



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE

300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 12265, Columbia, South Carolina 29211
803-898-5130 Fax # 803-896-0171

August 1, 2017

The Honorable Jana Shealy
Administrative Law Clerk
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: **Amazon Services, LLC, vs. South Carolina Department of Revenue**
Docket No. 17-ALJ-17-0238-CC

Dear Ms. Shealy:

Enclosed please find the South Carolina Department of Revenue's Agency Information Sheet and Notice of Appearance in connection with the above-referenced matter.

Please do not hesitate to contact me if you should have any questions.

Sincerely,

OFFICE OF GENERAL COUNSEL FOR LITIGATION

A handwritten signature in cursive script that reads "Lauren Acquaviva".

Lauren Acquaviva
Counsel for Litigation
Lauren.Aquaviva@dor.sc.gov
803-898-5110

c: Burnet R. Maybank, III, Esquire

Enclosures

LA:gjm

FILED

AUG 01 2017

SC ADMIN LAW COURT

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

AGENCY INFORMATION SHEET
AND NOTICE OF APPEARANCE
Contested Case

1. Identifying information on the matter in controversy (Name and/or title of agency proceeding, statutory provisions giving rise to the controversy, file number or any other identifying information):

Amazon Services, LLC

Periods Involved: Sales and Use taxes for January 1, 2016 through March 31, 2016

Is Amazon Services, LLC (“Taxpayer”) a person in the business of selling tangible personal property (“property”) at retail and, thus, subject to sales and use tax pursuant to S.C. Code Ann. §§ 12-36-910(A) and 12-36-1310(A) (2014)?

Sections 12-36-910(A) and 12-36-1310(A) (2014); S.C. Code Ann. § 12-36-2691 (2014); S.C. Code Ann. §§ 12-36-5 et seq (2014); S.C. Code Ann. §§ 12-36-1340 and 12-36-1350 (2014); S.C. Code Ann. § 12-36-70(1)(a) (2014); S.C. Code Ann. § 12-36-60 (2014); S.C. Code Ann. § 12-36-80 (2014); S.C. Code Ann. § 12-36-90(1)(a) (2014); S.C. Code Ann. § 12-36-110; S.C. Code Ann. § 12-36-100 (2014); S.C. Code Ann. Regs. 117-319 (2012); S.C. Code Ann. § 12-36-920(E) (2014); and S.C. Code Ann. § 12-36-140

2. Has the agency staff issued a final written decision regarding its action or inaction in this matter? X yes no (if yes, please attach a copy):

3. Name, address, and telephone numbers of all known parties and their attorneys, if represented:

Petitioner

Amazon Services, LLC
Attn: Damian Hunt
P. O. Box 80416
Seattle, WA 98108-0416
206-765-1533
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Attorney for Petitioner:

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SC ADMIN LAW COURT

Respondent:

South Carolina Department of Revenue
Lauren Acquaviva, Counsel for Litigation
Sean G. Ryan, Managing Counsel for Litigation
Jason P. Luther, General Counsel for Litigation
P.O. Box 12265
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Counsel for Respondent

4. Name, address, and telephone number of any persons who have exercised their legal right to object to the issuance of the permit or license:

Not Applicable.

Pursuant to ALC Rule 8(B), notice is hereby given that the undersigned is authorized to and will be representing the above named agency in this matter. Further, by my signature below, I certify that a copy of this information sheet has been served on all parties or their attorneys by first class mail on the date shown below.



Lauren Acquaviva (Bar No. 100528)
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Columbia, South Carolina
August 1, 2017

DEPARTMENT DETERMINATION

Taxpayer:

Amazon Services, LLC
P.O. Box 81207
Seattle, WA 98108

Periods Involved:

Sales and Use Tax – January 1, 2016 through March 31, 2016

Matters in Dispute:

1. Is Amazon Services, LLC (“Taxpayer”) a person in the business of selling tangible personal property (“property”) at retail and, thus, subject to sales and use tax pursuant to S.C. Code Ann. §§ 12-36-910(A) and 12-36-1310(A) (2014)?
2. Did the South Carolina Department of Revenue (“Department”) properly include all the proceeds from the Taxpayer’s online sales in the tax base?

Amount in Dispute:

Tax:	\$ 9,576,549.12 ¹
Penalty:	\$ 2,394,137.28
Interest:	<u>\$ 519,815.75</u>
Total	\$12,490,502.15 ²

Determinations:

1. The Taxpayer is a person in the business of selling tangible personal property at retail and is subject to South Carolina’s sales and use tax.
2. The Department properly included all the proceeds from the Taxpayer’s online sales in the tax base.

Relevant Facts:

1. The Taxpayer is an affiliate of Amazon.com, Inc. (“Amazon”). Other relevant affiliates of Amazon include Amazon.com, LLC, Amazon Fulfillment Services, Inc. (“AFS”), and Amazon Payments, Inc. (“Amazon Payments”).

