THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

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

Alltel Communications, Inc., 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, ...Respondents,

v.

South Carolina Department of Revenue, ...Appellant.

INITIAL BRIEF OF RESPONDENTS

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Statement of Issues on Appeal

I. Should the Administrative Law Court's grant of summary judgment to the Alltel Entities and against the Department of Revenue be affirmed where the Administrative Law Court correctly determined that a provider of wireless communications services and devices is not required to pay sales tax on amounts collected from customers for insurance coverage on communications devices based on the plain meaning of the sales tax statute and where a contrary interpretation of the statute would result in an ambiguity required to be construed in favor of the Alltel Entities?

II. Should the Administrative Law Court's grant of summary judgment to the Alltel Entities be affirmed where no facts subject to the substantial evidence standard of review were required to be found, the facts relied upon by the Administrative Law Court in granting summary judgment were established by a properly supported motion which was not refuted by opposing affidavits on the part of the Department of Revenue, and any putative issue regarding a lack of substantial evidence was not preserved for appellate review?

Statement of the Case

This is an appeal by the Department of Revenue ("DOR") from a grant of partial summary judgment by the Administrative Law Court ("ALC") in favor of the Alltel Entities[1] and a denial of DOR's cross motion for summary judgment. The ALC held that the Alltel Entities were not required to pay sales tax under S.C. Code Ann. §12-36-910 (2006) for sales tax periods May 1, 2005 through April 30, 2008 ("Periods at Issue") on amounts collected from the Alltel Entities' customers for insurance coverage on their wireless communications devices ("Devices") because insurance is not tangible personal property under S.C. Code Ann. §12-36-60 (2006) and the amounts collected for such coverage are therefore not gross proceeds of sales under S.C. Code Ann. §12-36-90 (2006). [R. at __, Final Order and Decision, Nov. 13, 2015 ("Final Order"), pp.17-18.]

The underlying matter arose when DOR initiated a sales tax audit of the Alltel Entities. [R. at__, Aff. of Jean Capehart, ¶4.] At the conclusion of the audit, DOR issued a proposed assessment against the Alltel Entities on the basis that the charges collected by the Alltel Entities from customers during the Periods at Issue for warranty and insurance coverages on Devices were subject to sales tax as "warranty, maintenance, or similar service contracts" under S.C. Code Ann. §12-36-910(B) (2006). [R. at __, Final Order, pp.3-4; R. at __, DOR Mem. in Supp. of Mot. for Summ. J., Ex. A, p.1; R. at __, Capehart Aff., ¶7.] The Alltel Entities timely protested the proposed assessment. [R. at __, Capehart Aff. ¶7 and Ex. C thereto.] DOR issued its determination denying the protest on November 11, 2011 ("DOR Determination"), and the Alltel Entities timely

[1] The "Alltel Entities" are Alltel Communications, Inc.; 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.

filed a request for a contested case hearing with the ALC. [R. at __, DOR Determination; R. at __, Req. for Contested Case Hr'g, Dec. 2, 2011.] Thereafter, the Department filed its Agency Information Sheet pursuant to Rule 12, RPALC [R. at __, Agency Information Sheet and Notice of Appearance, Dec. 14, 2011.] The ALC issued a Consent Scheduling Order, which was amended on three (3) separate occasions and which eventually called for, *inter alia*, the completion of discovery by October 1, 2012, and a hearing on the merits not sooner than November 26, 2012. [R. at __, Third Am. Consent Scheduling Order, July 26, 2012.] On motion of the Department, with the consent of the Alltel Entities, the ALC continued the hearing on the merits and held the proceeding in abeyance until January 2, 2013, to permit settlement negotiations and to allow DOR to address an issue it believed existed regarding the accuracy of the amount of its proposed assessment. [R. at __, ALC Order, Oct. 9, 2012.] After the close of the discovery period, the Alltel Entities filed and served an Offer of Judgment for the amount of sales tax due on the charges collected on the warranty coverages purchased by customers plus accrued interest for the Periods at Issue.[2] [R. at __, Offer of J., Feb. 1, 2013.] Thereafter, the Alltel Entities filed a motion for partial summary judgment pursuant to Rule 68, RPALC, and Rule 56, SCRCP, with a supporting memorandum, affidavits, and exhibits. [R. at__,

[2] The Alltel Entities' protest initially contended that amounts collected for warranty coverage on wireless communications devices was also not subject to sales tax. The Alltel Entities subsequently conceded before the ALC that amounts collected for warranty coverage were in fact subject to sales tax during the Periods at Issue, offering judgment to DOR in that regard pursuant to Rule 68, RPALC, and Rule 68, SCRCP, and leaving in dispute only the taxability of amounts collected for insurance coverage. [R. at __, Order, p.2, n.2.] Accordingly, the Alltel Entities are informed and believe that the amount involved on appeal is approximately $1,032,943.00 in sales tax and accrued interest through May 13, 2016. *Cf.* Rule 208(b)(1)(C), SCACR ("[t]he statement shall contain, as a minimum ... the amount involved on appeal"). This figure is based upon the amount asserted to be due in the DOR Determination ($1,113,895.76 in taxes and interest through October 17, 2011), less the amount of sales tax on the charges collected for warranty coverage and associated accrued interest which, again, is not in dispute in this appeal.

Mot. for Partial Summ. J., Feb. 6, 2013; R. at __, Mem. in Supp. of Mot. for Partial Summ. J., Feb. 6, 2013; R. at __, Capehart Aff.; R. at __, Aff. of Michael K. Ain.]

DOR filed its response to the Alltel Entities' motion for partial summary judgment in which it sought either (i) an order of the ALC denying the Alltel Entities' motion on the ground that a genuine issue of material fact existed as to whether the coverage alleged by the Alltel Entities to be insurance provided the "indemnification" required to constitute insurance or (ii) an order holding the matter in abeyance to allow DOR additional time to engage in discovery, the latter ground being supported by an affidavit from its then-counsel. [R. at __, Resp't's Resp. to Pet'rs' Mot. for Partial Summ. J., April 1, 2013; R. at __, Aff. of J. Abraham Gutting.] Contemporaneously, DOR filed its own motion for summary judgment, supporting memorandum and supporting affidavit. [R. at __, Resp't's Mot. for Summ. J., April 1, 2013; R. at __, Mem. in Supp. of Resp'ts' Mot. for Summ. J., April 1, 2013; R. at __, Aff. of Timothy Donovan.] The Alltel Entities filed a reply to DOR's memorandum in response to the motion for partial summary judgment and a reply affidavit from its counsel. [R. at __, Pet'rs' Reply to Resp. to Mot. for Partial Summ. J., April 22, 2013; R. at __, Reply Aff. of John M. S. Hoefer.] The Alltel Entities subsequently filed a memorandum in response to DOR's cross motion for summary judgment [R. at __, Pet'rs' Mem. in Resp. to Resp't's Mot. for Summ. J., May 16, 2013.] DOR made no filing in reply to the Alltel Entities' response to DOR's cross motion for summary judgment.

A hearing on the cross motions was conducted before the Honorable S. Phillip Lenski, Administrative Law Judge, on September 18, 2013. [R. at __, Final Order, p.4.] The ALC took the matter under advisement at the conclusion of the hearing and directed that the parties submit proposed orders within 30 days after receipt of the hearing

transcript. [R. at __, Hr'g Tr., Sept. 18, 2013, p.49, l.12 – p.50, l.5.] The parties submitted proposed orders to the ALC on November 6, 2013. [R. at __, Proposed Order Granting Pet'rs' Partial Summ. J., Overturning Determination, and Remanding to Resp't, Nov. 6, 2013; R. at __, Resp't's Proposed Order Granting Mot. for Summ. J., Nov. 6, 2013.]

Thereafter, the ALC issued its order granting the Alltel Entities' motion for partial summary judgment, denying DOR's motion for summary judgment, and remanding the matter to DOR to calculate the amount due from the Alltel Entities in sales tax and interest on the charges collected for warranty coverage less the 8% interest deduction to which it found the Alltel Entities entitled under Rule 68, SCRCP. [R. at __, Final Order, p.2 n.2 and p.27.] DOR thereafter filed a motion seeking reconsideration, alteration or amendment of the ALC's Final Order, [R. at __, Mot. for Recons. under ALC Rule 29(D) to Reconsider, Alter, and/or Amend under Rule 59(E) SCRCP, Nov. 30, 2015], to which the Alltel Entities responded. [R. at __, Pet'rs' Resp. in Opp'n to Mot. for Recons., Dec. 8, 2015.] The ALC denied DOR's motion for reconsideration, finding that it "[did] not raise any issue that [the] court has not already ruled upon." [R. at __, Order Denying Resp't's Mot. for Recons., Jan. 5, 2016 ("Reconsideration Order").] DOR's appeal to this Court followed.

Statement of Facts

During the Periods at Issue, the Alltel Entities were engaged in the business of selling wireless communications service and Devices in South Carolina. [R. at __, Capehart Aff., ¶5.] The sale of these services and Devices were, respectively, subject to sales tax under S.C. Code Ann. §12-36-910(B)(3) and §12-36-910(A) (Revised 2000). However, in conjunction with their business, the Alltel Entities also made available to

their customers both extended warranty coverage and insurance coverage on their devices. [R. at __, Capehart Aff., ¶5.] The former offered warranty coverage beyond that provided by the Device manufacturer for "electrical/mechanical malfunction or a manufacturer's defect during and beyond the manufacturer's warranty" while the latter offered indemnification in the form of repair or replacement if a Device was "lost, stolen or damaged." [R. at __, Capehart Aff., ¶5.] The Alltel Entities provided to their customers brochures which stated that the purchase of either coverage was optional to the customer and that the coverages could be purchased separately or together at any time (including after a Device had been purchased and communications service had been initiated). These brochures also explained to customers the differences between these two distinct types of coverages (i.e., warranty and insurance), the fees associated with these coverages, and the roles of the Alltel Entities, the warranty services company which offered and serviced the warranty coverage (Asurion Warranty Services, Inc.), the insurance agency which serviced the insurance coverage (Asurion Insurance Services, Inc.), and the insurance companies which underwrote the insurance coverage (initially Insurance Corporation of Hannover and later Old Republic Insurance Company (collectively the "Insurance Companies")). [R. at __, Capehart Aff., ¶5.]. These brochures replicated the terms of the underlying insurance policies, made clear that insurance coverage was available to customers as additional insureds under the policies of insurance issued to the Alltel Entities by the Insurance Companies, and informed customers that service under these policies would be provided by Asurion Insurance Services, Inc. as an agent for the Insurance Companies. [R. at __, Capehart Aff., Ex. A, pp.4, 16.]

As described above, DOR conducted an audit in 2009 of the Alltel Entities' South Carolina sales tax collections and remittances for the Periods at Issue and found that the Alltel Entities had failed to pay sales tax on the amounts for warranty coverage and insurance coverage that were collected by the Alltel Entities during the Periods at Issue, concluding that the Alltel Entities were liable for same, plus accrued interest, under S.C. Code Ann. §12-36-910(B)(6) (Supp. 2006).[3] [R. at __, Capehart Aff. ¶¶5, 7 and Ex. C, p.2; R. at __, Donovan Aff. ¶¶5, 8.] The Alltel Entities protested DOR's determination with respect to the taxability of the amounts collected from customers for insurance coverage. In so doing, the Alltel Entities sought to explain to DOR the difference between warranty coverage and insurance coverage, described the bases for their belief that insurance is intangible property the sale of which is was not subject to tax under S.C. Code Ann. §12-36-910(A), and advised DOR that they were prepared to pay sales tax on the charges for the warranty coverage if the issue regarding the taxability of the amounts collected for insurance coverage could be resolved. [R. at __, Capehart Aff. Ex. C, pp. 2-3.] Nevertheless, at the conclusion of its 2009 audit, DOR determined that the charges for both the warranty coverage and the insurance coverage collected by the Alltel Entities from their customers during the Periods at Issue were "gross proceeds from the 'sale or renewal of warranty, maintenance or similar service contracts for tangible personal property" and therefore subject to sales tax under §12-36-910(B)(6). [R. at __, DOR

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[3] This section—which was repealed by S.C. Act No. 32 of 2011—provided that "sales tax applied to 'gross proceeds accruing or proceeding from 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.'" [R. at __, Final Order, p.2 n2.] A slightly different version of this subsection also effective during a portion of the Periods at Issue likewise subjected warranty contracts for "tangible property" to sales tax. [*Id.*] As noted above, payment of sales tax on the warranty coverage during the Periods at Issue is not a subject of this appeal. And, as discussed below, DOR no longer disputes that the coverage in issue was insurance or asserts that the insurance coverage constituted a taxable "service" contract within the ambit of these former sections of the sales tax statute. *See* discussion at n.9, *infra*.

