THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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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.

FINAL REPLY BRIEF OF APPELLANT AMAZON SERVICES LLC

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INTRODUCTION

Amazon Services's opening brief demonstrated that the ALC's ruling—that Amazon Services is the seller of third-party products in its marketplace—violates basic principles of statutory interpretation, misreads South Carolina precedent, and rests on an indefensibly broad legal standard designed only for this case. The Department's response fails to overcome these arguments, in large part because the Department ignores controlling South Carolina authority and all of the undisputed evidence that contradicts the ALC's conclusion.

Amazon Services's brief, relying on the plain language of the Sales and Use Tax Act ("Tax Act"), explained that Amazon Services did not conduct a "sale" if it did not receive consideration for transferring personal property. (AS Br. 24 (quoting S.C. Code Ann. § 12-36-100).) Like the ALC, the Department does not point to evidence that customers pay *Amazon Services* for transferring personal property from Amazon Services to those customers. Instead, it cites the undisputed (but legally irrelevant) fact that customers input their credit card information on Amazon Services's website. (*See, e.g.*, DOR Br. 1.) The Department also acknowledges that Amazon Payments serves as the payment processor for those third-party sellers, and yet the Department continues to refer generically to "Amazon" as receiving payment. (*See, e.g.*, *id.* at 1, 10, 15, 19.) In doing so, the Department once again disregards the settled law that prohibits attributing conduct of one entity to another. (AS Br. 27 (citing cases).) Ultimately, the Department, like the ALC, simply ignores undisputed facts presented at trial demonstrating that customers pay third-party sellers for products bought by those customers, and sellers pay Amazon Services for services rendered to those sellers.

Unable to defend the ALC's flawed conclusion that Amazon Services is paid for selling third-party sellers' products, the Department falls back on the ALC's unfounded legal standard applicable only for this case: any business whose goal is to receive *any* profit, direct or *indirect*,

from sales of products is "in the business of selling." (Op., R.23.) As Amazon Services showed in its opening brief (AS Br. 29-30), that standard is so broad that it would include shipping companies, payment processors, and others who clearly are *not* responsible for collecting sales tax. Because the fatal overbreadth of its new rule affords no principled way to distinguish these other businesses, the ALC simply declared that they were excluded. (*Id.* at 30-31; Op., R.28 n.27, 29 n.28.) That is a tacit admission by the ALC that its rule—which if affirmed by this Court would produce absurd results—lacks legal footing in any statute, regulation, or case law.

The ALC's overbroad standard was based on a fundamental misreading of *Travelscape, LLC v. S.C. Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011). Amazon Services pointed to specific passages in *Travelscape* to explain how, unlike Amazon Services, the website operator in that case sold taxable items to customers. (AS Br. 27-29 (citing *Travelscape*, 391 S.C. at 95-96, 705 S.E.2d at 31).) The Department discusses *Travelscape* but ignores that the website operator there was a merchant of taxable room reservations—the website operator (not the hotels) set the price and was paid by customers for those room reservations. In Amazon Services's marketplace, third-party sellers set the prices for their products and Amazon Services is paid by the third-party sellers and not by the customers who purchased from those sellers.

Given the undisputed evidence about its marketplace business model, Amazon Services was not required under the proper interpretation of the statute to collect sales tax for third-party sales. But even if this Court were to disagree, reversal still would be required because Amazon Services's interpretation and application of the statute were reasonable. *See Alltel Communications, Inc. v. S.C. Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012). *Alltel* makes clear that when a taxpayer could reasonably conclude that the law, *as applied to it*, did not require it to collect a tax, the taxpayer cannot be liable for failing to collect that tax. 399

S.C. at 320-21, 731 S.E.2d at 873. The Department's argument that a taxpayer does not prevail even if it reasonably concluded that the statute does not apply to it, if accepted, would be fundamentally inconsistent with *Alltel*, and perhaps that is why the Department never discusses or even cites that Supreme Court precedent in its response. Beyond pretending that *Alltel* does not exist, the Department openly asks this Court to ignore the undisputed fact that its own officials and members of the legislative committee publicly declared—in the middle of the ALC litigation—that not only was the 2016 statute unclear, but that there was a gap in the law when it came to third-party marketplace sales and the law had to be changed to make Amazon Services responsible for those taxes. Under *Alltel*, this Court must reverse even if it was merely unclear that the 2016 statute applied to Amazon Services, something the Department openly acknowledged.

The Department's failure to acknowledge Amazon Services's main arguments, the undisputed evidence, and controlling authority in favor of Amazon Services's interpretation of the statute confirms that the Department's interpretation is simply wrong. And those failures are sure signals that Amazon Services's belief that the 2016 statute did not require it to collect sales tax on third-party sales was at least reasonable. On either ground, this Court should reverse.

ARGUMENT

The Department emphasizes that this Court reviews fact issues for substantial evidence. (DOR Br. 17.) But in this appeal there are no facts in dispute regarding any material issue, including how sellers offer products for sale in Amazon Services's marketplace, how customers select what to buy, and how customers pay for and ultimately receive what they have chosen. This appeal is about the legal significance of the undisputed facts. And legal issues are reviewed *de novo*. *See, e.g.*, *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260,

725 S.E.2d 480, 483 (2012) ("We will correct the decision of the ALC if it is affected by an error of law, and questions of law are reviewed *de novo*." (citations omitted)).