¹This is an estimated figure based on an agreement by the parties.

²The total for this quarter may change as interest and penalties are only calculated through July 18, 2017, and will continue to accrue until this matter is resolved.

2. Amazon.com, LLC is one of many Amazon affiliates whose property is offered for sale on www.amazon.com (the “Taxpayer’s Website”). In other words, Amazon.com LLC supplies property to the Taxpayer to be sold on the Taxpayer’s website. On January 1, 2016, Amazon.com, LLC began collecting and remitting sales tax to the Department.³
3. AFS has subsidiaries throughout the United States that own and operate Amazon’s fulfillment centers. Amazon.com.dedc, LLC (“DEDC”), is the AFS subsidiary that owns and operates the fulfillment centers located in South Carolina.
4. Amazon Payments is the payment processing entity that the Taxpayer uses. Amazon Payments contracts with various merchant services providers and/or financial institutions in order to provide its payment-processing services.
5. The Taxpayer owns and operates the Taxpayer’s Website. The Taxpayer enters into agreements with third parties and Amazon affiliates, such as Amazon.com, LLC, in order to offer various property for sale on the Taxpayer’s Website. The agreements the Taxpayer enters into with third parties and Amazon affiliates are almost identical except for the fees.
6. The third parties are suppliers and/or consignors of tangible personal property, and the Taxpayer is the seller and/or consignee of tangible personal property. As the consignors, the third parties retain title to the property.
7. The Taxpayer contracts with AFS for fulfillment services. AFS’s subsidiaries, such as DEDC, handle all the storing, packaging, and shipping of property held in AFS’s fulfillment centers. AFS controls which fulfillment centers are used for the storage of products. Finally, the Taxpayer contracts with Amazon Payments to obtain payment-processing services for the Taxpayer’s Website. The third parties and Amazon affiliates do not have agreements with AFS or Amazon Payments. They only have agreements with the Taxpayer.
8. When the Taxpayer’s customer makes a purchase on the Taxpayer’s Website, the customer enters his or her shipping address, billing address, and credit card information (collectively “customer order information”) on the checkout page of the Taxpayer’s Website. The Taxpayer holds that customer information while it processes the customer’s order. The Taxpayer sends the customer an order confirmation email. When a customer purchases property that is held in an Amazon fulfillment center (“Fulfilled by Amazon” or “FBA”),

³Initially, based on the Department’s understanding of the facts, the Department believed Amazon.com, LLC, was a South Carolina retailer and liable for sales and use tax on all sales made on the Taxpayer’s Website. As the facts have been developing and continue to develop, the Department now questions whether Amazon.com, LLC, is liable for the sales and use tax at all or whether the Taxpayer is liable for the sales and use tax on all sales made on the Taxpayer’s Website, including sales of property supplied by Amazon affiliates like Amazon.com, LLC. If, after discovery, the Department determines that the Taxpayer and not the Amazon affiliates, such as Amazon.com, LLC, is the proper taxpayer concerning all sales made on the Taxpayer’s Website, the Department reserves the right to make adjustments as necessary.

the Taxpayer sends an automated message to AFS instructing AFS to ship the property to the customer. Once AFS ships the property to the customer, the Taxpayer charges the customer's credit card. When a customer purchases property that is held by a third party (the "Merchant Fulfillment Network" or "MFN"), the Taxpayer instructs the third party to ship the property to the customer. The Taxpayer then requires the third party to notify the Taxpayer when the third party ships the property to the customer. Once the Taxpayer receives notification from the third party that the property shipped, the Taxpayer charges the customer's credit card.

9. Some of the property is shipped to the Taxpayer's South Carolina customers from within the State and the remaining property is shipped to its South Carolina customers from outside of the State. When the property is shipped from outside the State, it usually is shipped directly to the customer without any participation from any local place of business of the Taxpayer, i.e., AFS's distribution warehouse.
10. After the Taxpayer charges the customer's credit card, the Taxpayer, via Amazon Payments, holds the funds and records the transaction in the third party's "seller account."⁴ While the Taxpayer is holding the funds, the Taxpayer may combine the funds with proceeds from other sales on the Taxpayer's Website, invest and earn interest on the funds, or use the funds for any other purpose permitted by law. Every two weeks (or more frequently at the Taxpayer's discretion), the Taxpayer sends the third party the third party's portion of the proceeds and the Taxpayer retains its portion. The third party's portion of the proceeds is the total sale proceeds less the Taxpayer's fees.⁵
11. For orders that are fulfilled by AFS, the Taxpayer determines the shipping and handling charges. For orders that are fulfilled via the Merchant Fulfillment Network, the third party determines the shipping and handling charges. However, the third party's charges for shipping and handling must remain within the parameters set by the Taxpayer.
12. The Taxpayer provides some level of customer service on all purchases from the Taxpayer's Website. On FBA orders, the Taxpayer handles all customer service. On MFN orders, the Taxpayer only handles customer service on payment related issues. Additionally, the Taxpayer provides the A-to-Z Guarantee Program wherein a customer can submit a claim related to his or her order on the Taxpayer's Website regardless of which entity fulfilled the order. Third parties are required to comply with the requirements of the A-to-Z Guarantee Program. Moreover, the third party is required to reimburse the Taxpayer the amount the customer paid the Taxpayer plus any associated fees if the claim made by the customer is not caused by one of the two situations covered by the Taxpayer.⁶

⁴"Seller account" is a term used by the Taxpayer.

