STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Amazon Services, LLC, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 17-ALJ-17-0238-CC **FINAL ORDER**

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (the Court) pursuant to a Request for Contested Case Hearing filed by Amazon Services, LLC (Petitioner or Amazon Services) challenging the final determination of the South Carolina Department of Revenue (Department), in which the Department assessed Amazon Services for a total of $12,490,502.15 in taxes, penalties, and interest for the period of January 1, 2016, through March 31, 2016.[1] Specifically, the Department found Amazon Services is a retail seller who owes sales and use tax on certain retail sales involving third-party (Merchant) products on Amazon Services' online sales platform known as the Marketplace. Amazon Services contends the third-party Merchants are the sellers and are thus responsible for collecting and remitting sales and use tax. The Department issued its Department Determination on June 21, 2017. Amazon Services timely appealed to this Court on July 21, 2017. On December 7, 2018, Amazon Services and the Department filed cross-motions for summary judgment, which this Court denied in an order dated January 29, 2019. Thereafter, a hearing on the merits was held before this Court on February 4-6, 2019, in Columbia, South Carolina.

[1] The amount of assessed taxes is an estimated figure based on information Amazon Services provided to the Department. By agreement of the parties, this estimated amount was used to allow Amazon Services to proceed with this contested case, and the final amount will be determined at the Department level following the conclusion of this litigation. Additionally, the Department issued the proposed assessment without looking into whether any Merchants had already submitted sales tax for their sales in South Carolina. The Department agrees it would be inappropriate to collect sales tax for the same transaction from two different taxpayers. However, the Department also stated it was not provided with information about the identity of Merchants who made sales on the Marketplace so it could "look to see if any of those [Merchants] are registered and remitting any tax."

FINDINGS OF FACT

Amazon Services is an Amazon.com, Inc., subsidiary that operates the website amazon.com (the Marketplace) which lists various products for sale, including products of third-party Merchants. The Marketplace was founded in 2000. The three primary sources of products listed for sale on the Marketplace are: (1) Amazon; (2) Amazon Affiliates[2]; and (3) third-party Merchants. At issue in this case are the sales and use taxes due on retail sales of third-party Merchant products on the Marketplace.[3]

Amazon Services is registered in South Carolina as a "retailer" for the purposes of the South Carolina Sales and Use Tax Act. Besides Amazon Services, two other subsidiaries of Amazon.com, Inc., are also involved in the transactions at issue: Amazon Payments, Inc. (Amazon Payments) and Amazon Fulfillment Services, LLC (Amazon Fulfillment). Amazon Payments processes payments for products listed for sale on Amazon.com.[4] Amazon Fulfillment offers fulfillment services to Merchants (storage, packing, shipping, and delivery).

Approximately fifty percent of the transactions that take place on the Marketplace are sales involving Merchant products. There are approximately 2.5 million active Merchants listing products on the Marketplace. Merchants include both individuals and large corporations. Merchants do not necessarily list their products exclusively on the Marketplace; many Merchants list their products on their own websites, on other online marketplaces, or sell their products in brick and mortar stores.

Relationship Between Amazon Services and Merchants

To use the Marketplace, Merchants must create an online seller account with Amazon Services through an online portal called "Seller Central" and pay Amazon Services various fees. The Marketplace provides Merchants with tools and services to help them list, advertise, and

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[2] These affiliates include Amazon.com LLC, AmazonFresh LLC, Fabric.com, Woot, Inc., Zappos Retail, Inc., 6pm.com, LLC, Amazon Web Services, Inc., Quidsi Retail LLC, IMDb.com, BOP LLC, Warehouse Deals LLC, and Amazon Digital Services LLC.

[3] Sales and use taxes for Affiliate sales on the Marketplace are not at issue in this case because Amazon Services already collects tax for its Affiliates.

[4] Amazon Payments, Inc., is a subsidiary of Amazon.com, Inc. Amazon Services and Amazon Payments have a "Payment Processing Services Agreement" that governs Amazon Payments' collection and processing of payments from customers on the Marketplace. Under this agreement, Amazon Payments "act[s] on [Amazon Services'] behalf solely as a limited agent for the collection, processing and holding of funds in [Amazon Services'] Account." Amazon Services remains the owner of all funds processed by Amazon Payments and Amazon Payments remits the funds to Amazon Services minus any fees charged for its services.

market their products. To create an account, a Merchant must agree to the Amazon Services Business Solutions Agreement (BSA), which is the governing contract between the Merchant, Amazon Services, and several Amazon entities.[5] The BSA may be modified at any time by Amazon. Any modifications are deemed accepted by a Merchant simply by the Merchant continuing to list products on the Marketplace after notice of the modification. Merchants do not have the option of altering the terms of the BSA.

For Merchants whose "Elected Country" is the United States, Amazon Services is the contracting party for the following services: Selling on Amazon, Fulfillment by Amazon, Amazon Webstore, and Amazon Clicks. The contracting party for "Transaction Processing Services," is Amazon Payments.[6] The BSA contains general provisions covering the relationship between Amazon Services and Merchants, as well as more specific provisions governing particular parts of Amazon Services' sales platform, including "Selling on Amazon," "Fulfillment by Amazon," "Amazon Clicks," and "Transaction Processing."

The BSA provides that, except for Amazon Payments' limited role as a payment processing agent, the relationship between Amazon Services and Merchants is that of independent contractors and "nothing in this Agreement will create any partnership, joint venture, agency, franchise, sales representative, or employment relationship between us."[7] In addition, the BSA includes many restrictions on how Merchants can conduct business on the Marketplace. For example:

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[5] Interestingly, Mr. Revich, who is a Merchant on the Marketplace, testified he did not know that he was subject to the BSA when he and/or his company signed up for a Seller Central account. He said he never needed to read the BSA. He also testified he did not know about Amazon Services' published procedures and requirements for Merchants offering products on the Marketplace.

[6] If the Merchant registered for or used Amazon Payments prior to June 30, 2014, "then Amazon Services may in its discretion perform the Transaction Processing Services." However, there was no evidence in this case that Amazon Services exercised that option regarding any of the transactions at issue.

Furthermore, there has been some discussion in this case whether the Department improperly conflated Amazon Services with Amazon Payments and Amazon Fulfillment when it only named Amazon Services as the party responsible for tax in this case. However, based on the BSA, Amazon Services is the contracting party for Merchants whose elected country is the United States except Amazon Payments is an additional contracting party in some circumstances. As this Court noted in footnote 4, *supra*, Amazon Payments is an agent of Amazon Services for processing payments and routing the funds from the customer to Amazon Services. Therefore, Amazon Payments is acting on behalf of Amazon Services in these transactions. Accordingly, I find Amazon Services is the Amazon entity that is ultimately in charge of the transactions at issue.

[7] This language does not absolve Amazon Services of the responsibilities of a seller. Rather, it is a factor to consider when evaluating the true nature of the transactions at issue.

- Merchants agree not to contact a customer who ordered a product with the intent to collect any amounts in connection therewith or influence the customer to engage in an alternate transaction;
- Merchants agree not to target any communications of any kind on the basis of the intended recipient being an Amazon Site user;
- Merchants agree to only use tools and methods Amazon Services designates for communications with Amazon Site users regarding transactions;
- Merchants agree Amazon Services will enable Merchants to list products, conduct merchandising and promote products "as permitted by us";
- Merchants agree Amazon Services may use mechanisms to rate Merchants or allow customer ratings and feedback to be publicly available;
- Merchants agree Amazon Services will provide order information to Merchants;
- Merchants agree that if they are not enrolled in the order fulfilment program, they will set their own shipping and handling charges "subject to" Amazon Services' "program policies and standard functionality (including any category-based shipping and handling charges we determine) and when Amazon Services determines the shipping and handling charges, Merchants will accept them as payment in full for their shipping and handling;
- Merchants agree Amazon Services may, in its sole discretion, withhold for investigation, refuse to process, restrict shipping destinations for, or stop and/or cancel any Merchant transactions;
- Merchants agree to stop any transaction when Amazon Services requests them to do so and they agree to refund a customer in accordance with Amazon's policy when a customer has been charged for an order that Amazon Services stopped or cancelled;
- Merchants agree to "accept and process cancellations, returns, refunds and adjustments in accordance with [the BSA] and the Amazon Refund Policies for the applicable Amazon Site published at the time of the applicable order, and we may inform customers that these policies apply to" Merchant products.

Although these restrictions do not individually establish that Amazon Services is the seller or in the business of selling Merchant products, together they reflect Amazon Services' extensive level of control over transactions on the Marketplace.

Offering a Product on the Marketplace from the Merchant Perspective

Listing a Product

Once a Merchant creates an account, the Merchant can add products to be sold on the Marketplace. At this stage, Merchants set the product price, elect how many units (inventory) will

be available to be sold, determine how the product will be fulfilled, and choose from a variety of advertising campaigns. Although Merchants are ostensibly free to determine the price of their products, they agree in the BSA that the price (including shipping and handling charges, and discount, rebate, or "low price guarantee") must be as "favorable" as the price at which the Merchant offers the product through other sales channels.[8] Once the Merchant uploads the minimum product-specific details, the offer can be published on the Marketplace.

An important aspect of the sale of products on the Marketplace is the "Buy Box." When a customer searches for a product, one Affiliate or Merchant is featured in the Buy Box so that if a customer elects to click the "Buy Now" button, the customer will buy from this default, featured Merchant or Affiliate. Whether a Merchant or Affiliate product is featured in the Buy Box is determined by Amazon Services' algorithm. Although Amazon Services offers a guide to Merchants advising them how to "win" the Buy Box, it does not disclose the functionality of the algorithm to Merchants nor was it disclosed to the Court.[9] Therefore, the Court cannot determine if it is neutral or has inherent biases. Nevertheless, it is clear the Buy Box significantly impacts the sale of products on the Marketplace.[10] It appears analogous to product placement in retail stores.

Communicating with Customers

Amazon Services prohibits Merchants from contacting customers in a manner they do not specifically provide and approve. This limited communication arrangement is by design pursuant to the BSA, which provides that Amazon Services handles all communications related to order confirmation, cancellation confirmations, and notices of auto-renewal for certain programs regardless of whether the Merchant uses the FBA program or not. Thus, once a customer purchases a product on the Marketplace, it is Amazon Services, and Amazon Services only, that sends the

[8] Indeed, if Amazon Services discovers a product is not "in parity" with other sales channels, Merchants agree that if they do not lower the price to be in parity within twenty-four hours then Amazon Services can lower the price to match the more favorable offer. Moreover, if Amazon Services so requests, Merchants agree to reimburse customers adversely affected by the price that was not in parity with other sales channels.

[9] The evidence presented indicates the algorithm takes into account factors like price, the amount of product in stock, the Merchant's customer rating, and the speed of delivery, and puts the "best" offer forward. However, the algorithm is proprietary and how these factors are weighted and meshed together is not known to the Court.

[10] The witness that Amazon presented to "methodically" explain the sale of Merchant products on the Marketplace testified that though the data as to the percentage of customers who purchase from the Buy Box is known by Amazon Services, he had not seen the report. He eventually stated that his "instinct" was that sales attributable to the Buy Box are greater than fifty percent. This figure should have been readily available from a credible witness.

customer an order confirmation via email. Customers typically receive only one Amazon.com order number and one invoice from Amazon Services for a transaction, regardless of the number of items purchased in the transaction and the number of Merchants involved. Communications notifying customers that an order has been received or shipped also come from Amazon Services, not Merchants.

Communication between Merchants and customers must be made using a feature on the Marketplace called the "Buyer-Seller Messaging Service" or through a direct phone call to the Merchant. The "Buyer-Seller Messaging Service" connects customers to Merchants through the Merchant's business or personal email address that is connected to their Seller Central account. However, communication between customers and Merchants is not required to complete transactions on the Marketplace. Therefore, a customer on the Marketplace can purchase a Merchant product without ever interacting with the Merchant. Amazon Services did not dispute this fact or explain the regularity of its occurrence.

Purchase and Delivery

Customers can purchase multiple products from different Merchants and Affiliates one at time or at the same time. When customers are ready to buy the product(s) in their Amazon Cart, they click the "Proceed to Checkout" button and are directed to Amazon's Checkout page where they input their shipping address and payment method (or confirm a previously entered shipping address and payment method associated with the account). The customer also selects a shipping or delivery option (if more than one option is available).

Once a customer purchases a Merchant product, the order is shipped to the customer in one of two ways. First, the Merchant can ship the product itself. In this case, Amazon Services provides the Merchant with the customer's shipping information after the purchase is completed and the Merchant ships the product to the customer subject to Amazon Services' "Program Policies and standard functionality." These "Program Policies" set shipping and handling charges for certain types of products, and Merchants are required to accept these pre-determined charges as payment in full for shipping and handling even if it actually costs a Merchant more to ship that particular product.[11]

[11] Amazon Services provides Merchants with a "standard shipping credit" when an order is shipped. A Merchant "must ship orders even if the shipping credit is less than your total shipping costs" and can off-set any difference by adjusting shipping costs or the price of his product.

Second, Merchants can, for an additional fee, use Amazon Fulfillment's Fulfillment By Amazon (FBA) program to pack and ship their products. To utilize this service, Merchants must ship their products to an Amazon fulfillment center for storage. Amazon Fulfillment can comingle products and move them between fulfillment centers but keeps track of the products in its warehouses with bar codes. Merchants can remove their products from a fulfillment center at any time, and they remain the owners of the products they store at Amazon fulfillment centers. If there is an issue related to packaging, handling, shipping, or a customer return of a product in the FBA program, then Amazon Services handles the customer service for that product.

Payment

Customers cannot make payments directly to Merchants, and Amazon Services expressly prohibits Merchants from requesting payment from customers. Rather, when a purchase is made, it must be made directly through Amazon Services' website. Customers input their payment information directly into the Amazon.com website—there is no pop-up window or other action directing customers to another website operated by someone else. Therefore, Amazon Services conducts the point of sale[12] for any product sold on the Marketplace.

