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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2019-001706

Trial Court Case No. 17-ALJ-17-0238-CC

Amazon Services, LLC,..... Appellant,

v.

South Carolina Department of Revenue, ... Respondent.

APPELLANT AMAZON SERVICES LLC'S RESPONSE TO AMICUS BRIEF OF TAX LAW PROFESSORS TESSA R. DAVIS AND CLINTON G. WALLACE

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INTRODUCTION

The central question in this appeal is whether South Carolina could, prior to passage of new legislation in 2019, deem Appellant Amazon Services LLC ("Amazon Services") the "seller" or "retailer" of products offered and sold by independent third parties on the Amazon.com marketplace.[1] The brief of *amici curiae* tax law professors Tessa R. Davis and Clinton G. Wallace focuses on an entirely different and irrelevant question—whether, under U.S. Supreme Court case law, South Carolina could have enacted a valid statute imposing sales tax liability on a seller or retailer with a physical presence in South Carolina. Amazon Services does not dispute that South Carolina could have done so. But the outcome of this appeal turns on the meaning of South Carolina's pre-2019 sales tax statute (namely, who is the "seller" and "retailer" of third-party sales), not the Supreme Court's Dormant Commerce Clause jurisprudence. And under that statute, Amazon was not the "seller" or "retailer" for sales made by third parties. *Amici* largely avoid this dispositive statutory issue, offering no defense of the ALC's reasoning and relying instead on an argument that the Department of Revenue waived and that, in any event, the record squarely refuted.

When *amici* do address South Carolina's pre-2019 statute, they do not and cannot dispute that Amazon Services's interpretation must prevail so long as it was reasonable. Instead, *amici* baldly assert that it should have been "obvious" to Amazon Services that it was required before 2019 to collect and remit sales tax on third-party sales. *Amici*'s conclusory assertion is both unavailing and at odds with the considerable record evidence supporting Amazon Services's interpretation, including the ALC's own recognition that the law was "not clear" with respect to

[1] The sales tax statute defines "retailer" and "seller" in the same way. *See* S.C. Code Ann. § 12-36-70.

third-party sales on the Amazon.com marketplace and the Department's admissions that the pre-2019 version of the tax law did not cover marketplace facilitators like Amazon Services.

Amazon's interpretation of South Carolina's pre-2019 statute was correct and, at a minimum, plainly reasonable. The ALC's decision should be reversed.

I. This Case Is Not About South Carolina's Constitutional Authority to Require Amazon to Collect South Carolina Sales Tax.

Amici argue that South Carolina had the authority, under the U.S. Constitution, to impose sales tax liability on Amazon beginning in 2011 when Amazon built a warehouse in South Carolina and thus established a physical presence in the State. (*See, e.g.*, Brief of Tax Law Professors at 2-8.) In particular, they argue:

> In 2011, … Amazon established sufficient nexus in South Carolina to satisfy constitutional requirements for the State to impose sales tax obligations under the law in effect at that time. Once Amazon established physical presence in the State in 2011, from then on, the State of South Carolina was empowered under the dormant Commerce Clause of the United States Constitution … to impose and require collection of sales tax on all of Amazon's sales in the State.

(*Id.* at 2-3.) Amazon agrees. (*See* AS Opening Br. 23-24 & n.3.) But that legally uncontroversial rule about the scope of a state's authority under the federal Constitution has no bearing on the outcome of this case.

That is because South Carolina did not exercise that authority before 2019 with respect to online marketplaces like Amazon.com. The fact that South Carolina had the *constitutional authority* to impose sales tax obligations on Amazon starting in 2011 has no bearing on the separate question whether South Carolina did, in fact, do so. It did not. Indeed, as *amici* acknowledge, South Carolina did not even impose sales tax on Amazon's *own* sales to South Carolina customers, instead opting to incentivize Amazon to establish a physical presence in the State (with all of the attendant jobs for South Carolinians) by establishing a sales tax moratorium

on Amazon companies selling to South Carolina customers. (*See Amici* Br. 7; *see also* DOR Br. 2 ("In 2011, the South Carolina General Assembly passed the Distribution Facility Sales Tax Exemption … primarily to encourage investment by Amazon in South Carolina.").)

Upon the expiration of that moratorium in 2016, Amazon promptly began collecting and remitting sales tax *on products sold by Amazon companies.* Again, there is no dispute about that.[2] Amazon did so because, as discussed below and more fully in Amazon Services's briefs, the South Carolina sales tax statute in 2016 required sellers and retailers, and only those sellers and retailers, to collect and remit sales tax on goods sold to customers in South Carolina.