I. The Department's Response Ignores the Plain Language of the Tax Act, Relies on Legally Irrelevant Facts, and Rests on a Misreading of *Travelscape*.

A. The Department Ignores the Critical Fact That Amazon Services Is Paid for Services Provided to Third-Party Sellers and Not for Products Sold by Third Parties to Consumers.

The Department does not dispute that Amazon Services cannot be a seller if it does not make a "sale" within the meaning of Section 12-36-100. (*Compare* AS Br. 23-24, *with* DOR Br. 17-19.) Section 12-36-100 defines a "sale" or "purchase" as "any transfer, exchange, or barter, conditional or otherwise, of tangible personal property *for a consideration*." S.C. Code Ann. § 12-36-100 (emphasis added). So the Department cannot and does not dispute that "under the law in effect at the time of the transactions at issue here, Amazon Services did not conduct any 'sale' if it did not receive consideration 'for' transferring personal property." (AS Br. 24.)

The undisputed evidence demonstrates as a matter of fact and law that Amazon Services does not receive consideration "for" transferring third-party products. (*See, e.g.*, AS Br. 1-2, 19, 24-29, 34-35.) Contrary to the Department's accusation, this conclusion is not a result of Amazon Services "simply proclaim[ing]" that it is not the seller of third-party products. (DOR Br. 21.) It follows from the legally binding agreements and uncontroverted testimony explaining that customers pay third-party sellers for products. The BSA establishes that, when a customer orders a product in the Amazon.com marketplace from a third-party seller, the funds the customer provides for that product—*i.e.*, the "sales proceeds"—are sent through *Amazon Payments* (not Amazon Services) and belong to the third-party seller. (Ex. 3, R.892-93.) Amazon Payments remits those funds to the third-party seller and subtracts any fees the third-party seller owes to Amazon Services (or any other applicable Amazon affiliate) for services

provided to the third-party seller. (*Id.* at R.892.) The evidence at trial confirmed that what the BSA specifies is how the flow of funds actually works—Amazon Payments is merely "the conduit through which the funds from the customer get to the [third-party] seller."[1] (Tr., R.243.) The consideration paid by the customer and held (temporarily) in an Amazon Payments account belongs to the third-party seller—not Amazon Services (or any other Amazon affiliate). (Tr., R.242, 265, 295, 478.) The customer never pays Amazon Services for anything.

The Department never disputes or even addresses any of the agreements and testimony detailing how payment actually operates, all of which demonstrate that Amazon Services does not receive consideration *for* the sale of third-party products.[2] Instead, it points to evidence, which Amazon Services does not dispute, that customers input their credit card information on the Amazon.com website before they can buy any products in the marketplace. (DOR Br. 9 n.8 (citing Tr., R.379-80), 21, 32.) As the Department would have it, because Amazon Services operates the website where the customer *inputs* and *stores* credit card information, Amazon Services should be legally deemed to *receive payment* for every product sold in the marketplace, *no matter what* the agreements defining the rights to customer funds say. The Department never defends that legal proposition, because there is no legal basis for it.

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[1] The Department claims that the ALC "found that much of the testimony of Amazon's primary witness, Mr. Chris Poad, was not reliable or credible." (*See, e.g.*, DOR Br. 5 n.3 (citing Op., R.5 n.10, 11 n.16).) But the only two instances where the ALC criticized Mr. Poad's testimony dealt with the specific percentage of purchases on the Amazon.com website that were made via the "Buy Box" (Op., R.5 n.10) and the customer's perspective when making purchases on the Amazon.com marketplace (*id.* at 11 n.16). The legal issues in this appeal do not turn on those details, and the ALC never suggested otherwise. The Department offers no evidence or reason to doubt the accuracy of Mr. Poad's testimony on any fact material to this appeal.

[2] As Amazon Services explained, the ALC never pointed to any evidence that Amazon Services receives consideration for third-party products. (AS Br. 1-2, 26.) Neither does the Department.

Inputting and storing credit card information is not the same as purchasing a product. There is no purchase by the customer, or sale by the third-party seller, without an exchange of "consideration" for the product. And there is no dispute that a customer does not choose to purchase a product in the Amazon.com marketplace until the customer selects one or more products and checks out. (AS Br. 9-10 (citing Tr., R.231).) That act is fundamentally different from when a customer merely enters into his or her account profile the credit card information that will be charged after the customer checks out. (Tr., R.319-20.) Indeed, the testimony cited by the Department (DOR Br. 9 n.8) makes Amazon Services's point. The Department's *lawyer* likened inputting credit card information into a customer's profile on Amazon.com to handing a credit card to a merchant in a store. (Tr., R.378-79.) But the *witness* stated that the two situations are "completely different." (Tr., R.379.) As the witness explained: "The third party seller is listing the product. The third party seller agrees with Amazon Payments, Inc. to process the credit card," and a seller of products is different from Amazon Services, which runs a "multi-tenanted marketplace." (Tr., R.379.) This testimony fully *confirms* what the BSA shows: Amazon Services does not get paid like a brick-and-mortar seller when a customer enters credit card information on the Amazon.com website. Entering that information on the website makes payment to a third-party seller *possible*, and it makes such payment possible through the Amazon Payments processing system. But you have to look elsewhere, to the BSA provisions the Department refuses to acknowledge, to determine, as a matter of law, who receives payment from the customer *when the customer makes a purchase.*