When a product is purchased on the Marketplace, Amazon Payments obtains pre-authorization from the customer's credit card company to ensure funds are available to complete the purchase.[13] When asked whether a hold is placed on the card's available funds, Amazon Services' witness testified that some type of hold "may" be placed on a customer's card between the order being placed and shipment. I thus find that credit card companies place a hold on the available credit of Marketplace customers for some period of time.[14] Once a product is shipped, either by the Merchant or the FBA program, Amazon Payments completes the charge to the customer's credit card.

Amazon Services and Amazon Payments' actions during a transaction are governed by the BSA. In signing the BSA, Merchants authorize Amazon Payments to act as the Merchant's agent "for the purposes of processing payments, refunds and adjustments for Your Transactions,

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[12] The Court will address the phrase "point of sale" more fully *infra*.

[13] Furthermore, Amazon Services also accepts debit cards, U.S.-based checking accounts, "Amazon Store Cards," and Amazon gift cards. It is unclear whether these instruments are immediately charged or not.

[14] Amazon Services' witness should have been aware of how the process works. This finding is therefore based upon an evaluation of the witness's credibility, Petitioner's burden of proof, and common sense.

receiving and holding Sales Proceeds on your behalf, remitting Sales Proceeds to Your Bank Account, charging your Credit Card, and paying Amazon and its Affiliates amounts you owe in accordance with this Agreement or other agreements you may have with Amazon Affiliates." Merchants further agree Amazon Services will receive all sales proceeds on behalf of the Merchant "and [Amazon Services] will have the exclusive rights to do so."

Customer Service

If a customer has an issue with a Merchant product, Merchants are required to accept and process cancellations, returns, and refunds in accordance with the BSA and the applicable Amazon Refund Policies. Amazon Services informs customers that the Amazon Refund Policies apply to Merchant products. If a refund is requested, then Merchants agree Amazon Services "will process all payments, refunds and adjustments for Your Transaction." In other words, all refunds are routed through Amazon Services. Where fraud is suspected, Amazon Services bears the risk of credit card fraud, but Merchants bear the risk of all other fraud and loss. The BSA authorizes Amazon Services to "in [its] sole discretion withhold for investigation, refuse to process, restrict shipping destinations for, stop and/or cancel any [Merchant] Transactions." Additionally, Merchants agree to "stop or cancel order of [Merchant] Products if [Amazon Services]" so requests.

Receipt of Funds

Amazon Services controls the flow of funds between customers, Amazon Services, and Merchants. Amazon Services receives customer payments for Merchant products and then remits the proceeds to Merchants on a bi-weekly basis or more frequently at Amazon Services' option.[15] The proceeds are held in an Amazon Services' account and may be combined with other funds or other users, invested, or otherwise used as permitted by law before disbursement to Merchants. Merchants do not receive interest on any sales proceeds held on their behalf. Furthermore, Amazon Services deducts its fees, including the Referral Fee, the Variable Closing Fee (if applicable), the Selling on Amazon Subscription Fee ($39.99/month), and any other applicable

[15] The BSA provides that Merchants "will not have the ability to initiate or cause payments to be remitted to you." However, Amazon Services provided testimony that even though the BSA prohibits Merchants from requesting disbursement of their funds sooner than the fourteen-day period, they often do, and Amazon Services will remit the funds sooner. Amazon Services also provided testimony that it typically takes a couple days for a customer's funds to become available, and then a Merchant can request those funds from Amazon Services. I find Amazon Services ultimately controls when funds are disbursed.

fees owed to Amazon Services before remitting any proceeds to Merchants. Additionally, all customer refunds must be routed through Amazon Services, including refunds resulting from orders that are cancelled at the direction of Amazon Services. Thus, Amazon Services maintains control over the flow of funds from the sale of Merchant products and controls the flow of funds if a transaction unwinds as well.

Referral Fees

Amazon Services charges a Referral Fee for each Merchant product sold. The BSA describes the Referral Fee as "the applicable fee ***based on the Sales Proceeds*** from Your Transaction through the applicable Amazon Site . . . ***based on the categorization*** by Amazon of the type of product that is the subject of Your Transaction . . . ." Amazon Services' witness described the Referral Fee as "a percentage fee of the product charges which varies by category" that is charged for "all the services Amazon Services offers like listing a product, the ability to upload images and so on." In sum, Referral Fees are charged by product category and are based, in part, on the expected gross margin of the product. The fee ranges from a minimum Referral Fee of $1.00 to 45% of the total sales price for Amazon Device Accessories. If a customer requests a refund, Amazon Services will refund the Referral Fee to the Merchant minus a "refund administration fee," which is the lesser of 20% of the product's value or $5.00.

Taxes

Although Amazon Services issues 1099-Ks to Merchants who sell more than $20,000 worth of product within a year, Amazon Services only collects sales tax when it is obligated to by state law. Although no person or entity other than Amazon Services interfaces with customers during Marketplace transactions, the BSA requires Merchants to agree to be responsible for the collection, reporting, and payment of all taxes. However, Amazon Services will collect sales tax if a Merchant elects to pay for Amazon Services' tax collection service, but **only if** the merchant is a Professional Seller or Webstore Seller, not an Individual Seller. Therefore, Amazon Services' Marketplace platform and sales model precludes Individual Sellers from having the opportunity or means to collect taxes at the point of sale.

Additionally, if a Merchant subscribes to Amazon Services' tax collection service, then Amazon Services charges the customer the sales tax and remits that amount back to the Merchant. Accordingly, Amazon Services merely collects "the value of the sales tax." Therefore, Amazon

Services collects the sales tax due at the point of sale but places the responsibility upon the Merchant to disburse the sales tax to the relevant state.

Amazon Services' Example of a Merchant's Experience

Amazon Services presented the testimony of one Merchant, Matthew Revich of Yedi Houseware Appliances (Yedi), who utilizes the Marketplace to sell his Yedi products. Amazon Services appeared to offer Mr. Revich's testimony as an example of how all Merchants operate and interact with customers on the Marketplace. At the outset, the Court does not find that one Merchant's perspective establishes the perspective of all 2.5 million Merchants on the Marketplace. In fact, Mr. Revich had only compared his experiences with three other Amazon Merchants. Additionally, the Court did not find Mr. Revich's testimony very probative or compelling considering he was unaware of many details about how his own business is run, including how his inventory is tracked, who his employees are (despite being a very small company), and what fees he is charged. Although Mr. Revich believes he is the seller of Yedi's products on the Marketplace, Mr. Revich testified he was not familiar with how Amazon Services' Referral Fee is charged, and he was unaware of the Amazon Services' policies and guidelines or where to find them. He had never read the BSA.

Nevertheless, Mr. Revich's testimony offered an interesting correlation between what Amazon Services claims to be evidence showing Merchants are retail sellers and what this Court finds to be evidence showing Mr. Revich functions like a wholesale distributer. When Mr. Revich is interested in selling a product, he researches what products he believes are marketable and then contacts his source, "Vinnie," in Hong Kong to find factories in China that can manufacture the product. He tests the prototypes of the manufacturer, and then selects and determines the specifications of what he wishes to have manufactured. Once the product is manufactured, the product is sent to his warehouse in California. While I agree this testimony reflects Yedi controls the manufacturing of its products, that control does not reflect who is the ultimate seller of Yedi products.

Mr. Revich sells products through the Marketplace, Walmart's website, his own website, mom-and-pop shops, and supermarket chains. The sale of his products via mom-and-pop shops and supermarket chains are clearly as a wholesaler to brick-and-mortar stores, yet the product development is the same regardless of whether the product is sold to the brick-and-mortar store (wholesale) or sold on the Marketplace (retail). Thus, Yedi's control over product development is

not dispositive of whether Yedi, or by implication any other Merchant, is a retail seller as opposed to a wholesale seller.

Furthermore, Yedi provides the same customer services whether the product is sold on the Marketplace or to a brick-and-mortar retail store. Specifically, Mr. Revich provides customer service to address, for example:

- why the product did not come with the waffle plates,
- missing gloves from pressure cookers, and
- whether the product can be returned.

All Yedi products are sold with a product manual providing Yedi's e-mail address so that purchasers of its products can contact Yedi about product concerns and warranty claims. In other words, Yedi offers similar customer service no matter how the product is sold—at wholesale or at retail. Therefore, this evidence does not reflect that the customer service Merchants offer to Amazon customers is distinct from the customer support a wholesale seller would offer to a retail purchaser at a brick-and-mortar store.

Finally, Mr. Revich remits sales taxes to the state of California because his warehouse and business office are located there, but he does not know who should pay sales tax on products he currently sells to South Carolina customers. He does not currently pay sales tax to South Carolina. He further testified he does not know whether he should be paying sales tax on his products sold in South Carolina.

Buying a Product on the Marketplace from a Customer's Perspective

Finding a Product

No testimony was presented from an actual Marketplace customer; however, Amazon Services' executive, Mr. Poad, explained what he believes to be a typical customer purchase of a Merchant product.[16] He testified that a customer typically begins the process by searching for a product on the Marketplace (Amazon.com). Once the customer selects a product from the search results, the customer is taken to the Product Detail Page to see an image of the product, its description, and customer reviews. The Product Detail Page also has a link to purchase the product from the default offeror (the winner of the Buy Box) or the customer can click on a link lower

[16] Although I set forth some of Mr. Poad's observations, I do not find they are representative of a typical purchase on the Marketplace because his testimony was not supported by statistical data and is ultimately conjecture of how a typical purchase from the 2.5 million individual active Merchants would occur.

down on the right side of the page to see other sellers of the product. The name of the offeror whose product is in the Buy Box is visible, but not prominent underneath the "Buy Now" button. The link to other sellers is even less prominent. Unless a customer intentionally seeks out other sellers, the customer will probably purchase the product from the default offeror who won the Buy Box.[17]

If the customer clicks on the link to the other sellers, she will see all the Merchants and Affiliates on the Marketplace who offer the product. Although Mr. Poad testified most customers visit the "offer listing page," his opinion was not supported by data. The Court is thus left to speculate what his characterization of "most" means; in particular, whether "most" means the customer visits the page only once in conjunction with hundreds of purchases or visits the page for each and every purchase. Thus, the Court did not find this evidence particularly probative. In fact, if most customers visit the "offer listing page," it is equally clear the remaining number of customers, who do not meet the witness's characterization of "most," never consult the "offer listing page."

Purchasing a Product

Once the customer determines to purchase a Merchant product, the customer can click the "Buy Now" button or put the product in the customer's shopping "Cart" to purchase later. All purchases on the Marketplace go through the customer's Amazon.com account even if the customer has multiple products in their Cart from different Merchants. Once the customer clicks "Proceed to Checkout," the customer enters her shipping address and payment method using Amazon Services' functionality. Then, without leaving that page, Amazon Payments (operating in the background) processes the customer's payment.[18]

On the Checkout page, Amazon Services provides an "Order Summary," which identifies the total cost of the product(s), shipping and handling, and estimated tax to be collected (if any). No fees or per-transaction costs are listed on the Order Summary. Once the purchase is complete, Amazon Services sends the customer an Order Confirmation email along with an Amazon.com

[17] Surprisingly, Amazon Services' witness was unable to testify with any confidence about the percentage of sales that result from the customer clicking on the Buy Box product although this would seem to be an important figure for the company to know.

[18] As discussed *supra*, Amazon Payments conducts a "pre-authorization" confirming the customer's card has available funds immediately after the order is placed, but the customer's card is not actually charged until shipping is confirmed.

order number. The confirmation states, "Thank you for shopping with us," and is signed by "Amazon.com." Amazon Services also sends the customer a Shipping Confirmation email, at which point the customer's credit card is officially charged. The Merchant is not mentioned on either email.[19]

Although the BSA provides that Merchants "are always the seller of record," the evidence indicated Amazon Services' name or one of its Affiliates' names is the name that appears on the customer's credit card statement. Specifically, as explained by Mr. Poad, the charge on the customer's credit card statement usually reflects the charging entity to be Amazon or Amazon Marketplace in the field descriptor.

Customer Service Issues and the "A to Z Guarantee"

If, after receiving the product, the customer has questions about how to use it or is missing a part, the customer can seek answers through Amazon's Buyer-Seller Messaging service or call the Merchant for customer service.[20] However, if a dispute arises between the customer and the Merchant that cannot be resolved, Amazon Services will "make the customer whole" through its "A to Z Guarantee" program. In other words, Amazon Services guarantees purchases from "third-party sellers" made via the Marketplace to ensure customers "buy with confidence." Specifically, Amazon Services guarantees the condition of the product and its timely delivery under this program. Amazon Services will also reimburse customers who do not receive an agreed upon refund from a Merchant or who were charged more than the customer authorized for the purchase. Customers can receive up to $2,500 of the purchase price, including shipping charges.

The Department's Administrative Policy

The Court finds the Department has no longstanding administrative policy regarding the taxation of online marketplace facilitators like Amazon Services. The Court's determination is based upon the Department's own admission to this effect at the hearing and the testimony of its former Appeals Administrator, Ricky Taylor, who opined the Department did not have a longstanding policy as of 2016 with respect to how to apply sales tax law to products sold by

[19] However, if the customer clicks on the link to the order number or "Manage My Order," they will see a page that identifies the Merchant as the seller.

[20] As previously noted, Amazon Services did not explain how this customer service is distinct from the customer service a customer would receive from a manufacturer of a product sold at a brick-and-mortar store.

Merchants on Amazon.com. Indeed, there was no evidence presented that the Department ever held a position on the taxation of marketplace facilitators until this case arose in 2016.

Amazon Services also sought to introduce evidence of the Department's position regarding taxing third-party sales in various legislative settings after the Determination was issued. For example, Amazon Services cites to a document of the Legislative Oversight Committee of the South Carolina House of Representatives dated October 23, 2018, that recommends amending existing legislation to add a provision taxing marketplace facilitators. A specific phrase in the recommendation states, "[w]ithout this ability [to collect tax from marketplace facilitators], DOR would have the right to collect sales tax directly from some third-party sellers, but it predicts that the significant administrative burden of collecting from so many individuals and companies would result in a large percentage of these taxes going uncollected."

The Court allowed this evidence to be entered into the Record to the extent it might be probative. However, this evidence has little probative value because the Court has already determined the Department is not entitled to deference and, therefore, there is no need to impeach their interpretation. Moreover, this is a *de novo* hearing where it is the Court's province to determine whether Amazon Services is liable under the Sales and Use Tax regardless of what position(s) the Department may have taken in the context of legislative hearings after the Determination was issued. Accordingly, the Court does not find the Department's statements in legislative proceedings after the Determination was issued persuasive to this Court's charge to interpret and apply the law in this case.