II. *Amici* Offer No Principled Basis to Conclude That the Department Had the Statutory Authority to Impose Sales Tax Liability on Amazon Services for Third-Party Sales Before 2019.

The key dispute between the Department and Amazon Services is whether South Carolina's sales tax statute in 2016 required Amazon Services to collect sales tax on third-party sales. The answer to that question is no. With respect to third-party sales, Amazon Services operated the Amazon.com marketplace and provided services to sellers; it was not a seller itself. Recognizing that the pre-2019 version of the statute did not cover online marketplaces like Amazon Services, the legislature amended the statute in 2019 to cover precisely these kinds of third-party sales when it added "marketplace facilitators" to the list of statutory "sellers" and "retailers" required to collect sales tax on third-party sales.

Amici's brief largely avoids the statute. The brief ignores virtually all of the statutory language, the relevant legislative history, the historical application and enforcement of South Carolina's pre-2019 sales tax provision, record evidence, and the ALC's own reasoning. Instead,

[2] *See* AS Opening Br. 5 n.1; DOR Br. 3 (acknowledging that "Amazon *was* remitting sales and use tax [ ] for transactions involving goods owned by Amazon and its affiliates" (emphasis added)).

amici assert that Amazon was an "agent" of third-party sellers in an argument that was expressly waived by the Department and refuted by the record evidence.

Amazon Services had no duty to collect and remit sales tax under the pre-2019 sales tax law because it did not "transfer, exchange, or barter … tangible personal property for a consideration" with respect to those third-party sales. S.C. Code Ann. § 12-36-100. Rather, Amazon Services received consideration for services it provided to the third-party sellers for operating its online marketplace. (AS Opening Br. 23-33; AS Reply Br. 4-8.) *Amici* ignore the relevant provisions of the pre-2019 version of the sales tax law, instead (wrongly) declaring that Amazon Services was a "seller" of third-party sellers' products on the Amazon.com marketplace. (*Amici* Br. 9.) Notably, *amici* do not even attempt to defend the ALC's reasoning and statutory interpretation: they do not defend the ALC's "point of sale" construct, which has no basis in South Carolina tax law (AS Opening Br. 19-20, 33-35); they do not defend the ALC's analogy to "consignment-type relationship[s]," which was both legally baseless and contradicted by the record (*id.* at 35-37); and they do not defend the ALC's legal standard for defining a "seller," which has no plausible limiting principle, as even the ALC acknowledged by announcing *ad hoc* exceptions to exclude countless intermediaries like payment processors, credit card companies, banks, delivery companies, and advertisers that would otherwise be subject to sales tax collection duties on third-party sales (*id.* at 30-31).

Instead of addressing the issues before the Court, *amici* conclude that Amazon Services can be considered an "agent" of the third-party seller and liable under the "efficient administration" prong of Section 12-36-70. (*Amici* Br. 6 n.6 (citing S.C. Code Ann. § 12-36-70).) But the Department expressly waived this argument. When the ALC asked the Department whether it was pursuing this argument at the hearing, the Department responded:

"For a number of reasons we have just elected not to proceed with that theory." (Tr., R.163.) That concession was not surprising, because the Business Services Agreement that governs the relationship between Amazon Services and third-party sellers explicitly states that there is no agency relationship between them (*see* Ex. 3, R.851), and the Department offered no evidence suggesting otherwise. Nor could it have offered any evidence suggesting that Amazon Services is a "salesman, representative, trucker, peddler, or canvasser" as the "efficient administration" provision requires.[3] *See* S.C. Code Ann. § 12-36-70. Consistent with this practical reality, the South Carolina General Assembly in 2019 amended Section 12-36-70 to add "marketplace facilitators" as a statutory "seller" under the relevant provision of the tax code (*see* S.C. Code Ann. § 12-36-70 (2019))—an amendment that would have been unnecessary under *amici*'s interpretation of "agent" in the statute.

III. The "Substance Over Form" Principle Addressed By *Amici* Requires Reversal.

Amici argue that Amazon Services's interpretation of South Carolina's pre-2019 sales tax statute violates the "substance over form" doctrine because, they claim, Amazon Services is attempting to "shield" itself from sales tax obligations by assigning different functions to distinct corporate entities. (*Amici* Br. 9-12.) This argument grossly mischaracterizes Amazon Services's position and turns the "substance over form" doctrine on its head. Properly applied in this case, the "substance over form" principle compels reversal of the ALC's decision.