The Department compounds its legal error by using the defined term "Amazon" to mean "Amazon Services" (DOR Br. 1), and then consistently thereafter conflating the distinct roles of Amazon Payments and Amazon Services. The Department repeatedly declares that funds flow

through "Amazon" to support its view that Amazon Services receives payment from the customer. (*See, e.g.*, *id.* at 15 ("Only Amazon accepts and processes customer payments …"); *see also id.* at 1, 10, 19, 20, 21 n.12, 28 n.16, 29, 30, 36.) The Department ignores settled law that requires courts to respect corporate distinctions. (AS Br. 27 (citing *Mid-S. Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597-98, 649 S.E.2d 135, 140-41 (Ct. App. 2007); *S.C. Dep't of Revenue v. Anonymous Co. A.*, 401 S.C. 513, 515-21, 678 S.E.2d 255, 256-59 (2009)).) Funds never flow through Amazon Services. The Department, like the ALC, has no basis for claiming otherwise, and so it simply conflates Amazon Payments and Amazon Services. Nor is there any legal basis to conclude that the funds customers send through the Amazon Payments system belong to Amazon Services rather than the third-party sellers. The Department's assertion to the contrary is simply wrong.

With no legal authority or facts to defend its assertions, the Department turns, in a footnote, to mischaracterizing Amazon Services's argument. The Department asserts that Amazon Services is trying to avoid tax liability by "segregat[ing]" the different elements of a sales transaction, and claims that this approach "could be employed by any brick-and-mortar retail store … to evade tax responsibility as a seller." (DOR Br. 28 n.15 (quoting Op., R.47).) But Amazon Services has never argued that a seller can avoid sales-tax obligations by employing a distinct payment processing company to process credit card payments. Brick-and-mortar stores *do* use third-party payment processors and nobody doubts that the stores still owe the sales tax. And that is because the payment processor does not, in the words of the statute, transfer or exchange "tangible personal property for a consideration." S.C. Code Ann. § 12-36-100. The seller does those things, and the payment processor merely serves as the conduit for the seller's receipt of the consideration. The BSA provisions and the testimony discussed above regarding

payment (evidence that the Department studiously ignores) identify *who* the customer is paying through the Amazon Payments processing system—that is, *who* is receiving consideration for an exchange of personal property. That inquiry is what the statute demands, not a description of where (physically or online) a credit card is presented.

Finally, the Department notes repeatedly that Amazon Services refers to itself as a "service provider" and argues that such a label is not controlling when determining who has sales-tax obligations. (*See* DOR Br. 21, 27 & n.14, 28 n.15.) But Amazon Services agrees that this is not a case about labels; it is about the substance of the sales transactions. And all of the evidence the Department ignores confirms that Amazon Services is paid *only* for services it provides to sellers, not for products customers buy from those sellers. (*See* AS Br. 12-14.) The price a customer pays for the product is set by the third-party seller, while the price the third-party seller pays to Amazon Services for its services is set by Amazon Services. (Tr., R.207 ("In all cases the products offered by third parties have their prices set by the seller."); Tr., R.359-62 (describing fees charged by Amazon Services to third-party sellers).) The seller (not the customer) pays Amazon Services what the seller owes Amazon Services, and the seller agrees to use the proceeds it receives from the customer to do so. (Tr., R.242, 265-66; Ex. 3, R.846-47, 864-65, 872, 883, 892-93.) But that is no different than the fact that some part of the revenue a brick-and-mortar retailer collects from customers is used to pay rent.

In the end, the Department cites no authority (because there is none) supporting the legal proposition that Amazon Services receives payments for third-party sellers' products. Like the ALC's ruling, the Department's position rests on legal error and a refusal to confront the undisputed evidence that defines the legal rights to payment at issue here. Amazon Services did not make any "sale" of third-party products that required it to collect tax under the 2016 statute.

B. The Department Fails to Recognize That the Taxpayer in *Travelscape* Set the Price for and Sold Taxable Items, and Thus *Travelscape* Does Not Support the ALC's Decision.

The Department's heavy reliance on *Travelscape* continues the Department's strategy of choosing to ignore what it cannot explain. *Travelscape* involved an internet seller of taxable hotel reservations who used a "merchant model." *Travelscape, LLC v. S.C. Dep't of Revenue*, Docket No. 08-ALJ-1700076-CC, Final Order & Decision (Feb. 12, 2009), at 18 (ALC opinion). That seller did not operate an internet marketplace like Amazon Services.

In *Travelscape*, the Supreme Court explained that the applicable law taxed the sale of "hotel reservations" (not the physical room itself), and the website operator sold those taxable reservations to the customer for consideration. *Travelscape*, 391 S.C. at 101, 705 S.E.2d at 34 (holding that the term "furnish" in the tax statute "encompasses the activities of entities such as Travelscape who, whether directly or indirectly, provide hotel *reservations* to transients for consideration" (emphasis added)). Travelscape set the price for the reservations that it sold on its website. Like a retailer who purchased wholesale goods, Travelscape added its own charges on top of what Travelscape would pay the hotel operator to allow Travelscape's customer to occupy the physical room. *Id.* at 95-96, 705 S.E.2d at 31. Critically, the customer paid Travelscape, and Travelscape paid the hotel what Travelscape had agreed to pay the hotel. The customer never agreed to pay the hotel anything. *Id.* This is precisely the opposite of how third-party sales work in the Amazon.com marketplace. Amazon Services highlighted all of these features of Travelscape's merchant business model, and how they contrast with Amazon Services's marketplace business model, in its opening brief. (AS Br. 27-29.)