ISSUES

1. Whether the Department erred in assessing Amazon Services for sales and use tax on the sale of third-party Merchant products on its Marketplace.
2. Whether the Department's imposition of the sales and use tax on Amazon Services violates Amazon Services' due process rights.
3. Whether the Department's imposition of the sales and use tax on Amazon Services violates Amazon Services' right to equal protection under the law.

STANDARD OF REVIEW

This Court has subject matter jurisdiction in this case pursuant to section 1-23-600(A) of the South Carolina Code (Supp. 2018) and section 12-60-460 of the South Carolina Code (2014). This is a contested case, and it is heard *de novo*. *Be Mi, Inc. v. S.C. Dep't of Revenue*, 408 S.C.

290, 297, 758 S.E.2d 737, 740 (Ct. App. 2014) ("In reaching a decision in a contested violation matter, the ALC serves as the sole finder of fact in the de novo contested case proceeding." (citation omitted)); *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002) (explaining that a contested case before the ALC is "in the nature of a de novo hearing with the presentation of evidence and testimony"). The standard of review is thus a preponderance of the evidence. S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2018); *see also Anonymous (M-156-90) v. State Bd. Of Med. Exam'rs*, 329 S.C. 371, 375-78, 496 S.E.2d 17, 19-20 (1998) ("Absent an allegation of fraud or a statu[t]e or a court rule requiring a higher standard, the standard of proof in administrative hearings is generally a preponderance of the evidence."). Because Amazon Services is challenging a Department Determination, Amazon Services has the burden of proof to show by a preponderance of the evidence that the Department's Determination was incorrect. *Leventis v. Dep't of Health and Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that generally, the complaining party bears the burden of proof).

CONCLUSIONS OF LAW

Statutory Construction of Tax Laws

To the extent the Court must engage in statutory construction to resolve this case, the primary goal is to discern the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); *see also Multi-Cinema, Ltd. v. S.C. Tax Comm'n*, 292 S.C. 411, 413, 357 S.E.2d 6, 7 (1987) ("The usual rules of statutory construction apply to the interpretation of tax statutes.").

"The first question of statutory interpretation is whether the statute's meaning is clear on its face." *Wade v. Berkeley Cty.*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581.

In the context of tax statutes, our Supreme Court has held that "where the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor." *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012). The Supreme Court's decision in *Alltel* reflects our courts' long-

standing precedent that "any *substantial doubt* must be resolved against the state and in favor of the taxpayer." *Edisto Fleets, Inc. v. S.C. Tax Commission*, 256 S.C. 350, 357, 182 S.E.2d 713, 716 (1971) (Bussey, J., dissenting) (emphasis added); *Rent-A-Ctr. E., Inc. v. S.C. Dep't of Revenue*, 425 S.C. 582, 587, 824 S.E.2d 217, 220 (Ct. App. 2019), *reh'g denied* (Mar. 21, 2019) ("[A]ny substantial doubt in the application of a tax statute must be resolved in favor of the taxpayer.").

But what is "substantial doubt"? In *Alltel*, the Supreme Court held "[t]he presence of an ambiguity in a tax assessment statute requires that a court resolve that doubt in favor of the taxpayer." 399 S.C. at 316, 731 S.E.2d at 870. Thus, the Supreme Court associated "substantial doubt" with "ambiguity."[21] Further, something is ambiguous if it is "susceptible to two reasonable interpretations." *S.C. Dep't of Soc. Servs. v. Lisa C.*, 380 S.C. 406, 416, 669 S.E.2d 647, 652 (Ct. App. 2008); *see also Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001) ("[S]ince the plain language of the statute lends itself to two equally logical interpretations, this Court must apply the rules of statutory interpretation to resolve the ambiguity and to discover the intent of the General Assembly."). Therefore, a taxpayer is entitled to have an "ambiguity" or "substantial doubt" resolved in his favor if the statute is susceptible to two ***reasonable*** interpretations.

Further, whether a certain interpretation is reasonable is not made in a vacuum; rather, the Sales and Use Tax Act is construed in light of "the purpose of the whole statute" and "the policy of the law." *Enos v. Doe*, 380 S.C. 295, 305, 669 S.E.2d 619, 623 (Ct. App. 2008). Indeed, our Supreme Court's decision in *Crescent Manufacturing Co. v. Tax Commission* stands for the principle that even if a single statute is ambiguous as applied to a taxpayer, if that ambiguity is resolved by the overall legislative purpose evidenced by the tax scheme as a whole, then the taxpayer is not entitled to have the statute construed in his favor. 129 S.C. 480, __, 124 S.E. 761, 765 (1924) ("That rule of strict construction of . . . tax statutes is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose, and does not prevent the courts from calling to their aid all the other rules of construction and giving each its appropriate scope, etc." (internal quotation marks and citations omitted)).[22]

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[21] Equivocating substantial doubt to ambiguity is further supported by the Supreme Court's conclusion in *Alltel* that "[t]he existence of an ambiguity in section 12–20–100 raises substantial doubt regarding the section's application to Petitioners" and "[t]his doubt must be resolved in favor of Petitioners." *Id.* at 321, 731 S.E.2d at 873.

[22] Another facet of statutory construction in administrative law is agency construction. If a statute is ambiguous, the long-standing interpretation of the statute by the agency tasked with administering it is entitled to deference if the interpretation is not arbitrary, capricious, or manifestly contrary to the statute. *See Kiawah Dev. Partners, II v. S.C.*

Finally, there is yet one more distinction that must be made in this case. The fact that there is a disagreement about the application of a tax statute to the facts does not mean that the tax statute itself is ambiguous. It is the province of this Court to make findings of fact, and facts may clarify the application of the law. *See Brown*, 348 S.C. at 512, 560 S.E.2d at 413 (explaining that a contested case before the ALC is "in the nature of a de novo hearing with the presentation of evidence and testimony"). This point is most salient in this case because, before the Court can find Amazon's interpretation of the tax laws is reasonable, it must first agree with Amazon's view of the facts.

Legislative Documents

Amazon Services argues certain statements made by the Department in legislative documents after the Determination constitute admissions by the Department that the Sales and Use Tax Act is ambiguous as applied to Amazon Services, and the ambiguity should be construed in its favor. Specifically, Amazon Services argues statements, primarily made by the Department's Director at legislative proceedings (which were held after the Department issued its Determination in this case), show the Department does not believe it can tax marketplace facilitators without new legislation.

A change in the Department's position does not inherently show ambiguity in the statute or its application. This Court has witnessed state agencies change their position numerous times, sometimes as the result of the change in directors, sometimes for other reasons.[23] Although the Department's position may change, therefore diminishing the worthiness of its interpretation in a deference analysis, the law remains the same. Furthermore, no matter what position the Department may espouse, it cannot circumvent the obligations imposed upon it by the General Assembly. *See TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 627, 503 S.E.2d 471, 480

Dep't of Health & Envtl. Control, 411 S.C. 16, 34–35, 766 S.E.2d 707, 718 (2014) (holding "where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons" and "[w]e defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute'"); *Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950) ("We have held in many cases that where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons."). In this case, the Department admitted it has no-longstanding interpretation of the Sales and Use Tax Act as applied to third-party sellers or marketplace facilitators in an online marketplace. Therefore, the Court finds the Department has no long-standing interpretation that is entitled to deference in this case.

[23] Indeed, Amazon Services' own expert witness confirmed that different Directors present different viewpoints concerning the law.

(1998) (holding that the "Department does not have the authority to waive the application deadline and annual determination requirements" set forth in the statute). Therefore, the Court finds the Department's statements in the legislative context after the Determination was issued do not render the Sales and Use Tax Act ambiguous because it is the Court's province to interpret the law and establish ambiguity, not the Department's. *See Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) ("Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below."); *see also Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995) ("An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose.").

Novelty of Amazon Services' Business Model

Amazon Services also argues that its self-proclaimed function as a "marketplace facilitator" precludes it from being a seller under Sales and Use Tax Act because "marketplace facilitators" are not named in the Act. All parties agree that at the time of the tax audit, no specific statutory provision imposed the responsibility to collect sales or use tax on a "marketplace facilitator" when a product is sold on the facilitator's online marketplace.[24] However, even though

[24] At the time this case arose in 2016, the Sales and Use Tax Act contained no reference to businesses, such as Amazon Services', that style themselves as "marketplace facilitators." During this case, Amazon Services sought to introduce evidence of pending legislation regarding marketplace facilitators to show the Act was ambiguous because it required an amendment to incorporate marketplace facilitators into the tax scheme. The Court explained at the merits hearing that it was not comfortable relying on pending legislation as a tool of statutory construction. *See CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 80-81, 716 S.E.2d 877, 884 (2011) (holding failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute" and "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change"). Since the merits hearing in this case, the General Assembly passed legislation amending the Sales and Use Tax Act to specifically add marketplace facilitators to the statutory scheme. *See* 2019 S.C. Acts No. 21 (effective April 26, 2019).

Generally, "[w]hen a statute is amended, there is a presumption that the legislature intended to change the existing law." *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008). "Nonetheless, a subsequent statutory amendment may also be interpreted as clarifying original legislative intent." *Id.* Sometimes the General Assembly will indicate whether it intended an amendment to clarify its original intent in the enacting legislation, as the Court recognized in *Duvall*. *See id.* at 47, 659 S.E.2d at 130 ("Given that the title of the Act itself indicates the amendment was a clarification of, rather than a change to, the law, we find a remand to the ALC is unnecessary."); *see also Hock RH, LLC v. S.C. Dep't of Revenue*, 423 S.C. 208, 215, 813 S.E.2d 540, 544 (Ct. App. 2018) (noting "Act 208 is titled, 'An act to amend section 59-40-140 . . . so as to clarify that property of charter schools exempt from such taxation includes owned or leased property'" and finding "by its own words, the General Assembly's stated purpose for the 2014 amendment was to clarify rather than broaden the exemption already afforded"). It may also be appropriate to look to the enacting legislation to determine legislative intent. *Hock RH, LLC*, 423 S.C. at 214, 813 S.E.2d at 543 ("It is [also] 'proper to consider the title or caption of an act in aid of construction to show the intent of the legislature.'" (citation omitted)).

Here, when the General Assembly amended the Sales and Use Tax Act to include a definition for, and references to, "marketplace facilitator," it specifically stated in the enacting legislation that "this act shall not be construed as a statement concerning the applicability of the South Carolina Sales and Use Tax Act to any sales and use tax liability

Amazon Services' business model is new and not specifically referenced in the Act, the novelty of its business model does not mean the application of the Act to Amazon Services is necessarily ambiguous such that it requires a resolution in Amazon Services' favor.

Specifically, "[w]hile every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (emphasis in the original); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 86 (2012) ("The meaning of rules is constant . . . [o]nly their application to new situations presents a novelty."). As Justice Scalia explained, "[d]rafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances that they could not possibly envision." SCALIA & GARNER at 86. Consistent with these principles, courts have routinely found changed circumstances and new technologies that were beyond the conception of the legislature at the time it enacted a statute are to be included within statutory definitions. *See Diocese of Trenton v. Toman*, 74 N.J. Eq. 702 (N.J. Ch. 1908) (deciding that an automobile is a carriage within the meaning of a covenant passed before the invention of automobiles and which reserved a strip of land for a "carriageway" forever); *Crispin v. Christian Audigier, Inc.*, 717 F.Supp.2d 965 (C.D. Cal. 2010) (holding that Facebook is an Electronic Communication Service under the Stored Communication Act, which is a statute that predated Facebook and the Internet); *State v. Espinoza*, 264 So.3d 1055, 1067 (3rd Fla. Dist. Ct. App. 2019) (finding that "[a]lthough Bitcoin did not exist at the time the registration requirements of chapter 560 were enacted, Bitcoin undoubtedly qualifies as a 'medium of exchange'").

Therefore, although the legislature may not have envisioned the facts of this case when it passed our tax laws, this does not mean the facts of this case do not fit within the existing laws.

General Sales and Use Tax Law

In this State, a "sales tax, equal to five percent of the gross proceeds of sales, is imposed upon

in matters currently in litigation or being audited." 2019 S.C. Acts No. 21 § 5 (effective April 26, 2019). This case was, and is, "currently in litigation" as the result of an audit. Therefore, consistent with the legislative intent expressed in the enacting legislation, the Court will interpret the Sales and Use Tax Act as it existed at the time this case arose without reference to the new legislation and without drawing any inferences from it.

- every person
- engaged or continuing within this State
- in the business of selling tangible personal property
- at retail."

S.C. Code Ann. § 12-36-910(A) (2014) (emphasis added). Section 12-36-910(A) clearly imposes the sales tax upon the ***person*** engaged in the ***business of selling*** tangible personal property at retail. Further, the term "business" is broadly defined to mean "***all activities***, with the object of gain, profit, benefit, or advantage, ***either direct or indirect***." S.C. Code Ann. § 12-36-20 (2014) (emphasis added). This broad application of who is engaged in the business of selling is also reflected in the definition of "retailer" or "seller," which includes, in relevant part, every person "selling or auctioning tangible personal property whether owned by the person **or others**." S.C. Code Ann. § 12-36-70(1)(a) (2014) (emphasis added). Therefore, reading the statutes as a whole, a person is "engaged in the business of selling" if the object of the activity is to achieve a profit, benefit, or advantage by either a direct or indirect means whether the property is owned by the person or others.

Next, the person who is taxed under section 12-36-910(A) must be engaged in "retail" sales. A "retail sale mean[s] all sales of tangible personal property except those defined as wholesale sales." S.C. Code Ann. § 12-36-110 (2014). Moreover, a "sale" or "purchase" is defined to mean:

> any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration ***including***:
>
> * * *
>
> (4) a transfer of title ***or*** possession, or both.

S.C. Code Ann. § 12-36-100 (2014) (emphasis added). Importantly, under section 12-36-100, a sale does not require the transfer of title ***and*** possession, nor is a sale limited to the transfer of title or the transfer of possession.

