value of the sale of the wireless communications services and telephone equipment. Without the sale of the wireless communications service and telephone equipment, the Taxpayer is unable to sell Coverage Plans. Furthermore, § 12-36-90 expressly states that the gross proceeds of sales must not be reduced by the cost of any service or any other expenses.<sup>7</sup> The

---

<sup>7</sup>See also, S.C. Code Ann. § 12-36-130 (2014), which defines “sales price” in part to mean the “total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of the materials used, labor or service

Coverage Plans are incidental services the Taxpayer provides its subscribers to protect from loss or damage to the telephone equipment. The subscribers pay for the wireless communication services, telephone equipment, and Coverage Plan each month in one lump sum. The subscriber pays the Taxpayer and no other entity. Thus, pursuant to § 12-36-90, the fees the Taxpayer received for Coverage Plans are not deductible from the Taxpayer's gross proceeds of sales.

ii) Whether The Taxpayer Remits Fees Related To The Coverage Plans To A Third Party Insurance Carrier Is Not Determinative.

The ALC found it significant that the Taxpayer remits some portion of the proceeds collected for Coverages Plans to a third-party insurance carrier. As will be discussed, the ALC's conclusion that all of the proceeds received by the Taxpayer for Coverage Plans is transmitted to the third party insurance carrier is factually incorrect.

---

cost, interest paid, losses, or any other expenses." The statute specifically goes on to state:

- (1) The term includes:  
(a) any services or transportation costs that are a part of the sale, whether paid in money or otherwise; and

Id. (Emphasis added). While "sales price" is most generally associated with the imposition of use taxes under S.C. Code Ann. § 12-36-1310 ("A use tax is imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail ... at the rate of five percent of the sales price of the property"), the sales tax and use tax are complementary such that the sales and use taxes should be applied consistently. State ex el. Roddy v. Byrnes, 219 S.C. 485, 517, 66 S.E.2d 33, 46 (1951); See also, Edisto Fleets, Inc. v. SC Tax Commission, 256 S.C. 350, 182 S.E.2d 713 (1971) ("Although the definition of the term 'sale' as found in Section 65-1360 does not specifically refer to the lease or rental of tangible personal property, the same nonetheless is included because of the definition of the term 'purchase' that is provided in Section 65-1357. The terms 'sale' and 'purchase' are inextricably related and bound together and must be so construed and the term 'purchase' specifically refers to the lease or rental of tangible personal property.")

Nevertheless, for the purposes here, it makes no difference whether some or all of the proceeds paid to the Taxpayer by its subscribers for Coverage Plans is thereafter remitted to the third party insurance carrier. As set forth in § 12-36-90, the Taxpayer is prohibited from deducting the cost of any service or other expenses from its gross proceeds of sales, including charges for the Coverage Plans. The fact that the Taxpayer elects to subcontract with a third party insurance carrier for the Coverage Plans and pays the third party insurance carrier to do this does not alter the fact that the Taxpayer's transaction with the subscriber includes proceeds from the Coverage Plans. While insurance coverage sold on its own may not be subject to the sales tax because it is not typically a part of a sale of tangible personal property, Coverage Plans added to the sale of tangible personal property are subject to the sales tax. In this case, the proceeds from Coverage Plans are part of the sale of wireless communication services and telephone equipment, despite the Taxpayer's listing of it as a separate item on the bill. The Coverage Plans are sold as part of the sales transaction of the tangible personal property.

The Taxpayer's argument that the Coverage Plans do nothing to enhance the value of the sale of the telecommunications lacks merit. The Coverage Plans add value to the Taxpayer's sale of the wireless communications services and mobile telephones. Not only does the sale of Coverage Plans add revenue (value) to the transaction between the Taxpayer and its customer from an objective sense, telephone equipment protected "against loss of, theft of, or damage to the devices" has more value than telephone equipment without such protection.<sup>8</sup> The Taxpayer bases this argument purely on the fact

---

<sup>8</sup>The Taxpayer acknowledged that the Coverage Plans add value to the sales of communications and telephone equipment when in argument; its counsel observed that

that it does not retain the premiums but rather remits them (less an undisclosed commission) to a third party insurance carrier. The Taxpayer's contention misses the point of the sales tax - that the "value" subject to the tax is not the value retained by the retailer but instead the overall value proceeding or accruing from the sales transaction between the retailer and its subscriber. Under the Taxpayer's logic, the amount the Taxpayer paid to the manufacturer of the telephone equipment for its phones should be deducted from the gross proceeds of sales because the Taxpayer did not retain this amount. Clearly, this is not correct, and the Taxpayer's retention of the amount charged and received does not determine the gross proceeds of sales.