The Department never acknowledges these differences, much less discusses how its reading of the case can be squared with them. Instead, the Department likens Amazon Services to Travelscape only by mischaracterizing how both operate their distinct businesses:

> In both cases, the entity receiving payment directly from the customer was contractually obligated to pay the amount received—less its fees—to the owner of the product. And in both cases the price paid by the customer was the result of the combination of the amount set by the owner of the product and the fees charged by the entity offering the product for sale and collecting payment through its website.

(DOR Br. 25.)

But again, Amazon Services is *neither* "the entity receiving payment directly from the customer" *nor* "collecting payment through its website." Travelscape, on the other hand, *did* receive payment directly from its customers. Travelscape also was *not* "obligated to pay the amount received less its fees." It was obligated to pay the pre-negotiated amount it agreed to pay the hotel for the reservation Travelscape sold to the customer. 391 S.C. at 95-96, 705 S.E.2d at 31. By contrast, Amazon Services has *no* obligation to pay third-party sellers *anything*. Third-party sellers agree to pay Amazon Services certain fees in connection with selling through Amazon Services's marketplace, not the other way around. (*See supra* at 4-5.)

Nor is it true that in either case the amount paid by the customer is "the combination of the amount set by the owner of the product and the fees charged by the entity offering the product for sale … through its website." In *Travelscape*, the website operator set the final price for the room reservation it was selling. It labeled its markup a "facilitation fee," but the whole point of the Supreme Court's ruling was that the markup was simply part of the price for the reservation and was therefore properly included in the amount subject to tax, *Travelscape*, 391 S.C. at 95-96, 98, 101-02, 705 S.E.2d at 31, 33-35, the same way a retailer adds a markup to the wholesale price of a product and that markup is properly included in the amount subject to tax. Amazon Services does *not* add its fees to some pre-negotiated price set by the third-party seller and then present the marked-up total to customers. It does not set the price customers pay; the third-party sellers do that.

The Department has not explained and cannot explain away these differences. And these differences are fundamental to the ruling in *Travelscape* and flow from the plain language of the statute. Customers do not pay Amazon Services consideration for the taxable items, *i.e.*, third-party goods priced by third-party sellers that are sold in its marketplace. But customers of Travelscape *did* pay Travelscape for the taxable items, *i.e.*, hotel reservations priced by Travelscape that were sold on its website.

In sum, *Travelscape* does not support the ALC's decision.

C. The Department Misconstrues Amazon Services's Rules Governing Conduct in Its Marketplace as Evidence That Amazon Services Was a "Seller" or "in the Business of Selling."

Amazon Services explained that it exercises control over the Amazon.com marketplace, (*see* AS Br. 5-15, 22, 33-35) and that its rules are designed to promote a safe, reliable, and efficient marketplace for millions of buyers and third-party sellers. The Department repeats these details at length, apparently believing that these facts somehow make Amazon Services responsible for collecting and remitting sales tax for third-party sales under the Tax Act. (*See, e.g.*, DOR Br. 20 ("Amazon's control of the Website, which is the retail store, confirms that it is the seller of the goods."), 33 ("Amazon's control over the Website, combined with Amazon's direct participation and control over the transactions occurring on the Website … , demonstrate that Amazon is in the 'business of selling' and is the 'retailer' or 'seller' with respect to sales on Amazon.com.").) But there is nothing in the Tax Act—and the Department cites nothing in its brief—that makes a marketplace operator's control over its marketplace relevant to determining who is responsible for collecting sales tax under the statute. The business of operating a marketplace is not the same as the business of selling goods in that marketplace.

The ALC thought otherwise, as Amazon Services explained (AS Br. 29-30), because the ALC adopted a legal standard that has no limiting principle: "whether the object of Amazon

Services' business activity is to achieve a profit, benefit, or advantage by either direct or indirect means from the sale of property owned by Amazon Services or others on its Marketplace." That standard would sweep in mall operators and many other industries that *serve* those who sell and thus have as their "object" achieving a "profit" by "indirect means from the sale of property owned by … others," including payment processors, credit card companies, banks, delivery companies, advertisers, and more. (*Id.*) The ALC saw the problem, but rather than abandon the overbroad standard, it simply carved out unprincipled exceptions by fiat. It declared those exceptions to its interpretation, without pointing to any statute or regulation, or any governing principle or logic, that would justify its *ad hoc* modifications. (*See* Op., R.28 n.27, R.29 n.28.)

The ALC's legal standard cannot survive scrutiny given its limitless expanse, so the Department ignores that the standard has no limit. The Department says simply that the ALC's standard was based on *Travelscape* and "the plain language of the statute, which defines 'business' as 'all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.'" (DOR Br. 26 (quoting S.C. Code Ann. § 12-36-20).) But, as discussed above, neither *Travelscape* nor the statute endorses what the ALC has done here. *Travelscape* involved an internet merchant who, unlike Amazon Services, set prices and was paid by customers for taxable items. *See Travelscape*, 391 S.C. at 95-96, 98, 101-02, 705 S.E.2d at 31, 33-35. And the Tax Act, by its plain language, limits sales-tax obligations to those who, unlike Amazon Services, exchange tangible personal property for a consideration. S.C. Code Ann. § 12-36-100.