Although the tax is imposed upon the person in the business of selling, the seller may pass it onto, and collect it from, the purchaser. *See* S.C. Dep't of Revenue, South Carolina Sales and Use Tax Manual, Chap. 2, Pg. 2 (2015) ("The seller may pass the sales tax on to the purchaser when billing the purchaser, but while many sellers collect the sales tax from the purchaser, this is

not a requirement.").[25] The seller's failure to collect the sales tax from the purchaser does not relieve the seller of his obligation to remit the tax. *See* S.C. Code Ann. § 12-36-940(B) ("The inability, impracticability, refusal, or failure [of the retailer] to add these amounts [of sales tax] to the sales price and collect them from the purchaser does not relieve the taxpayer from the tax levied by this article."); *see also* S.C. Dep't of Revenue, South Carolina Sales and Use Tax Manual, Chap. 2, Pg. 2 (2015) ("However, the seller's inability, refusal or failure to collect the sales tax from the customer does not relieve the seller from remitting the sales tax to the State."); 85 C.J.S. *Taxation* § 2214 ("The seller has the duty to remit the sales tax to the appropriate administrative agency even if the seller does not collect the tax from the buyer at the time of sale.").

Additionally, the sales tax is calculated based upon the "gross proceeds of sales," which means "the value proceeding or accruing from the sale, lease, or rental of tangible personal property." S.C. Code Ann. § 12-36-90(1) (2014). "Gross proceeds" also includes "the proceeds from the sale of property sold on consignment by the taxpayer." *Id.* The inclusion of the proceeds from consignment sales is notable because our statutory scheme does not directly define or address consignment sales, yet the reference to consignment sales in section 12-36-90(1) makes it clear that our State recognizes them. Our Supreme Court has recognized consignment sales and has distinguished between a regular sale and a consignment sale as follows:

> There is hardly any conflict as to the law on the distinction between a sale and a consignment. The whole difficulty arises, as is usual, in applying the law to the particular facts of each case. It is, of course, of the greatest importance to determine the real character of every transaction, for if it is a sale, title to the property, with all its attendant advantages and responsibilities, passes; while if it is a consignment, title does not pass, being merely an agency for the purpose of the sale.

Greenwood Mfg. Co. v. Worley, 222 S.C. 156, 160–61, 71 S.E.2d 889, 891 (1952); *see also* Black's Law Dictionary 1364 (8th ed. 2004) (defining "consignment sale" to mean a "sale of an owner's property (such as clothing or furniture) by a third party entrusted to make the sale").

Recognizing consignees as sellers for the purpose of the Sales and Use Tax Act is consistent with the statutory definition of "seller," which includes persons selling or auctioning

[25] Indeed, for small sales (mostly under a dollar), our code includes a provision that a "retailer" may add a specific number of cents to the price of a product to reflect the tax, thus implying that a retailer has the power to set prices. S.C. Code Ann. § 12-36-940(A) ("Each retailer may add to the sales price as a result of the five percent state sales tax . . . ."). Also, it has been the Department's policy that the seller is not required to collect the sales tax from the purchaser and may absorb the tax themselves. *See* S.C. Dep't of Revenue, South Carolina Sales and Use Tax Manual, Chap. 2, Pg. 2 (2015) ("[T]he seller may advertise that the seller will absorb the sales tax and not collect it from the purchaser.").

tangible personal property of ***others***, which is what a consignee does. § 12-36-70(1)(a). And, indeed, the Department treats the retailer/consignee as the seller for the purposes of remitting sales tax. *See* S.C. Dep't of Revenue, South Carolina Sales and Use Tax Manual, Chap. 23, Pg. 19 (2015) ("The retailer selling the items on consignment is the person responsible for remitting the tax on the consignment sale.").

Finally, in considering when the tax is imposed, it is helpful to consider the complementing provision of the sales tax: the use tax. A use tax is "imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State, at the rate of five percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State." S.C. Code Ann. § 12-36-1310 (2014). The use tax must be collected by the seller "at the time of making the sales or, if the storage, use, or consumption is not then taxable, at the time the storage, use, or other consumption is taxable" and the seller must "give to the purchaser a receipt showing the amount subject to the tax and the amount of tax collected." S.C. Code Ann. § 12-36-1350(A).

Application of Tax Laws

The parties agree the transactions at issue are retail sales that are subject to tax. However, the parties disagree as to whom the tax is imposed. Amazon Services argues, in part, that it cannot be the seller of Merchant products (and therefore responsible for the tax) because it does not hold title to Merchant products and cannot transfer title. Thus, under Amazon Services' theory, Merchants are by default the sellers because they transfer title and/or possession in exchange for consideration, which constitutes a sale under section 12-36-100. Amazon Services thus takes the statutory definition of "sale" and makes two assumptions: (1) whoever transfers title or possession (or both) is the seller and (2) whoever receives the consideration is the seller. However, Amazon Services erroneously interprets a sale as requiring the transfer of title and/or possession when this is merely one type of sale defined under section 12-36-100.

The basic definition of a sale under § 12-36-100 only requires a ***transfer of tangible personal property for consideration***. § 12-36-100. Section 12-36-100's use of the word "including" after this basic definition of a sale signals that what follows is a non-exhaustive list of types of factual scenarios that would constitute sales under the basic definition, to *include* the transfer of title and/or possession. *See* Black's Law Dictionary 777 (8th ed. 2004) (explaining "[t]he participle *including* typically indicates a partial list"). Furthermore, section 12-36-70(1)(a)

dispels the notion that a seller must be the person who transfers title because a seller can clearly sell things to which he does not have title. This is also consistent with the concept of consignment sales. *See Greenwood Mfg. Co.*, 222 S.C. at 160–61, 71 S.E.2d at 891. A sale thus does not require the transfer of title ***and*** possession, nor is a sale limited to the transfer of title or the transfer of possession

The Supreme Court's decision in *Travelscape, LLC v. South Carolina Department of Revenue* also demonstrates the falsity of Amazon Services' argument. 391 S.C. 89, 705 S.E.2d 28 (2011). In *Travelscape*, the Supreme Court declined to hold hotels responsible for remitting sales tax on hotel rooms they transferred to customers where the online booking company was the party who initially accepted money in exchange for the right to occupy the hotel rooms. *Id.* Consequently, the person physically transferring the product (the hotel) was not deemed the seller. Similarly, *Travelscape* also establishes that the person (the hotel) who ***ultimately*** receives consideration in exchange for the transfer of a product is not necessarily the "seller" or "retailer" under the Sales and Use Tax Act (the online booking company). *See id.* Indeed, Amazon Services' theory that the seller is the person who receives consideration does not hold up in the context of a consignment sale where it is the consignee—the person who initially accepts the money for the product—who is responsible for the sales tax even though the consignee passes on the consideration to the consignor.

Therefore, while Amazon Services' assumptions may be factually true in many situations, they are assumptions and not legal rules Amazon Services can use to shield itself from tax liability. The Court thus must determine whether the object of Amazon Services' business activity is to achieve a profit, benefit, or advantage by either direct or indirect means from the sale of property owned by Amazon Services or others on its Marketplace. Here again, since the South Carolina Supreme Court's decision in *Travelscape* evaluated a case in which both the statutory scheme and the factual circumstances were very similar to the one here, it is highly relevant to this case. This Court turns to an analysis of this case in light of *Travelscape's* holding.

Application of *Travelscape*

In *Travelscape*, the Supreme Court upheld this Court's determination that Travelscape, an online travel company offering hotel reservations on Expedia.com, was responsible for remitting sales tax because it was "engaged or continuing within this State in the business of furnishing accommodations to transients for consideration." 391 S.C. 89, 705 S.E.2d 28 (2011); *see also*

§ 12-36-920(E). Travelscape facilitated the sale of third-party hotel rooms to the public at negotiated discounted rates on its website, Expedia.com. *Travelscape*, 391 S.C. at 95, 705 S.E.2d at 31. When a customer booked a room through Expedia.com, Travelscape would charge the customer the discounted room rate, a facilitation fee, a service fee, and a tax recovery charge.[26] *Id.* Travelscape would physically process the customer's payment and, after the customer checked out of the hotel, the hotel would invoice Travelscape for the room rate and the sales tax owed on the room. *Id.* Travelscape remitted the room rate and sales tax (tax recovery charge) to the hotel and retained the facilitation and service fees, upon which it did not remit taxes. *Id.* at 95-96, 705 S.E.2d at 31. During an audit of Travelscape, the Department determined Travelscape owed sales tax on the gross proceeds received from furnishing hotel accommodations, which included the room rate, the facilitation fee, and the service fee. *Id.* at 96, 705 S.E.2d at 31-32.

Travelscape argued it could not be held liable for sales tax because it did not "furnish" hotel rooms under section 12-36-920(E). *Id.* at 99, 705 S.E.2d at 33. It argued it was "only an intermediary providing hotel reservations to transients and d[id] not physically provide sleeping accommodations." *Id*. The Supreme Court determined that, while the term "furnish" carried the connotation of physically providing hotel rooms, one could be "in the business of" furnishing hotels rooms without physically furnishing them because "business" was statutorily defined as "all activities, with the object of gain, profit, benefit, or advantage, either **direct or indirect**." *Id.* at 101 705 S.E.2d at 34 (emphasis added).

Thus, the Supreme Court concluded "we find the context of 'furnish' . . . demonstrates that it encompasses the activities of entities such as Travelscape who, whether directly or indirectly, provide hotel reservations to transients for consideration." *Id*. It further concluded that "[w]hile Travelscape does not physically provide accommodations, it is in the business of doing so." *Id*. The Supreme Court found its determination was supported by the legislative purpose of section 12-36-20, which was "to levy the tax not merely on those physically providing sleeping accommodations, but on those entities who were ***accepting money in exchange for supplying hotel rooms***," to include "real estate agents, brokers, corporations, and listing services." *Id.* at 102, 705 S.E.2d at 35 (citing *City of Charleston, S.C. v. Hotels.com*, 520 F.Supp.2d 757 (D.S.C. 2007)) (emphasis added).

[26] The tax recovery charge was only based on the cost of the hotel room and excluded Travelscape's fees from the calculation of the tax.

Comparatively, the factual positions of Travelscape and Amazon Services are very similar. Both provide an online platform where they facilitate the sale of other persons' products. Both are the sole entity that interacts with the customer at the point of sale, processes the customer's payment, accepts the customer's consideration, takes a fee, and then remits the proceeds from the sale to the owner. And, although in *Travelscape* the Supreme Court was determining who is "engaged or continuing within this State in the business of furnishing accommodations to transients for consideration," that determination is quite similar to the determination in this case of who is "engaged or continuing within this State in the business of selling tangible personal property at retail." *Compare* § 12-36-920(E) *with* § 12-36-910(A).

Because of these similarities, several relevant principles can be distilled from *Travelscape* that guide the Court's factual analysis in this case, although it is by no means an exclusive list of the factual circumstances this Court finds material to this case. Indeed, if we analogize "furnish" in *Travelscape* to "sale" in this case, then *Travelscape* stands for the following: (1) an "intermediary" sales facilitator is not immune from sales tax; (2) the person accepting money in exchange for a product is responsible for sales tax; (3) the person who the customer interacts with at the point of sale is presumed to be the seller; (4) an agency relationship between the sales facilitator and the seller/provider is not necessary to create sales tax liability on the part of the facilitator under the Sales and Use Tax Act; (5) a person does not have to own the product to sell it; (6) the customer's awareness that the seller is not the owner does not impact the seller's sales tax liability; and (6) the tax imposition statute is interpreted broadly to incorporate all persons engaged in the business of furnishing/selling, whether directly or indirectly.

Using these principles as a starting place, the Court analyzes the facts and circumstances of this case to determine who is in the business of selling for the purposes of the Sales and Use Tax Act.

"Point of Sale"

The Department contends that whoever accepts money at the "point of sale" is the seller. Amazon Services takes issue with the Department's use of the phrase "point of sale" because it is not a defined term in our statutes. Nevertheless, Amazon argues the point of sale occurs when a sale is complete, and in this case the sale is complete after the product has shipped (title is transferred) and Amazon Payments completes the credit card charge. Although our statutes do not

use the phrase "point of sale," identifying the point in time when a sale takes place and who is present at that point is an elementary consideration in determining who is the seller.

When a customer purchases a Merchant product on the Marketplace, the customer enters his credit card number and Amazon Payments obtains pre-authorization from the customer's credit card company to ensure funds are available to fulfill the order. This pre-authorization places a hold upon the customer's available credit. These facts indicate the point of sale occurs when the customer places the order and Amazon Services confirms the order after encumbering the customer's card, thereby ensuring its receipt of funds. This concept—that the transfer of the funds is not as significant as the agreement to receive the funds—is illustrated in *Travelscape*.

Furthermore, concluding that a sale occurs when the credit card or other payment is encumbered is judicious, if for no other reason, then because Amazon Services' theory, leads to an uncertain outcome. Under Amazon's theory, the determination of when a transaction is consummated is nebulous: is it concluded when an item is shipped, thereby resulting in the transfer of title, or is it concluded when the charge is finally processed after the product has shipped?

Currently, Amazon Services does not charge a customer's card until the product has shipped. When that occurs, title to the property has already passed to the customer. Therefore, though Amazon asserts that the final processing of the charge is important, the significance of charging the card is questionable because, under Amazon Services' theory, title passes to the customer before the credit card charge is concluded. This begs the question, if the sale can be completed without the consumer receiving the product, then why would the sale not be completed when the customer agrees to purchase the product and his card is encumbered?

Moreover, Amazon Services' theory is further clouded by the fact that it chooses when to finally process the credit card charge. Although Amazon Services currently processes the charge after the product has shipped, there is nothing to prevent Amazon Services from processing the final charge earlier. Accordingly, the event that creates certainty for all the parties involved in the transaction is when the customer gives the credit card number to Amazon Services, agrees to the payment, and places the order. Identifying this moment as the point of sale is not only judicious, but likely also reflects the point in time when the customer believes the sale has been completed based on the following:

- Customers purchase the products by submitting payments directly to Amazon Services through the website;

- Upon completing the purchase on the website, customers receive the right to possession of the product;
- Customers receive confirmation of their order from Amazon Services;
- Customers' credit card invoices show the products were purchased from Amazon, not from the Merchant; and
- Customers frequently complete purchases of Merchant products without ever interacting with the Merchant.