[3] As a general rule, this Court does not entertain arguments raised by *amici* that were not raised by the parties. SCACR Rule 213. And to the extent there are exceptions to that rule, they are "narrow[ ]," as the Supreme Court has observed. *State v. Langford*, 400 S.C. 421, 433, 735 S.E.2d 471, 477 (2012). Given the clarity of the Department's waiver and the absence of any evidence to support *amici*'s "agency" argument, this case warrants no exception. *Cf. James v. Anne's Inc.*, 390 S.C. 188, 193-94, 701 S.E.2d 730, 732-33 (2010) (applying Rule 213 and declining to consider argument not raised by party).

The *substance* of the third-party seller transactions is that Amazon Services is not the "seller" or "retailer." (*See, e.g.*, AS Opening Br. 23-37; AS Reply Br. 4-15.) Amazon Services is paid by third-party sellers for the services it provides to those sellers; it is not paid for the products those third parties sell to South Carolina customers on Amazon's online marketplace. Instead, it is the third-party sellers that are paid for the products customers buy from those sellers (AS Opening Br. 12-14; AS Reply Br. 7-8), and thus the third-party sellers, not Amazon Services, that had the duty under the pre-2019 version of the law to collect and remit sales tax on third-party sales. Amazon Services's argument does not turn on which Amazon entity performs which service; the point is that *none* of the Amazon entities, individually or collectively, receives consideration in exchange for any sale of the third-party product.

Indeed, *amici* misunderstand and hence mischaracterize *why* Amazon Services has described the other Amazon entities—Amazon Payments, Inc. ("Amazon Payments") and Amazon Fulfillment Services, Inc. ("Amazon Fulfillment")—in this appeal. Amazon Services has done so to correct various factual misstatements by the ALC concerning facts that are not in dispute. For example, the ALC asserted that Amazon Services "processes the customer's payment" and "remits the proceeds from the sale to the owner." (Op., R.25.) But the unrefuted evidence at trial established that *Amazon Payments* performs these functions. As Amazon Services has explained, brick-and-mortar stores use third-party payment processors and fulfillment companies, and nobody asserts that such service providers are required to collect sales tax on goods sold in those stores. (AS Reply Br. 7.) Brick-and-mortar stores remain the seller with sales tax obligations because they, not the payment processor or fulfillment company, receive consideration in exchange for their sales. (*Id.* at 7-8.) The same is true here: the third-party seller—not Amazon Services, or Amazon Payments or Amazon Fulfillment for that

matter—receives consideration from the customer for their products, and therefore had the duty under the pre-2019 version of the sales tax law to collect and remit the sales tax.[4] Amazon Services, on the other hand, receives consideration *from the third-party sellers* in exchange for services it provides *to them*; it does not replace or stand in the shoes of the sellers vis-à-vis the customers. Contrary to *amici*'s suggestion, the "substance" of third-party transactions supports Amazon Services's position.[5]

IV. *Amici* Offer No Reason Why Amazon Services's Interpretation of the Pre-2019 Version of the Sales Tax Law Was Unreasonable.

The *amici*'s brief is notable for what it does *not* say. *Amici* do not dispute that as long as Amazon Services's interpretation of the statute was reasonable Amazon Services must prevail in this appeal. (AS Opening Br. 39-47; AS Reply Br. 15-24.) *Amici* claim that "it should have been obvious to Amazon that it would be required to collect and remit sales tax" once it "established a physical nexus in the state in 2011." (*Amici* Br. 12.) But that assertion is nothing

[4] By the same token, Amazon Services is not "using multiple related entities or using an agent to *avoid* sales tax obligations by way of avoiding constitutional nexus," which *amici* wrongly claim "is the argument that Amazon is advancing." (*Amici* Br. 11 n.12 (emphasis in original).) Amazon Services does not dispute that there was "constitutional nexus" beginning in 2011. Once again, the question is whether, under South Carolina's statute, Amazon Services was a "seller" or "retailer" for third-party sales.

[5] *Amici*'s naked policy arguments—untethered to the language of the statute—about a supposed "additional subsidy" that Amazon Services would receive and "lost government revenue" if the ALC's decision were affirmed (*see Amici* Br. 12-14) are misplaced. *See, e.g.*, *S.C. Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 20, 382 S.E.2d 11, 14 (Ct. App. 1989) ("Once the Legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy."). They also fail on their own terms. Amazon Services did not receive "an additional subsidy at the expense of local businesses" (*Amici* Br. 12) because, under the pre-2019 version of the sales tax law, it had no duty to collect sales tax on third-party sellers to begin with. And had the Department collected the sales tax from the correct entity—the third-party sellers—there would have been no "lost government revenue" (*id.* at 14).

