

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

SC Court of Appeals

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’s Reply Brief in Support of Petition for Rehearing

NELSON MULLINS RILEY &
SCARBOROUGH LLP

SIDLEY AUSTIN LLP

SIDLEY AUSTIN LLP

Bryson M. Geer
SC Bar No. 13606
bryson.geer@nelsonmullins.com
John C. von Lehe, Jr.
SC Bar No. 5719
john.vonlehe@nelsonmullins.com
151 Meeting St / 6th Floor
PO Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Carter G. Phillips
(admitted *Pro Hac Vice*)
cphillips@sidley.com
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Robert N. Hochman
(admitted *Pro Hac Vice*)
rhochman@sidley.com
Neil H. Conrad
(admitted *Pro Hac Vice*)
nconrad@sidley.com
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Attorneys for Amazon Services LLC

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INTRODUCTION

The Department of Revenue's Return to Amazon Services's Petition for Rehearing confirms that rehearing is warranted. The Department has led this Court to adopt reasoning squarely at odds with South Carolina Supreme Court precedent and foundational principles of tax and statutory interpretation law. This reply focuses on three especially significant issues: (1) how the Department is misusing the "burden of proof" to lead this Court to abandon longstanding substantive legal standards, (2) the Department's inability to reconcile this Court's ruling with *Alltel Communications, Inc. v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012), and (3) the Department's inaccurate contention that Amazon Services failed to preserve arguments that plainly have been central to this litigation since its inception. The Department's contrived machinations to sidestep these errors in this Court's ruling reinforces that rehearing is both necessary and appropriate.

ARGUMENT

I. The Department's Erroneous "Burden of Proof" Argument Changes Substantive Law and Underscores the Need for Rehearing.

The Department's argument regarding the burden of proof reinforces the need for rehearing. (*See* Return at 3-6.) The Department is attempting to use the "burden of proof" to change substantive law by asserting that Amazon Services was required to show more than that its interpretation was reasonable. This represents a significant change in the law that requires correction on rehearing.

As a threshold matter, contrary to the Department's argument, Amazon Services has not tried to "flip" or "shift" the burden of proof. (*Id.* at 3, 5.) Amazon Services does not dispute that it must ultimately prove that the Department's assessment of the tax was incorrect. But, under well-established South Carolina law, one way to carry that burden is by showing that the tax law

was reasonably susceptible of an interpretation that excluded the taxpayer. (Appellant’s Opening Br. at 37-39; Appellant’s Reply Br. at 15-17.) The Department’s gloss on this Court’s ruling, if not corrected, would eliminate this critical taxpayer protection and work a sea change in South Carolina tax law.

The Department’s Return takes the view that because Amazon bears the burden of proof, Amazon must show more than just that its reading of the statute was reasonable. (Return at 3 (criticizing Amazon Services for arguing that it had to prove only that its understanding of the Sales Tax Act was “reasonable”).) Indeed, the Department insists that Amazon Services must show that the Department’s interpretation was “incorrect.” (*Id.* at 5.) This is a critical mischaracterization of South Carolina law and underscores just how destabilizing this Court’s ruling will be to tax law in South Carolina if it remains in effect. Under the Department’s view, this Court has ruled that once the Department persuades an ALC in a contested proceeding to read a tax statute in a manner that is unfavorable to the taxpayer, the taxpayer loses the benefit of any reasonable interpretation of the statute. That is not the law in South Carolina and contravenes decades of precedent that sides with taxpayers so long as their interpretation of the law is reasonable. (Appellant’s Opening Br. at 37-39; Appellant’s Reply Br. at 15-17.) This Court’s ruling cannot be reconciled with that longstanding precedent and warrants rehearing and correction.

DIRECTV, Inc. & Subsidiaries v. South Carolina Department of Revenue, 421 S.C. 59, 804 S.E.2d 633 (Ct. App. 2017) (*see* Return at 5), does not support the Department’s position. There, the issue turned on a question of fact, not law. For purposes of calculating corporate income tax that should be apportioned to South Carolina, the parties disputed the value of the taxpayer’s income-producing activities in South Carolina. This Court held that, as the party

challenging the Department's determination, DIRECTV had the burden to prove by a preponderance of the evidence that the Department's assessment was incorrect. The Court concluded that DIRECTV "failed to satisfy its burden of proof because it did not demonstrate an actual value for its [income-producing activities] and did not present other evidence proving the DOR incorrectly included 100% of DIRECTV's subscription receipts from South Carolina customers in the numerator of the gross receipts ratio." 421 S.C. at 80, 804 S.E.2d at 644. The ruling did not turn on any *legal* question of the value of the taxpayer's activities in South Carolina. It turned only on whether the Department had, as a matter of *fact*, properly accounted for the relevant activities. Largely because DIRECTV's expert's methodology was deemed unreliable, the Court held that it had simply failed as a matter of fact to prove that the Department had made any factual error. *See id.* (ALC did not clearly err when it found that DIRECTV's expert's "methods did not provide actual values for DIRECTV's services and his proxies did not provide a reasonably approximate value of DIRECTV's IPAs in South Carolina"). Accordingly, *DIRECTV* is inapposite, and the Department's inability to identify any case that actually supports its position reinforces the need for rehearing to bring this case into line with existing South Carolina precedent and longstanding principles of tax law interpretation.