The Department ignores not only the uncontrollably expansive nature of the ALC's standard, but also its novelty. Amazon Services explained that no statute, regulation, or court decision supported treating Amazon Services as the seller because Amazon Services does *none* of the following: (1) choose what items third-party sellers make available to customers in the

marketplace or at what price, (2) determine the number of products to make available to customers in the marketplace or own or exercise control over any inventory third-party sellers make available to customers in the marketplace, (3) receive payment from buyers for the products, or (4) transfer ownership of products to the buyers. (AS Br. 1, 29-30.)[3] Despite all of its emphasis on Amazon Services's marketplace rules, the Department can point to no rule that controls how third-party sellers make these core selling decisions. The Department disputes neither the facts nor the unprecedented nature of the ALC's ruling.

The absence of any statute, regulation, or court decision to support its conclusion led the ALC to make up a wholly new legal standard, rooted in what it referred to as control over the "point of sale," to capture Amazon Services. The Department claims that "a focus on the point of sale is logical and inherent in the pertinent provisions of the Tax Act." (DOR Br. 31.) But the only provision of the Tax Act the Department cites merely says sales tax should be collected "at the time of making the sales." (DOR Br. 31 (quoting S.C. Code Ann. § 12-36-1350).) Once again, the Department ignores the absurdity of its position: under the Department's view, Amazon Services, and nobody else, should have been collecting and remitting sales tax since 2016, even as the Department has been collecting sales-tax payments from those who sell through the Amazon Services marketplace, including third-party sellers. (AS Br. 1, 16.) The Department's view is at odds with the elemental feature of tax law administration that treats only one entity as the responsible seller for sales tax purposes.[4]

[3] Contrary to the Department's mischaracterization of Amazon Services's argument, Amazon Services does not argue that transfer of title alone relieves it of tax obligations. (*See, e.g.*, DOR Br. 21 (Amazon argues that "whoever transfers title must be the seller"), 22 (stating Amazon Services's argument "relies entirely on the fact that Amazon does not own or hold title.").)

[4] The Department also refers to the fact that Amazon Services sends order confirmations to customers. (DOR Br. 31-32.) But the Department never points to any language in the Tax Act

The Department's response adds a new gloss to the ALC's unsupported legal standard, invoking what the Department calls the "customer's perspective," to justify rewriting the Tax Act to apply to Amazon Services. (DOR Br. 22-23.) But it is far too late for such new arguments. The Department introduced no evidence regarding whether customers correctly perceived that they were buying from third-party sellers, much less whether they thought they were buying from the only Amazon entity present in this litigation: Amazon Services. The Department's argument here is pure conjecture. And in any event, nothing in the Tax Act makes the customer's perspective relevant to determining whether Amazon Services owes a collection duty for third-party sales. That is for good reason: businesses need certainty when planning their financial and tax affairs. Having to speculate about how a customer might view a transaction is no substitute for the underlying legal and factual realities of transactions and the relationship between a marketplace facilitator and a third-party seller that customers often do not know or care about. The governing statutes, court rulings, and regulations focus on identifiable business and legal realities, not on amorphous concepts like varying customer perceptions. The Department's persistent efforts to look *away* from those legal authorities is precisely why this Court should reverse the ALC's ruling.

The Department is even willing to try to defend the ALC's ruling with an argument it expressly abandoned before trial. The Department repeatedly suggests that the Tax Act should be construed to impose a collection duty on Amazon Services for third-party sales because it would make enforcement of the statute easier. (*See, e.g.*, DOR Br. 15 ("Thus, only Amazon has the ability to collect sales and use taxes arising from the purchase of tangible personal property

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that makes Amazon Services responsible for collecting sales tax simply because it sends order confirmations through the Amazon.com website.

on the Website."), 20 ("Third-Party Merchants cannot collect payment directly from the purchaser."), 32 ("The purpose of the Tax Act is not just to impose a tax, but to ensure the collection and remittance of the tax.").) The statute allows the Department, "when necessary for the efficient administration" of the Tax Act, to treat entities legally distinct from the actual retailer "as a retailer for purposes of this chapter," S.C. Code Ann. § 12-36-70 (1996), but the Department expressly waived any such argument at trial. (Tr., R.163 ("For a number of reasons we have just elected not to proceed with that theory.").) So this Court should not consider it. *See, e.g.*, *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004).

Moreover, the argument amounts to blatant policymaking. Amazon Services did not prevent third-party sellers from remitting sales tax; indeed, it offered tax collection services for all substantial sellers. And it is undisputed that South Carolina had been collecting sales tax from third-party sellers before the Department suddenly declared that it would start treating Amazon Services as the seller. (*See* AS Br. 1.) Administrative convenience is not a legitimate basis for retroactively imposing a collection duty on conduct not covered by the language of the statute. *See Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 900-01 (1988).

II. The Reasonableness of Amazon Services's View of the Law Is Confirmed by the Department's Failure to Respond to Amazon Services's Main Arguments.

Time and again the Department has chosen to ignore or mischaracterize Amazon Services's arguments and authorities rather than acknowledge them and explain why they are wrong. The failure of the Department to muster any response leaves no doubt that Amazon Services's view of the statute was reasonable.