more than *amici*'s conclusory assertion and reflects a misunderstanding of the issues in this case.[6]

Amici offer no explanation why Amazon Services's interpretation was not reasonable given the many factors set forth in Amazon Services's briefs, including that the ALC recognized that the law was "not clear" as applied to third-party sales on the Amazon.com marketplace (Tr., R.603-04); that multiple government officials, including the Department's own Director, repeatedly acknowledged that the applicable version of the sales tax law did not apply to marketplace facilitators and would not unless it was changed; that the Department did not seek sales tax from Amazon Services on third-party sales for years until it abruptly and arbitrarily changed course in 2016; and that the Department defined "seller" for one purpose under the tax code differently than it did for other purposes. (AS Opening Br. 39-47; AS Reply Br. 15-24.) Nor do *amici* dispute that when the legislature adopts an amendment to a statute, there is a well-settled presumption under South Carolina law that the legislature intended to change the existing law. (AS Opening Br. 42-44; AS Reply Br. 19-21.) That is exactly what the legislature did here when it introduced a comprehensive set of changes tailor-made to bring marketplace facilitators like Amazon Services within the scope of the law. *Amici* have not tried to explain why the legislature would have so thoroughly amended the statute if it was *unreasonable* to believe that internet marketplace facilitators like Amazon Services already were required to collect and remit sales tax on third-party products sold on their marketplaces. Respectfully, if anything is

[6] *Amici* cite a Form 10-K for 2015 in which Amazon acknowledged to investors that sales tax rules might change to impose sales tax obligations on Amazon Services. (*Amici* Br. 12-13.) To the extent *amici* suggest that Amazon Services knew it already *was* required to collect sales tax *without* any change, they are wrong. The statement merely acknowledges what was obvious to all: states were changing their rules and *going forward* Amazon would have to comply with those changes.

"obvious," it is that it was reasonable for a marketplace facilitator to believe that sales tax obligations in South Carolina remained with the third-party seller.

Finally, *amici* take issue with Amazon Services's characterization of the ALC's decision and the Department's position as an "outlier" among taxing jurisdictions. (*Amici* Br. 8 n.9.) But *amici* cite no case from any other jurisdiction holding that a marketplace facilitator like Amazon Services was responsible for sales taxes before the jurisdiction's law was amended to cover marketplace facilitators.[7] *Amici* claim that this can be explained away because "the breadth and clarity of the South Carolina definition of 'retailer' and 'seller' stands in contrast to some other states," but they cite no example and do not explain how the language in the South Carolina statute is materially different from laws in other jurisdictions. (*See id.*) Moreover, they ignore decisions like the Supreme Court of Louisiana's decision in *Normand v. Wal-Mart.com USA, LLC*, which specifically rejected this argument under a similar statute when holding that Wal-Mart.com was not liable for third-party sales made in its online marketplace. 340 So. 3d 615 (La. 2020). There, the statute defined a "sale at retail" as "a sale to a consumer or to any other person for any person other than for resale as tangible personal property." *Id.* at 626 (quoting La. R.S. 47:301(10)(a)(i)). A "sale," in turn, was defined as "any transfer of title or possession, or both ... conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration." *Id.* (quoting La. R.S. 47:301(12)). As the Supreme Court of Louisiana explained:

[7] *Amici*'s discussion of catalog and mail-order sales is revealing. (*See Amici* Br. 3-4.) As *amici* explain, Illinois and other states amended their sales tax statutes to impose "sales tax obligations on retailers who solicited orders via catalogs or other advertisements" because their pre-existing laws did not cover out-of-state taxpayers. (*See id.* at 3.) Amending the statute to impose duties on those not previously covered by existing laws is exactly what happened here when South Carolina amended the sales tax law in 2019 to impose sales tax obligations on marketplace facilitators.

> [T]hese statutory provisions contemplate that the seller and purchaser/consumer are the actual parties to the sale. Relative to sales by third party retailers on Wal-Mart.com's online marketplace, the actual participants to the sale are the third party retailers that actually sell the goods and the purchasers. Clearly, an online marketplace is not a party to the underlying sales transaction between the third party retailers and their customers, but rather a facilitator of the sale.

Id. So too here.

CONCLUSION

The ALC's decision should be reversed because Amazon Services had no duty to collect and remit sales tax on third-party sales under the plain language of the pre-2019 sales tax law, and its interpretation of the statute was at least reasonable. *Amici* do not address Amazon Services's main arguments for reversal, and they provide no reason to affirm the ALC's decision.

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