Determination; R. at __, DOR Mem. in Opp'n to Mot. for Summ. J., Ex. A, pp. 4-5.] DOR thereupon issued an assessment to the Alltel Entities for $1,113,895.76 in taxes and interest. [R. at __, Final Order, p.2.] In response, the Alltel Entities submitted a request for a contested case hearing before the ALC. (R. at __, Req. for Contested Case Hr'g, Dec. 2, 2011.]

Thereafter, the Alltel Entities sought to enter into stipulations with DOR to narrow the issues as contemplated by S.C. Code Ann. §12-60-3320 (Revised 2000), propounded discovery to DOR pursuant to Rule 21, RPALC, and made an offer of judgment to DOR pursuant to Rule 68, RPALC, and Rule 68, SCRCP, to eliminate as a disputed issue the application of sales tax to the charges collected from customers for warranty coverage on their Devices. [R. at __, Hoefer Reply Aff., ¶¶3, 7; R. at __, Offer of J.] DOR declined to enter into stipulations proposed by the Alltel Entities, failed to respond to the discovery requests of the Alltel Entities, and did not respond to the Alltel Entities' Offer of Judgment. [R. at __, Hoefer Reply Aff., ¶¶3, 7, 12.] The Alltel Entities formally responded to DOR's interrogatories and informally responded to DOR's request for production of documents. [R. at __, Hoefer Reply Aff., ¶¶5-10; R. at __, Final Order, p.15.]

Subsequently, the Alltel Entities filed their motion for partial summary judgment with respect to the taxability of the amounts collected for the insurance coverage on the customers' Devices, [R. at __, Alltel Mot. for Partial Summ. J.,] with supporting affidavits from their internal certified public accountant who had been involved in the DOR sales tax audit, [R. at __, Capehart Aff.,] and from an employee of the insurance agent, Asurion Insurance Services, Inc., [R. at __, Ain Aff.] Attached to the motion and affidavits were documents which had been identified and produced to DOR long prior to

the filing of the motion. [R. at __, Alltel Entities' Reply to Resp. to Mot. for Summ. J., p.21; R. at __, Final Order, pp.14-15.]

DOR opposed the Alltel Entities' motion on the grounds that material facts were in dispute. [R. at __, DOR Resp. to Mot. for Partial Summ. J., p.1.] In support of its opposition, DOR submitted the affidavit of its audit Manager who had reviewed the proposed assessment against the Alltel Entities [R. at __, Donovan Aff.][4] However, this affidavit did not refute the factual assertions advanced by the affidavits of the witnesses on behalf of the Alltel Entities or otherwise raise any genuine issue of disputed material fact. [R. at __, Final Order, pp.6, 11-12.][5] Further, and notwithstanding its opposition to the Alltel Entities' motion for partial summary judgment on the ground that material facts were in dispute, DOR submitted its own motion for summary judgment on the same date [R. at __, DOR Mot. for Summ. J.] supported by the same affidavit submitted in opposition to Alltel Entities' motion for summary judgment. [R. at __, Mem. in Supp. of DOR Mot. for Summ. J., Ex. F.]

The ALC heard the parties' motions on September 18, 2013, and directed that proposed orders be submitted. [R. at__, Hr'g Tr. p.49, ll.12-17.] Thereafter, the ALC issued its Final Order in which it concluded that the substance of the affidavits and

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[4] By Mr. Donovan's affidavit, DOR sought to raise an issue with respect to the accuracy of DOR's assessment as it related to the amount of charges collected by the Alltel Entities from its customers for warranty coverage. [R. at __, DOR Resp. to Mot. for Summ. J., p.7 n. 10, n.12; R. at __, Final Order, pp. 11-12.] DOR abandoned that issue via an electronic mail communication with the ALC following the submission of its motion to reconsider, alter or amend the Final Order [R. at __, Alltel Entities' Resp. to Mot. for Recons., Dec. 8, 2015, p.6 n.4] and it was therefore not addressed in the Reconsideration Order.

[5] DOR also asserted that summary judgment was premature because DOR "did not have a full and opportunity to complete discovery" and submitted an affidavit of its then-counsel for purposes of advancing a claim under Rule 56(f), SCRCP, that Alltel's motion should not be considered because opposing affidavits were unavailable to DOR. [R. at __, DOR Resp. to Mot. Summ. J.; R. at __, Gutting Aff., DOR Resp. to Motion for Partial Summ. J. Ex. I.] This claim was disputed by the Alltel Entities in their April 22, 2013, reply memorandum which was supported by an affidavit of their counsel, [R. at __, Alltel Entities Reply to Resp. to Mot. Summ. J.; R. at __, Hoefer Reply Aff.,] and was rejected by the ALC. [R. __, Final Order, pp.12-16.] DOR has not appealed this part of the ALC's decision.

incorporated documents submitted by the Alltel Entities established that the coverage against loss of, theft of, or damage to a Device provided indemnification, that these facts had not been disputed by DOR via opposing affidavits or otherwise and, thus, that no genuine issue of material fact existed with respect to the issue of whether the coverage against "loss, theft or damage" to devices constituted insurance under South Carolina law. [R. at __, Final Order, pp.7-8.] The ALC further concluded that the Alltel Entities were entitled to judgment as a matter of law because the amounts collected from the Alltel Entities' customers for the insurance coverage were not subject to sales tax based upon the plain meaning of §§12-36-60, 12-36-90(1)(b), and 12-36-910(A), stating that "the amounts collected by [the] Alltel Entities 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." [R. at __, Final Order, p.18.] In so ruling, the ALC noted that DOR had "acknowledge[d] that '[t]here are no South Carolina sales and use tax provisions specifically relating to insurance companies,'" had "'freely admit[ted]' that there is not 'a statute that says insurance policies are subject to sales tax'", and had "conceded that 'insurers are not selling tangible personal property.'" [*Id.*]

Following entry of the ALC's Final Order, DOR submitted a motion to reconsider, alter and/or amend the Final Order, which did not assert that a genuine issue of disputed material fact precluded a grant of summary judgment or that the ALC should have made any findings of fact. [R. at __, DOR Mot. to Recons.] Because it found that DOR's motion to reconsider, alter, or amend failed to raise any issue that had not already been ruled upon, the ALC denied DOR's motion. [R. at __, Order Denying Resp't's Mot. for Recons.]

Summary of Argument

In this appeal from the ALC's order granting partial summary judgment, which overturned a portion of DOR's assessment of additional sales tax against the Alltel Entities, DOR bears the burden of showing that the ALC erred in ruling that the Alltel Entities were entitled to judgment as a matter of law. Although it acknowledges the rule of construction that words in a statute "must be given their plain and ordinary meaning," DOR does anything but that in its arguments to this Court and instead "resorts to subtle or forced construction to . . . expand the operation" of §§12-36-60, 12-36-90, and 12-36-910, which it acknowledges to be inappropriate. Init. Br. of App. at 3.

To the contrary, DOR seeks to have this Court re-write these statutory provisions to subject to sales tax revenues from the sale of intangible property -- i.e., insurance -- which DOR has admitted is not specifically subject to tax under the language of the statute. DOR urges this Court to do that which the ALC would not, which is to expand the meaning of the statute to subject to sales tax all revenue collected by a retailer, even though the General Assembly has not so provided in the statute and even though DOR itself does not require all retailers to adhere to this strained interpretation of the statute. DOR makes arguments which effectively employ rules of statutory construction inappropriate to a plain meaning analysis, which are not preserved for appellate review, or which constitute arbitrary application of inconsistent and invalidated agency precedent that is not uniformly followed. DOR's arguments in this regard only serve to reinforce the correctness of the ALC's alternative conclusion that if the pertinent statutory provisions are read to subject revenues from the sale of insurance to sales tax, such a reading necessarily renders these statutory provisions ambiguous and entitles the Alltel Entities to judgment as a matter of law. Finally, DOR's assertion that one of the ALC's

findings is unsupported by substantial evidence of record is unfounded because it relies upon a standard of review that does not apply in this appeal and raises an issue not preserved for appellate review.

Because DOR has failed to meet its burden, the ALC's grant of partial summary judgment based on its conclusion that sales tax does not apply to the amounts collected by the Alltel Entities for insurance coverage on customer Devices under the plain meaning of §§12-36-60, 12-36-90, and 12-36-910 should be affirmed.

Argument

In an appeal from an order of the ALC granting summary judgment on cross-motions, this Court reviews the matter solely for errors of law under S.C. Code Ann. §1-23-610(B)(a),(d) (Supp. 2015). *See Duke Energy v. S.C. Dept. of Revenue*, 410 S.C. 415, 764 S.E.2d 712 (Ct. App. 2014), *aff'd as modifie*d, 415 S.C. 351, 782 S.E.2d 590 (2016). Because the parties filed cross-motions for summary judgment, this Court is authorized to assume that there are no disputed issues of material fact and that the issue may be resolved as a matter of law. *Id.*, 410 S.C. at 419-420, 764 S.E.2d at 715 *citing Alltel Commc'ns, Inc. v. S. Carolina Dep't of Rev.*, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012).[6] DOR has not appealed the ALC's conclusion that no genuine issue of material fact existed which would preclude a determination based solely upon the law [R. at __, Final Order, pp.9-12], which renders that conclusion the law of the case.[7] Furthermore, DOR now concedes that the issue involving the applicability of the sales tax

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[6] "[T]he parties filed cross motions for summary judgment, thereby indicating the parties' belief that further development of the facts was unnecessary. [C]ross motions for summary judgments ... 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. Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." (Internal citations and alterations omitted.)

[7] *See Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 253 (1996) and *Biales v. Young*, 315 S.C. 166, 432 S.E2d 482 (1993).

statute to the amounts collected by the Alltel Entities for insurance coverage is one of law alone. Init. Br. of App., pp.3, 22.[8] In considering this question of law, this Court is not bound to accept the ALC's reading of the statute as "[q]uestions of statutory interpretation are questions of law, which this Court is free to decide without any deference to the tribunal below." *See Duke Energy v. S.C. Dept. of Revenue, supra,* 415 S.C. 351, __, 782 S.E.2d 590, 592. The Alltel Entities submit that the ALC has correctly interpreted the law and that this Court should affirm that interpretation.

I. The Administrative Law Court did not err in granting summary judgment to the Alltel Entities where there was no genuine issue of material fact in dispute and the Alltel Entities were entitled to a judgment as a matter of law.

A. The ALC's conclusion that the amounts collected by the Alltel Entities from customers for insurance coverage on their wireless communications devices are not subject to sales tax under §§ 12-36-60, 12-36-90, and 12-36-910 must be affirmed in view of the plain meaning of the statutory language.