The Department is not seeking to impose a sales tax on the transaction between the Taxpayer and the third party insurance carriers who underwrite the Coverage Plans. Rather, the Department seeks to impose the sales tax on the gross proceeds of Taxpayer's sales of wireless communications services and telephone equipment, which include proceeds from the Coverage Plans. See, State ex rel. Roddev v. Byrnes, 66 S.E.2d 33, 219 S.C. 485 (S.C. 1951) ("In general, the sales tax is an imposition upon the privilege of the business of selling at retail and measured by the amount of business done . . . (emphasis added))." As a result, based upon a plain reading of the statute, the proceeds received by the Taxpayer for the Coverage Plans must be included in Taxpayer's gross

---

"...I've had to use that insurance because I have two teenagers and a wife who can't hold onto the cell phone." (R., p. \_\_\_\_; Tr. p. 38, lines 6-8) While the argument itself was directed to another issue (whether insurance was a necessary part of the transaction), the comment clearly suggests that some value is derived from a customer's purchase of insurance coverage from the Taxpayer in connection with his or her purchase of communications and telephone equipment.

proceeds of sales.<sup>9</sup>

iii) Meyers Arnold v. South Carolina Tax Commission requires that the proceeds from the coverage plans be included in the gross proceeds of sales under § 12-36-90.

This Court previously interpreted the definition of gross proceeds of sales in a case which is controlling here. In Meyers Arnold, Inc. v. South Carolina Tax Commission, 285 S.C. 303, 328 S.E.2d 920, 923 (Ct. App. 1985), the issue before this Court was whether layaway fees – charges collected by a retailer for an additional, optional service provided to its customers -- were included in Meyers Arnold's gross proceeds of sales. Id. at 304, 328 S.E.2d at 921. Ultimately, the Court of Appeals affirmed the lower court's ruling, which held that the layaway fees were subject to sales tax. Id. at 308, 328 S.E.2d at 923.

In determining whether the layaway fees were included in the gross proceeds of sales, the court considered whether the element of service involved in a layaway sale was subject to tax as being part of the sale of tangible personal property. Id. at 307-08, 328 S.E.2d at 923. The court addressed the issue thusly:

The second issue is whether fees charged by Meyers Arnold on sales made under its lay away plan are subject to sales tax. According to the stipulated facts, the lay away fee is charged on all lay away sales and is not refundable. The fee does not vary with the amount of the sale nor the time period of the lay away. Meyers Arnold retains the goods purchased until the full price is paid.

The sales tax is imposed under Section 12-35-510 as a tax levied on persons engaged in selling tangible personal property at retail with the tax being a percentage of the

---

<sup>9</sup>The Department submits that its interpretation of §12-36-90 does not create any ambiguity as proscribed under Alltel v. South Carolina Department of Revenue, 399 S.C. 313, 731 S.E.2d 869 (2012).

gross proceeds of sales of the business.

It is undisputed that Meyers Arnold is in the business of making retail sales of tangible personal property when it sells to a customer under the 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.

Id., at 307, 328 S.E.2d at 923 (emphasis added).

Meyers Arnold argued that the layaway fees were finance charges and, therefore, should not be included in gross proceeds of sales. Id. This Court, however, rejected such argument, because Meyers Arnold did not advance credit to the customers, as required by the regulation addressing financing arrangements. Id. at 308, 328 S.E.2d at 923.<sup>10</sup>

The ALC found that Myers Arnold was distinguishable from the case at bar. The Department respectfully submits that the ALC’s analysis and reasoning is incorrect and misplaced. Contrary to the ALC’s conclusions, the layaway fees in Meyers Arnold were