A. The Department's Attempt to Rewrite the Well-Established Rule That Ambiguity Favors the Taxpayer Is Foreclosed by Supreme Court Precedent.

The Department argues that it need not show that Amazon Services's interpretation of the statute was unreasonable. According to the Department, Amazon Services presents "just a

traditional application-of-the-law-to-facts argument" not capable of triggering the long-settled rule that an ambiguous tax statute must be construed in favor of the taxpayer. (DOR Br. 34.) The Supreme Court's decision in *Alltel*, which Amazon Services explained requires reversal of the ALC's ruling (AS Br. 37-39), forecloses this argument. The Department ignores the case entirely.[5]

In *Alltel*, the Supreme Court had to decide whether a cellular service provider should be taxed as a "telephone company" under S.C. Code Ann. § 12-20-100(A). The Supreme Court relied on the rule that in "the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt," and made clear that the rule applies whenever there is "substantial doubt regarding the [statute's] *application to*" the taxpayer. 399 S.C. at 321, 731 S.E.2d at 873 (citation and internal quotation marks omitted, emphasis added). The cellular provider prevailed not because the Supreme Court determined that the provider had proposed a reasonable definition of the statute in a vacuum. Indeed, the Supreme Court nowhere even discusses its views of the range of reasonable meanings of the phrase "telephone company." The cellular provider won simply because it had a reasonable argument that the phrase "telephone company" did not apply to cellular service providers. *Id.*

This focus on application follows naturally from the well-established rule that "where the language relied upon to bring a particular person within a tax law is ambiguous *or* is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded,

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[5] The Department cites no South Carolina authority on this issue of South Carolina law, and relies exclusively on a concurring opinion by a single Justice of the United States Supreme Court. (*See* DOR Br. 34.) But Justice Thomas's concurrence in *Bank of America National Trust & Saving Association v. 203 North LaSalle Street Partnership* made only the straightforward observation that a statute is not ambiguous merely because the litigants disagree on its meaning. 526 U.S. 434, 461 (1999) (Thomas, J., concurring).

any substantial doubt being resolved in his favor." *Id.* (quoting *Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 76, 188 S.E. 508, 509-10 (1936)) (emphasis added). The question in tax cases is whether there is any substantial doubt that the language of the statute applies to the taxpayer—that is, whether there is a reasonable interpretation "that will exclude such person." Accepting the Department's position would not only contravene *Alltel*, but would eviscerate this important protection for taxpayers. Many tax statutes require case-specific judgments about how to apply statutory terms to particular taxpayers. If courts cannot examine the reasonableness of such applications, this safeguard all but vanishes.[6]

The Department's failure to address *Alltel* is especially revealing, because the ALC itself recognized, contrary to what the Department says now, that the Department needed to demonstrate that Amazon Services's interpretation of the statute was not just wrong but unreasonable. (Op., R.16, 47.) And, as Amazon Services pointed out in its brief, the ALC admitted that the law "is not clear" with respect to third-party sales on the Amazon.com marketplace. (Tr., R.603-04.) Under *Alltel*, that observation should have ended the case. 399 S.C. at 315-16, 320-21, 731 S.E.2d at 870, 873.

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[6] *Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000), cited by the Department (DOR Br. 33 n.20), is not to the contrary. *Leventis*, an environmental case involving a procedural due process claim, merely states that a moving party in an administrative hearing generally bears the burden of proof. 340 S.C. at 132-33, 530 S.E.2d at 651. The case did not address a tax issue and did not purport to overrule or modify the longstanding taxpayer-protection rule applicable here. Nor does *Rent-A-Center East, Inc. v. S.C. Dep't of Revenue*, 425 S.C. 582, 589, 824 S.E.2d 217, 221 (Ct. App. 2019), support the Department's position. (*See* DOR Br. 33.) There, this Court held that §§ 12-36-910(A) and 12-36-90 unambiguously imposed a tax on liability-waiver fees that were "fundamentally interconnected" with rental agreements for durable consumer goods. *Rent-A-Center East*, 425 S.C. at 585-86, 824 S.E.2d at 219. The case did not hold that the statute could never be examined to determine whether it is ambiguous as applied.

B. This Court Should Not Allow the Department to Walk Away From Its Mid-Litigation Sworn Statements Acknowledging That a Change in the Law Was Necessary to Tax Marketplace Facilitators Such as Amazon Services.

The Department does not deny that multiple government officials, including the Department's own Director, repeatedly admitted—sometimes under oath—that the applicable version of the Tax Act did not cover marketplace facilitators, like Amazon Services, and would not do so unless it was changed. (*See* AS Br. 39-44.) The Director himself expressly admitted that "[t]here is no law related to the taxation of third party sales," he urged the legislature to make "legislative changes," and he testified under oath that the proposed legislation would "close[] the gap" so that "nobody has to guess" who owes taxes on third-party sales. (Ex. 205, R.1381; Ex. 203, R.1342; Ex. 207, R.1506; Ex. 194, R.1263 at 6:13-15, 8:40-50.) The Department tries to downplay these significant admissions as just a "few statements" made after the tax period in question and after the start of this case (DOR Br. 36), and then observes that these statements do not change the rule that courts interpret statutes (*id.* at 36-37).