At various points below DOR has asserted that the coverage for repair or replacement of a Device that was lost, stolen or damaged, which was made available to customers of the Alltel Entities through a licensed insurance agent representing licensed insurance underwriters, (1) constituted a "warranty, maintenance or similar service contract" taxable under §12-36-910(B)(6) or §12-36-910(B)(7), (2) did not constitute insurance because the coverage did not provide "indemnification" to the Alltel Entities' customers, or (3) did not constitute insurance because the "deductible" under the policies issued by the underwriters was required to be paid by the customer to a third party. [R. at

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[8] DOR implicitly references the scope of review arising under the substantial evidence standard of S.C. Code Ann. §1-23-610(B)(e) (Supp. 2015), Init. Br. of App., p.2, but, in its argument on the second issue on appeal, states that the point it makes in regard to substantial evidence "is [not] legally significant in the proper analysis regarding 'gross proceeds of sale' under §12-36-90." Init. Br. of App., p.22. For the reasons discussed, *infra*, the Alltel Entities submit that there is no issue implicating the standard of review under §1-23-610(B)(e), that the only issue preserved for appeal is that of the correctness of the ALC's reading of the sales tax statute, and that the issue is otherwise without merit.

__, Final Order, p.8-11.] Having failed to raise these arguments on appeal,[9] DOR now pursues a tortured reading of the pertinent provisions of the sales tax statute that is not only contrary to the rules of statutory construction cited in DOR's own brief, but which gives rise to an ambiguity that must be construed in the Alltel Entities' favor. In aid of its current arguments, DOR not only misinterprets or mischaracterizes the precedents of the Supreme Court and this Court, it also fails to acknowledge its most recent advisory opinion on the liability of a provider of accommodations for sales tax on insurance -- which opinion contradicts the arguments DOR advances in this Court. For the reasons that follow, the plain language of §§12-36-60, 12-36-90 and 12-36-910 -- which does not subject to sales tax the amounts collected from the Alltel Entities' customers for insurance coverage -- must be given effect and the decision of the ALC must therefore be affirmed. As the ALC correctly concluded, any other reading of these sections gives rise to an ambiguity in the sales tax statute which also requires that the ALC be affirmed – particularly in view of the fact that DOR has failed to appeal this conclusion below.

1. Statutory Background.

As the ALC correctly concluded, there are three specific statutory provisions which bear on the question presented by the Alltel Entities' motion for partial summary

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[9] DOR's brief does not challenge the ALC's conclusion that the coverage in question was insurance. [R. at __, Final Order, pp.9, 16.] Accordingly, that conclusion becomes the law of the case. *Anderson v. Short, Biales v. Young, supra.* Nonetheless, DOR refuses to employ the term "insurance" in describing the only coverage at issue, instead including both the insurance coverage and the warranty coverage in the term "Coverage Plans" which it uses throughout its brief. Init. Br. of App., *passim.* In so doing, DOR incorrectly states that "the ALC determined that the Taxpayer's Coverage Plans were not subject to sales tax." Init. Br. of App., p.6. As noted above, the ALC concluded only that the amounts collected by the Alltel Entities for insurance coverage were not subject to sales tax, ruling that "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.**" [R. at ___, Final Order, p.9 (emphasis supplied).] *See also* Final Order, p.2 ("[t]he 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").

judgment and these are the only statutory provisions bearing on DOR's first issue on appeal.

Under S.C. Code Ann. §12-36-910(A) (Revised 2000), "[a] sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail." In determining whether "gross proceeds of sales" subject to sales tax under §12-36-910(A) exist, the statutory definition of that term must be applied.[10] That definition is provided by §12-36-90, which states in pertinent part that "[g]ross proceeds of sales, or any similar term, means the value proceeding or accruing from the sale, lease or rental of tangible personal property." Thus, in order to ascertain whether value proceeds or accrues from the sale of "tangible personal property" under §12-36-90, the definition of tangible personal property under §12-36-60 must be applied. Section 12-36-60 provides as follows:

> "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**[11] and does not include stocks, notes, bonds, mortgages, or other evidences of debt. Tangible personal property

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[10] *See Goldston v. State Farm Mut. Auto Ins. Co.*, 358 S.C. 157, 594 S.E.2d 511, (Ct. App.2004) (cert den., Aug. 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").

[11] The Devices sold by the Alltel Entitles constitute "personal property" within the scope of the first sentence of this section. Because S.C. Code Ann. §12-36-910(B)(3) (Revised 2000) provides that the "gross proceeds accruing or proceeding from the charges for the ways or means for the transmission of the voice or messages, including the charges for the use of equipment furnished by the seller or supplier of the ways or means or the transmission of voice or messages," the communications services sold by the Alltel Entities are subject to tax under Chapter 36 of Title 12 as tangible personal property as contemplated by the second sentence of §12-36-60.

> 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.

(Emphasis supplied.) It is within this statutory framework that the ALC considered (correctly, the Alltel Entities submit), and this Court must now consider, the legal question of whether amounts collected by a retailer for insurance coverage are subject to sales tax.

2. Analysis.

The ALC properly concluded that amounts collected by the Alltel Entities for insurance coverage on their customers' Devices are not gross proceeds of sale which are subject to sales tax under the plain meaning of the language used in §§12-36-60, 12-36-90, and 12-36-910. "The usual rules of statutory construction apply to the interpretation of tax statutes." *Alltel Commc'ns, Inc., supra,* 399 S.C. at 320-1, 731 S.E.2d 872-3, *citing 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." *Id., citing Media Gen.,* 388 S.C., 138, 147, 694 S.E.2d 525, 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." *Id. citing 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.* Thus, "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will" and "the courts are bound to give effect to the expressed intent of the legislature." *Hodges v.*

Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTR. § 46.03, at 94 (5th ed. 1992)). The definitions supplied by the General Assembly are binding upon this Court. *Purvis, supra.*

a. The plain meaning of the pertinent statutory provisions entitles the Alltel Entities to prevail.

The ALC properly determined that, when the statutorily defined terms "tangible personal property" under §12-36-60 and "gross proceeds of sale" under §12-36-90 are given effect, the plain meaning of §12-36-910 does not include within the base of the sales tax the amounts collected by the Alltel Entities for insurance coverage. [R. at __, Final Order, pp.16-18, 27.] In so ruling, the ALC noted that DOR had "acknowledge[d] that '[t]here are no South Carolina sales and use tax provisions specifically relating to insurance companies'..., 'freely admit[ted]' that there is not 'a statute that says insurance policies are subject to sales tax' and conceded that 'insurers are not selling tangible personal property.'" [R. at __, Final Order, p.18.][12] The ALC then applied the plain meaning of §§12-36-60, 12-36-90(1)(b), and 12-36-910(A) to conclude that "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 there is no provision of Chapter 36 of Title 12 subjecting insurance to sales tax," noting that to conclude otherwise would ignore the specific requirement of §12-36-60 that intangible property or services must otherwise be subject to sales tax under Chapter 36 of Title 12 in order to come within the definition of tangible personal property for purposes of §§12-36-90 and 12-36-910. [R. at __, Final Order, p.18.] The ALC noted also that, by contrast,

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[12] DOR does not argue otherwise in this Court. Init. Br. of App., p.13 ("[w]hile **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 property are subject to the sales tax") (emphasis supplied).

laundry and dry cleaning, electricity, communications, and accommodations are subject to tax under §§12-36-910 and 12-36-920 and that to conclude that insurance is tangible personal property in the absence of a provision in the sales tax chapter subjecting insurance to sales tax would render the qualifying language of §12-36-60 meaningless, which the ALC could not do. [*Id.*], *citing 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 leads to an absurd result or renders it meaningless"). Because this Court is also required to give effect to the plain meaning of the statute and is bound to accept the definitions supplied by the General Assembly, the ALC's determination that the amount collected by the Alltel Entities from their customers for insurance coverage is not subject to sales tax should be affirmed. *See Alltel Communications, Purvis supra.* DOR's arguments to the contrary are without merit.

b. DOR's arguments that the ALC erred in its reading of the sales tax statute are either unpreserved or unavailing.

i. DOR's argument that intangibles and services are subject to sales tax unless specifically excluded by statute is unpreserved and without merit.

The first portion of DOR's argument is based on matter that was not presented to the ALC and is therefore not preserved for appellate review. DOR contends that because the Alltel Entities are "in the business of selling tangible personal property—wireless communications service and telephone equipment – to the public at retail ... [they] must remit sales taxes on [their] gross proceeds of sales" under §12-36-910. Init. Br. of App., p.7. In support of this unremarkable contention, however, DOR refers (albeit, without citation) to the language of §12-36-60 (providing that certain services and intangibles specifically subject to tax under other provisions of the statute are included within the definition of tangible personal property) and then asserts that "[t]he General Assembly's

inclusion of services in the definition of tangible personal property bespeaks a broader reach for 'tangible personal property' than allowed by the ALC." Init. Br. of App., p.7-8, n.6. DOR goes on to state that "[s]ection 12-36-910(A) (*sic*)[13] contains no limiting language for the inclusion of intangibles within the definition of tangible personal property except that the terms cannot encompass 'stocks, notes, bonds, mortgages, or other evidences of debt.'" Accordingly, and for the first time, DOR asserts on appeal that §12-36-910(A) can be read to subject to sales tax revenues derived from the sale of intangibles which are not listed in the definition of tangible personal property supplied by the General Assembly in §12-36-60.

It is well-settled that an issue not raised and ruled upon by the ALC is not preserved for appellate review. *Home Medical, supra, Kiawah Resort Assocs. v. S.C. Tax Comm'n*, 318 S.C. 502, 458 S.E.2d 542 (1995). Nowhere in the DOR supporting or responsive memoranda on the cross motions for summary judgment did DOR assert that the ALC could or should deviate from the statutory definition of tangible personal property provided for by the legislature in §12-36-60, that such definition did not apply for purposes of §12-36-90 or §12-36-910(A), or that tax statutes could be construed with

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[13] The correct statutory reference here should be to §12-36-60 and not §12-36-910 as it is the former which excludes "stocks, notes, bonds, mortgages or other evidences of debt" from the definition of "tangible personal property" and not the latter.

DOR also cites in this part of its brief S.C. Code Ann. §12-36-950 (Revised 2000), which section is inapposite as it simply creates a presumption that all gross proceeds of sales of tangible personal property are retail—as opposed to wholesale—sales and puts the burden of proof on the retailer to establish otherwise. DOR's reliance on §12-36-950 here is also curious in view of the fact that a sale at retail has been defined by the legislature to involve only personal property or services, while DOR's argument assumes that insurance is intangible property. The Alltel Entities submit that this inconsistency is emblematic of a recurring problem with DOR's argument on appeal, which necessarily requires the finding of an ambiguity in the sales tax statute in order to reach DOR's desired result (*but see, Alltel Commc'ns, supra*, holding that an ambiguity in a section of a tax statute which raises substantial doubt as to its application to a taxpayer is required to be resolved in favor of the taxpayer) or contradicts DOR's own regulations and advisory opinions (i.e., S.C. Code Regs. 117-313.3, and SC Revenue Ruling No. 14-6, 2014 WL 5529252 (2014)) as discussed, *infra*).

a "broader reach," so as to subject to sales tax any intangibles other than those specifically identified by the General Assembly. Nor were these assertions advanced in the hearing on the cross motions conducted by the ALC[14] or in DOR's proposed order submitted to the ALC.

Even assuming that it is preserved, this portion of DOR's argument is without merit. In essence, DOR is contending that by listing certain categories of intangibles which are not subject to sales tax, the General Assembly has opened the door to the imposition of sales tax on any other intangible. Init. Br. of App. at 7, n.6.[15] This contention appears to be an assertion that this Court should construe §12-36-60 by applying "[t]he canon of construction *expressio unius est exclusio alterius* or *inclusio unius est exclusion alterius* [which] holds that 'to express or include one thing implies the exclusion of another, or the alternative.'" *See Riverwoods LLC v. Charleston County*, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002) *citing Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000). As explained by the Supreme Court, the canon means that "'[t]he enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded.'" *Riverwoods, supra, citing Hodges.* However, the *expressio/inclusio* canon cannot have any effective application to §12-36-60 in this case for several reasons.