In defense of its theory, Amazon Services nevertheless argues section 12-36-100 requires title or possession to pass to the customer before a sale can be final. But section 12-36-100 contains no such demand. Rather, section 12-36-100 sets forth that a sale or purchase is "defined to mean: any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration ***including***: . . . (4) a transfer of title **or** possession, or both." In interpreting the meaning of this statute, we must again recognize that when the General Assembly used the term "including," it was not intended to limit the application of a law but to reference examples from a broader general class. *Lightner*, *supra*. Thus, section 12-36-100 provides examples that must be applied contextually to the facts.

Here, the Court finds that the point of sale occurs not upon shipment, but when the customer places the order and his card is encumbered. This determination is not only in line with section 12-36-100 but with common sense. Indeed, when a customer purchases a product in a retail store that must be subsequently shipped to the customer's home, would it not be reasonable to determine that the sale occurred when payment was made at the register?

Intermediary Sales Facilitator

Travelscape argued it was "only an intermediary providing hotel reservations to transients and does not physically provide sleeping accommodations." *Travelscape*, 391 S.C. at 99, 705 S.E.2d at 33. Similarly, Amazon Services argues it merely facilitates sales and Amazon Payments is only a "conduit" for money exchanged between customers and Merchants. However, the Supreme Court determined Travelscape was not merely an "intermediary," but was "in the business of furnishing" hotel rooms for consideration, which suggests a similar inference here. *See Travelscape*, 391 S.C. at 101, 705 S.E.2d at 34. Amazon Services nevertheless argues its services are distinct from Travelscape's services because it serves as a conduit for funds **after** a customer places an order and it does not charge the customer until the product has shipped. This argument is fundamentally flawed.

In *Travelscape*, the Supreme Court determined Travelscape was responsible for sales tax despite (1) its self-characterization as a service provider and (2) the fact that it charged "service fees" to customers. *Id.* at 98-102, 705 S.E.2d at 33-35. Here, Amazon Services does not charge any "service fees" to ***customers***. It charges them to ***Merchants***. The fact that customers paid "service fees" to Travelscape but customers do not pay "service fees" to Amazon Services creates an even greater inference that Amazon Services is engaged in the business of selling Merchant products *to* ***customers*** even if it is providing a service to Merchants.

Moreover, it is Amazon Services' website and functionality, not the Merchants', which are used to consummate the sales at issue.[27] In completing a sale on the Marketplace, the customer never leaves Amazon Services' website. When the customer purchases a Merchant product, she gives her name, address, credit card, and shipping information to Amazon Services. Amazon Services confirms the sale and provides an Amazon order number to the customer, indicating the finality of the transaction. In fact, when Amazon Services sends the Order Confirmation email to the customer, the Merchant is not mentioned in the email. These facts reflect an entity that is more than an intermediary or conduit. It also important to recognize that Amazon Services' purposefully controls the consummation of these sales in order to provide a seamless and uniform buying experience for each customer on Amazon Services' platform despite dealing with millions of independent Merchants. Furthermore, Amazon Services emphasized that the payment processing function is distinct from itself. Indeed, it is Amazon Payments (on behalf of Amazon Services) that serves as the payment processer that routes the customer's money from the customer's bank account to Amazon Services' bank account.

Therefore, Amazon Services only acts as a "conduit" to send money to the Merchant after the product it sold has shipped. In fact, contrary to Amazon Services contention, it is not just facilitating sales, it is consummating them. To sell products on the Marketplace, Merchants must agree Amazon Services has the exclusive right to process transactions, confirm orders, and confirm shipping. Specifically, the BSA provides Merchants must not only "accept and process [Amazon

[27] If Amazon Services only provided advertising services or only provided fulfillment services, the Court would find that Amazon Services is a service provider not subject to sales and use taxes. *See* S.C. Regs. Ann. 117-308 (The receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax . . . ."); *see also id.* (providing the receipts from advertising agencies for professional services are not subject to sales tax). However, this case involves more than several discreet service transactions between Amazon Services and Merchants because the evidence shows Amazon Services takes a very direct role in consummating sales transactions on behalf of Merchants.

Services'] cancellations, returns, refunds and adjustments," but must do so "in accordance with this Agreement and the Amazon Refund Policies." For instance, in the case of an A to Z Guarantee claim, Amazon determines whether the customer is due a refund. Thus, Amazon Services controls not only the consummation of the transaction but its unwinding as well.

In sum, although Amazon Services characterizes itself as a conduit for funds *after* a customer places an order, it:

- restricts the types of communications Merchants can have with Amazon.com customers,
- controls all information about Amazon.com customers,
- requires the use of an Amazon affiliate for payment processing,
- controls the flow of funds for all transactions and refunds, and
- provides the order confirmations and receipts for all purchases.

Indeed, during the entire transaction, the customer only interacts with Amazon Services. Amazon Services is the party present at the consummation of the sale who accepts money from the customer in exchange for the product. Amazon Services' actions are not the actions of a simple payment processor but are the actions of someone who is in the business of selling.[28]

Based upon these conclusions and the fact that Amazon Services is the only party present at the consummation of the sale, I find Amazon Services is not merely a conduit or intermediary. Amazon Services' actions demonstrate it is in the business of selling under section 12-36-910(A).

Accepting Money in Exchange for Products

In *Travelscape*, Travelscape was the entity that initially accepted money in exchange for the promise to transfer a product. After Travelscape accepted the card payment, it transferred the money (less its fees) to the hotel. The Supreme Court did not find it dispositive that Travelscape accepted money before the purchased product (occupancy of the room) was actually transferred. Rather, the Supreme Court focused on who accepted money for the transfer. Indeed, despite Travelscape remitting the consideration it received for the rooms to the hotels, the Supreme Court determined Travelscape accepted consideration and was responsible for collecting and remitting the sales tax because the tax liability was imposed upon the person accepting money in exchange

[28] Importantly, although this determination is based upon a recognition of the broad application of section 12-36-910(A), it is nevertheless clear that the legislature did not intend to impose the sales tax on businesses whose sole purpose truly is payment processing and who are otherwise uninvolved in sales transactions. Such businesses clearly are not engaged in selling, even if they are making a profit off sales.

for furnishing the product. *Travelscape*, 391 S.C. at 103, 705 S.E.2d at 35 ("Clearly, Travelscape was engaged in the business of furnishing accommodations in South Carolina during the audit period, seeing as it . . . (3) booked reservations in exchange for consideration at hotels located in this State.").

The same situation exists here. Amazon Services accepts money from customers in exchange for the promise that the Merchant will transfer her product to the customer. Amazon Services receives the money and eventually remits a portion of the proceeds—minus its fees—from the sale to the Merchant on its bi-weekly disbursement schedule.[29] Amazon Services also receives interest on the money it collects on behalf of Merchants. Thus, both Amazon Services and Travelscape initially accept consideration/money in exchange for another person's product that is being sold to the customer, suggesting Amazon Services is similarly responsible for the sales tax.

Although Amazon Services concedes it accepts money from customers in exchange for products, it argues it does not receive consideration because Amazon Services (via Amazon Payments) merely functions as a conduit or intermediary for the consideration to pass through it from the customer to the Merchant.[30] But as explained above, Amazon Services clearly does not accept the money as an "intermediary" payment processor because that function is carried out by Amazon Payments, which routes the customers' payments to Amazon Services. As illustrated in *Travelscape*, simply because a party transfers a portion of the profits to the supplier of a product does not establish that the supplier, (or in this case, the Merchant) is the seller.

Since Amazon Services is not the payment processor, the money it accepts from customers must be accepted either as consideration for its role in the transaction, as a fiduciary holding the

[29] Amazon Services distinguishes *Travelscape* because, unlike the hotels in *Travelscape*, Merchants do not invoice Amazon Services for the cost of the product. However, in both cases, Travelscape and Amazon Services remit the money received for a product back to the owner and transfer the product in exchange for consideration, yet the Supreme Court found Travelscape received consideration and remained responsible for the sales tax. The Court does not find this distinction to be probative. Similarly, the Court does not find it probative that customers in *Travelscape* only purchased the "right to occupy the room for a particular time" from Travelscape, whereas customers in this case purchased all rights to products (title and possession) from Merchants and not Amazon Services. As the Court has already noted, a seller can sell things he does not own, and identifying who owns title to the product is not determinative of who is the seller. See § 12-36-70(1)(a).

[30] Amazon Services' arguments address the actions of Amazon Payments but neglect to explain Amazon Services' role in this process.

money for Merchants, or as both. Here, the facts established that there is bargained-for consideration between Amazon Services and customers.

"Valuable consideration may consist of 'some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.'" *Hennes v. Shaw*, 397 S.C. 391, 399, 725 S.E.2d 501, 505 (Ct. App. 2012) (quoting, in part, *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 503 S.E.2d 184 (Ct.App.1998)). In addition, as explained in the Restatement (Second) of Contracts § 79 (1981), if the requirement of consideration is met, there is no additional requirement that there be "a gain, advantage, or benefit." Through the sales structure outlined in the BSA, Amazon Services initially receives the consideration for a sale, and then, after deducting its fees, transfers the remaining funds to the Merchant. Amazon Services' fees are thus not reimbursed to them after the Merchant receives its funds but is rather part of the sales transaction. Indeed, simply because Amazon Services transfers a portion of the consideration it receives does not mean the portion it retained was not consideration paid to Amazon Services for its role in the transaction.

This discussion further highlights an incongruity in Amazon Services' reasoning. If Amazon Services only accepts money on behalf of the Merchants, it is acting as an agent for the Merchants—a position that Amazon contends it does not hold. And, if Amazon Services acts in the capacity of an agent, then the door is opened to determine that they function as a consignee.

Moreover, from the customer's perspective, the customer provides consideration to Amazon Services for the right to receive title and possession. In fact, there is no evidence showing customers have any knowledge of the behind-the-scenes exchange of money between Amazon Services and Merchants. Nor does that information matter to a customer's product purchase. Customers are not paying Amazon Services for any services—they are paying Amazon for the right to receive tangible personal property.

No matter how Amazon Services characterizes itself or the money it receives, Amazon Services operates a website on which customers pay Amazon Services directly for products that will be received in a matter of days without any further interaction with Amazon Services. Therefore, although Amazon Services' fees may be deducted from the proceeds distributed to the Merchant, these fees are directly related to the sale of tangible personal property. In fact, most of the fees are charged on a "transaction-by-transaction" basis, and the "Referral Fee" is imposed as a percentage of the gross price paid by the customer for the product. Accordingly, Amazon

Services owns and operates a website where Amazon Services' compensation is, in part, directly tied to the amount of sales it can generate, not for any one Merchant's products, but on its website as a whole. Amazon Services thus directly receives consideration for a customer's purchase, a portion of which is retained by Amazon Services as various fees.

Profiting or Benefiting from Transactions

The sales tax is imposed upon the person engaged in the business of selling tangible personal property, and the term "business" means "all activities, with the object of gain, ***profit, benefit, or advantage, either direct or indirect***." § 12-36-20 (emphasis added). Amazon Services claims the fees it charges for its services do not represent any form of profit-sharing. While the monthly subscription fee appears to be a legitimate service fee, the Referral Fee is separate from the flat, monthly subscription fee, and it is based upon a percentage of the sale price of each product depending upon the category of product sold and the typical profit margin for that product. Thus, instead of simply providing a service and charging Merchants a fee based on the operating cost of listing products on a website and processing payments, Amazon Services **indirectly** retains a share of the profits from each sale through the Referral Fee. Amazon Services therefore profits from every product that is sold upon its website—its profits are simply set by a fee structure.[31] Indeed, since its service is the selling of the product, then calling its "profit, benefit, or advantage" a fee is simply a matter of semantics. Additionally, like Amazon Services' other fees, the Referral Fee is not reimbursed to Amazon Services after the Merchant receives her funds; rather, it is withheld by Amazon Services before the Merchant's funds are disbursed.

Amazon Services nevertheless seeks to distinguish the Referral Fee from "profit" because the Referral Fee is charged "whether the [Merchant] actually earns a profit or loss on its sale, and Amazon Services has no way of knowing what profit or loss a [Merchant] earns on each of its sales." However, simply because one party does not profit from a sale does not imply that the other party did not profit from the sale. In fact, here the evidence established that Amazon Services assures itself of a profit off every sale. Moreover, the distinction that Amazon Services assures itself of profit is even more indicative that Amazon Services is in the ***business*** of ***directly or indirectly*** making a profit off of tangible personal property sold on the Marketplace.

[31] Although this fee is refundable, the fee is refunded minus a "refund administration fee" that can range anywhere up to $5.00.

The definition of "business" reveals Amazon Services' mischaracterization of its profits as services fees. In section 12-36-20, the definition of "business" includes all activities with the object of "benefit, or advantage." § 12-36-20. In this instance, the object of Amazon Services business model is to profit from the sale of products upon its website even, as Amazon Services points out, if Merchants do not. Further, a profit requires proof of a valuable return, but a benefit may result from any "good or helpful results or effects." *Benefit*, WEBSTER'S ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/benefit (last visited July 23, 2019). In this case, it can be reasonably inferred that Amazon Services benefits from every sale upon its website.

In sum, despite its claims that it does not engage in "profit-sharing," the Referral Fee appears to be a transaction-by-transaction fee that either compensates Amazon Services for consummating the sale or constitutes profit for Amazon Services as a result of a sale. Either way, Amazon Services' activities and collection of the Fee show it is engaging in the "business" of selling because business includes "all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect." § 12-36-20. Moreover, as illustrated in *Travelscape*, the transfer of funds is not as significant as the acceptance of funds when the transaction is made. Accordingly, under the circumstances of this case, I find the Referral Fee is charged for selling the product.

Interaction with the Customer at the Point of Sale

In *Travelscape*, the Supreme Court acknowledged that Travelscape was not actually furnishing hotel rooms, yet it found Travelscape was "in the business" of furnishing hotel rooms because section 12-36-920(E) "encompass[ed] the activities of entities such as Travelscape who, whether ***directly or indirectly*** provide hotel reservations to transients for consideration." *Travelscape*, 391 S.C. at 101, 795 S.E.2d at 35 (emphasis added).