But the Department is wrong about the nature of the statements, and the timing of the statements only strengthens Amazon Services's position. Contrary to the Department's assertion, Department officials—including the Department's Director—*repeatedly* observed that the law prior to 2019 had to be changed to make internet marketplace operators responsible for sales tax on third-party sales. And the fact that the Department's many statements were made during the litigation—and precisely when the scope of the Tax Act was being hotly debated before the ALC and the legislature—makes them even more significant than if they had been made well before this case began. More importantly, the Department misses the point when it notes that courts construe statutes. Amazon Services has always agreed that courts interpret statutes. The question at issue is not who gets to ultimately interpret the law, but rather whether Amazon Services reasonably concluded in 2016 that it was not responsible for collecting and

remitting tax on third-party sales. The fact that *the Department itself* repeatedly acknowledged during the ALC litigation that the law was at best unclear confirms the reasonableness of Amazon Services's interpretation. To that, the Department has no answer.

C. The "Marketplace Facilitator" Amendments Did in Fact Change the Law with Respect to Third-Party Sales, and at a Minimum Established That the 2016 Tax Act Was at Best Ambiguous as to Marketplace Facilitators.

The Department also struggles to explain away the comprehensive set of amendments enacted in 2019 that for the first time extended a sales-tax collection duty to marketplace facilitators like Amazon Services. The Department clings to the prefatory language that the amendments "shall not be construed as a statement concerning the applicability of the South Carolina Sales and Use Tax Act to any sales and use tax liability in matters currently in litigation or being audited." (DOR Br. 39 (quoting S.214, 123d Session, 2019-2020 S.C. Gen. Assembly, § 1(5)).) According to the Department, this prefatory language "forecloses either party from relying on the 'Marketplace Facilitator' legislation in support of their position." (*Id.*) In similar fashion, the Department claims that this Court is "barred" from considering the Director's testimony about the proposed amendments before the General Assembly. (*Id.* at 39 n.23.) These extreme claims, unsupported by any legal authority, are meritless.

As Amazon Services explained, the prefatory language merely clarifies that changes in the law would apply only prospectively, and that the General Assembly was not attempting to interfere with the judicial task of resolving the legal dispute between the Department and Amazon Services about the statute in effect during the period relevant to this case. (AS Br. 43-44.) The prefatory language does not override the settled rule that, when the legislature adopts an amendment to a statute, there is a "presumption that the Legislature intended to change the existing law." (AS Br. 42 (collecting cases).) And that presumption is well-supported here.

There can be no reasonable doubt the 2019 amendments changed the law with respect to third-party sales on online marketplaces. The 2016 version of the Tax Act had *expressly* identified other parties that were not sellers but who nonetheless were to be treated as sellers for sales-tax collection purposes. S.C. Code Ann. § 12-36-70 (1996). The 2019 amendments expressly added marketplace facilitators like Amazon Services to the group of non-sellers who would be treated as sellers for sales-tax collection purposes. To bring the new business model within the scope of the statute, the legislature implemented a comprehensive set of changes, across multiple provisions of the Tax Act. The amendments changed virtually every provision the Department has relied on in this litigation in its quest to hold Amazon Services liable for sales tax under the 2016 law, including (1) changing the definition of "retailer" and "seller" in § 12-36-70 to include every person "operating as a marketplace facilitator"; (2) adding a specific, detailed definition of "marketplace facilitator" in § 12-36-71; (3) changing "gross proceeds of sales" in § 12-36-90(1)(a) and "sales price" in § 12-36-130(1) to include "property sold through a marketplace by a marketplace facilitator"; and (4) expanding the list of those responsible for collecting sales tax in § 12-36-1340 to include any retail seller who "operates as a marketplace facilitator." The amendments even provided (5) that "a marketplace facilitator includes any *related entities*," such as Amazon Payments, "assisting the marketplace facilitator in sales, storage, distribution, payment collection, or in any other manner, with respect to the marketplace." S.C. Code Ann. § 12-36-71(C) (2019) (emphasis added). That so many changes were required to cover Amazon Services's online marketplace business model proves conclusively that the previous version of the statute did not do so. As the Legislative Oversight Committee explained, without this "statutory change," the Department would not be able "to

force internet marketplace retailers, such as Amazon and eBay, to collect and remit sales tax on items sold by third-party vendors through the marketplace sites." (Ex. 192, R.1256.)

It is true, as the Department points out, that *Duvall v. S.C. Budget & Control Board*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008), recognizes that "statutory amendments 'may also be interpreted as clarifying original legislative intent'" rather than changing the law. (DOR Br. 39.) But in *Duvall*, the legislative amendment actually said on its face that it was intended "*to clarify* the contribution requirements on unused annual leave and the use of such payments in calculating average final compensation." 377 S.C. at 47, 659 S.E.2d at 130 (quoting 2005 Act No. 14, § 3) (emphasis added). There is no comparable language in the 2019 amendments here. And that is because the amendments changed rather than clarified the statute.

More fundamentally, the Department misses the crucial point that this is a tax case (unlike *Duvall*). Even if the 2019 amendments were "a clarification to the existing law, not a change" (DOR Br. 40), the fact that a clarification was needed defeats the Department's case. The need for clarification reveals that the version in effect during the first quarter of 2016 was ambiguous with respect to third-party sales through Amazon Services's marketplace. Amazon Services should therefore prevail. *See Alltel*, 399 S.C. at 320-21, 731 S.E.2d at 873.

