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Nov 19 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Supreme Court Appellate Case No. 2024-000625

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.

BRIEF OF *AMICUS CURIAE* NATIONAL RETAIL FEDERATION IN SUPPORT OF AMAZON SERVICES, LLC

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INTEREST OF *AMICUS CURIAE*

The National Retail Federation ("NRF") submits this brief as *amicus curiae* in support of the Appellant, Amazon Services, LLC, to reverse the ruling of the Court of Appeals in *Amazon Services, LLC v. South Carolina Department of Revenue*.

Retailers represent the nation's largest private-sector employer, contributing $5.3 trillion to annual GDP and supporting more than one in four U.S. jobs — 55 million working Americans. Most retailers are small businesses — 91.2 percent of retail firms have fewer than 10 employees. And in South Carolina, the retail industry directly employs 535,000 workers, representing 28 percent of the total jobs in the State — double the next largest industry. More than 22 percent of South Carolina's labor income is supported by the retail industry, and more than 23 percent of South Carolina's GDP is supported by the retail industry.

NRF advocates for the people, brands, policies, and ideas that help retail succeed. For over a century, NRF has been a voice for every retailer and every retail job, educating, inspiring, and communicating the powerful impact retail has on local communities and global economies. NRF periodically submits *amicus curiae* briefs in cases raising significant legal issues impacting the retail community and advocates for issues that affect retailers and their customers.

As an organization dedicated to representing the retail industry, NRF is able to offer unique perspectives and insights regarding the adverse impact of the Court of Appeals' decision on the broader retail community. This brief addresses matters that might otherwise escape the Court's attention, and *amicus* has a substantial, legitimate interest in the outcome of the case.

INTRODUCTION

NRF strongly supported the creation of explicit legal requirements that marketplace facilitators pay sales tax on transactions facilitated over a marketplace platform in every state

with a sales tax regime – including South Carolina. NRF made such legislation a major priority so that brick-and-mortar retailers would be placed on a level playing field with online marketplace sellers. Consistent with NRF's legislative priorities, it strongly supported the passage of 2019 S.C. Act No. 21 (the "South Carolina Marketplace Amendments"), which provided an effective date of April 26, 2019 for amendments to South Carolina's sales tax laws that, among other things, amended the definition of a "retailer" or "seller" subject to South Carolina sales tax to include any person "operating as a marketplace facilitator." S.C. Code § 12-36-70(3); *see also* S.C. Code § 12-36-910(A).

But NRF is concerned that the South Carolina Department of Revenue ("Department") now considers NRF's efforts supporting the South Carolina Marketplace Amendments wholly unnecessary – especially since Department Director W. Hartley Powell told the South Carolina General Assembly in sworn testimony that prior to the passage of the South Carolina Marketplace Amendments: (1) there was nothing in South Carolina's sales tax "law[s] related to the taxation of third party sales"[1]; and (2) legislation was needed to "close[] the gap" so that "nobody has to guess" who owes sales taxes on sales over a marketplace.[2]

Based on the Department's arguments and the conclusions of the Court of Appeals, in South Carolina the Department would not need to bother with seeking clear tax legislation if it can merely re-interpret existing legislation to cover situations never contemplated by a statute. Without this Court overturning the decision of the Court of Appeals, all taxpayers will be at risk

[1] S.C. Dep't of Revenue, Program Evaluation Report at 33 (May 31, 2018), available at http://web.archive.org/web/20220120093909/https://www.scstatehouse.gov/CommitteeInfo/HouseLegislativeOversightCommittee/AgencyWebpages/DOR/PER-CompletePDF-DOR.PDF (last accessed Aug. 9, 2022). The cover page of this report states "The contents of this report are considered sworn testimony from the Agency Director" (W. Hartley Powell).

[2] Sworn Testimony of Director W. Hartley Powell before the S.C. General Assembly Joint Education and Finance Committee (Oct. 23, 2018), quoted in Final Opening Brief of Appellant Amazon Services LLC, *Amazon Services, LLC v. S.C. Dep't of Revenue*, Case No. 2019-001706 (filed June 11, 2020) at 40.

as no statute can be relied on based on its historic application and the general understanding of its scope.

In the case of the sales tax, this risk is compounded by the fact that under South Carolina law a taxpayer may "add to the sales price" the amount of the sales tax owed on the sale by the retailer – an opportunity that, practically speaking, is impossible to take advantage of when the Department seeks to retroactively apply a new, broader interpretation of the law. S.C. Code § 12-36-940(A). As the sales tax is specifically applicable to "the business of selling tangible personal property at retail," NRF's members are put at significant risk that the Department could change its mind about how it interprets South Carolina's sales tax law and assess retailers a potentially bankrupting sales tax liability. S.C. Code § 12-36-910(A).