This determination reflects the broad application of the statutory phrase "in the business of." Even though Travelscape did not physically provide hotel accommodations, since Travelscape was the only person accepting money in exchange for supplying hotel rooms at the point of sale, that fact created an inference that Travelscape was in the business of furnishing hotel rooms. Similarly, Amazon Services is the only party present at the point of sale accepting money from customers, and this creates an inference that they are in the business of selling.

Amazon Services nevertheless argues it is not the only entity that interacts with the customer during the sale. Specifically, it contends the customer and Merchants have "meaningful

and vital" contact, and this contact occurs through phone or e-mail (Buyer-Seller Messaging) conversations about products. Amazon Services also contends Merchants "interact" with customers when they read a product description the Merchant wrote and uploaded to the Amazon.com website.[32]

At the outset, I find that a significant portion of the evidence offered to show customers and Merchants have meaningful interactions was unconvincing. Although the evidence showed one Merchant has had direct communications with customers through phone or email, the evidence did not establish that these communications occurred at the point of sale, nor did it establish that such communications occur extensively or even frequently for the millions of the other Merchants. I therefore do not find the evidence shows meaningful interactions between the customers and Merchants take place regularly at the point of sale. In fact, the evidence clearly establishes that sales can be made, and often are made, without any interaction between customers and Merchants.

Moreover, whether the customer interacts with the Merchant before or after the point of sale is not determinative of who is selling the product. For example, a Travelscape customer could call a hotel before booking a room through Expedia.com to confirm the hotel has spa services available. Then, the customer could make the reservation on Expedia.com because it has the best price, they have an account with them, or for whatever reason. After the reservation, the customer could call the hotel again to actually book the spa service, which could not be booked through Expedia.com. In this hypothetical, the customer may have "interacted" with the hotel at several points before and after the transaction, but ***contact was not required*** to book the hotel room when the money was exchanged.

Likewise, in this case, a customer might contact a Merchant before or after purchasing a product on Amazon.com to ask questions or discuss a missing part upon delivery. However, this evidence does not establish that the Merchant is the seller. Rather, the evidence reflects that once a customer purchases a product on the Marketplace, it is Amazon Services that sends the customer an order confirmation. Afterwards, Amazon Services also sends the communications notifying a customer that an order has been received or shipped. Amazon Services also controls refunds and,

[32] Amazon Services nonetheless avers they do not control the point of sale because Merchants have the authority to refuse to fulfill or cancel a customer's order after a customer places the order with Amazon Services. However, simply because a person possesses the authority to nullify a sale does not negate the events that already occurred or the fact that a sale took place. If the authority to nullify a sale exemplifies who is in control of the point of sale or consummation of the sale, then Amazon Services equally holds that right and, in fact, holds that right in the first instance.

to a great extent, return policies. In fact, it is possible a customer on the Marketplace can complete an entire purchase of a Merchant product ***without any interaction*** between the customer and the Merchant. This set-up is similar to a customer at a retail store who can communicate with the manufacturer about a product and then go to the respective retail store to purchase the product. Therefore, at most, Amazon Services has proven that it is possible for customers and Merchants to interact for the purpose of receiving customer service before or after the transaction—not that these services occur on a regular basis and not that such communications dictate that Merchants are the sellers of their products.[33]

The South Carolina District Court's decision in *City of Charleston, S.C. v. Hotels.com, LP*, further supports this Court's conclusion that the person who is present with the customer at the point of sale is indicative of who is "in the business" of selling the product under the Sales and Use Tax Act. 520 F. Supp. 2d 757 (D.S.C. 2007). In *City of Charleston*, the District Court concluded that Hotels.com, like Travelscape, was in the business of furnishing accommodations and was required to pay the accommodations tax on the gross proceeds of furnishing hotel rooms. *Id*. In its analysis, the District Court remarked that "[a]ccording to the facts as alleged by Plaintiffs," Hotels.com was subject to the tax. *Id.* at 768. The facts alleged by the Plaintiffs which the District Court found probative included the following:

> Defendants are the ones directly dealing with the consumer on the internet. Defendants are consummating the sale, calculating the tax, and collecting the retail rate for the room and the tax. Most significantly, Defendants are the only entity on

[33] Indeed, Amazon Services' case centered on one Merchant witness, Mr. Revich. However, the testimony of Mr. Revich established that Yedi orchestrates the manufacture of its products, administers the product-specific warranties, creates the packaging for the product, and handles product-related customer service issues. These activities are not generally indicative of a retailer. In fact, although the Court recognizes that a business can serve in the capacity as manufacturer and retailer, the evidence established that Yedi's participation on the Marketplace more closely resembles the actions of a manufacturer or wholesaler rather than a retail seller.

A retailer is primarily defined by its position in the sales chain as the person who sells to the end consumer, not by its ability to develop and manufacture a product. It is also telling that no one argued a retailer who does not engage in product development is any less of a "seller" or "retailer" under our tax laws. Mr. Revich's testimony also showed Yedi's ability to provide customer service and otherwise process sales is more restricted on the Marketplace than on Yedi's own website. Thus, when Yedi "sells" products on the Marketplace, its restricted actions more closely mirror the actions of a manufacturer, distributer, or wholesaler who delivers his products to a retailer to sell, refund, return, or otherwise handle various aspects of customer service related to the sale.

Furthermore, communication with a customer that occurs after the sale of a product is not nearly as indicative of who is the seller as evidence showing communication at the point of the sale. In fact, Amazon Services failed to distinguish the customer service offered by Merchants from customer service offered by manufactures and suppliers in a more traditional retail setting. This type of after-purchase customer service is often required by the warranties associated with products.

> the selling part of the transaction who know the amount of the gross price paid by the consumer.

Id. From these facts, the Court concluded:

> If consumers access a website, use it to book a hotel room, pay the website directly, and never pay the hotel, or interact with the hotel at all until they arrive, the court cannot accept Defendants' assertion that they do not furnish accommodations to consumers.

Id.

The District Court obviously found the complete absence of interaction between the customer and the hotel to be of consequence to its decision. *See id.* Here, likewise, a customer only interacts with Amazon Services at the point of sale and all communications about the order and shipment go through Amazon Services.

The Court is also not persuaded by Amazon Services' argument that customers meaningfully interact with Merchants during a sale when they read the product listing or description on the Amazon.com website. The testimony revealed that if a Product Detail Page already exists for a product, a new seller of the product on Amazon.com cannot create a new Product Detail Page. Therefore, if a customer buys from this new seller, they are not even, under Amazon Services' definition, "interacting" with the new seller by reading the Product Detail Page. Rather, they are "interacting" with the original seller of the product who created the Product Detail Page. Additionally, the evidence did not establish the Product Detail Page is materially different from a manufacturer's product description on the packaging of products sold in retail stores. Therefore, I do not find this interaction meaningful or determinative of who is the seller

Ownership of Property Sold

Amazon argues it cannot be the seller of Merchant products because it does not own the products and thus cannot transfer title to them. This issue was addressed in *Travelscape*. The Supreme Court determined Travelscape was in the business of furnishing hotel rooms even though it did not own or physically furnish to its customers. Therefore, it follows that Amazon Services can be in the business of selling Merchant products even though it does not own or physically transfer these products.[34]

[34] Recently, the Sixth Circuit Court of Appeals determined that a "seller" under Tennessee's products liability law is not required to hold title to the product he is selling. *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 422 (6th Cir. 2019) (rejecting defining "seller" as "any individual or entity regularly engaged in transferring title to a product for an agreed upon price, for livelihood or gain"). Rather, the Sixth Circuit determined that "seller" is defined broadly to include

Furthermore, section 12-36-70(1)(a) specifically provides that a person selling tangible personal property can be a seller of goods that are either owned by them or owned by others.[35] This law presents two sides of a coin. It is certainly lawful to sell another person's property when properly authorized to do so. On the other hand, a person cannot sell something they do not own without the true owner's authorization. Selling someone else's property does not appear to be an unusual occurrence in the retail sales setting and is indeed the crux of consignment sales.

Section 12-36-70(1)(a) thus provides that a person who lawfully sells a product he does not own, but has been granted the authority to do so, may be found to be the seller under the sales tax laws. Nevertheless, simply because a non-owner can be subject to sales tax does not mean that he is by rule; the court must review the transaction to determine if the product was sold with the authority of the owner. Here, the evidence establishes Merchants grant Amazon Services the authority under the BSA to allow Amazon Services to sell their products on their behalf.

The sale of property owned by another assumes the existence of an agency relationship. The facts of this case thus open the door to the conclusion that the sale of Merchant products on the Marketplace constitute consignment sales. As explained above, I find that whether such an agency relationship exists between Amazon Services and Merchants is a factual matter in this case.

Agency and Consignment

Amazon Services attempts to distinguish *Travelscape* because the hotels in *Travelscape* supplied rooms to Travelscape at pre-negotiated rates whereas Merchants do not supply products to Amazon Services. Essentially, Amazon Services' argument suggests Travelscape contracted with the hotels to allow it to sell rooms at a discounted rate as the hotels' agent, whereas no agency relationship exists between Amazon Services and Merchants. Amazon cites to the provision in the BSA that states, except for Amazon Payments' role as a payment processing agent, the relationship between Amazon Services and Merchants is that of independent contractors and

"any individual regularly engaged in exercising sufficient control over a product in connection with its sale, lease, or bailment, for livelihood or gain." *Id.* at 425. Although products liability law is not directly analogous to tax law, the Sixth's Circuit's analysis concerning the scope of the definition of "seller" is still informative.

[35] Similarly, although the transfer of title is not irrelevant to determining who the seller is, it is nonetheless not a legal prerequisite. Again, it is a fact to consider. In this case, Amazon Services' contention that it cannot be the seller because it does not transfer title ignores its role in consummating the transaction, securing the consideration, and then notifying the Merchant to ship the product, which results in the transfer of title. Furthermore, as discussed earlier, Amazon's theory that title must pass before a sale can occur presents an uncertain result that would not have been intended by the General Assembly.

"nothing in this Agreement will create any partnership, joint venture, agency, franchise, sales representative, or employment relationship between us." Nevertheless, this language does not absolve Amazon Services of the responsibilities of a seller's agent if the facts show it is acting as an agent for Merchants. This provision is simply a factor to consider in the Court's review of the nature of the transactions at issue. In other words, a person cannot contract away their obligations under the South Carolina tax laws. *See Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them."); *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977) (holding "[t]he States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired . . . [o]therwise, one would be able to obtain immunity from the state regulation by making private contractual arrangements"); *see also* 71 Am. Jur. 2d *State and Local Taxation* § 61 ("The sovereign power to tax may be abrogated by contract only if it has been specifically surrendered in terms which admit of no other reasonable interpretation.").

Moreover, an agency relationship is not necessary to impose an obligation to collect sales tax under the facts of this case. Notably, in deciding *Travelscape*, the Supreme Court did not identify a legal agency relationship between Travelscape and the hotels, nor did its decision rely on such a relationship being established to hold Travelscape responsible for remitting sales tax. Rather, the Supreme Court relied on the plain language of the statutes at issue, which evidenced a legislative intent that whoever was accepting money in exchange for "directly or indirectly" furnishing hotel rooms was responsible for the sales tax. *See Travelscape*, 391 S.C. at 102, 705 S.E.2d at 35. Following the Supreme Court analysis in *Travelscape*, an actual agency relationship between Amazon Services and Merchants is not necessary to impose sales tax liability under the Sales and Use Tax Act.

Rather, as demonstrated by *Travelscape*, the most important consideration is who is accepting money in exchange for the product at the point of sale. In *Travelscape*, the Supreme Court cited to the legislative purpose of section 12-36-20, which was "to levy the tax not merely on those physically providing sleeping accommodations, but on those entities who were ***accepting money in exchange for supplying hotel rooms***," to include "real estate agents, brokers, corporations, and listing services." *Id.* at 102, 705 S.E.2d at 35 (citing *City of Charleston*, 520 F.Supp.2d at 757) (emphasis added). All the persons listed in the statute recited by the Supreme

Court—such as real estate agents and brokers—are persons who are usually present at the point of sale acting on behalf of someone else to consummate a transaction (agents). The responsibility to collect tax is similarly imposed on warehousemen when they engage in selling:

> When, however, warehousemen buy and sell property as a regular course of business such sales, if not otherwise exempted, are subject to the sales tax, including sales of goods held on consignment and including transactions in which the warehouseman acts as a broker selling goods not actually owned by him or in his possession at the time he accepts the order.

S.C. Code Ann. Regs. 117-319 (2012). Again, we see the word "broker," like in section 12-36-920(C), which was discussed in *Travelscape*. Brokers, and in this regulation, warehousemen, are assessed for sales tax despite acting on behalf of another who may own the property. *See* Reg. 117-319.

Here, section 12-36-910(A) likewise does not impose an obligation to establish an agency relationship. Rather, the Court's consideration is whether the object of Amazon Services' activities is to achieve a profit, benefit, or advantage by either a direct or indirect means whether the property is owned by it or by others. Based on the facts of this case, the object of Amazon Services' business activities are to achieve a profit or benefit, by either direct or indirect means, from the sale Merchant property on its Marketplace. In other words, the evidence shows Amazon Services, at a minimum, ***indirectly*** receives a profit or benefit from the sale of Merchant property on the Marketplace. Moreover, Amazon Services is the party who is present at the point of sale and who accepts consideration in exchange for the transfer of the product. In this case, this Court does not need to determine whether Amazon is contractually designated as an agent.

Nevertheless, even though evidence of agency is not required by the statute, I find Amazon Services functions like a consignee for the purposes of the Sales and Use Tax Act. Indeed, the strong similarities between the sales on the Marketplace and consignment sales cannot be ignored for the purpose of determining legislative intent when looking the Sales and Use Tax Act as a whole. Amazon Services, like a consignee, provides a service to the owner of a product that directly facilitates the sale of that product. Also like a consignee, Amazon Services retains a percentage of the sales price as a fee (Referral Fee).[36] Amazon Services is also the person who processes the transaction, just like a consignee.