⁵At this point, the Department is still not clear as to how money changes hands.

⁶Pursuant to the Taxpayer's Business Solutions Agreement, the third party is responsible for the costs of all returns, claims, chargebacks, and disputes except those caused by "(i) credit card fraud for which [the Taxpayer is] responsible under Section S-1.4; or (ii) [the Taxpayer's]

13. The Taxpayer determines the cancellation, return, and refund policy for all property sold on the Taxpayer's Website.
14. The Taxpayer restricts how a third party can use a purchaser's customer order information and any other data the third party acquires from the Taxpayer, Amazon, or an Amazon affiliate.
15. The Taxpayer requires that when a third party's property is offered for sale somewhere other than the Taxpayer's Website, the purchase price, terms of the offer, customer service, and product information on the Taxpayer's Website must be equal or better than that of any other store or website.
16. In 2011, AFS opened a fulfillment center in Lexington County, South Carolina. That same year, the South Carolina General Assembly passed the "Distribution Facility Sales Tax Exemption," which exempted retailers like the Taxpayer from collecting and remitting sales and use tax for a five-year period from January 1, 2011, through December 31, 2015. See S.C. Code Ann. § 12-36-2691 (2014). AFS later opened two more fulfillment centers in South Carolina – one in North Charleston and one in Spartanburg.
17. On January 1, 2016, the Taxpayer's duty to remit sales and use tax began. Shortly thereafter, the Department began receiving emails and phone calls from the Taxpayer's South Carolina customers who reported that "Amazon charged them sales tax on some purchases but not others."
18. On February 25, 2016, the Department emailed Amazon to start a discussion about Amazon's sales and use tax collection and remittance. During the discussions that followed, the Department learned that Amazon was treating sales of property supplied by Amazon affiliates differently from sales of property supplied by third parties. The Department also learned that Amazon believed Amazon.com, LLC, was liable for sales tax on sales of its property on the Taxpayer's Website, and that the Taxpayer merely provided a nontaxable service to the third parties.
19. On September 1, 2016, the Department mailed the Taxpayer a letter informing the Taxpayer that the Department would be conducting a sales and use tax audit of the Taxpayer's online sales for the periods from January 1, 2016, through March 31, 2016. The Department also issued the Taxpayer a Summons to Produce Records in order to help expedite the audit.
20. In November of 2016, the Department received a spreadsheet with summary data from the first quarter of 2016. The spreadsheet contains data regarding the Taxpayer's sales of property owned by third parties during that quarter. The spreadsheet also reflects tax collected by the Taxpayer on behalf of third parties and then remitted to those third parties.

failure to make [the] Order Information available as the same was received by [the Taxpayer] or resulting from address verification"

21. On November 15, 2016, the Department held a meeting with the Taxpayer and its counsel. The Taxpayer asked the Department to issue the proposed assessment based on the summary data in the above-referenced spreadsheet. As such, the parties agreed the Department would issue the proposed assessment based on estimated figures.
22. The Department used the spreadsheet to create a proposed assessment. On December 9, 2016, the Department sent the Taxpayer and its counsel the Proposed Assessment and the Explanation of Audit Assessments and Adjustments. The Proposed Assessment indicated that the Taxpayer owed \$9,830,759.19 in sales and use tax plus substantial understatement penalties and interest.
23. On March 9, 2017, the Taxpayer hand delivered its protest letter to the Department.
24. On March 22, 2017, the Department held a conference with the Taxpayer and its counsel to discuss the Proposed Assessment. The Taxpayer requested an adjustment to the Proposed Assessment because the Taxpayer included the "shipping count" in the spreadsheet it provided to the Department. The shipping count represented the total number of shipments made during the first quarter of 2016. The Department did not need such figure in making its calculation, but was not aware that such figure was included in the Total Net Activity. All the Department needed was the total shipping charges for the quarter, which were also included in the spreadsheet. Accordingly, the Taxpayer asked that the Department exclude the shipping count and recalculate the tax liability based on the adjusted Total Net Activity. The recalculation resulted in reducing the tax measure by \$3,631,571.43. Using a 7% sales and use tax rate (6% state rate plus an estimate 1% for local option sales tax), the tax liability was reduced by \$254,210.00. The Department agreed to make this adjustment. The Taxpayer's counsel also expressed some concerns about the accuracy of the local option taxes. The parties agreed that for purposes of the hearing, the Department would use a 7% tax rate, and that the local option taxes could be verified if necessary after a decision from the court. Finally, the Taxpayer asked about taxes that it collected on behalf of the third parties. The Department informed the Taxpayer that the Department did not give any credit for those collected taxes, but that the Department may need to make adjustments after a decision from the Court.
25. After the conference on March 22, 2017, the Department sent the Taxpayer and its counsel an Amended Proposed Assessment and Explanation of Audit Assessments and Adjustments. The Amended Proposed Assessment indicates the Taxpayer owes \$9,576,549.12 in sales and use tax plus substantial understatement penalties and interest.
26. On March 28, 2017, the file was forwarded to the Office of General Counsel for Litigation.