II. The Department's Inability to Reconcile This Court's Ruling with *Alltel* Highlights the Far-Reaching Consequences of This Court's Decision and Further Supports Rehearing.

The Department's effort to reconcile this Court's ruling with the South Carolina Supreme Court's decision in *Alltel* also fails. Indeed, the Department's own reading of *Alltel* ultimately underscores that a taxpayer need only establish a reasonable interpretation of a tax statute that excludes the taxpayer, and nothing more. If this misunderstanding is not corrected, it will have consequences for all cases in which the taxpayer reasonably interpreted the law to not cover its activities.

According to the Department, the taxpayer in *Alltel* prevailed not because its reading of the tax statute was reasonable, but because that statute was “ambiguous.” (Return at 12-15.) This is verbal sleight-of-hand. A taxpayer cannot escape the reach of a tax statute merely by pointing to some ambiguity if that ambiguity provides no reasonable basis for excluding the taxpayer. What must be shown is that there is some reasonable understanding of the statute that excludes the taxpayer; that is what makes the statutory ambiguity relevant to the particular taxpayer. That is why *Alltel* stated that, “[w]here 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.” 399 S.C. at 321, 731 S.E.2d at 873 (emphasis added) (quoting *Cooper River Bridge, Inc. v. S.C. Tax Comm’n*, 182 S.C. 72, 76, 188 S.E. 508, 509-10 (1936)). Amazon Services’s rehearing petition thus properly emphasized both its reasonable interpretation for why it was “excluded” from the sales tax collection duty with respect to third-party sales under the pre-2019 version of the Act, *and* how this Court’s ruling did not and could not explain what made Amazon Services’s interpretation unreasonable. Put simply, when it comes to tax statutes, a law is ambiguous in the relevant respect whenever a taxpayer offers a reasonable interpretation of the act that will exclude it from coverage. That is what *Alltel* means. This Court’s acceptance of the Department’s contrary reading warrants correction.

The details of *Alltel* confirm Amazon Services’s view. As the Department concedes, the “ambiguity in [*Alltel*] related to whether Alltel, as a cell phone provider, qualified as a ‘telephone company’ under the statute.” (Return at 12-13.) The Department claims that the *Alltel* court “never reached the question of whether Alltel’s position was ‘reasonable,’ necessarily inferring that substantial doubt was present based on the existence of the ambiguity.” (*Id.* at 13.) But it

was unclear whether the definition of “telephone company” included cellular phone providers *because* it was reasonable to understand the term to exclude cellular providers. That *was* the ambiguity. Put another way, the Court had only two possible resolutions: did the statutory term “telephone company” reasonably exclude cellular providers or did it unambiguously cover them? To rule that the statute was ambiguous, as the Court did expressly, was the same thing as saying that Alltel had reasonably read the statute to exclude cellular providers. *See Alltel*, 399 S.C. at 318, 731 S.E.2d at 872. The reasonableness of Alltel’s position and the Supreme Court’s discussion of ambiguity went hand in hand.

Likewise, here, this Court’s task was to determine whether Amazon Services, as an online marketplace, had offered a reasonable interpretation of the statutory term “seller.” This case and *Alltel* are parallel. In *Alltel*, the Supreme Court reversed this Court because it failed to give effect to Alltel’s reasonable interpretation of the statute. Refusing to explain why a taxpayer’s interpretation of the tax statute’s application to its conduct was unreasonable is the same error.

Ultimately, the Department’s effort to explain its view ends in self-contradiction. The Department claims that “Amazon misconstrues *Alltel* as requiring a finding in its favor *if it can advance a ‘reasonable’ interpretation of the Act that creates substantial doubt as to its applicability to Amazon.*” (Return at 15 (emphasis added).) Yet elsewhere in its Return the Department concedes: “Amazon has the burden of proving by a preponderance of the evidence that ... *the Act is reasonably susceptible to an interpretation that excludes Amazon’s business model from application.*” (*Id.* at 6 (emphasis added).)