[36] Amazon Services also seeks to distinguish the service fees charged by Travelscape, which were charged to customers, from the service fees charged in this case, which Amazon Services charges to Merchants. Although the fees in *Travelscape* were determined to be part of the gross proceeds of sales, they otherwise were not important to

Further, this Court finds the testimony presented by Amazon Services' executive officer, Mr. Poad, about the differences between consignment transactions and the transactions at issue, to be unpersuasive. Mr. Poad argued, for example, that in a consignment transaction the retailer/consignee determines what to sell whereas in this case the Merchant decides what to sell. However, a consignee can only sell what the consignor first decides to sell. In other words, the consignee can only sell what other people choose to allow him to sell (even if the consignee thereafter has discretion to reject what the consignor offers). Similarly, Merchants must decide to sell their products before they can be listed on the Marketplace and the Marketplace can only list those products Merchants decide to post. Therefore, the two situations are very similar. Thus, while it is true that a consignee often has control over how many of a single product they sell, whereas Merchants control their inventory on the Marketplace, the basic set-up is the same: someone, who is not the owner of a product, is hired to help sell a product for the owner.[37]

Amazon Services nonetheless contends this comparison is not proper because a consignment inherently requires an agency relationship. However, I do not find that a formal agency relationship is required under the tax laws. What matters is the nature of the transactions at issue and the resulting nature of the relationship between the relevant parties, not contractual provisions. Moreover, even if a contractual agency relationship were required,

> [a]gency may be created by law as well as by an action of the principal. Where parties place themselves in a position requiring the relationship of principal and agent to be inferred by the courts, and if from the circumstances there appears at least an implied intention that agency be created, the law will create the relationship, regardless of whether the parties deny the relationship or understood it to be agency. Agency may be implied from the course of dealings of parties, from course of conduct, or by circumstances or apparent relations.

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the Supreme Court's determination that Travelscape owed the sales tax. Therefore, the Court likewise does not find this distinction probative. If anything, a similarity can be drawn between Travelscape's facilitation fee and Amazon Services' Referral Fee—each appear to be fees charged for the assistance Travelscape and Amazon Services provided to the hotel or Merchant to consummate each individual sale. In other words, the fees were exchanged for the facilitation of the sale of the product, much like a consignee retains a fee for selling someone else's product.

[37] Amazon Services also cites to Tennessee law for the proposition that "[g]enerally, when the identity of the seller is disclosed to customers, a consignee is not required to collect sales taxes on behalf of the seller." Amazon Services' Proposed Order 56. However, Amazon Services has provided no South Carolina law to support this assertion, and the Department's policy manual advises that consignees are responsible for sales tax with no exceptions for the disclosure of the owner's identify. *See* S.C. Dep't of Revenue, South Carolina Sales and Use Tax Manual, Chap. 23, Pg. 19 (2015) ("The retailer selling the items on consignment is the person responsible for remitting the tax on the consignment sale.").

23 S.C. Jur. *Agency* § 8, *see also Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 242, 597 S.E.2d 165, 168 (Ct. App. 2004) ("[T]he relationship of agency need not depend upon express appointment and acceptance thereof. Rather, an agency relationship may be, and frequently is, implied or inferred from the words and conduct of the parties and the circumstances of the particular case.").

Overall, I find Amazon Services is "engaged in the business of selling." Furthermore, the "true nature" of the relationship between Amazon Services and Merchants is that Amazon Services acts as the Merchants' agent in selling their products, even if a formal agency relationship is not recognized by the parties.

Identification of the Merchant as the "Seller"

Amazon Services contends it is obvious and apparent to customers on the Marketplace that they are purchasing products from a Merchant rather than Amazon Services because Merchants are identified as the sellers on the website. It thus argues the sales on its Marketplace are made by Merchants and are distinguishable from consignment sales. The Supreme Court's holding in *Travelscape* is instructive because, in that case, the customer using Expedia.com knew the identity of the hotel at which they were reserving a room (and, correspondingly, the fact that the hotel was not owned or operated by Travelscape or Expedia.com), but the Supreme Court still found Travelscape was in the business of furnishing hotel rooms.

Even apart from the holding in *Travelscape*, I find Amazon Services' argument unavailing. Section 12-36-70(1)(a) defines "retailers" or "sellers" as those "selling or auctioning tangible personal property whether owned by the person or others." Critically, it does not state "whether owned by the person or others whose identities are unknown to the buyers" or anything to a similar effect. Indeed, nothing in the Sales and Use Tax Act imposes or even implies such a limitation. Rather, as discussed above, the relevant statutory provisions focus on the person selling goods in exchange for payment from the customer, regardless of whether those goods are owned by that person or others.

Furthermore, I do not find that the customer's knowledge that they are purchasing a Merchant product rather than an Amazon product is as pervasive as Amazon Services propounds. Rather, I find that although the knowledge that a product is sold by a Merchant is obtainable by the customer, the evidence did not establish the instances in which customers sought out that

information.[38] Moreover, even in instances in which a customer seeks out this information, it equally appears that customers are assured that those purchases are made under the umbrella and protection of Amazon Services' corporate assurances, such as its A to Z Guarantee.

Also, a customer's knowledge of who sells the product is not distinctly different from sales of products in a tradition retail setting. In almost all retail sales, the manufacturer or company that developed the product is known to the customer. For example, a customer buying a bottle of Tide detergent at Walmart typically views the product in packaging created by the company that developed Tide, which usually includes the name of that company, a description of Tide, and images of the product. There is also often contact information of that company on the packaging so that customers can contact it to ask questions about Tide prior to purchasing the product. However, Walmart, not the company who makes Tide, is considered the seller when you purchase the detergent at Walmart. Similarly, the fact that a customer knows the identity of a Merchant and can view descriptions and images created, in some cases, by the Merchant on Amazon.com, and can initiate contact with the Merchant to ask product specific questions, is not determinative of whether the Merchant or Amazon Services is the "retailer" or "seller."

Finally, although Amazon Services contends that generally when the identity of the seller is disclosed to customers a consignee is not required to collect sales taxes on behalf of the seller, the evidence does not support this conclusion.

Control Over the Marketplace and Merchant Products

The parties disagree over who has control of Merchant products on the Marketplace and its legal significance. Amazon Services argues control can indicate ownership or, at the least, authority over the product, including the authority to sell the product. Based upon this premise, Amazon Services contends that it is not the seller of Merchant products because Merchants exercise control over the products they list on the Marketplace. Inversely, the Department contends Amazon Services exercises pervasive control over Merchant products listed on the Marketplace such that Amazon Services is the seller of the products. To analyze this issue, the

[38] Indeed, several of the products liability cases Amazon Services cites show that other courts around the country have found it is not the seller for the purpose of products liability include allusions to customers being under the impression that Amazon was selling the products at issue rather than a third-party Merchant. *See Allstate New Jersey Ins. Co. v. Amazon.com, Inc.*, No. 17-2738, 2018 WL 3546197, at *1 (D.N.J. July 24, 2018) (slip op.); *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 418 (6th Cir. 2019) ("At that time, Plaintiff believed that [Amazon] owned the hoverboard, and that she purchased the hoverboard from [Amazon]."

Court focuses upon the facts that are indicative of the exercise of control over Marketplace sales, with particular attention paid to who controls the point of sale and who accepts money in exchange for products.[39]

The evidence established Amazon Services wields significant control over the Marketplace. In particular, it controls many aspects of the sales transaction process on its Marketplace to create a brand-centric, unified customer buying experience to promote further sales. Specifically, the facts show Amazon Services controls the flow of money between the customer, itself, and Merchants; indeed, Merchants are prohibited from exercising this function. Amazon Services controls the unwinding of the sale as well. Amazon Services also restricts communication on the Marketplace, prohibiting Merchants from communicating with customers in ways not expressly provided by or approved by Amazon Services. Amazon Services also provides its customers with an "A-to-Z- Guarantee," which brings dissatisfied Merchant customers under the umbrella of its protection. Amazon Services also enforces its own Return and Refund policy for Merchant items.

These rules and restrictions Amazon Services places upon its Marketplace are by design. They ensure the Amazon brand is not tarnished by a Merchant who might take advantage of a customer, refuse or botch returns, use an un-safe payment processor, or otherwise engage in practices that would be received badly by a customer. These provisions may protect the Merchant's customer, but they are intended to protect ***Amazon's*** customer, ***Amazon's*** reputation as a seller, and the reputation of the Marketplace. Thus, Amazon Services controls how sales transactions are processed on the Marketplace and that control shows Amazon Services is in the business of making sales on its Marketplace.

Moreover, Amazon Services actively participates in the selling process through its proprietary algorithm that selects a certain product to offer in the Buy Box. Unless the customer clicks a hyperlink on the Product Detail Page for "Other Sellers on Amazon," the product

[39] Amazon Services emphasizes the Merchants' control over their products listed on the Marketplace. Importantly, consideration of that control necessitates consideration of Amazon Service's control over the products listed on the Marketplace because the party that controls the sale inversely suggests the other party does not. Additionally, Amazon Services cited to several products liability cases from other jurisdictions in which those courts found Amazon Services or another Amazon company did not exercise enough control over the product to be liable under the theory of products liability in those jurisdictions. The Court is unpersuaded by citations to cases in other jurisdiction that are not controlling in South Carolina and are not reflective of tax laws, much less this State's specific statutory scheme at issue in this case.

purchased by the customer will be from the default Buy Box offeror. Amazon Services refers to the default offeror as the winner of the Buy Box. How a merchant "wins" the Buy Box is a mystery, but what is clear is that winning the Buy Box significantly effects sales. Even Amazon Services' witness testified he believed the percentage of sales attributable to the winner of the Buy Box was at least 50%, although, surprisingly to this Court, he was unable to testify as to a more precise percentage or even a range of percentages.

Control of Pricing

Amazon Services also contends that since Merchants set the price of their products on the Marketplace, they are the sellers. Amazon Services' theory presumes that only retailers control pricing. However, suppliers or manufacturers of products can also exercise control over the price at which their products are sold. Specifically, a supplier or manufacturer can sell products to a retailer with the requirement that the retailer sell the products at a minimum retail price, yet the supplier or manufacturer will not be deemed the retail seller by virtue of its control over the price. *See, e.g., Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 883, 899 (2007) (evaluating, under federal antitrust law, resale price maintenance contracts by which a manufacturer "refused to sell to retailers that discounted . . . goods below suggested prices"); *see also Travelscape,* No. 08-ALJ-17-0076-CC, 2009 WL 769017, at *12 n.15 ("[I]n a consignment sale, the owner of tangible personal property allows a third party to sell the property. At the time of sale, the third party collects and remits sales tax on the gross proceeds of its retail sale to customers, retains its fee as compensation and then pays the owner for the property."). In fact, if a wholesaler controls the cost of a product and the minimum retail price, it would exercise greater control than Amazon Services' wields over prices on the Marketplace, yet the wholesaler would not be the retail seller.[40]

Here, both Amazon Services and Merchants influence the price of Merchant products sold on the Marketplace. While it is true that Merchants ultimately set the price, they are constrained by Amazon Services' requirements and fees. In particular, Amazon Services requires Merchants

[40] Although the Court has compared Merchants to manufacturers or wholesalers several times, the Court is not implying that Merchants are manufactures or wholesalers; rather, these examples are meant to illustrate that neither product development, customer service, nor pricing, on their own, are determinative of who is the seller. Indeed, if the Court agreed with Amazon Services' argument that whoever develops, prices, and replaces parts for products is the seller, then we would conclude that manufacturers are the sellers of products in the retail setting, which is obviously incorrect.

to set prices to be at least as favorable as the lowest price in other sales channels. Additionally, Amazon Services deducts its fees from the sales price of Merchant products. Therefore, Merchants must charge their lowest price on Amazon while also ensuring the price is high enough to cover the cost of Amazon Services' fees and still yield a profit. Complicating this further, Amazon Services has sole discretion to modify its fees when it wishes, and its fee structure is variable according to the profitability of the category of the product sold. Amazon Services clearly benefits from these parameters governing pricing because it receives a profit off every sale through its fees while ensuring that the offers listed on its website are the most attractive sales offers to encourage more sales on its Marketplace. Thus, the Marketplace pricing structure also shows Amazon Services is in the business of selling.

Overall Conclusions

Notably, the Supreme Court engaged in statutory construction in its analysis in *Travelscape*—where it obviously was not clear at first glance whether the tax was imposed on Travelscape—yet the Supreme Court did not find the statutory scheme to be ambiguous or to require substantial doubt to be resolved in Travelscape's favor. *See Travelscape*, 391 S.C. 89, 705 S.E.2d 28. A complete reading of *Travelscape* shows that although the application of specific statutes to a set of facts may not be initially clear, this does not mean that the statutes are ambiguous such that the case must be resolved in the taxpayer's favor. Rather, the existence of an ambiguity must be determined by reading the statutory scheme as a whole in light of the pertinent facts of the case. The Supreme Court's decision in *Travelscape* is therefore consistent with its prior opinion in *Crescent Manufacturing Co.* in which the Supreme Court noted the "rule of strict construction of . . . tax statutes is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose, and does not prevent the courts from calling to their aid all the other rules of construction and giving each its appropriate scope, etc." 129 S.C. at 480, 124 S.E. at 765 (internal quotation marks and citations omitted)).

Indeed, the Supreme Court's decision in *Travelscape* highlights the broad application of the "in the business of" language. Construing the statutes at issue here like the Supreme Court did in *Travelscape* and applying "in the business of selling" in keeping with the broad statutory framework logically results in the conclusion that someone who facilitates or consummates a sale as a "service provider" can be "in the business of selling" for the purposes of the Sales and Use Tax Act.

I conclude, based upon the factual discussion above and the broad application of the statutes, that Amazon Services is in the business of selling tangible personal property at retail for the purposes of the Sales and Use Tax Act. Additionally, while Amazon Services and Merchants have not legally entered into a consignment relationship, for the purposes of the Sales and Use Tax Act the relationship between Amazon Services and Merchants functions as a consignment-type relationship. Indeed, it would be an oddity to deem a Merchant a seller when: (1) a purchase is often completed through Amazon Services' website without any interaction between the customer and the Merchant other than a product description (possibly) written by the Merchant; (2) the Merchant is prohibited from accepting payment from the customer; (3) Amazon Services sends the order confirmation to the customer; (4) Amazon Services notifies the customers when an order has been received or shipped; and (5) Amazon is the only party that provides a receipt for the products purchased.