Analysis:

I. The Taxpayer is a person in the business of selling tangible personal property at retail and is subject to sales and use tax.

South Carolina has a Sales and Use Tax Act (the “Act”), which imposes sales and use tax on specific persons. See S.C. Code Ann. §§ 12-36-5 et seq. (2014). In determining whether a specific person is subject to sales or use tax in South Carolina, it is important to read the Act as a whole. See TNS Mills, Inc. v. South Carolina Dept. of Revenue, 503 S.E.2d 471, 476, 331 S.C. 611, 620 (1998); Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992) (“In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction.”). Under South Carolina law, “[a] sales tax, equal to [six]⁷ percent of the gross proceeds of sales, is imposed upon every person⁸ engaged or continuing within this State in the business⁹ of selling tangible personal property¹⁰ at retail” and is not limited to tangible personal property owned by the person/retailer. Section 12-36-910(A). Additionally, § 12-36-1310(A) imposes a use tax 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” However, S.C. Code Ann. §§ 12-36-1340 and 12-36-1350 (2014) impose the responsibility of collecting and remitting the use tax on the retail seller who maintains a place of business in this State.¹¹ Thus, if the Taxpayer is a retail seller who maintains a place of business in this State, then the Taxpayer is responsible for remitting the sales and use tax.

The definition of “retailer” and “seller” includes every person “selling or auctioning tangible personal property whether owned by the person or others.” S.C. Code Ann. § 12-36-70(1)(a)

⁷S.C. Code Ann. § 12-36-1110 (2014) imposes an additional one percent sales and use tax.

⁸Under the Act, the term “person” includes “any individual, firm, partnership, limited liability company, association, corporation, receiver, trustee, any group or combination acting as a unit, the State, any state agency, any instrumentality, authority, political subdivision, or municipality.” S.C. Code Ann. § 12-36-30 (2014).

⁹Under the Act, the term “business” includes “all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.” S.C. Code Ann. § 12-36-20 (2014).

¹⁰Under the Act, the term “tangible personal property” is defined as “personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses.” S.C. Code Ann. § 12-36-60 (2014).

¹¹“Retailer maintaining a place of business in this State, or any similar term, includes any retailer having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent operating within this State under the authority of the retailer or its subsidiary, regardless of whether the business or agent is located here permanently or temporarily or whether the retailer or subsidiary is admitted to do business within this State.” S.C. Code Ann. § 12-36-80 (2014).

(2014).¹² In addition, the term “gross proceeds of sales,” which will be discussed in more detail under section II, includes proceeds from the sale of tangible personal property sold on consignment. See S.C. Code Ann. § 12-36-90(1)(a) (2014). “Sale at retail” and “retail sale” generally is a sale, not for resale, to the user or consumer of the tangible personal property. See S.C. Code Ann. § 12-36-110 (defining “sale at retail” and “retail sale”) and § 12-36-120 (2014) (defining “wholesale sale”). Finally, “sale” means “any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration” S.C. Code Ann. § 12-36-100 (2014). Thus, reading the Act as a whole, a person in the business of transferring tangible personal property to its user or consumer in South Carolina for a consideration, regardless of whether that person owns or physically possesses such property, is responsible for sales and use tax.

The Taxpayer in this case operates a business where it offers for sale property owned by its affiliates or third parties on the Taxpayer’s Website to users or consumers of the property in South Carolina. Some of the property is shipped to the Taxpayer’s South Carolina customers from within the State and the remaining property is shipped to its South Carolina customers from outside of the State. When the property is shipped from outside the State, it usually is shipped directly to the customer without any participation from any local place of business of the Taxpayer. The Taxpayer does not dispute that tangible personal property is sold at retail on the Taxpayer’s Website to users or consumers in South Carolina.¹³ Rather, the Taxpayer disputes *who* sells the tangible personal property on the Taxpayer’s Website. Thus, the primary issue in this case is whether the *Taxpayer* sells tangible personal property on the Taxpayer’s Website.