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[14] To the contrary, DOR argued below that "where that customer then opts to get the insurance coverage, it's part of the gross proceeds resulting from the sale of **tangible personal property**." [R. at __, Hr'g Tr., p.21, ll.18-21 (emphasis supplied).]

[15] "Section 12-36-910(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.'" DOR overlooks the fact that a stock certificate, promissory note, and written mortgage can all be documented on paper, which can be seen, weighed, measured, felt, touched or perceived. Accordingly, it only makes sense for these to have been excluded from the definition of tangible personal property by the legislature in order to avoid the application of sales tax to these non-retail items.

First, because it is a rule of construction, *expressio/inclusio* only applies when it is necessary for a court to resolve an ambiguity in a statute. 2A Sutherland Statutory Construction §47.23 ("[t]he maxim *expressio unius est exclusio alterius*, like all rules of construction, may apply under certain circumstances to help determine a legislature's intent that is otherwise not clear"). The Alltel Entities submit, of course, that there is no ambiguity in the statute which would require any construction. However, where an ambiguity exists in a tax statute such that it is not clear that a person is subject to tax under its provisions, that ambiguity must be construed in favor of the taxpayer. *Alltel Commc'ns, Inc., supra,* 399 S.C. at 319-21, 731 S.E.2d at 872-3. Here, DOR is contending that the Alltel Entities' are subject to sales tax on the sale of intangible property which it admits is not otherwise subject to tax under Chapter 36 of Title 12 as is expressly required under §12-36-60. Thus, it cannot be said that the Alltel Entities are clearly subject to the sales tax in this instance. Accordingly, resort to *expressio/inclusio* cannot aid DOR in this context. *Cf., e.g., M. Lowenstein & Sons, Inc. v. S.C. Tax Comm'n*, 277 S.C. 561, 290 S.E.2d 812 (1982), cited in dissent in *SCANA Corp. v. S.C. Dept' of Rev.*, 384 S.C. 388, 394, 683 S.E.2d 468, 471 (2009) (recognizing that a taxpayer is not entitled to benefit of the doubt in construction of a statute granting a tax deduction).

Second, DOR's construction of §12-36-60 ignores the portion of the second sentence of this section—which provides that tangible personal property "includes ... intangibles ... the sale or use of which is subject to tax under this chapter." As the ALC correctly found, §12-36-60 is unambiguous in its meaning: only an intangible which the General Assembly has provided be subject to sales tax under the statute is "tangible personal property" for purposes of §12-36-90 and §12-36-910. [R. at __, Final Order,

p.18.] Again, in order to engage in the construction advanced in DOR's first argument, an ambiguity must exist which requires that the ALC be affirmed. But even if this Court were to conclude (1) that §12-36-60 is ambiguous with respect to which intangibles are subsumed within the definition of "tangible personal property" and (2) that the Alltel Entities are not entitled to the benefit of doubt with respect to that ambiguity (*cf. Alltel Commc'ns, supra*), DOR's construction cannot withstand minimal scrutiny under two standard rules of statutory construction.

The first of these is that a statute may not be construed so as to render language meaningless. *State of South Carolina v. County of Florence*, 406 S.C. 169, 174, 749 S.E.2d 516, 518 (2013), citing *Florence Cnty. Democratic Party, supra.* To accept the contention that an intangible is within the definition of tangible personal property under §12-36-60, even though no provision of the statute subjects it to sales tax, simply renders the language "the sale or use of which is subject to tax under this chapter" in this section meaningless. The second of these rules is the requirement that a statute not be construed so as to lead an absurd result. *State of South Carolina v. County of Florence, supra.* Here, DOR advocates a reading of the statute that would subject **all** intangibles and services to sales tax unless specifically excluded when the legislature's express intent is to impose sales tax on the sale of tangible personal property and on the sale of services and intangibles which it specifically provides are to be subject to sales tax. If adopted, this interpretation of §12-36-60 would result in the sale of any number of services – including professional (e.g., medical, legal, dental accounting, architectural, engineering, and counseling) landscaping, construction, painting, repair and other services – being subjected to sales tax when they are currently not so subject. *Cf.,* S.C. Code Regs. 117-308 ("[t]he receipts from services, when the services are the true object of the transaction,

are not subject to sales ...tax, unless the sales ... tax is specifically imposed by statute on such services (i.e., accommodations services, communications services").[16] Assuming this Court were to agree with DOR and conclude that the plain meaning of the statute requires that sales tax be imposed on every intangible and service not specifically excluded by §12-36-60, this absurd result would prevent the Court from giving effect to the statutory requirement that the sale of an intangible be specifically subject to tax under Chapter 36 and eviscerate DOR's own regulation pertaining to the imposition of sales tax on services. *See Duke Energy Corp. v. S.C. Dept. of Revenue*, 415 S.C. 351, __, 782 S.E.2d 590, 592 (2016) (holding that "regardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly").

ii. DOR's argument that the ALC incorrectly interpreted §12-36-90 takes the ruling below out of context and is without merit.

Below, DOR contended that this Court's decision in *Meyers Arnold, Inc. v. S.C. Tax Comm'n*, 285 S.C. 303, 328 S.E.2d 920 (Ct. Apps. 1985), supported a 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." [R. at __, Final Order, p.22.] The ALC found that this was not a holding of *Meyers Arnold* and that DOR's

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[16] This regulation has recently been applied by this Court to determine that the gross proceeds from the rental of portable toilets are subject to sales tax and not exempt as a service under the regulation where the evidence supported the ALC's conclusion that the transaction involved the rental or lease of portable toilets and other personal property. *See Boggero v. S.C. Dept. of Revenue*, 414 S.C. 277, 777 S.E.2d 842 (Ct. Apps. 2015). There, this Court concluded that a determination of taxability under this regulation was fact intensive. However, *Boggero* was not decided on cross motions for summary judgment and, as noted above, DOR did not submit opposing affidavits which challenged the facts advanced by the Alltel Entities via affidavit and submitted its own motion for summary judgment. Accordingly, there is no disputed fact at play in this appeal. Further, unlike the present case, *Boggero* did not involve a third party seller of insurance services. Moreover, the question of whether the sale of insurance contemporaneous with a sale of communications or Devices was a sale not exempt under R.117-308 was not presented below and therefore is not preserved for appeal. *Lucas v. Rawl Family, L.P.*, 359 S.C. 505, 598 S.E.2d 712 (2004). Further, it has not been raised by DOR in this appeal, and therefore is not an issue before this court. *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010).

contention that *Meyers Arnold* supported a conclusion that the focus of §12-36-90(1)(b) is on the fees received for, as opposed to costs deducted from, the gross proceeds of sales would, if correct, necessarily give rise to an ambiguity in the statute which would entitle the Alltel Entities to prevail. [*Id.*][17] The ALC therefore rejected DOR's contention in this regard. [R. at __, Final Order, pp.22, 25.]

DOR argues—without reference to its assertion below that *Meyers Arnold* supported its reading of §12-36-90(1)(b)—that in rejecting this contention "the ALC incorrectly interpreted the 'value proceeding or accruing' language explicitly found within the definition of gross proceeds of sales found in Section 12-36-90" and as a result "created a limitation wherein that section only applies to expenses incurred by the taxpayer." Init. Br. of App., p.8. In support of this argument, DOR asserts that 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 applies.'" Init. Br. of App., pp.8-9.[18] DOR contends that the ALC "fail[ed] to grasp the fundamental principles behind a sales tax based on gross proceeds" which "is aimed at taxing the full amount of value associated with a given transaction" and that "[t]he 'value proceeding or accruing language' is intentionally broad so as to include all aspects of a transaction regardless of title given to any expenses to the taxpayer." *Id.*, p.9. Thus, according to DOR "[g]ross proceeds are not limited to just those items that

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[17] The section concerned in *Meyers Arnold* was S.C. Code Ann. §12-35-30(1976), which contained similar language to §12-36-90(1)(b). [R. at __, Final Order, p.24 and n.19.]

[18] Only the underlined quoted language is contained in the Final Order (which appears at p.25, not p.22) and reflects the ALC's rejection of DOR's contention that *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." The ALC disagreed with DOR's contention that *Meyers Arnold* supports a reading of §12-36-90(1)(b) to include within the proscribed deductions from the proceeds of sale in items (i-vii) of the subsection any **revenues** received by a retailer because it would necessitate reading language into the section, and thereby give rise to an ambiguity. [R. at __, Final Order, p.25.]

constitute expenses to the taxpayer," the "Coverage Plans ... constitute value that proceeds or accrues as a result of the sale of tangible personal property," and "such value is included within gross proceeds of sales and [is] therefore subject to sales tax." *Id.*, pp.9-10. For the reasons discussed below, it is DOR and not the ALC that has misinterpreted §12-36-90(1)(b).

The underlying premise of DOR's argument is that, by failing to require the Alltel Entities to include within their gross proceeds of sales the amounts collected from customers for insurance, the ALC ignored the requirement of §12-36-90(1)(b) that a retailer not deduct "the costs of material, labor or service" or "any other expenses." Init. Br. of App., p.8. However, and as the ALC ruled, §12-36-90(1)(b) by its plain terms pertains only to deductions by retailers from the gross proceeds of sale (i.e., revenues) any costs or expenses incurred by the retailer in making the tangible personal property available for purchase, not to deductions of revenues from gross proceeds of sale received by a retailer. [R. at __, Final Order, pp.24-25.] Stated another way, §12-36-90(b)(1) only precludes a retailer from deducting from the amount paid by a customer to purchase tangible personal property to which sales tax applies some portion of that amount representing a component of the cost incurred by the retailer in providing the tangible personal property for purchase.[19] As the ALC observed in factually distinguishing *Myers Arnold* from the instant case, no such deduction occurred here as the Alltel Entities excluded the entire amount of revenue collected for insurance coverage based upon their belief that insurance is not tangible personal property.[20] Accordingly, DOR is simply

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[19] As the ALC described it, "*Meyers Arnold* addresses an attempt by the taxpayer to exclude from gross proceeds a cost of service provided by the retailer in the sale of tangible personal property." [R. at __, Final Order, p.24.]

[20] The ALC's discussion of the facts of *Meyers Arnold* is instructive as it places into context for this Court the ruling made below regarding the meaning of §12-36-90(1)(b) and the reason why that

wrong in its assertion that "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" and thereby "created a limitation wherein that section only applies to expenses incurred by the taxpayer." Init. Br. of App., p.8.

Similarly without merit is DOR's contention that the ALC's interpretation of §12-36-90(1(b) requires that language in that subsection be ignored and different language be read into it.[21] To the contrary, it is DOR which seeks to read out of §12-36-90 the words used by the General Assembly and replace them with other words in order to reach a conclusion that is not supported by the plain meaning of the language used. This is so because §12-36-90 plainly states that "[g]ross proceeds of sales, or any similar term, means the value proceeding or accruing from the sale, lease or rental of tangible personal property." Accordingly, if value does not proceed or accrue from the sale of tangible personal property, it is not gross proceeds. As the ALC correctly concluded, the value proceeding or accruing from the sale of insurance cannot be "gross proceeds of sale" because insurance is not "tangible personal property" within the plain

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subsection cannot bear on the question of whether the amounts collected for insurance coverage are gross proceeds of sale in the manner asserted by DOR without creating an ambiguity. [R. at __, Final Order, pp.24-25.] Key among these facts is that the retailer in *Meyers Arnold* retained the fees for its service of holding merchandise on lay-away, which fees the Court of Appeals concluded reflected the taxpayer's cost of providing that service. Here, and as was noted below, the insurance provided to the Alltel Entities' customer was not a service provided by the taxpayer and the premiums were not retained by the Alltel Entities. [*Id.*]

[21] "[T]he ALC's interpretation disregards the 'value proceeding or accruing' language' that proceeds (*sic*) 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.'" Init. Br. of App., p.9. As is the case with many other assignations of error set out in its brief, DOR does not cite to any portion of the Final Order which it contends reflects this interpretation by the ALC. The Alltel Entities assume that DOR's argument here takes issue with the portion of the ALC's order rejecting DOR's argument that "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)," which argument was based upon DOR's characterization of "'gross proceeds of sale almost as a bucket with regard to the sale of tangible personal property' and assertion that 'anything associated with that sale of tangible personal property goes into the bucket of gross proceeds.'" [R. at __, Final Order, pp.18-19.]

meaning of the language set out in definitions supplied by the General Assembly which apply to §12-36-910. [R. at __, Final Order, p.18.]