---

<sup>10</sup>A South Carolina circuit court and the South Carolina Tax Commission (Commission), in applying the Meyers Arnold test, have determined that several types of charges are included in gross proceeds of sales. See e.g., Regency Towers Association, Inc. v. South Carolina Tax Commission, Horry County Court of Common Pleas, Case No. 88-CP-26-1109 (1989) (charges for maid services are included in gross proceeds derived from furnishing accommodations to transients) (See SC Code Ann. 12-36-920(B) and SC Regulation 117-307 for subsequent changes in the statute concerning charges such as maid service); S.C. Tax Comm’n Decision #90-38 (charges for engraving services, even though optional, were a part of the sale of plaques and trophies by the retailer and includible in gross proceeds of sales); S.C. Tax Comm’n Decision S-D-179 (sales tax imposed on certain charges by an automobile dealership, including charges for delivery and subject to sales personnel.)

not mandatory. Layaway sales were an option made available to the Meyers Arnold shopper. The customer could simply buy an item outright, on its own and not on the layaway plan. When the customer chose to buy an item on layaway, he or she had to pay a layaway fee and that fee became a part of the gross proceeds of sales. Similarly here, a subscriber can purchase a phone without protection. When a subscriber elects to purchase a Coverage Plan, the proceeds from that plan become a part of the Taxpayer's gross proceeds of sales. In other words, while a Coverage Plan may be optional, once purchased it is merged into and becomes inextricable from the transaction and has no value apart from the underlying transaction. For these transactions, therefore, the gross proceeds of sales included the Coverage Plans and that cost should not be excluded from the gross proceeds of sales.

Further, the ALC's assertion that the Meyers Arnold "but for" test is not applicable here is suspect. (R.,p. \_\_\_; ALC Order , pages 22-23). There is no question that "but for" the sale of wireless communication services and telephone equipment, the Taxpayer could not provide Coverage Plans to its subscribers. No evidence exists that a person can walk into the Taxpayer's retail store and purchase Coverage Plans for a product not sold by the Taxpayer.<sup>11</sup> Meaning, but for the sale of the wireless communications services and telephone equipment, the Taxpayer would not have received proceeds from the Coverage Plans.

Instead, the ALC seems to focus on the fact that the Taxpayer does not retain the

---

<sup>11</sup>Similarly, there is no evidence that the Taxpayer's Coverage Plans themselves have any value in the absence of a sale of mobile telephone equipment or communications.

proceeds from the Coverage Plans.<sup>12</sup> This is not legally significant inasmuch as the Taxpayer here is providing a service, collecting a fee for that service, and then subcontracting the performance of that service out to a third party. Sales tax is not determined by the amount retained by the seller. It is determined by the amount received by the seller and that amount includes any services provided with the tangible personal property. The fact remains that as to the transaction between the Taxpayer and its subscribers, the gross proceeds of sales include the value received for the wireless communication services, telephone equipment, and Coverage Plans. The Department respectfully asserts that Myers Arnold controls the instant case and the ALC's decision to disregard Meyers Arnold warrants reversal.<sup>13</sup>

The ALC also cites Travelscape v. SC Department of Revenue, 391 S.C. 89, 705 S. E2d 28 (2010) to support its conclusion that the seller's retention of sales proceeds is important to the imposition of sales tax. (R., p. \_\_\_\_; ALC Order, p. 24.) The Department would respectfully counter that the result in Travelscape actually supports the Department's position here and compels that the ALC ruling be reversed. In

---

<sup>12</sup>The ALC is incorrect that the Taxpayer did not have any interest in the proceeds from the Coverage Plans. Neither affidavit proffered by the Taxpayer says the Taxpayer had no interest in the proceeds. (R., p. \_\_\_\_; Capehart Affidavit, para. 6; Ain Affidavit, para. 6). Instead, the product brochure plainly states that the Taxpayer does retain some undisclosed fee. ("A monthly fee based on your wireless device will be added to your wireless bill – no separate invoices or checks to write. This fee includes the cost of your insurance premium payable to Old Republic Insurance Company and administration fees payable to Asurion Insurance Service, Inc. and Alltel [the Taxpayer]"). (R., p. \_\_\_\_; Capehart Affidavit, Exhibit A).

<sup>13</sup>The ALC's citation to Reg. 117-313.3 for the Taxpayer's proposition that "the Department does not consistently impose sale tax on a separate service" is similarly unavailing. Except for this regulation, labor associated with the installation of an automobile part would be subject to sales tax under the Myers Arnold "but for" test.