As will be discussed in more detail below, the totality of the Taxpayer’s activities clearly demonstrates that the Taxpayer is in the “business of selling tangible personal property at retail” within the meaning of § 12-36-910(A). The Taxpayer hosts the Taxpayer’s Website so its customers can select from a variety of items. The Taxpayer controls to whom and to where the property is sent and effects the actual transfer of the property to its customers. The Taxpayer accepts payment for said property and holds the funds in “escrow” for later disbursement of a

¹²For example, S.C. Code Ann. Regs. 117-319 (2012) provides, in part:

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.**

(Emphasis added). This regulation demonstrates just how broad a reach the Act has, such that even persons who do not own or possess the tangible personal property are liable for sales and use tax on their sale of such property.

¹³If the Department’s understanding as to the nature of the dispute is incorrect, please inform the Department in writing prior to requesting a contested case hearing so the Department can issue an amended Department Determination addressing all of the disputed issues. If you fail to inform the Department of any additional issues, such additional issues, if any, will be deemed abandoned.

portion of the funds to third parties. Finally, the Taxpayer exercises controls over transaction details such as customer service and returns. Therefore, the Taxpayer is liable for sales and use tax as a South Carolina retailer.

A. A plain reading of Section 12-36-100 demonstrates the Taxpayer sells tangible personal property on the Taxpayer's Website.

The Taxpayer sells tangible personal property on the Taxpayer's Website. Specifically, for a sale to take place, as defined by the Act, there must be (1) a transfer of tangible personal property (2) for a consideration. See § 12-36-100. Section 12-36-100 is very broad and includes *any* transfer. In International Harvester Co. v. Wasson, 281 S.C. 458, 460, 316 S.E.2d 378, 379 (1984), the South Carolina Supreme Court examined the definition of "sale." In doing so, the Court stated "if the transfer of the [tangible personal property], i.e., delivery, took place in South Carolina, the sale would take place in this State." Id. The Court did not mention physical possession in its analysis. Id. Notably, Black's Law Dictionary defines the term "transfer" as "[t]o convey or remove from one place or one person to another." Black's Law Dictionary, 729 (3d. Pocket Ed. 2006). Accordingly, any type of transfer for a consideration, whether it be on consignment, via drop shipment, or in some other way by direction of the retailer, constitutes a sale.

Here, once a customer places an order on the Taxpayer's Website, the Taxpayer transfers the property to the customer by directing either AFS or a third party to ship said property. This method of transferring property is akin to a drop shipment and/or consignment sale. Accordingly, the facts demonstrate that the Taxpayer transfers the property, satisfying the first element of a sale. Next, the Taxpayer only directs shipment of the property after it receives payment from the customer. As such, the Taxpayer receives a consideration in exchange for it transferring the property. Specifically, when a customer places his or her order on the Taxpayer's Website, the customer provides the Taxpayer with his or her billing information. The Taxpayer holds the customer's billing information until the property is shipped. Once the property is shipped, the Taxpayer charges the customer's credit card and receives payment. After the Taxpayer charges the customer's credit card, the Taxpayer holds the funds. In instances when a third party supplies the property,¹⁴ the Taxpayer records the transaction in the third party's "seller account." Every two weeks, the Taxpayer sends the third party its proceeds, which is the total sales proceeds less the Taxpayer's fees. As such, the Taxpayer receives a consideration, satisfying the second and final element of a sale. Accordingly, since the Taxpayer receives money from its customer – a consideration – in exchange for the Taxpayer transferring tangible personal property to the customer, the Taxpayer sells tangible personal property in South Carolina via the Taxpayer's Website.

Additionally, § 12-36-100 provides some examples of what constitutes a sale. Specifically, § 12-36-100(4) provides that a transfer of possession for a consideration constitutes a sale. The Act, however, does not include a definition of the term "possession". The South Carolina Supreme Court has stated "[w]hen faced with an undefined statutory term, the Court must interpret the term in accordance with its usual and customary meaning." Travelscape, LLC v. S.C. Dept. of Revenue,

¹⁴At this time, the Department does not know how money changes hands when an Amazon affiliate, such as Amazon.com, LLC, supplies the property.

391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011) (internal citation omitted). In its usual and customary meaning, possession can be actual or constructive. See Black's Law Dictionary, 546 – 547 (3d. Pocket Ed. 2006) (defining “possession” as “something that a person owns [actual possession] or controls [constructive possession].”) The Black's Law Dictionary defines actual possession as “[p]hysical occupancy or control over property” and constructive possession as “[c]ontrol or dominion over a property without actual possession or custody of it.” Id. Thus, the first element of a “sale” can also be satisfied if the Taxpayer has either physical possession/control over the tangible personal property or control over tangible personal property without physical possession of it. This is consistent with, when reading the Act as a whole, the provisions of the imposition statute, the inclusion of consignment sales in the definition of gross proceeds of sales, and the definition of retailer.