That is not the Department’s only contradiction. The Department also claims that an “ambiguity argument” is somehow distinct from, and can never touch on, an argument about the

“application of the law to facts.” (*See* Return at 9, 13.) But the Department concedes elsewhere, as it must, that Amazon can carry its burden “by demonstrating that ... (2) the Act is ambiguous on its face *or in its application* to Amazon’s business model; or (3) the Act is reasonably susceptible to an interpretation that excludes Amazon’s business model *from application*.” (*Id.* at 6 (emphases added).) A statute may be ambiguous on its face, or as applied to the facts of a particular case; either way, “the taxpayer should receive the benefit in cases of doubt.” *Alltel*, 399 S.C. at 321, 731 S.E.2d at 873 (internal quotation marks omitted) (quoting *S.C. Nat’l Bank v. S.C. Tax Comm’n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989)).

To be sure, this Court said that the statute is unambiguous. Amazon Services’s Petition for Rehearing acknowledged as much. (Pet. 1-2.) But, as that Petition demonstrated, that assertion did not account for the reasonableness of Amazon Services’s interpretation. (*See id.* at 8-10, 21, 24-25.) The Department’s suggestion that this Court’s bare conclusion that the statute is unambiguous suffices *even though* it does not account for Amazon Services’s reasonable interpretation amounts to an admission that this Court has significantly changed the law in a way harmful to taxpayers. This Court should reconsider its ruling and reject the Department’s view of the law.

Importantly, Amazon Services has not argued and does not suggest that its mere “subjective belief” that it was excluded from the tax statute means it must prevail. (*Contra* Return at 13.) Such a mischaracterization of Amazon Services’s view reflects a failure to engage with the legally determinative question: was Amazon Services’s view reasonable? The relevant inquiry is objective, not subjective, and Amazon Services has never suggested otherwise.

The Department ultimately resorts to cases outside of tax law to justify its disruption to tax law. For example, the Department argues that *Paschal v. State Election Commission*, 317

S.C. 434, 436 S.E.2d 890, 892 (1995), “forbids a court from resorting to a party’s ‘reasonable’ contrary interpretation in the face of an unambiguous statute.” (Return at 4 n.6.) But *Paschal* is not a tax case and thus does not implicate the longstanding, foundational principle of tax law that taxpayers are entitled to the benefit of reasonable interpretations of tax statutes in their favor. And notwithstanding the Department’s misleading quotation marks, the word “reasonable” does not appear in the *Paschal* opinion. Nor does the case otherwise support the Department’s position. There, the State Election Commission’s construction of the statute was unreasonable. The Commission argued that it was entitled to retain filing fees of unopposed political candidates whose names *do not appear on the ballots* to be voted in primary elections. 317 S.C. at 436, 454 S.E.2d at 891 (emphasis added). The Supreme Court rejected that interpretation because the statute expressly stated the opposite. The statute provided, in no uncertain terms, that the Commission was entitled to receive only “filing fees for candidates whose names *are on ballots* to be voted on in all primaries.” *Id.* at 436, 454 S.E.2d at 891-92 (quoting the statute) (emphasis modified). Given that the Commission’s interpretation was contradicted by the statute’s plain language, there was no need to consider the Commission’s other arguments. *Paschal* cannot meaningfully inform the outcome of this case.

The Department also suggests that because different provisions of the Act had been construed and held to be unambiguous in prior decisions, they could not be found to be ambiguous here. (*See* Return at 8, 13.) That position guts this important rule. No prior decision of this Court or the South Carolina Supreme Court had considered whether the pre-2019 version of the Act applied to third-party sales on the Amazon.com marketplace. That the pre-2019 version unambiguously applied to the fees included from the sale of optional liability waivers when renting tangible personal property (*Rent-A-Center*) and retailers’ membership fees in the

context of retail bookstores (*Books-A-Million*) does not mean that it unambiguously imposes a collection duty on every business no matter how novel and unanticipated the business is structured. *See Rent-A-Center E., Inc. v. S.C. Dep't of Revenue*, 425 S.C. 582, 589, 824 S.E.2d 217, 221 (Ct. App. 2019) (liability waivers); *Books-A-Million, Inc. v. S.C. Dep't of Revenue*, 430 S.C. 388, 399, 844 S.E.2d 399, 405 (Ct. App. 2020) (bookstore membership fees), *aff'd*, 437 S.C. 640, 880 S.E.2d 476 (2022). Amazon Services's role with respect to third-party sales on its marketplace is a particular business arrangement that requires its own specific analysis under the terms of the statute.