It is also notable that in discerning what activities signal someone is "engaged in the business of selling," this Court's interpretation of the state tax laws must reach a "reasonable, sensible construction, having in view effectuation of the legislative purpose." *Crescent Manufacturing Co.*, 129 S.C. at 480, 124 S.E. at 765. Here, without Amazon Services collecting the sales tax at the point of sale, it is unlikely the tax would ever be collected, which would not effectuate the legislative intent of the Sales and Use Tax Act. Amazon Services completely controls the point of sale and restricts its offering of tax collection services to certain "professional" Merchants.[41] Thus, a non-professional Merchant would not even have a chance to collect sales tax at the point of sale. For example, the Court heard no testimony to suggest that a non-professional Merchant could intervene on Amazon Service's platform to add the tax themselves at the point when the customer is charged for the product. The only conclusion the Court is left with is that if a non-professional Merchant wished to collect the sales tax, the Merchant would have to invoice the customer for the sales tax after the sale or absorb the tax itself. And because it is

[41] Notably, only Merchants with "Marketplace Professional" and "Amazon Webstore" accounts can register to have Amazon Services collect sales and use taxes on their behalf in conjunction with sale of their products on the Marketplace. Merchants without these types of accounts presumably cannot enable this feature. Merchants who maintain these types of accounts must pay Amazon Services an additional fee to enable this service and are then reliant on Amazon Services' functionality to collect the appropriate amount of tax. In other words, even for Merchants who can use this tax collection feature, there is no way for them to independently comply with the tax collection requirements under the Act; they must instead rely on Amazon Services, as the person present at the point of sale, to perform these tasks for them.

Amazon Services who sends communications, order confirmations, and receipts to customers, there is also no way for Merchants to send this invoice as part of a receipt.

Similarly, if Merchants are deemed to be the "sellers" under South Carolina law, it would still be incumbent on Amazon Services to collect the use tax when it was applicable because there is no opportunity for Merchants to "collect the use tax from the purchaser and give to the purchaser a receipt showing the amount subject to the tax and the amount of tax collected" and to do so "***at the time of making the sales***." § 12-36-1350(A). Like with the sales tax, there is no way for Merchants to "give the purchaser a receipt showing the amount subject to the tax and the amount of tax collected" as required by the use tax statute. § 12-36-1350(A).

Even more disconcerting, under Amazon Services' business model, if a Merchant pays for Amazon Services' tax collection service, Amazon merely collects "the value of the sales tax" that it deems is owed to a state and then remits that amount back to the Merchant. It is thereafter the responsibility of the Merchant to "disburse" sales tax to the relevant state. This creates a process by which Amazon collects tax from a purchaser that may not ever be paid by a Merchant. Therefore, there are no tax collection options for Merchants, in particular non-professional Merchants, that are effectual or are likely to encourage Merchants to submit their taxes to taxing authorities.

Considering the above findings and conclusions, Amazon Service's attempt to segregate all that it does into discrete "service" buckets creates an unreasonable interpretation of the State's Sales and Use Tax Laws. Amazon Service is the owner and operator of the Marketplace. It is through that Marketplace that products are offered for sale and it is Amazon Service who directly receives payments from its customers. Its affiliate, Amazon Payments, serves as the payment processor that must be used for all transactions, but it is not the entity with whom customers interact or to whom they provide their payment information. Customers meaningfully interact with Amazon Services to consummate the sales of Merchant products and no one else. Moreover, Amazon Services' self-characterization as a service provider could be employed by any brick-and-mortar retail store or consignment shop to evade tax responsibility as a seller. Either could claim that instead of being engaged in the business of selling tangible personal property, they just provide an array of discrete, non-taxable services, charging the same types of "service" fees as Amazon Services even though, in reality, they are selling products. Separating the actions of a retail seller such as Target into discrete, non-taxable services would be absurd, and so it is here.

Amazon Services' interpretation of this State's tax laws is thus incongruent to the way these transactions actually occur. Furthermore, because Amazon Services accepts customer payments and is the point of sale for all transactions on the Marketplace, Amazon clearly has the responsibility to collect the sales and uses taxes owed for these transactions and, indeed, has the mechanism in place to perform that function. Therefore, given that the obvious purpose of the Sales and Use Tax Act, is not reasonable to interpret the tax laws as requiring Merchants to remit the sales tax when they are prohibited from accepting money from customers in exchange for their products at the point of sale. In other words, when two actors are both "engaged in the business of selling" of a product, the Court finds it is the actor who is present at the point of sale and accepting money in exchange for the transfer of the product who is responsible for the sales and use tax under our tax laws. This is especially true under the circumstances of this case.

Section 12-36-920(A) is written to broadly to impose sales tax on persons "in the business of selling tangible personal property at retail," which includes a person accepting money in exchange for products, whether owned by themselves or others. When we consider that the activity can be for profit or benefit—directly or indirectly—Amazon Services' activities and collection of the Referral Fee exemplify that it is engaging in the "business" of selling because business includes "all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect." § 12-36-20. Amazon Services accepts money in exchange for Merchant goods that are not owned by Amazon Services and receives fees in exchange, including a fee for consummating each individual sale. Therefore, I find Amazon Services is "in the business of selling" for the purpose of the Sales and Use Tax Act and is responsible for sales tax on the sale of third-party Merchant products on the Marketplace.

Due Process

Amazon Services contends the Department's attempt to require it to remit sales and use tax for the sales at issue violates the U.S. Constitution's guarantee of due process of law. U.S. Const. amend. V; U.S. Const. amend. XIV. Specifically, Amazon Services cites to *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) for the proposition that "laws regulating persons or entities must give fair notice of what conduct is required or proscribed" because this is "essential to the protections provided by the Fifth Amendment's Due Process Clause . . . which requires the invalidation of impermissibly vague laws." Based upon this principle, the United States Supreme Court outlined the "void for vagueness doctrine," which has two requirements: "first, that regulated

parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* at 253. As a result of its analysis in *Fox Television Stations*, the United States Supreme Court declined to enforce a change in policy that the FCC tried to retroactively apply to sanction two TV stations for conduct that would have previously been permissible. *Id.* at 249-255. The United States Supreme Court found the policy was void for vagueness as applied in those circumstances. *Id.* at 258.

Amazon Services argues the Department, like the FCC in *Fox Television Stations*, is trying to impose a change in tax policy on it without "fair notice." Amazon Services claims the Department is trying to prospectively apply recommended/pending legislation (the proposed "Marketplace Facilitator Legislation," which has since been enacted) to place a legal obligation on Amazon Services that does not exist under the current tax scheme. Amazon Services maintains it could not have had "fair notice" that is was subjecting itself to a sales tax when it provided services to third-party Merchants.

In response, the Department argues the South Carolina Sales and Use Tax Act is not impermissibly vague or ambiguous with respect to Amazon Services' liability for collecting and remitting sales and use tax under the current statutory scheme. The Department cites to the *Travelscape* decision in 2011 to argue Amazon Services should have been on notice that the responsibility for collecting sales and use tax could be imposed upon online retailers "in the business" of selling. The Department also notes that Amazon Services never sought clarification of its tax obligations in a private letter ruling from the Department.

The Court finds Amazon Services' situation is not comparable to the circumstances described in *Fox Television Stations* and there is no constitutional violation. Unlike the FCC in *Fox Television Stations*, the Court finds no evidence that the Department imposed, or was trying to impose, pending legislation on Amazon Services to obligate Amazon Services to remit sales and use tax for these transactions. *See Fox Television Stations*, 567 U.S. at 249-255. Nowhere has the Department cited to the pending legislation in an attempt to apply it to Amazon Services in this case. Therefore, the Department is not seeking to impose a new law retroactively on Amazon Services in the same way the FCC was attempting to do in *Fox Television Stations*. Rather, the Court finds that this case is more reflective of an existing tax scheme being applied to a relatively new business model (the online marketplace). Just because a new business structure

is created does not mean that this new structure is immune from existing tax obligations or other legal obligations simply because the existing statutory scheme does not specifically incorporate the new business model. Moreover, this Court has even emphasized in its previous rulings in this case the folly of relying on unenacted legislation to interpret legislative intent or construe existing statutes. *See* Order on Motion for Summary Judgment (January 29, 2019) (citing and quoting *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011)).

Equal Protection

Amazon Services argues that the Department has singled it out for imposition of tax to the neglect of other e-commerce sites or online marketplaces, which is an equal protection violation.

Under the South Carolina Constitution, no "person shall be denied the equal protection of the laws." S.C. Const. art. I, § 3. *See also Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013) (citing S.C. Const. art. I, § 3). "In order to establish an equal protection violation, a party must show that similarly situated persons received disparate treatment." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 626, 503 S.E.2d 471, 479 (1998). Moreover, "[a] crucial step in the analysis of any equal protection clause is the identification of the pertinent class . . . ." *Bodman*, 403 S.C. at 69, 742 S.E.2d at 367 (quoting *Sloan v. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 481, 636 S.E.2d 598, 613 (2006). Equal protection does not require that all taxpayers be treated the same, rather, only similarly-situated taxpayers be treated the same. *See id*. "Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Town of Hollywood v. Floyd*, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013). "To prevail under the rational basis standard, a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose." *Town of Hollywood v. Floyd*, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013). Moreover, "[t]o prove that a statute has been administered or enforced discriminatorily, more must be shown than the fact that a benefit was denied to one person while conferred on another." *Whaley v. Dorchester Cty. Zoning Bd. of Appeals*, 337 S.C. 568, 576, 524 S.E.2d 404, 408 (1999). "A violation is established only if the plaintiff can prove that the state intended to discriminate." *Id.* at 576, 524 S.E.2d at 408; *see Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 329 (4th Cir. 2005) ("Even if we were to determine that plaintiffs' project was similarly situated to other projects, they would still need to show purposeful discrimination."); *id.* ("If disparate treatment alone was sufficient to support a

Constitutional remedy then every mistake of a local zoning board in which the board mistakenly treated an individual differently from another similarly situated applicant would rise to the level of a federal Constitutional claim.").

Amazon Services did not devote much time at trial developing a foundation for its equal protection argument. In its closing argument, Amazon Services' attorney argued that "[t]he Court must know that these websites like Amazon and eBay and Etsy, that's where people buy stuff." Amazon Services' executive, Mr. Poad, also briefly testified eBay operates a marketplace, and he believes Wayfair and Walmart have marketplaces. Amazon Services also argued that pending marketplace facilitator legislation showed that the Department had no intention of assessing the tax against other marketplace facilitators except for the "pending litigation," which referred to this litigation.

However, Amazon Services has failed to submit any evidence specifically identifying other online marketplaces *and* showing that these other online marketplaces are similarly situated. *See Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 70, 663 S.E.2d 497, 504 (Ct. App. 2008) (upholding the denial of an equal protection claim where the plaintiffs "summarily" argued their property was similarly situated to the neighboring property and failed "to cite any evidence of record that support these assertions"); *Town of Hollywood*, 403 S.C. at 482, 744 S.E.2d at 169 ("The pertinent issue before this Court is whether the developers presented evidence that the Planning Commission treated them differently than other similarly situated developers."). Indeed, in its proposed order making the equal protection argument, Amazon Services does not even address what level of review is to be used—in this case, rational basis. Thus, Amazon Services has not argued that its "disparate treatment did not bear a rational relationship to a legitimate government purpose." *Id.* at 480, 744 S.E.2d at 168 ("To prevail under the rational basis standard, a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose.").

Amazon Services contention was rather based upon a negative inference that the Department "has not sought to audit or collect sales or use taxes on third-party sales from any other ecommerce site or online marketplace." However, the transcript reflects the Department merely testified that, at the time it audited Amazon Services, it had not previously audited any online marketplace or ecommerce business.

Although the Court acknowledges there are other businesses with online marketplaces or ecommerce websites potentially similarly situated to Amazon Services, there was no evidence presented to establish this fact. In fact, Amazon Services offered no evidence regarding whether the Department assessed sales and use tax on another online marketplace or why the Department failed to impose the tax on such a similarly situated business. Thus, there is no evidence that the Department purposefully singled-out Amazon Services to intentionally discriminate against them with the imposition of the tax. *See Sunrise Corp. of Myrtle Beach*, 420 F.3d at 329 (4th Cir. 2005) ("Even if we were to determine that plaintiffs' project was similarly situated to other projects, they would still need to show purposeful discrimination."); *id.* ("If disparate treatment alone was sufficient to support a Constitutional remedy then every mistake of a local zoning board in which the board mistakenly treated an individual differently from another similarly situated applicant would rise to the level of a federal Constitutional claim."). A summary observation that other online marketplaces appear not to have been taxed is not enough, and it is incumbent upon Amazon Services to show, through evidence, that an equal protection violation has occurred. *See Olson*, 379 S.C. at 70, 663 S.E.2d at 504 (upholding the denial of an equal protection claim where the plaintiffs "summarily" argued their property was similarly situated to the neighboring property and failed "to cite any evidence of record that support these assertions").

Finally, this case is heard *de novo* before the ALC. This Court would not allow the singling out of any company for selective enforcement and, indeed, recognizes that Amazon is a respected company that contributes to this State's economy. Although, there will always be instances in which a business will be placed in the position to be the first to challenge viewpoints propounded by the Department before the ALC, that primordial position does not in turn imply disparate treatment.

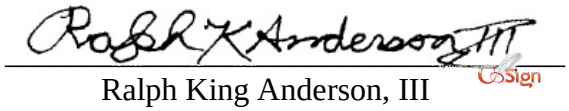
ORDER

Having considered the parties' submission, the testimony at the hearing, and the applicable South Carolina statutes and case law,

IT IS HEREBY ORDERED that the Department's determination that Amazon Services owes sales and use tax on the sale of third-party product sold on the Marketplace for audit period at issue is AFFIRMED.

IT IS FURTHER ORDERED that pursuant to the parties' agreement, now that the litigation is complete the Department will calculate the specific amount of tax owed on the sales at issue in this case.

AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

September 10, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE

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

E. Harvin Belser Fair
Judicial Law Clerk

September 10, 2019
Columbia, South Carolina