Travelscape, the South Carolina Supreme Court held that an on-line travel company's (OTC) gross proceeds of sale for purposes of determining the base for sales taxes on accommodations included the service fees the company charged its customers:

Therefore, the definition of gross proceeds of sales also applies to gross proceeds. Accordingly, "gross proceeds" under section 12-36-920(A) includes the value obtained from the rental of accommodations *without deduction for the cost of services*. S.C. Code Ann. § 12-36-90(1)(b)(ii). Because the cost of services is specifically included in the definition of gross proceeds of sales, we find the fees retained by Travelscape for its services are taxable as gross proceeds."

Id., at 98 (emphasis in original). It is significant for the purposes here to note that the OTC was determined to be the retailer of hotel rooms for purposes of the accommodations tax statute. Id. The total amount the OTC charged its customer included charges for rental of the hotel room and the OTC's services. At some point after the OTC received payment from its customer, the OTC then sent funds to the hotel to pay for the hotel room. Like here, the OTC remitted a portion of the funds it received to a 3<sup>rd</sup> party vendor. Nevertheless, the Travelscape Court held that the entire sum received by the OTC was subject to sales tax. The Court did not allow the OTC to exclude the amounts paid to the hotels from the sales tax base because the OTC did not retain these funds. Similarly, here the Taxpayer bills its customer for the entire amounts due for communications services and insurance. In those instances, the Taxpayer's gross proceeds of sale generated by its sales of communications and telephone equipment include amounts charged for insurance coverage. The entire gross proceeds of sale are subject to sales tax despite the fact that some portion of the money received by the Taxpayer is thereafter remitted to a 3<sup>rd</sup> party insurer.

Finally, the ALC also improperly concluded that only tangible personal property is subject to sales tax as defined in § 12-36-60. The ALC's analysis fails to recognize that sales tax is imposed on the gross proceeds of sales of a person *in the business of selling tangible personal property*, which by definition includes:

- (a) the proceeds from the sale of property sold on consignment by the taxpayer;
- (b) the proceeds from the sale of tangible personal property without any deduction for:
  - (i) the cost of goods sold;
  - (ii) the cost of materials, labor, or service;
  - (iii) interest paid;
  - (iv) losses;
  - (v) transportation costs;
  - (vi) manufacturers or importers excise taxes imposed by the United States; or
  - (vii) any other expenses;

(Emphasis added). Contrary to the ALC's conclusion, sales tax is not just applied to the sale of tangible personal property, it is applied to *the value proceeding or accruing from* the sale of tangible personal property.<sup>14</sup> The ALC's focus simply on tangible personal property rather than gross proceeds of sales is an error of law.<sup>15</sup>

- iv. The ALC failed to give the Department's long-standing administrative policy of including proceeds for insurance in "gross proceeds of sales" proper deference.

"Where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled

---

<sup>14</sup>Thus, in Travelscape, the OTC's gross proceeds of sale subject to sales tax included not only the sums attributable to the sale of the accommodation but also the sales proceeds attributable to the OTC's services.

<sup>15</sup>See footnote 7, above.

without cogent reasons." Etiwan Fertilizer Co. v. S.C. Tax Comm'n, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950). It has been the Department's long standing policy to apply the Meyers Arnold test in determining whether certain charges are included in the gross proceeds of sales of taxable communications services. For over twenty-five years, the Department has included charges for insurance, or insurance like items, in a retailer's gross proceeds. S.C. Comm'n Decision S-D-174 (May 27, 1986). The Commission, in citing Meyers Arnold, held that a property damage waiver fee charged by a person engaged in the business of leasing tangible personal property was subject to sales tax. Id. Pursuant to the terms of the rental agreement, the lessee was responsible for the loss, theft, damage, or destruction of the leased property. Id. The taxpayer, however, charged a five percent (5%) fee for property damage waiver. Id. The Commission stated that "[b]ut for the lease of tangible personal property, the taxpayer would not have received the fee. The fee is obviously charged for the additional service of providing a lease of property free from liability for damage. In the absence of such service, the lessee, under the taxpayer's lease agreements, would be "liable for any loss, theft, damage or destruction of leased property." Id. (emphasis added).