As stated above, the Taxpayer transfers property to its customer after the customer places an order on the Taxpayer's Website. The Taxpayer uses two different means of transferring tangible personal property to its customers: (1) AFS fulfills some orders and (2) third parties fulfill the other orders. When AFS fulfills the order, AFS stores the property at one of its fulfillment centers. Once a customer places an order with the Taxpayer, the Taxpayer instructs AFS to ship the property to the customer. Thus, even though AFS fulfills the order, the Taxpayer has control over the property. The Taxpayer controls when the property is shipped and who receives the property. AFS simply follows the Taxpayer's instructions, but the Taxpayer is who has control over and transfers the property. AFS cannot fulfill an order without instruction from the Taxpayer. As such, the Taxpayer has physical control of the tangible personal property and maintains such control until it transfers possession of the property to its customer.

Similarly, when a third party fulfills the order, the third party stores the property. Once a customer places an order with the Taxpayer, the Taxpayer instructs the third party to ship the property to the customer. Thus, when a third party fulfills the order, the Taxpayer has control or dominion over the property without actual possession or custody of it. As such, the Taxpayer is who transfers the property to its customer. Accordingly, whether AFS or a third party fulfills the sales order, the Taxpayer has either actual physical possession of the tangible personal property or sufficient control over the tangible personal property to constructively possess the same and transfers such possession to its customer. Thus, the Taxpayer sells tangible personal property on the Taxpayer's Website.

B. South Carolina case law supports the conclusion that the Taxpayer is engaged in the business of selling tangible personal property at retail and is subject to sales and use tax.

Our Supreme Court examined a similar issue in Travelscape, LLC v. S.C. Dept. of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011). Specifically, the Travelscape Court examined the “engaged in the business of” language and the undefined term “furnish” found in S.C. Code Ann. § 12-36-920(E) (2014). Similar to § 12-36-910(A), which imposes a sales tax on “every person **engaged . . . in the business of [transferring]** tangible personal property [for a consideration],” § 12-36-920(E) imposes an accommodations tax “on every person engaged or continuing within this State **in the business of furnishing** accommodations to transients for consideration.” (emphasis added). The term “transfer” is not defined in the Act. Similarly, the term “furnish” or “furnishing” is not

defined in the Act. In construing the undefined term “furnish,” the Travelscape Court stated that the meaning of an undefined term should be construed “in conjunction with the whole purpose of the statute and the policy of the law.” 391 S.C. at 99, 705 S.E.2d at 33. In doing so, the Court determined the term “furnish” must be read in light of the “engaged in the business of” language in the statute. The Travelscape Court reasoned as follows:

As used in subsection (E), “furnish” does mean to physically provide sleeping accommodations. However, Travelscape's argument ignores the antecedent language in (E) that it applies to all persons “engaged ... in the business of” furnishing accommodations. “Business” includes “all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.” S.C. Code Ann. § 12-36-20 (2000). **Accordingly, we find the context of “furnish” as it appears in subsection (E) demonstrates that it encompasses the activities of entities such as Travelscape who, whether directly or indirectly, provide hotel reservations to transients for consideration. . . . [W]e interpret subsection (E) in such a manner as to give effect to all the language contained therein—particularly that the entity be “engaged ... in the business of” furnishing accommodations—rather than focusing on the term “furnish” in isolation. While Travelscape does not physically provide accommodations, it is in the business of doing so.**

391 S.C. at 101, 705 S.E.2d at 34. The Travelscape Court went on to explain that “[t]he application of the tax to ‘every person engaged . . . in the business of furnishing accommodations’ also reveals that the legislature intended 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.**” Id. (emphasis added).

The language in § 12-36-910(A) is substantively identical to the language in § 12-36-920(E), therefore the Court’s analysis in Travelscape is instructive here. Like the taxpayer in Travelscape, the Taxpayer argues that since it does not have physical possession of the property, it cannot transfer the property and, thus, cannot be selling the property. However, the term “transfer,” like the term “furnish,” is not defined in the Act. Moreover, § 12-36-100 does not limit the definition of sale to a transfer of possession. Rather the statute is broad and includes any type of transfer, the transfer of possession being just one example. Therefore, in determining the meaning of the term “transfer” in the Act, the term should be construed in conjunction with the whole purpose of the statute and the policy of the law in the same way the Travelscape Court construed the term “furnish.” 391 S.C. at 99, 705 S.E.2d at 33. Applying the Travelscape Court’s reasoning to construe the term “transfer” demonstrates that the Legislature intended to levy a sales tax on the Taxpayer regardless of whether the Taxpayer has actual or constructive possession of the property because the Taxpayer accepts money in exchange for supplying/conveying/delivering property to its customers. Accordingly, the application of the statutes at issue combined with the Court’s reasoning in Travelscape demonstrate that South Carolina’s Sales and Use Tax Act has a broad reach and that the Taxpayer is a person engaged in the business of selling tangible personal property at retail.

II. The Department properly included all the proceeds from the Taxpayer's online sales in the tax base.

All retailers must collect and remit sales tax on their gross proceeds of sales. See § 12-36-910(A). "Gross proceeds of sales" is defined as:

[T]he value proceeding or accruing from the sale, lease, or rental of tangible personal property.