SUMMARY OF ARGUMENT

As the Appellant has explained to this Court, this case addresses whether the Department could, prior to passage of new legislation in 2019, deem the Appellant the seller of products offered and sold in the Amazon.com marketplace by independent third parties resulting in a sales tax collection obligation and liability. Importantly, the Department did not just announce a new interpretation, it also applied this interpretation to sales that had already been completed.

Reversal of the Court of Appeals' decision is necessary because, if the Department is allowed to have such broad unilateral power to reinterpret the sales tax law – even after its own Director testified in support of legislation explicitly establishing the sales tax responsibility it now claims it always had – all retailers will be at risk of another novel interpretation of South Carolina sales tax law that could create an existential liability based on a sales tax assessment with no ability to collect reimbursement from retail customers.

The Department's approach in claiming sales tax could be assessed on a marketplace facilitator prior to the effective date of the South Carolina Marketplace Amendments broadly

raises the risk that retailers, both large and small, will never have certainty over their financial obligations related to South Carolina's sales tax regime. It means retailers must spend time attempting to read a future Department Director's mind as to what additional obligations might be suddenly imposed on historical sales. It means a liability that economically belongs to the customer can become the liability of the retailer at the whim of a change in Department policy. All of these results are financially untenable for any retailer, and perhaps risk bankrupting some.

ARGUMENT

At issue in the case is whether the Department can aggressively reinterpret a long-standing sales tax law and then apply the new interpretation to commercial activity that happened in the past. Prior to the Department's audit and assessment of the Appellant, NRF is unaware that the Department or any retailer disputed that under South Carolina law third-party retail sellers were liable for sales tax – meaning it was those third-party retail sellers that had the ability to seek reimbursement for the sales tax from retail customers.

The apparent impetus for the Department's assessment of the Appellant is the Department's inability to impose sales tax on third-party sellers without nexus with the State and the perceived impracticality of directly auditing and assessing individual purchasers for use tax.[3] NRF has been at the forefront of advocating for solutions to the sales tax collection challenges states encountered as a result of historic and now invalidated constitutional nexus restrictions. NRF's members have long argued for a level sales tax collection playing field as between traditional brick-and-mortar retailers and online sellers. Therefore, NRF supported legislation

[3] As explained by the Department, "South Carolina also imposes a complementary . . . use tax on the 'sales price' of tangible personal property purchased at retail for storage, use or other consumption in South Carolina." S.C. Dep't of Revenue, South Carolina Sales and Use Tax Manual (last updated Nov. 2022) at Introduction. Such tax is complementary to the sales tax because any "user shall be relieved of liability for the use tax on property subject to the sales tax and on which the tax has been paid." *Id.* at Chapter 3, pg. 1 (quoting *McJunkin Corp. v. City of Orangeburg*, 238 F.2d 528, 529 (4th Cir. 1956)).

imposing sales tax responsibilities on marketplace facilitators, including the South Carolina Marketplace Amendments, in order to create some type of consistency among the states and establish widely understood standards for retailers and marketplace facilitators.

However, NRF is concerned about judicial acceptance of the Department's assessment of a sales tax liability on marketplace facilitators in the absence of clear legislation and notice. As explained by Professor Walter Hellerstein – perhaps the most cited state and local tax scholar by the U.S. Supreme Court in the 21st century[4] – sales taxpayers "need advance notice of changes in tax base, tax rate, and boundaries of local taxing jurisdictions in order to adjust their tax collection systems and procedures." Hellerstein, Hellerstein, & Appleby, *State Taxation*, ¶ 19A.07[3] (Thomson Reuters/Tax & Accounting, 3rd ed. 2001, with updates through December 2023) (online version accessed on Checkpoint (www.checkpoint.riag.com) May 7, 2024)). The South Carolina Marketplace Amendments provided the very type of advance notice needed by South Carolina sales taxpayers – or, in the words of Department Director Powell, served to "close[] the gap" so that "nobody has to guess" who owes sales taxes on sales over a marketplace.[5]

If this Court allows the Department to bypass the General Assembly and impose new interpretations of settled terms in this case, the Department will have judicial authority to force taxpayers "to guess" whether the Department will retroactively reinterpret other statutory terms related to retailers' sales tax collection obligations. Notably, all other jurisdictions that have enforced marketplace collection obligations are doing so through specific, new marketplace

[4] The U.S. Supreme Court regularly cites Professor Hellerstein's articles and his treatise in support of the conclusions reached in their decisions applying the dormant Commerce Clause to U.S. state and local tax issues. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 176 (2018); *Comptroller of the Treasury of Md. v. Wynne*, 575 U.S. 542, 561 (2015) (citing Professor Hellerstein's treatise); *Ala. Dep't of Revenue v. CSX Transp., Inc.*, 575 U.S. 21, 28 (2015) (citing Professor Hellerstein's treatise); *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 25, 27, 29, 31 (2008) (citing Professor Hellerstein's treatise).