Rather than hewing to the plain meaning of the language used in these statutory definitions, DOR asserts that "[a] sales tax based upon the gross proceeds of sales is aimed at taxing **the full amount associated with a given transaction.**" Init. Br. of App., p.9 (emphasis supplied). And, to avoid the requirement that tangible personal property be sold in order for sales tax to apply, DOR asserts that "value that proceeds or accrues **as a result of** the sale of tangible personal property" (Init. Br. of App., p.9, (emphasis supplied)) is within the ambit of §12-36-90. But these assertions, which underpin DOR's contention that "'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" impermissibly read the emphasized language into the statute. As the ALC correctly put it, '[i]n order to accept the Department's argument that the statute requires that any amounts of revenue collected by a retailer at that 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." [R. at __, Final Order, p.19.] *See Alltel Commc'ns, supra.*

In a similar vein, DOR contends that the ALC erred in considering whether the insurance coverage purchased by the Alltel Entities' customers is tangible personal property under §12-36-60, but instead should have considered only whether the cost of insurance is included in the gross proceeds of sales under §12-36-90. Init. Br. of App., p.10.[22] According to DOR, focusing only upon this question compels a conclusion of law

[22] DOR's characterization of the ALC's analysis suggests that the court below focused only on the question of whether insurance coverage is tangible personal property under §12-36-60. This suggestion is inaccurate as the ALC analyzed all three of the pertinent sections [R. at __, Final Order, pp.16-18], giving

that the "Coverage Plans ... constituted a service or other expense incidental to the sale of tangible personal property," the cost of which cannot be deducted under §12-36-90(1)(b)(ii,vii). Init. Br. of App., p.10.[23] Once again, DOR seeks to read out of §12-36-90 the requirement imposed by the General Assembly that gross proceeds of sale proceed or accrue from a sale of tangible personal property. This the Court may not do. *Alltel Commc'ns, supra.*

Further, and, in a variation of its contention that this Court should read the statute as having a "broader reach" that includes "intentionally broad" language, DOR asserts that because §12-36-90(1)(b) precludes the deduction of costs of any service or any other expenses from gross proceeds of sale, and because the Alltel Entities are providing the service of "Coverage Plans" to their customers, the amounts collected for insurance coverage "are incidental to and enhance the value of the sale of wireless communications services and telephone equipment" and are thus within the definition of gross proceeds of sales under §12-36-90. Init. Br. of App., pp.10-12. Quite apart from the undisputed fact that the Alltel Entities are not providing insurance coverage to their customers (*see* discussion at p.6, *supra*), DOR's argument in this regard again founders upon the rule of statutory construction which precludes a court from reading language into a statute to expand its scope or meaning and thereby bring a taxpayer within the terms of the taxing

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effect to each. *Cf. Gilfillin v. Gilfillin*, 344 S.C. 407, 414, 544 S.E.2d 829, 832 (2001) (holding that, "[i]n construing statutory language, the statute must be read as a whole, and the sections which are part of the same general statutory law must be construed together and each one given effect," citing *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E2d 471, 476 (1998)).

[23] Although there is a regulation which pertains to the imposition of sales tax on services incidental to the sale of tangible personal property (*see* discussion at n.16, *supra*), DOR does not invoke it here. This is understandable since DOR has not preserved any issue arising under R. 117-308 and since there is no genuine disputed issue of material fact that the insurance premiums were paid to the insurance carriers.

statute. *See Alltel Commc'ns, supra.*[24] Nothing in the statute provides that the sale of intangible property which is "incident to" or which "enhances the value of" a sale of tangible personal property is a service that is subject to sales tax. As much as DOR would like for this Court to depart from the plain meaning of §§12-36-60, 12-36-90, and 12-36-910 for purposes of this appeal, it has demonstrated that it is itself unwilling to do so in another context addressed in one of its regulations. *See* S.C. Code Regs. 117-313.3 ("[n]ot subject to the sales or use tax are charges for installation incident to the sale of tangible personal property when such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property"). As recognized by the ALC, this regulation quite clearly provides that labor used in the installation of automobile parts sold by a repair shop, even though that service is "incidental to" and "enhances the value of" the parts sold, is not subject to sales tax.

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[24] In support of its argument at pp. 10-14 of its brief, DOR asserts that the ALC should have inferred from the facts that wireless service customers paid insurance premiums through the Alltel Entities instead of directly to the insurance carriers and that the Alltel Entities "subcontract[ed] the service offered to its subscriber to another provider" and that "[t]his contractor-subcontractor relationship cannot absolve [the Alltel Entities] of its duty to remit sales taxes on the gross proceeds resulting from its retail sales." Init. Br. of App., p.11. Accordingly, DOR contends that this inference supports its contention that the amounts collected by the Alltel Entities for insurance coverage were "incidental to and enhance the value of the sale of wireless communications service and telephone equipment" which it asserts subjects the amounts collected for the coverage to sales tax. Init. Br. of App., p.11.

In support of this proposition, DOR cites S.C. Code Ann. §12-36-130 (2014), which DOR acknowledges is the measure of tax employed for the use tax. *Id.*, pp.11-12, n.7. *See also* S.C. Code Regs. 117-318 ("'Gross proceeds of sales' is the basis for calculating the sales tax and 'sales price' is the basis for calculating the use tax"). Even assuming that this section has application in the instant case (which the Alltel Entities dispute), any argument based upon it is not preserved as it was not made below. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716(2000).

Furthermore, DOR's argument based upon the inferred existence of a contractor-subcontractor relationship is not preserved as it was not presented to the ALC in DOR's motion for summary judgment, its supporting or opposing memoranda, or in its oral argument to the ALC. Rather, DOR only raised the existence of any contractor-subcontractor relationship in its motion for reconsideration, and then primarily asserted that such a relationship existed between the Alltel Entities and the insurance agent. [R. at __, DOR Motion for Recons., pp.6-7.] Because this matter was raised for the first time in a motion for reconsideration, it is not preserved for appeal. *See Kiawah Prop. Owners Grp., Inc. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 597 S.E.2d 145 (2004).

[R. at __, Final Order, pp.20-21.] And, as the ALC also noted, DOR is only able to exclude the charge for labor under R. 117-313.3 because §12-36-90(b) does not include it given that DOR is not able to exempt by regulation that which the legislature has provided be taxed. [R. at __, Final Order, pp.21-22.][25]

DOR's assertion that "[w]ithout the sale of the wireless communications service and telephone equipment, the [Alltel Entities are] unable to sell Coverage Plans" (Init. Br. of App., p.11) misses the mark from two perspectives: first, the undisputed facts demonstrate that Alltel Entities did not sell insurance, but simply collected premiums for optional insurance coverage sold by licensed insurance agents for licensed insurance companies. [R. at __, Final Order, pp.6-8.] Second, and as the ALC concluded, the tangible personal property which Alltel did sell (communications service and Devices) could be purchased without insurance coverage [R. at __, Final Order, pp.24-25]—just as automobile parts can be purchased without the labor needed to install them. *Cf.* R. 117-313.3. Regardless, whether insurance coverage is or is not purchased by its customers, the Alltel Entities' obligation to pay sales tax on the gross proceeds of sale of tangible personal property does not, as a matter of law, extend to a sale of a service or intangible property absent legislative authorization. *See* §12-36-60. The only way DOR's argument in this regard can achieve purchase is to read language into the statute, which the ALC could not, and this Court cannot, do without also concluding that the Alltel Entities are entitled to prevail as a matter of law due to an ambiguity in the statute. *Alltel Commc'ns, supra.*

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[25] "'Regulations authorized by the Legislature have the force and effect of law.' Nonetheless, a regulation may not alter or add to a statute." *Id.*, *citing Home Medical Systems, Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) (internal citation omitted).

In a further attempt to support its effort to have this Court expand the plain language of the statute, DOR criticizes the ALC's reliance upon the undisputed fact that the insurance premiums paid by customers were remitted to the insurance companies. Init. Br. of App., p.12.[26] In so doing, DOR attributes to the ALC the "conclusion that all of the proceeds received by the [Alltel Entities] is (*sic*) transmitted to the third party insurance carrier" which conclusion DOR contends is "factually incorrect." Init. Br. of App., p.12. This is an inaccurate assertion as the ALC concluded only that, based upon the unrefuted facts established in the affidavits and documents submitted with respect to the issue of whether the coverage against theft, loss, or damage to a Device was insurance (an issue decided adversely to DOR below and not challenged on appeal), the Alltel Entities had no interest in the insurance premiums, could not retain these insurance premiums, and were required to remit these insurance premiums to the insurance companies. [R. at __, Final Order, pp.7-8, 25.][27] However, DOR has observed that "it makes no difference whether some or all of the proceeds paid to the [Alltel Entities] by [their] subscribers for [insurance] ... [are] thereafter remitted to the third party insurance carrier" (Init. Br. of App., p.13) and the Alltel Entities agree because insurance is not tangible personal property and only by engaging in unwarranted and impermissible

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[26] DOR does not cite the pertinent portion of the Final Order to which it refers, but the Alltel Entities assume that this criticism pertains to ALC's analysis of DOR's argument based upon *Meyers Arnold, supra,* and the distinction the ALC drew between the facts of that case (as well as those in *Travelscape v. S.C. Dept. of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2010)) and the instant case. [R. at __, Final Order, pp.24-25.]

[27] The affidavits submitted by the Alltel Entities [R. at __, Capehart Aff., Ex. A, pp. 3, 15] and the parties' arguments below [R. at __, Hr'g Tr. p. 34, ll.9-23] made clear to the ALC that a portion of the amounts collected by the Alltel Entities for insurance coverage did not constitute premiums recovered by the insurance companies, but were administration fees to be recovered by the insurance agent and the Alltel Entities. There is no fact established by the record below with respect to whether any administration fees were recovered by the Alltel Entities and, if so, whether they were deducted from the amounts collected from customers purchasing insurance coverage or whether they were paid by the insurance companies to the Alltel Entities. As further discussed *infra*, DOR acknowledged below that development of facts in this regard was not necessary to the address the legal issue presented on the cross motions for summary judgment.

construction of the statute do the amounts collected for insurance coverage become subject to sales tax. *Cf. Alltel Commc'ns, supra.*[28]

iii. The case law cited by DOR does not support its arguments.

DOR cites three South Carolina appellate court decisions in support of its argument that §12-36-910 should be read to subject to sales tax the sale of intangible property which is not specifically subject to tax under Chapter 36 of Title 12. However, none of these cases compel the result urged upon this Court.