(1) The term includes:

- (a) the proceeds from the sale of property sold on consignment by the taxpayer;
- (b) the proceeds from the sale of tangible personal property without any deduction for: [various expenses].

S.C. Code Ann. § 12-36-90 (2014). The Administrative Law Court (ALC) looked at § 12-36-90(1)(a) in the Travelscape case. See Travelscape, LLC v. S.C. Dept. of Revenue, 08-ALJ-17-0076-CC, 2009 WL 769017 at *22 fn 15 (S.C. Admin. Law Ct. Feb. 12, 2009). In doing so, the ALC explained:

In 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. The total amount received for the sale is subject to sales tax without any deduction for labor costs.

Id. Moreover, our Supreme Court in Travelscape examined § 12-36-90(1) and explained that a taxpayer is liable for tax on the entire amount received by the seller, to include the fees retained by the seller for its services. Travelscape, 391 S.C. at 98, 705 S.E.2d at 33. Accordingly, the Taxpayer, as a retailer who operates like a consignment store, must remit sales tax on all sales and on the entire value of each sale, including its retained fees, and cannot deduct its expenses.

Additionally, a retail seller who maintains a place of business in this State is responsible for collecting and remitting the use tax at a rate of six percent of the sales price. See §§ 12-36-1310, 12-36-1340, and 12-36-1350. "Sales price" is defined as "the total amount for which tangible personal property is sold, without any deduction for [various] expenses." S.C. Code Ann. § 12-36-140. Thus, just like with the sales tax, the Taxpayer must remit use tax on all sales and on the entire value of each sale, including its retained fees, and cannot deduct its expenses.

Here, the Taxpayer sells property owned by its affiliates or third parties through the Taxpayer's Website. The Taxpayer does not own any of the property it sells; rather, the Taxpayer sells property that is owned by others – a consignment sale. The Taxpayer receives the proceeds from the sale then the Taxpayer remits to the third party that party's share of the proceeds. However, because the Taxpayer must remit sales tax on the entire value of the sale, the Taxpayer must remit

sales and use tax on the entire amount the Taxpayer collects from its customers. Accordingly, because the Taxpayer sells the tangible personal property on the Taxpayer's Website, the Department properly included all the proceeds from the Taxpayer's online sales in the tax base.¹⁵

III. The Taxpayer's arguments are not persuasive.

A. The Department has sufficient nexus with the Taxpayer, and therefore, the Proposed Assessment does not violate the Due Process and dormant Commerce Clauses of the U.S. Constitution.

First, the Taxpayer argues that the Proposed Assessment violates the Due Process Clause because the Taxpayer "did not direct purposeful contact with the state when it provided services to the Merchants situated in states other than South Carolina . . ." Taxpayer's Protest Ltr. at p. 46. The Taxpayer, however, mischaracterizes itself as a service provider and ignores the fact that it is deemed the seller by South Carolina law, as discussed above. Accordingly, when the Taxpayer sold property to its South Carolina customers, it directed purposeful contact with South Carolina. Thus, the Department has sufficient nexus with the Taxpayer to satisfy the Due Process Clause.

Second, the Taxpayer appears to argue that the Proposed Assessment violates the dormant Commerce Clause because the Taxpayer does not have a physical presence in South Carolina. However, AFS, an affiliate of the Taxpayer, has three distribution centers in South Carolina. Commerce Clause nexus may be established through an agent performing activities on behalf of a taxpayer that help the taxpayer establish and maintain a market in the taxing state. See e.g., New Mexico Taxation and Revenue Dep't v. Barnesandnoble.com LLC, 303 P.3d 824 (relying on Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue, 483 U.S. 232 (1987)). AFS's distribution centers help the Taxpayer establish and maintain a market in South Carolina and throughout the world. Accordingly, the Taxpayer has a physical presence in South Carolina. Because the Taxpayer has a physical presence in South Carolina, the Proposed Assessment does not violate the dormant Commerce Clause.

B. The Taxpayer had fair notice that its selling activities within South Carolina subjected the Taxpayer to South Carolina's taxing jurisdiction.

The Taxpayer also argues that South Carolina did not give it fair warning that its actions may be subject to South Carolina's taxing jurisdiction. Here again, the Taxpayer mischaracterizes itself as a service provider rather than a seller of tangible personal property. Because the Taxpayer is deemed the seller by South Carolina law, the Taxpayer had fair warning that its sales of tangible personal property in South Carolina subjected it to South Carolina's taxing jurisdiction. Moreover, the passage of § 12-36-2691, which gave the Taxpayer a five year moratorium on collecting and remitting sales and use tax, put the Taxpayer on notice that it was a retailer subject to South Carolina sales and use tax on all sales transactions that took place on the Taxpayer's Website beginning on January 1, 2016. As such, not only did the Taxpayer have fair notice that its selling

¹⁵Again, the Department did not include the proceeds derived from the sale of tangible personal property supplied by the Taxpayer's affiliates based on the original information Amazon and its affiliates provided to the Department. As the facts in this case develop further, the Department reserves the right to make adjustments as necessary.

activities in South Carolina subjected it to South Carolina's taxing jurisdiction, but it had five years to prepare for its sales and use tax collection obligation.