The Commission previously determined that charges by an automobile rental company were includable in gross proceeds of sales and therefore subject to sales tax. S.C. Rev. Rul. #93-1. In addition to the basic rental charges, the company charged its customers for fueling and optional coverage. Id. The coverage offered by the company included Collision Damage Waiver, Personal Accident Coverage, Extended Protection, Personal Effects Coverage and Personal Accident and Effects Coverage. Id. The fueling charge and the other charges, except collision damage waiver, were separately stated on

the customer's bill. Id. The Commission determined that:

The tax is based upon the gross proceeds of sales of the business, which is the value proceeding from the sale without any deductions for service costs and other expenses. Therefore, "[b]ut for [the rental of the car], the taxpayer would not have received the [fees for the various charges connected with the rental car, as described in the facts.]"

Id. (quoting Meyers Arnold) (emphasis added).

The Department respectfully asserts that the ALC should have given the Department's long-standing administrative policy greater deference in the instant matter.

**II. THE ALC'S FINDINGS PERTAINING TO THE TAXPAYER'S RECEIPT AND RETENTION OF FEES FOR INSURANCE PREMIUMS ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE.**

The ALC found that the Taxpayer pays all of the collected insurance premium over to the third party insurance carrier and does not retain any interest in said premium. (R., p. \_\_\_; ALC Order, page 25). While the Department does not believe that this point is legally significant in the proper analysis regarding "gross proceeds of sale" under § 12-36-90, it is important to note that the ALC's conclusions in this regard are clearly erroneous and not supported by substantial evidence. Although what was formally denominated as a "premium" by the insurance carrier may have been paid over, the Taxpayer is most certainly retaining some portion of the overall proceeds received from its customer. The Taxpayer's own product brochures discussing the products at issue advise the prospective customer:

Product Guard Plus and Platinum Guard Plus: How much does this cost? A low monthly fee based on your wireless device will be added to the cost of your wireless phone bill. No separate invoices or checks to write. This fee includes

the cost of your insurance premium payable to the Old Republic Insurance Company and administration fees payable to Asurion Insurance Service, Inc., and Alltel.

(R., p. \_\_\_\_; Capehart Affidavit Exhibit A).

The affidavit of Michael K. Ain indicates that during the time Hanover was the insurance carrier, the customer was charged \$4.00 for coverage, but the actual premium paid to the insurance company was \$3.16 per month; for a customer who paid \$6.00 for insurance, the premium was listed as \$5.16 per month. (R., p. \_\_\_\_; Ain Affidavit, Exhibit A, p. 3).

Finally, in this regard, the ALC actually questioned whether summary judgment was appropriate in this matter given the fee issue:

**Court:** [I] did have a quick question though. During the course of this, I'm not sure, do we have a disputed material fact, in that the issue of whether Alltel retained any of this money that was collected as a result of this disputed contract that was signed. It appeared that there was some back and forth about whether a portion of this was retained by Alltel and that seemed to be important to your argument, Mr. Kimpson. Do we have a disputed issue of material fact here or do we agree that the --I think assertion of what I came in here to this morning, I was under the impression that all that money collected from that disputed contract was then forwarded to the carrier. Is that ---

**Mr. Hoeffler:** Your Honor, the brochure makes it very clear that there is a charge to the customer. And that charge consists of the premium and a fee payable by the insurance company to Alltel and to the insurance agents. Asurion Insurance Service for their services. Now, I do not know if we stand here today, because it hasn't been raised before, whether or not the money is deducted from that or whether it all goes to the insurance company. Then the insurance company sends checks back out. I don't know the answer to that question. But, I think, the important point is that they are seeking to impose it on the entire amount. They're not seeking to impose it just on the fee.

Now, I believe that amount, that fee amount, is subject to income tax payable by Alltel and Asurion. Because that money is not in lieu of the licensed tax that the premium tax covers it, Mr. Kimpson mentioned. But I don't know....

(R., pp. \_\_\_\_; See Transcript, page 46, line 1 thru page 47 line 12).

### CONCLUSION

As explained more fully above, the Department respectfully requests that the ruling of the ALC in this matter be reversed as the decision is not supported by the evidence in the record, and the ALC made errors of law in its decision..



---

Milton G. Kimpson (Bar No. 7917)  
General Counsel for Litigation  
Nicole Wooten Bar No. 73594)  
Counsel for Litigation  
Mary Elizabeth Campbell (Bar No. 100025)  
Counsel for Litigation  
PO Box 12265  
Columbia, SC 29211  
Phone: 803-898-5598  
Fax: 803-898-5147  
Attorneys for Appellant

Columbia, South Carolina  
April 4, 2016