DOR quotes from *State ex rel. Roddey v. Byrnes*, 219 S.C. 485, 66 S.E.2d 33 (1951),[29] in support of its assertion that it "is not seeking to impose a sales tax on the 'transaction' between the [Alltel Entities] and the third party insurance carriers who underwrite" the insurance coverage for customer Devices but, rather, on "the gross proceeds of [the Alltel Entities'] sales of wireless communications services and telephone equipment, which include the proceeds from the [insurance coverage]." Init. Br. of App., p.14. The Supreme Court's description of the general nature of a sales tax in *Roddey,*

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[28] DOR makes a number of other assertions in this portion of its brief which are intended to establish the correctness of its position that the clause "value proceeding or accruing from the sale ... of tangible personal property" under §12-36-90 can include value accruing from the sale of "services and intangibles" that are not "subject to tax" under Chapter 36 as required by §12-36-60. Init. Br. of App., p.13-14. These assertions either ignore the undisputed facts or consist of unsupported legal or factual conclusions. For example, DOR contends that the Alltel Entities "subcontract with a third party insurance carrier for the Coverage Plans and pays the third party insurance carrier." Init. Br. of App., p.13. There was no ruling made (or sought by DOR) below that a subcontract existed with regard to the insurance coverage purchased by customers. Similarly, DOR states that the Alltel Entities have advanced an "argument that the Coverage Plans do nothing to enhance the value of the sale of telecommunications." *Id.* No such argument was made by the Alltel Entities in their motion for partial summary judgment or in opposition to DOR's motion for summary judgment. Nor was any such argument addressed in the Final Order. The reference in n.8 of DOR's brief to argument of counsel for the Alltel Entities – which argument is not evidence (*see Sulton v. HealthSouth Corp.*, 400 S.C. 412, 734 S.E.2d 641 (2012)) – is inapposite since the issue being addressed before the ALC (by DOR's own admission) did not pertain to any issue of whether insurance coverage "enhances" the value of wireless communications or Devices. This "argument" attributed to the Alltel Entities is, thus, manufactured for the purpose of allowing DOR to advance grounds for reversal which were neither presented to nor ruled upon by the ALC and should therefore be ignored. *See I'On, LLC, supra.*

[29] "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, which is a clear case of an excise tax to which the constitutional provisions relating to property taxes are irrelevant."

which was made in the context of a challenge to the constitutionality of the first legislative enactment providing for general taxation of retail sales (*Id.*, 291 S.C. at ___, 66 S.E.2d at __), does nothing to support DOR's expansive reading of the statute as both the pertinent portion of 1951 S.C. Act No. 47 (later codified as S.C. Code Ann. §12-35-510) and current §12-36-910 provide that the sales tax is imposed "upon every person engaged or continuing within this State in the business of selling tangible personal property" and that the base for the sales tax is "gross proceeds of sales." Contrary to DOR's assertion otherwise, only by avoiding the plain meaning of the statute do proceeds from the sale of intangible property become subject to sales tax in this instance and *Roddey* does not compel a different result.

Similarly misplaced is DOR's reliance upon *Meyers Arnold, supra*, which it contends establishes a "but for" test that is required to be used in determining whether fees received by a retailer are subject to sales tax and is controlling in this appeal. Init. Br. of App., pp.15, 17. DOR's argument fails to address the actual holding of *Meyers Arnold*—which was to give effect to the plain meaning of the applicable section of the sales tax statute—and is otherwise unavailing.

DOR begins its analysis of *Meyers Arnold* by stating that "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 sale." Init. Br. of App., p.15. (Emphasis supplied.)[30] In challenging the ALC's determination that the facts of *Meyers Arnold* are distinguishable from those of

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[30] Nowhere in this Court's opinion in *Meyers Arnold* is the word "optional" employed. This Court described the pertinent issue before it in as follows: "[t]he second issue is whether fees charged by Meyers Arnold on sales made under its lay away plan are subject to the sales tax." *Meyers Arnold*, 285 S.C. at 307, 328 S.E.2d at 923. Quite clearly, if the customers of the retailer in *Meyers Arnold* had wanted to purchase merchandise on layaway, the fee was not optional and if the customer had wanted to purchase merchandise "outright," no fee was charged.

the present case, DOR then states that "[c]ontrary to the ALC's conclusions, the layaway fees in *Meyers Arnold* were not mandatory." Init. Br. of App., pp.16-17. (Emphasis in original.)[31] DOR's need to inaccurately characterize the holding in *Meyers Arnold* and the ALC's ruling is understandable as that is the only means by which DOR may advance its argument to this Court, i.e. because purchasers of merchandise on layaway have the option to purchase tangible personal property "outright" without the delay involved in a layaway sale and purchasers of wireless communications or equipment have the option of not insuring their wireless devices, the facts of *Meyers Arnold* and the instant case are not distinguishable. Init. Br. of App., pp.16-17. Thus, DOR argues, when the retail customer in *Meyers Arnold* "chose to buy an item on layaway, he or she had to pay a layaway fee and that fee became part of the gross proceeds of sales" and when an Alltel Entities' customer "elects to purchase [insurance], the proceeds from that [insurance] become part of [the Alltel Entities'] gross proceeds of sale." Init. Br. of App., p.17. Therefore, DOR posits, even though "[insurance] may be optional, once purchased it is merged into and becomes inextricable from the transaction and has no value apart from the underlying transaction." *Id.* Because the ALC did not recognize these "facts," DOR contends that its conclusion that *Meyers Arnold* is distinguishable from the case on appeal is "incorrect and misplaced." Init. Br. of App., p.16.

DOR's argument is without merit because it fails to address the holding in *Meyers Arnold* that applied the statutory definition of "gross proceeds" and which was relied upon by the ALC in determining the plain meaning of the language in §12-36-90(1)(b). The ALC noted that, in order to purchase the merchandise (which is tangible personal property) on layaway, the retailer's customers in *Meyers Arnold* had to pay a non-

[31] However, there are no such conclusions made in the ALC's order on appeal.

refundable fee for the service provided by the retailer of making the merchandise available on a layaway basis. [R. at __, Final Order, p.24.][32] As the ALC further noted, in view of this fact the Court in *Meyers Arnold* concluded that the retailer could not--consistent with the statutory definition of gross proceeds -- deduct from the amount paid by the customer the cost incurred by the retailer in making the sale on a layaway basis, which cost was reflected in the layaway fee. [R. at __, Final Order, p.24.] The distinction noted by the ALC that the customer in *Meyers Arnold* "could not purchase the layaway merchandise without paying the subject fee" while "communications services could be purchased by customers from [the] Alltel [Entities] regardless of whether they bought insurance" [R. at __, Final Order, pp.24-25] is simply beyond dispute. In the context of §12-36-90(1)(b), this means that no cost is incurred by the Alltel Entities in making their communications services or devices available for purchase that is sought to be deducted. Stated another way, the Alltel Entities do not charge a different price for their tangible personal property (i.e., communications services or devices) whether a customer does or does not purchase insurance coverage. By contrast, the retailer in *Meyers Arnold* clearly charged a different price for its tangible personal property (i.e., merchandise) depending upon whether the customer bought on lay away or "outright." The cost associated with the former method of purchase was the lay away fee charged for handling merchandise that this Court held could not be deducted from "gross proceeds" under the statutory definition of that term.[33]

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[32] "In fact, the lay away sale is made upon the condition that the customer may not obtain possession until the full purchase price is paid." *Myers Arnold*, 285 S.C. at 307, 328 S.E.2d at 923.

[33] "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.'" *Meyers Arnold, supra*, 285 S.C. at 307, 328 S.E.2d at 923.

DOR further argues that "the ALC's assertion (*sic*) that the *Meyers Arnold* 'but for' test is not applicable here is suspect" and that when this test is applied, DOR should prevail as a matter of law because *Meyers Arnold* controls the instant case. Init. Br. of App., pp.17-18. This argument is without merit for several reasons.

First, DOR's argument in this regard suggests that the ALC recognized that such a "test" arises under *Meyers Arnold.* In fact, the ALC expressly refused to recognize this putative "test for determining whether sales tax applies that focuses on fees received by a retailer in conjunction with a sale of tangible personal property." The ALC recognized that §12-36-90(1)(b) pertains to deductions of "costs of service" from revenue and not deductions of revenue from revenue and concluded that "to read *Meyers Arnold* as DOR 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." [R. at __, Final Order, p.25.] Properly, the ALC recognized that accepting DOR's assertion in this regard would require departing from the plain meaning of the statute and give rise to an ambiguity that would entitle the Alltel Entities to prevail, citing *Alltel Commc'ns,* supra, in support of this conclusion. [*Id.*]

Second, even assuming that the ALC had recognized that *Meyers Arnold* establishes such a "but for" test, DOR's proposed application of it in this appeal does not withstand casual scrutiny. This is so because DOR bases its argument in this regard on the assertion that the Alltel Entities provided insurance to their customers. Init. Br. of App., p.17. ("There is no question that 'but for' the sale of wireless communications services and telephone equipment, the Taxpayer could not provide Coverage Plans to its subscribers.") The undisputed facts before the ALC demonstrated that the insurance was

provided by licensed insurance companies—not the Alltel Entities. [R. at __, Final Order, pp.6-8.]

Third, DOR's argument that an absence of evidence[34] compels a reversal of the ALC's conclusion regarding the "but for" test ignores the function of, and requirements for opposing, a motion for summary judgment. The ALC found that the affidavits and documents submitted by the Alltel Entities established that the coverage for the loss, theft or damage to a device was insurance as a matter of law, that the premiums which entitled customers of the Alltel Entities to that insurance coverage were paid to the insurance companies, and that the Alltel Entities did not receive the premiums for that insurance coverage. [R. at __, Final Order, pp.8, 25.] It was incumbent upon DOR to establish that genuine issues of disputed material fact existed which precluded summary judgment by refuting the facts presented by the Alltel Entities with opposing affidavits. *See* Rule 56(e), SCRCP. As the ALC found, DOR failed to meet its burden under Rule 56(e). [R.__, Final Order, pp.6, 9-10.] And, because DOR has not appealed from the ALC's determination that no genuine issues of disputed material fact existed which would preclude a grant of summary judgment, that determination becomes the law of the case and binding upon this Court. *Anderson v. Short*, *Baliles v. Young*, *supra*. Accordingly,

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[34] In this regard, DOR asserts that "[n]o 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" and that "[s]imilarly, 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." Init. Br. of App., p.17 and n.11. In addition to having failed to raise any concerns regarding a lack of evidence below and therefore being unpreserved for appeal (*see I'On, LLC, supra*), DOR's proposed new application of the "but for" test founders because it is based on the conclusion that the Alltel Entities "received proceeds from the Coverage Plans" and that it "subcontracted" performance of an insurance contract to a third party. *Id.* at 17-18. The undisputed facts below established that insurance was provided by two licensed insurance companies and that all of the insurance premiums were paid over to the insurance companies. [R. at __, Final Order, pp.6-8.] The undisputed facts below also established that a fee for administration was payable to the insurance agent and the Alltel Entities, but this service is not tangible personal property under §12-36-60, therefore did not constitute gross proceeds of sale under §12-36-90, and therefore was not subject to sales tax under §12-36-910.

DOR may not now be heard to complain regarding the facts established by the Alltel Entities which were relied upon by the ALC to determine that summary judgment was appropriate.

Fourth, and finally, DOR's contention that sales tax "is determined by the amount received by the seller and that amount includes any services provided with the tangible personal property" (Init. Br. of App., p.18) is contradicted by S.C. Code Regs. 117.313.3, which was cited by the ALC in support of its conclusion that *Meyers Arnold* cannot be read to compel the result urged by DOR. [R. at __, Final Order, p.20-21.] DOR attempts to avoid the impact of its own regulation which directly conflicts with its position in this appeal by making the astonishing assertion that "[e]xcept for this regulation, labor associated with the installation of an automobile part would be subject to sales tax under the Meyers Arnold 'but for' test." Init. Br. of App., p.18, n.13. In other words, DOR contends that it may exempt from taxation by regulation that which the General Assembly has determined to be subject to taxation. Of course, DOR has no authority do so (*see Home Medical Systems, Inc., supra.*) and its contention that this regulation supports its argument based on *Meyers Arnold* should be rejected.