Additionally, the Taxpayer appears to believe that the Department is imposing an obligation on the Taxpayer to collect and remit sales and use tax on behalf of the third parties. This is not the case. As explained above, the Taxpayer, just like a consignee, is the seller and the legally liable taxpayer for the sales and use taxes due on items sold on the Taxpayer's Website.

C. The Proposed Assessment does not violate the Internet Tax Freedom Act.

Finally, the Taxpayer argues that the Proposed Assessment violates the Internet Tax Freedom Act (ITFA) (47 U.S.C. 151 note). Specifically, the Taxpayer argues that the Proposed Assessment constitutes a discriminatory tax per the ITFA. Section 1105(2) of the ITFA defines a discriminatory tax, in part, as follows:

(A) any tax imposed by a State or political subdivision thereof on electronic commerce that-

(i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means;

* * *

(iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means.

First, the Taxpayer argues that the Proposed Assessment is discriminatory pursuant to ITFA § 1105(2)(A)(i) because "it taxes sales that would not be taxed if they were accomplished through traditional commerce." Taxpayer's Protest Ltr. at p. 49. This argument is without merit. While the Taxpayer likes to compare itself to a shopping mall that is not responsible for collecting sales and use tax, the Taxpayer is actually a consignment store that is responsible for collecting sales and use tax. The Taxpayer, like a consignee, offers property for sale that belongs to third parties/consignors. The Taxpayer, like a consignee, receives payment from the customer and passes the third party/consignor's portion on to the third party in two-week intervals. Finally, the Taxpayer, like a consignee, transfers the property to the customer. The sales and use tax applies to the Taxpayer the same way it applies to a consignee who has a brick and mortar store. As such, the Taxpayer's sales would still be taxed if such sales were accomplished through other means. Therefore, ITFA § 1105(2)(A)(i) does not apply here.

Second, the Taxpayer argues that the Proposed Assessment is discriminatory pursuant to ITFA § 1105(2)(A)(iii) because it "shift[s] the tax obligation" from the third party to the Taxpayer. Taxpayer's Protest Ltr. at p. 49. As explained above, because the Taxpayer is the retailer in these transactions operating like a consignee and South Carolina law imposes a sales and use tax on the consignee, the Proposed Assessment does not shift the tax obligation. Rather, it is the Taxpayer

who would like the Department to shift the tax obligation from the Taxpayer to the third parties. As such, ITFA § 1105(2)(A)(iii) does not apply here.

Finally, the Taxpayer argues that the ITFA prohibits taxing transactions that are unique to the internet. See Taxpayer's Protest Ltr. at p. 50. The Taxpayer cites H.R. Rep. No. 105-570 (1998) in support of this proposition. Id. The relevant portions of H.R. Rep. No. 105-570 (1998) provide as follows:

No taxes on Internet-unique services

Taken together, [Section 1105(2)(A)(i) and (ii)] mean that property, goods, services, or information that are sold exclusively over the Internet--**with no comparable off-line equivalent**--would be protected from taxation for the duration of the moratorium. Examples of such transactions include, but are not limited to, electronic mail over the Internet, Internet site selections, Internet bulletin boards, and Internet search services.

No new collection obligations

[Section 1105(2)(A)(iii)] states that a tax on electronic commerce is discriminatory if it imposes an obligation to collect or pay a tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means, such as over the telephone or via mail-order. **For instance, a tax does not discriminate against electronic commerce if the obligation to collect and remit the tax falls on the vendor if the same goods were ordered off-line as well as online.** This provision would also bar taxes that seek in the case of electronic commerce to impose tax collection obligations on persons other than the buyer or seller in a transaction. Specifically, it would bar taxes that impose collection or reporting duties on Internet access or online service providers, telephone companies, banks, credit card companies, financial intermediaries, or other entities that might have access to a consumer's billing address since these obligations do not also apply in the case of telephone or mail-order sales.

(Emphasis added). Here again, the transactions that occur on the Taxpayer's Website are not unique to the internet. The same types of transactions occur every day in consignment stores. Accordingly, because a comparable off-line equivalent exists, the Proposed Assessment does not violate the ITFA. Additionally, whether a customer orders the property online from the Taxpayer or purchases the property off-line from a consignment store, the tax obligation still falls on the South Carolina retailer. The Taxpayer is a consignee and the South Carolina retailer in this case just as a consignee is the South Carolina retailer for purposes of transactions that occur at a brick

and mortar consignment store. Accordingly, the Proposed Assessment does not constitute a discriminatory tax pursuant to the ITFA.

Conclusion:

For all of the foregoing reasons, the Taxpayer is a person in the business of selling tangible personal property at retail, and the Department properly included all the proceeds from the Taxpayer's online sales in the tax base.

June 21, 2017