[5] *Supra* note 2.

legislative authority.[6] The few jurisdictions that initially attempted to enforce a marketplace collection obligation in the absence of specific legislative authority either quietly gave up or lost in a judicial challenge. *See Normand v. Wal-Mart.com USA, LLC*, No. 2019-C-00263, 2020 WL 499760 (La. Jan. 29, 2020).

The implications of the Court of Appeals' decision stretch far beyond the question of when marketplace facilitators started to have an obligation to pay South Carolina sales tax. Instead, every retailer subject to South Carolina's sales tax regime is at risk if this Court upholds the Department's two-faced approach in dealing with the South Carolina General Assembly and actual South Carolina taxpayers. The Department could target any element of South Carolina's sales tax law, such as an exemption or the tax base calculation, and reinterpret the statute to expand liability. As a result, any retailer, whether selling taxable or presumably non-taxable items, could be in the same position as the Appellant with a surprise assessment. This result is particularly destructive because an interpretive change to tax obligations for sales that have already taken place deprives such retailers of the practical opportunity to seek reimbursement for the sales tax from retail customers. S.C. Code § 12-36-940(A).

Most retailers operate on slim operating margins. For smaller retailers that cannot take advantage of economies of scale, the margins are even slimmer.[7] These businesses generally do

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[6] *See e.g.*, Ga. Code Ann. § 48-8-30(c.2) (enacted by 2020 Georgia Laws Act 322 (H.B. 276), effective April 1, 2020 and applicable to all sales occurring on or after April 1, 2020); Miss. Code. Ann. §§ 27-65-7, 9 (amended by 2020 Miss. Laws H.B. 379, effective and in force from and after July 1, 2020); N.C. Gen. Stat. Ann. § 105-164.4J (enacted by 2019 North Carolina Laws S.L. 2019-246 (S.B. 557), Sec. 4, effective February 1, 2020 and applicable to sales occurring on or after that date); Tenn. Code Ann. § 67-6-501(f) (enacted by 2020 Tennessee Laws Pub. Ch. 646 (S.B. 2182), effective October 1, 2020); Va. Code Ann. § 58.1-612.1 (enacted by 2019 Virginia Laws Ch. 815 (H.B. 1722), which is not applicable to any retail sales transactions occurring before July 1, 2019); *see also* National Conference of State Legislatures Executive Committee Task Force on State and Local Taxation, *Marketplace Facilitator Sales Tax Collection Model Legislation*, § 3 ("No obligation to collect the sales and use tax required by this Act may be applied retroactively") (unanimously approved Nov. 22, 2019), available at https://www.ncsl.org/Portals/1/Documents/Taskforces/SALT_Model_Marketplace_Facilitator_Legislation.pdf?ver=2020-01-30-122035-320&timestamp=1580412048938.

[7] While there is no specific data regarding the margins of small retailers, general retail firms average a net margin of 3.09%. New York Univ. Stern School of Business, *Margins by Sector*,

not have the financial wherewithal to pay a tax liability that they had no idea existed at the time that they sold an item. Larger retailers frequently have a more complex product mix and varied customer base, thus providing more opportunities for application of a taxability or exemption change to historic sales to disrupt their businesses. Furthermore, many large retailers have the same slim margin issues as small companies.

This Court has previously held that "[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 (2008) (emphasis added). Any other conclusion would imply that the amendment was "essentially [] a futile act," an implication this Court is "disinclined" to allow. *Key Corp. Capital, Inc. v. Cty. Of Beaufort*, 373 S.C. 55, 61 (2007). It may seem fanciful to suggest the Department would just reinterpret a statute to require a tax collection obligation when there was none originally, but since this is precisely what happened to the Appellant, it could happen again unless this Court prevents it by applying the standards of narrowness and reasonableness as explained by the Appellant. Reversal of the Court of Appeals' decision is necessary here to reaffirm that taxpayers, including South Carolina retailers, may rely upon this Court's presumption that changes in South Carolina's sales tax laws are intended to mean something.

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https://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html (last visited 5/2/2024). Grocery and Food retailers have only a 1.18% net margin. *Id.* Comparing this profit level to the net margin average for all businesses of 7.59%, *id.*, and one can see how uniquely vulnerable the retail industry is to unbound whims of a judicially empowered, rogue tax authority.

CONCLUSION

For the reasons stated, and for the reasons stated by Petitioner, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

November 19, 2024

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