Lastly, *Travelscape, supra*, does not support DOR's argument regarding the plain meaning of the sales tax statute. There, the Supreme Court held that fees received and retained by the taxpayer ("Expedia")[35] derived from the rental of hotel rooms via an on-line service were subject to sales tax under S.C. Code Ann. §12-36-920. A principal issue in *Travelscape* concerning the applicability of §12-36-920 to "service and

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[35] Although a distinct legal entity from the taxpayer in *Travelscape*, Expedia is the single member of the taxpayer limited liability company. *Id.*, 391 S.C. at 95, 705 S.E.2d at 31, n.1. In order to avoid repetitive and potentially confusing use of the taxpayer's name and the case name, the Alltel Entities will in their brief refer to that taxpayer as "Expedia."

facilitation fees" retained by Expedia as compensation for its efforts in arranging for the on-line rental of accommodations was whether such fees were "gross proceeds derived from the rental or charges for any room" within the plain meaning of §12-36-920. *Id.*, 391 S.C. at 98, 705 S.E.2d at 32-33. In reaching its determination that these fees were subject to sales tax, the Supreme Court held that the term "gross proceeds" under §12-36-920 was similar to the term "gross proceeds of sales" as defined by §12-36-90(1)(b)(ii). *Id.*, 391 S.C. at 98, 705 S.E.2d at 32-33. The Supreme Court concluded that, because §12-36-90(1)(b)(ii) precludes "deduction for the cost of services" from gross proceeds, the fees retained by Expedia for its services were taxable as gross proceeds. *Id.*

Although it was a party in the contested case and subsequent appeal giving rise to the decision in *Travelscape*, which was decided ten months before the DOR Determination was issued and more than two years before the motions hearings below, DOR never cited that decision to the ALC in the instant case. [R. at __, DOR Proposed Order.][36] In this Court, however, DOR contends that the holding in *Travelscape* "compels that the ALC ruling be reversed." Init. Br. of App., p.18. In support of this contention, DOR states that the holding in *Travelscape* was that "the entire sum received by the [on-line travel company] was subject to sales tax" and that the Supreme Court "did not allow [Expedia] to exclude the amounts paid to the hotels from the sales tax base because [Expedia] did not retain these funds." Init. Br. of App., p.19. Accordingly, DOR argues, notwithstanding the fact that the Alltel Entities remit "some portion of the money received by the [Alltel Entities] to a 3rd party insurer," the entire amount received by the

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[36] The ALC distinguished the facts of the instant case and those in *Travelscape* and *Meyers Arnold* and cited these cases for the proposition that where a fee is retained for the provision of a service that is inextricably intertwined with the sale of tangible personal property or accommodations, such that the personal property or accommodations are not obtainable from the retailer without obtaining the service, the fees retained for the service are gross proceeds because the cost of the service could not be deducted. [R. at __, Final Order, p.24 n.20, 25.]

Alltel Entities for communications service, telephone equipment, and insurance coverage is gross proceeds of sale subject to sales tax. Init. Br. of App., p.19.

For many reasons, DOR's argument is without merit. As an initial matter, the two holdings attributed by DOR to the decision in *Travelscape* are entirely inaccurate. The Supreme Court did not hold that all funds received by Expedia were subject to sales tax; to the contrary, the Court held that "the fees **retained** by [Expedia] for its services are taxable as gross proceeds." *See Travelscape*, *supra*, 391 S.C. at 98, 705 S.E.2d at 33 (emphasis supplied). Nor did the Supreme Court hold that it would not allow Expedia to exclude from sales tax the amounts it paid to the hotels; rather, the Court specifically stated that "the issue of whether [Expedia] is entitled to a credit from the taxes it collected and remitted to the hotels based on the net room rate is not before the Court by stipulation of the parties." *Id.*, 391 S.C. at 95, 705 S.E.2d at 31, n3.

Further, the ALC's analysis of the differences between the facts of the instant case and those in *Travelscape* (as well as *Meyers Arnold*) only supports a conclusion contrary DOR's position. In both of those cases, the taxpayer sought to exclude from gross proceeds of sale (of accommodations or tangible personal property) a cost of a service it provided to the retail customer. By contrast, and as the ALC concluded, the Alltel Entities have not excluded any costs associated with the selling of their communications services (or Devices) from gross proceeds of sale. [R. at __, Final Order, p.24.] The effect of this distinction recognized by the ALC is to acknowledge that which DOR has now conceded: insurance is not tangible personal property. By not remitting tax on the amounts collected for insurance, the Alltel Entities have not deducted from revenue derived from the sale of tangible personal property any cost of service as prohibited by §12-36-90(1)(b). The results reached in both *Travelscape* and *Meyers Arnold* are only

consistent with the plain meaning of the two statutes involved in those cases as they prevented retailers from failing to pay sales tax on the full amount they charged to customers for hotel rooms and merchandise, respectively. Here, no such failure can exist in view of the undisputed facts that insurance is not tangible personal property and no revenue retained by the Alltel Entities for the sale of tangible personal property has been omitted from the amounts returned for sales tax.[37]

iv. The ALC did not err in refusing to defer to DOR's construction of the statute where there is no ambiguity in the statute, if any ambiguity existed it would be required to be construed in favor of the Alltel Entities, and any policy by DOR providing for such construction has not been uniformly applied.

DOR asserts that it has a "long-standing policy to apply the *Meyers Arnold* test in determining whether certain charges are included in gross proceeds of sales of taxable communications services." Init. Br. of App., p.21. In support of this assertion, DOR states that for more than twenty-five years it has "included charges for insurance, or insurance like items, in a retailer's gross proceeds and cites a decision of the South Carolina Tax Commission, S.C. Comm'n Dec. S-D-174 (1986 WL 221967) for this

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[37] DOR contends in this portion of its brief that the ALC erred as a matter of law in focusing on simply whether insurance was "tangible personal property" under §12-36-60 and failing to consider the definition of "gross proceeds of sale" under §12-36-90 pursuant to which "a person in the business of selling tangible personal property" is subject to sales tax under §12-36-910. Init. Br. of App. at 20. This contention is incorrect (as well as curious) inasmuch as the ALC explicitly framed the issue before it by reference to each of these sections [R. at __, Final Order, p.6] and specifically applied them in deciding the cross motions for summary judgment. [R. at __, Final Order, pp.17-22.] *Cf. Gillfilin, supra.*

DOR further asserts in this portion of its brief that "in *Travelscape*, [Expedia's] gross proceeds of sale subject to sales tax included not only the sums attributable to the sale of accommodations but also the sale proceeds attributable to [Expedia's] services," thereby suggesting that the Supreme Court has recognized that it was unnecessary for a sale of accommodations to have occurred before the sales tax under §12-36-920 could apply. Init. Br. of App., p.20, n. 14. Ergo, DOR submits, it is unnecessary that a sale of tangible personal property exist in order for sales tax to apply to the amounts collected by the Alltel Entities for insurance. *Id.* The fallacy in this contention is that the Supreme Court expressly found that Expedia was in the business of furnishing accommodations and that the purpose of §12-36-920 was to "levy a tax on the amount of money visitors ... spend on their hotel rooms or other accommodations." *Travelscape, supra,* 391 S.C. at 101-102, 705 S.E.2d at 35. As noted by the Supreme Court, only one amount was paid by the customer for her stay, which consisted of the amount charged to Expedia for the hotel room, Expedia's fees, and sales tax on the accommodations. *Id.*, 391 S.C. at 95, 705 S.E.2d at 31.

proposition. DOR also relies upon a revenue ruling issued by the South Carolina Tax Commission, S.C. Rev. Rul. #93-1 (1993 WL 321463).[38] DOR asserts that the ALC should have "given greater deference" to the policy arising out of this decision and this ruling of its predecessor agency. Init. Br. of App., p.21.

The Alltel Entities addressed the substance of the cited decision and ruling – along with multiple other determinations made by DOR or its predecessor agency asserted below to have established this long-standing policy on the part of the agency—in a comprehensive response to DOR's motion for summary judgment. [R. at __, Alltel Entities Resp. to Mot. for Summ. J., pp.16-26.] In the interest of judicial economy, the Alltel Entities will not repeat the entirety of its argument below and incorporate into this brief by reference its response below. Suffice it to say that under *Media General Communications, Inc.*, *supra*, DOR's putative policy cannot overcome the plain meaning of the statute and under *Alltel Commc'ns, supra*, resort to any such policy for the meaning of the statute necessarily requires the finding of an ambiguity the benefit of which goes to the Alltel Entities.

However, the Alltel Entities believe it necessary to address two points arising from DOR's current argument. As the ALC recognized, in view of R. 117-313.3, DOR has not uniformly applied the "but for" test it claims this Court established in *Meyers Arnold*. [R. at ___, Final Order, pp.20-21.] Accordingly, the requirement of *Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 60 S.E.2d 682 (1950) that "a long-standing administrative policy" be "uniform" is not met. But in addition to a lack of

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[38] This decision and this revenue ruling involve a fee charged by a personal property rental company and an automobile rental company, respectively, for property damage waivers which allowed the renter to use the property without concern over liability for damage to the property. Neither, however, pertains to "sales of taxable communications services" as DOR suggests. Accordingly, neither pronouncement supports the specific legislative acquiescence that DOR suggests has occurred.

uniformity in its application of this putative policy, DOR has actually reversed its position on the application of sales tax to charges collected by a retailer for "insurance or insurance like items." Specifically, in S.C. Revenue Ruling No. 14-6 (2014 WL 5529252), DOR concluded that where a retailer of accommodations collects a charge for "optional hurricane insurance," that charge is not subject to sales tax under §12-36-920. In so ruling, DOR stated that RR. #14-6 "[s]upersedes: SC Revenue Ruling #05-06 **and all previous advisory opinions** and any oral directives **in conflict herewith.**" *See* 2014 WL 5529252 (emphasis supplied).[39]

The effect of RR #14-6 -- which DOR fails to mention in its brief -- cannot be understated. By issuing this ruling, DOR has not only indicated that it will interpret the sales tax statute in some circumstances to impose sales tax on insurance and not in others (thereby destroying any semblance of the uniformity required by *Etiwan*, *supra*), but has also withdrawn any prior rulings issued which may be in conflict. This would include both SD-174 and RR#93-1 relied upon in DOR's brief. This Court should therefore not only ignore DOR's argument in this regard, it should consider all of DOR's arguments through the prism that RR#14-6 provides, which is that whether "the value proceeding or accruing from the sale, lease or rental of tangible personal property" includes revenue derived from intangible property that is not subject to tax under Chapter 36 of Title 12 is merely a matter of whim and caprice on the part of DOR. Under these circumstances, it certainly cannot be said that the Alltel Entities are clearly subject to tax with respect to amounts collected for insurance on the Devices. Rather, substantial doubt exists in that

[39] DOR acknowledged below that the insurance coverage on Devices was optional [R. at __, Final Order, p.22.]

regard and the Alltel Entities are entitled to receive the benefit of that doubt and have the ALC's order affirmed. *Alltel Commc'ns, supra.*

B. The ALC's Alternative Ruling that the Alltel Entities Were Entitled to Prevail as a Matter of Law is the Law of the Case and Must Therefore Be Affirmed.

As discussed above, DOR's arguments leave no doubt that it is engaged in an impermissible extra-legislative effort to amend §§12-36-60, 12-36-90, and 12-36-910 so as to include within their operation intangible property that is not now subject to sales tax under the plain meaning of the statute. *See* discussion at 41-43, *supra.* The ALC found in three separate instances involving three separate sections of the sales tax statute[40] that the arguments advanced by DOR necessarily constituted an acknowledgment by DOR that the statute is ambiguous, that such ambiguities must be construed in favor of the Alltel Entities under *Alltel Commc'ns, supra*, and that the Alltel Entities were therefore entitled to summary judgment as a matter of law on this alternative ground. Although DOR sought reconsideration of the ALC's conclusion that DOR's reading of §12-36-90(1)(b) (based upon DOR's interpretation of the holding in *Meyers Arnold*) created an ambiguity [R. at __, Mot. for Recons., p.9, n.5], it did not seek reconsideration of the ALC's alternative conclusion that DOR's reading of §12-36-60 and §12-36-910 necessarily rendered these sections ambiguous.