III. The Department's Meritless Waiver Arguments Do Not Provide Any Reason to Deny Rehearing.

Finally, the Return is replete with efforts to argue waiver over issues that have been at the heart of this long-running dispute from its inception. The most glaring example: contrary to the Return (*see* Return at 19-21), Amazon Services expended considerable effort in its briefing to explain how its interpretation of the Tax Act excluded Amazon Services because Amazon Services does not receive payment “for” the transfer of personal property. It receives payment from the third-party seller for the valuable services Amazon Services provides to those sellers. Indeed, Amazon Services never receives money from the buyer at all. Amazon Payments, a different corporate entity, performs that important role. This topic was the subject of extensive testimony at trial and lengthy briefing in this Court, the fundamentals of which were undisputed. (*See* Appellant's Opening Br. at 5-6 (describing different roles of each Amazon entity), 12-14 (explaining payment process), 24-30 (explaining Amazon Services's interpretation of the Act).) The Department imagines that this evidence was neither submitted nor discussed, and simply asserts, with no factual or legal basis, that Amazon Services's “referral fee” is payment from the buyer to Amazon Services “for” tangible personal property, rather than payment from the seller

to Amazon Services for the value the website provides to the seller. (*See* Return at 19-21.) There was no waiver.

In another glaring example of alleged waiver, the Department asserts that Amazon offered “no textual analysis of the Act itself.” (Return at 7 (internal quotation marks omitted).) That is a gross mischaracterization. Amazon Services explained, in detail, its interpretation of the language of the Act and why that language did not apply to its activities with respect to third-party sales. (Appellant’s Opening Br. at 24-30.) The Department effectively admits as much, expressly acknowledging that Amazon Services argued, among other things, that the plain and unambiguous meaning of “sale” in Section 12-36-100 of the Act did not encompass Amazon Services’s activities with respect to third-party sales. (*See* Return at 8 n.9; *id.* at 18 (“Amazon’s primary argument that its business model falls outside the scope of the Act is based on its ... reading of the definition of a ‘sale’ under S.C. Code Ann. § 12-36-100.”).) Contrary to the Department’s bald assertion, Amazon Services’s interpretation of “sale” in Section 12-36-100 is plainly a “textual analysis of the Act itself.”

The Department also claims that “Amazon does not contend that any specific section or term of the Act is ambiguous.” (Return at 8.) But Amazon Services’s lead argument was that the *best* reading of the pre-2019 Act excluded Amazon Services with respect to third-party sales. (Appellant’s Opening Br. at 23-37.) It then argued in the alternative that, even if the Court disagreed and ruled that the Department’s reading was better, Amazon Services’s reading was at least *reasonable*, which shows that the pre-2019 version of the law was ambiguous. (*Id.* at 37-47.) For purposes of this alternative argument, the principal source of ambiguity is the definition of “seller” in Section 12-36-70 (2016). And this ambiguity was eliminated by the 2019 amendment where the legislature explicitly expanded the definition of “seller” to include any

person “operating as a marketplace facilitator.” *See* S.C. Code Ann. §§ 12-36-70 (2019) (redefining “seller” to include those “operating as a marketplace facilitator”), -71 (2019) (adding definition of “marketplace facilitator”). It is the Department, not Amazon Services, that is unable to point to any “specific section or term of the Act” that covers Amazon Services’s activities with respect to third-party sellers. That is why—as the Department’s Director conceded (Ex. 194, R.1263 at 6:13-15, 8:40-50; Ex. 192, R.1256)—the 2019 amendment was necessary.

Likewise, the Department’s position that Amazon did not challenge the breadth of the ALC’s reasoning under *Travelscape* defies reality. (*See* Return at 23-24.) That topic was a central argument in Amazon Services’s principal brief and discussed during the oral argument. (*See* Appellant’s Opening Br. at 19-20, 28-29, 30-33; Oral Argument at 8:48–9:12, 45:46-46:54.) The Department’s willingness to double down on this Court’s reading of *Travelscape* as requiring courts to read tax statutes broadly confirms the extent to which this Court’s ruling departs significantly from the South Carolina Supreme Court’s precedents.

CONCLUSION

The Department has not and cannot offer a reading of this Court’s ruling that aligns with longstanding tax law principles because the ruling itself departs from those principles and in a manner that will have enormous implications for taxpayers throughout South Carolina. This Court should grant rehearing and rule in favor of Amazon Services.

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By: s/ Bryson M. Geer

NELSON MULLINS RILEY &
SCARBOROUGH LLP

Bryson M. Geer
SC Bar No. 13606
bryson.geer@nelsonmullins.com
John C. von Lehe, Jr.
SC Bar No. 5719
john.vonlehe@nelsonmullins.com
151 Meeting St / 6th Floor
PO Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

SIDLEY AUSTIN LLP

Carter G. Phillips
(admitted *Pro Hac Vice*)
cphillips@sidley.com
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SIDLEY AUSTIN LLP

Robert N. Hochman
(admitted *Pro Hac Vice*)
rhochman@sidley.com
Neil H. Conrad
(admitted *Pro Hac Vice*)
nconrad@sidley.com
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Attorneys for Amazon Services LLC