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[40] *See* [R. at __, Final Order, p.19] ("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, 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 DOR's argument would require the court to read out of [§12-36-60] 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 DOR on this point, however, DOR would not prevail because the statute would then be rendered ambiguous and therefore inapplicable to Alltel.) *See, also*, [R. at __, Final Order, p.20] (ALC concluding that DOR argument that ALC should defer to agency's long-standing application of §12-36-910 to include revenue from sale of intangible property "incidental to purchase of communications service" gives rise to ambiguity entitling the Alltel Entities to prevail) and [R. at __, Final Order, pp.22, 25] (ALC concluding that DOR argument that §12-36-90(1)(b) should be read, pursuant to *Meyers Arnold*, as precluding a deduction of revenue – as opposed to deduction of cost or expense – sanctions application of sales tax to a retailer "in circumstances where it is far from clear that the sales tax applies" thereby implicating *Alltel Commc'ns, supra*).

DOR has not, however, presented any issue on appeal to this Court with respect to the ALC's alternative conclusions that the Alltel Entities were also entitled to prevail as a matter of law under *Alltel Commc'ns, supra*, as its statement of issues on appeal (Init. Br. of App., p.1) fails to set forth any point in this regard. *See* Rule 209(b)(1)(B), SCACR (["o]rdinarily, no point will be considered on appeal which is not set forth in the statement of issues on appeal"). This Court may consider an issue not set forth in the statement of issues on appeal "if it is *reasonably clear* from an appellant's arguments." *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642-3 (2011) (emphasis in original). However, in order to meet the reasonable clarity requirement of *Herron*, the "'ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue.'" *Id.*, 719 S.E2d at 64. DOR does state in a footnote "that its interpretation of §12-36-90 does not create any ambiguity as proscribed under *Alltel v. South Carolina Department of Revenue*" (i.e., *Alltel Commc'ns, supra*). Init. Br. of App., p.15, n.9. It does not, however, mention the ALC's other two alternative conclusions that DOR's interpretations of §§12-36-60 and 12-36-910 necessarily recognize an ambiguity in the statute. It is therefore not "reasonably clear" that DOR is seeking this Court's review of the ALC's alternative conclusions, and certainly not all three of them. *Cf.* n. 40, *supra*. Accordingly, deviation from the general rule set out in Rule 209(b)(1) is not warranted under *Herron, supra*. However, even if this Court were to conclude that an issue for review has been presented with respect to all three of the ALC's alternative conclusions based on *Alltel Commc'ns, supra*, DOR has abandoned the point on appeal because its "argument" is presented in a short, conclusory manner without supporting authority. *See Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d

281 (2003), cited in Jean Hoefer Toal, et al., *Appellate Practice in South Carolina*, (3rd Ed.) 208, 432 (2016). And, because the issue is not preserved on appeal, the ALC's ruling becomes the law of the case and requires that its grant of partial summary judgment to the Alltel Entities be affirmed. *See Biales v. Young, Anderson v. Short, supra.*

Furthermore, even if DOR has raised an issue in this regard, the ALC correctly ruled in the alternative that the statute was ambiguous to the extent it can be read to subject the amounts collected by the Alltel Entities for insurance on Devices. A statute is ambiguous if it "lends itself to two equally logical interpretations." *See Kennedy v. South Carolina Retirement Sys.,* 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001). At a minimum, one logical interpretation of the statute is that only intangibles specifically subjected to sales tax under Chapter 36 of Title 12 are included within the definition of tangible personal property under §12-36-60 and that revenue from the sale of intangibles not within that definition do not constitute gross proceeds of sale under §12-36-90 which are subject to sales tax under §12-36-910. If nothing else, DOR's regulation (R.117-313.3) and advisory opinion (RR #14-6) demonstrate that the Alltel Entities' interpretation has a basis in logic. Accordingly, the ALC's alternative conclusions should be affirmed under *Alltel Commc'ns* for this reason as well.

II. The Administrative Law Court did not err by making findings which are unsupported by reliable, substantial or probative evidence of record.

Notwithstanding its acknowledgment that the instant matter raises a question of law that renders its second issue on appeal "not … legally significant," (Init. Br. of App.,

p.22), DOR attempts[41] to present an argument that the ALC's order is based upon "conclusions" that "are clearly erroneous and not supported by substantial evidence." Init. Br. of App., p.22. In support of this argument, DOR asserts that "[t]he ALC found that the [Alltel Entities] pay[] all of the collected insurance premium over to the third party insurance carrier and do[] not retain any interest in said premium." *Id.* DOR acknowledges that "what was formally denominated as a 'premium' may have been paid over" but then asserts that "the [Alltel Entities] are most certainly retaining some portion of the overall proceeds received from its customer." *Id.* In support of this latter assertion, DOR cites to exhibits to the supporting affidavits submitted by the Alltel Entities below in support of this statement, *Id.*, pp.22-23. DOR concludes its argument on this point by referring to a colloquy between the ALC and counsel for the Alltel Entities in which the ALC asked if the retention of administration fees by the Alltel Entities created a disputed issue of material fact. *Id.*, pp.23-24.

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[41] The Alltel Entities submit that DOR's second issue on appeal is unpreserved because DOR did not raise it below. *Kiawah Resort Assocs. v. S.C. Tax Comm'n, supra.* Although it was addressed by the ALC in its colloquy with counsel at the motions hearing, that is insufficient to preserve the issue for appellate review. *See Gatewood v. S.C. Dept. of Corrections*, Op. 5389 (S.C. Ct. App. filed March 9, 2016) (Shearouse Adv. Sh. No. 10 at 39), citing *Mize v. Blue Ridge Ry. Co.*, 219 S.C. 119, 64 S.E2d 253 (1951).

Even if it had been presented below, this issue has been abandoned on appeal because it is argued in conclusory terms without citation to supporting authority. *See South Carolina Appellate Practice, supra, citing Jinks v. Richland County, supra,* and *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106 & n.3, 439 S.E.2d 283, 285 & n.3 (Ct. App. 1993) ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority."). DOR asserts in its brief only that the ALC's conclusion regarding the remittance of insurance premiums to the insurance companies is not supported by substantial evidence because the Alltel Entities were entitled to receive a fee for administration. Init. Br. of App., p.22. DOR does not explain to this Court why the fact that administration fees were payable to the Alltel Entities and insurance agent bears on the ALC's conclusion regarding insurance premiums. This argument is insufficient to "include all that is necessary to enable the appellate court to decide whether the ruling complained of was erroneous." *Smith v. South Carolina Dep't of Soc. Svcs.*, 284 S.C. 469, 471, 327 S.E.2d 348, 349 (1985). In fact, it is essentially no more than a "mere expression of dissatisfaction with the ruling." *Al-Shabazz v. State*, 338 S.C. 354, 379, 527 S.E.2d 742, 755 (2000). Therefore, DOR should be deemed to have abandoned these issues on appeal. Even assuming that it has not been abandoned, the argument is without merit for the other reasons discussed *infra.*

As has previously been the case, DOR seeks to advance on appeal an argument that is unpreserved for review. Although the ALC asked whether a genuine issue of material fact was in dispute regarding the retention of administration fees payable to the Alltel Entities (which the exhibits to the affidavit supporting the Alltel Entities' motion and the response of its counsel to the ALC's question confirmed), the ALC concluded in its order that no genuine issue of material fact existed which would preclude a grant of summary judgment. [R. at __, Final Order, pp.6-12, 16.] In so ruling, the ALC analyzed each of the three grounds upon which DOR had asserted that a genuine issue of material fact in dispute existed, namely: (1) that the coverage for loss, theft, or damage with respect to a Device was not insurance but a service contract because (a) no indemnification was provided and (b) the deductibles were allegedly processing fees for a service contract [R. at __, Final Order, p.9-10], (2) that the Alltel Entities' customers did not pay a premium to the insurance companies [R. at __, Final Order, p.11], and (3) that the purchase of warranty coverage and insurance coverage were not separate transactions [R.at __, Final Order, p.11]. The ALC did not, however, address in its Final Order the question of whether a genuine issue of material fact was in dispute regarding the administration fees payable to the Alltel Entities and the insurance agent. Even assuming that the ALC's question on this point in the motions hearing sufficed to raise this as an issue below (which Alltel disputes), DOR has not preserved the issue for review in this court as it did not raise the ALC's failure to address it in its motion under Rules 29.D and 68, RPALC, and in accordance with Rule 59(e), SCRCP. [R. at __, DOR Mot. for Recons.] Having failed to do so, DOR has not preserved this issue and it may not be considered on appeal. *See Risher. v. South Carolina Department of Health and Environmental Control,* 393 S.C. 198, 712 S.E.2d 428 (2011).

Furthermore, because the interpretation of a statute is a matter of law (which DOR has conceded is the issue in this appeal), there is no need for any factual finding which could implicate the substantial evidence standard under S.C. Code Ann. §1-23-610(B)(e) to which DOR indirectly refers. Init. Br. Appellant, p.22. Here, because the ALC decided this matter on cross-motions for summary judgment, no finding of fact was necessary nor was any made. To the contrary, the ALC concluded that because no genuine issue of material fact was in dispute, no facts were required to be found. [R.__, Final Order, p.5.][42] Instead, the ALC found that the facts established by the supporting affidavits were neither refuted by DOR nor subject to any reasonably drawn inferences that contradicted the Alltel Entities' factual assertions. [R. at __, Final Order, pp.11-12.] DOR's attempt to invoke the substantial evidence standard of review in this appeal as a means of avoiding the effect of its failure to preserve an issue for appeal is therefore without merit.[43]

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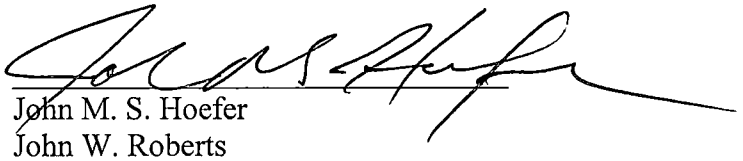
[42] "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Id.*, *citing David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

[43] The Supreme Court's recent decision in *CareAlliance Health Services v. S.C. Dept. of Revenue*, Op. No. 27627 (S.C. Sup. Ct. filed April 20, 2016) (Shearouse Adv. Sht. No. 16 at 58), does not compel a different result here as that case involved the absence of facts to support a finding made by the ALC. Here, the ALC's determination about which DOR now complains (i.e., that there was no genuine issue of disputed material fact that all of the insurance premiums collected by the Alltel Entities were remitted to an insurance agent and then to the insurance carrier [R. at __, Final Order, p.7]) is amply supported by the exhibits attached to the affidavits submitted below. Further, the fact that an administration fee was payable to the Alltel Entities (and insurance agent) from the amounts collected for insurance is documented by the same exhibits. What is not contained in the record below is any assertion by the Department at any stage that the fact that administration fees were payable to the Alltel Entities and agent either precluded a grant of summary judgment on the ground that a genuine issue of material fact was in dispute or additional evidence was required to support the ALC's conclusion with respect to these facts.

Conclusion

For the reasons set forth above, this Court should affirm the decision of the ALC. The ALC correctly concluded that no genuine issue of disputed material fact existed and that the Alltel Entities were entitled to judgment as a matter of law that amounts collected from their customers for insurance coverage on Devices were not gross proceeds of sale of tangible personal property and therefore not subject to sales tax based on the plain meaning of the statute. The ALC also correctly concluded, in the alternative, that if the statute can be read to subject to sales tax the amounts collected for such insurance, the statute would be ambiguous and must be construed in favor of the Alltel Entities and against DOR as a matter of law. Finally, there is no issue properly preserved and argued that the ALC's decision is unsupported by substantial evidence of record.

Respectfully submitted,



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