D. The Department Misunderstands the "Remote Sellers" Argument and Has No Answer for It.

In September 2018, the Department issued S.C. Revenue Ruling 18-14 (Ex. 137, R.993-98), which set forth the Department's official position on the sales-tax responsibilities of remote sellers in the wake of *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). In the Ruling, the Department said that third-party sellers are the "sellers" of their products sold in an online marketplace. (Ex. 137, R.995-96.) Given that the Department in 2018 decided to treat third-party sellers as "sellers" for purposes of the "gross revenue" provision, it was certainly

reasonable for Amazon Services in 2016 to conclude that third-party sellers are the "sellers" of their products for *all* sales-tax purposes.

The Department never even tries to explain why it would have been *unreasonable* to treat third parties as sellers for all sales-tax purposes. Certainly nothing in the language of the statute distinguishes between "seller" for purposes of calculating "gross revenue" and "seller" for all other sales-tax purposes. Once again, the Department's refusal to confront Amazon Services's arguments all but concedes that Amazon Services's position was at least reasonable.

E. The Department Has No Response to Amazon Services's Argument That It Reasonably Interpreted South Carolina's 2016 Tax Act the Same Way Every Other State Has Interpreted Its Comparable Tax Law.

The Department does not dispute that there are dozens of states (besides South Carolina) that have passed "marketplace facilitator" laws, and in no other jurisdiction did a taxing agency or court ever conclude that Amazon Services was liable for sales tax on third-party sales before those changes were enacted. (AS Br. 46 & n.9.) Nor does it acknowledge the Supreme Court of Louisiana's decision in *Normand v. Wal-Mart.com USA, LLC*, — So.3d — , 2020 WL 499760 (La. Jan. 29, 2020), which was decided after Amazon Services submitted its opening brief but *before* the Department submitted its response brief. *Normand* held that Wal-Mart.com, which also operates an online marketplace, is not liable for sales tax on third-party sales made in its marketplace, and specifically rejected many of the arguments the ALC adopted in this case.

In particular, the Supreme Court of Louisiana recognized the clear distinction between being a "seller" and a "facilitator" of third-party sales: "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." *Normand*, 2020 WL 499760, at *8 (footnote omitted). The court

also agreed that reading the Louisiana sales-tax statute more broadly would sweep in a host of intermediaries that clearly should not be liable for the tax: "A contrary interpretation … would authorize the imposition of liability for sales tax on any intermediary that aids or enables sellers to reach new customers although not selling anything (*i.e.*, payment processors, credit card companies, financial institutions, common carriers, advertisers, and broadcasters). Such an interpretation produces an absurd result … ." *Id.* at *13. The same defects in the ALC's ruling, all of which the Department has failed to address, doomed the taxing authority's position in Louisiana. They likewise undermine the Department's position here.

The Department tries to distance itself from the uniformly contrary views of other states either by staying silent about them (see above) or by noting that "[w]hat another state has done or not done with respect to its own tax laws has no bearing on the interpretation of the South Carolina Tax Act." (DOR Br. 44.) To be sure, South Carolina courts are the sole arbiters of South Carolina law. But there is no reason South Carolina courts should ignore such widespread treatment by taxing authorities across the country when assessing the *reasonableness* of a taxpayer's interpretation of South Carolina law. There is nothing particularly unique about the wording of the relevant provisions of the Tax Act. Many states impose a sales tax on sales, where the sale is defined as a transfer or exchange of tangible personal property for a consideration. *See, e.g.*, *Cincinnati Reds, L.L.C. v. Testa*, 122 N.E.3d 1178, 1183 (Ohio 2018) ("Sale is defined … to include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, … but this definition applies only if those transactions are for a consideration." (brackets, citations, and internal quotation marks omitted)); *Comptroller of Treasury v. J/Port, Inc.*, 967 A.2d 253, 262 (Md. Ct. Spec. App. 2009) ("The term sale is further defined … as a transaction for a consideration whereby … title or possession

of property is transferred or is to be transferred absolutely or conditionally by any means … ." (brackets, citations, and internal quotation marks omitted)). Other states' consistent approach requiring a *legislative* amendment to their sales-tax statutes to cover marketplace facilitators like Amazon Services confirms the reasonableness of Amazon Services's view that in South Carolina, too, Amazon Services was not required to collect and remit sales tax on third-party sales until South Carolina changed its law.

III. The Department's Constitutional Arguments Are Meritless.

A. The Department's Assertion That Amazon Services Had Fair Notice Fails in Light of the Department's Novel Interpretation of the Statute and Its Sudden Change in Departmental Policy.

The Department argues that Amazon Services had fair notice of its tax liability in the first quarter of 2016 based "simply [on] the plain language of the Tax Act," which was satisfied because Amazon Services "effected an 'exchange … of tangible personal property for a consideration.'" (DOR Br. 45 (quoting S.C. Code Ann. § 12-36-100).) But the Department does not deny that, in the first quarter of 2016, "[t]here [was] no law related to taxation of third party sales," and it has admitted that taxpayers had to "guess" who owed sales tax for third-party sales on online marketplaces. (*See, e.g.*, Ex. 194, R.1263 at 6:13-15, 8:40-50; Ex. 203, R.1342; Ex. 205, R.1381; Ex. 207, R.1506.) The Department also cannot point to a single other instance in which it—or any other taxing authority—attempted to hold a marketplace facilitator liable for sales tax on third-party sales where the marketplace facilitator did not set the price for the products, determine how much inventory to make available, receive payment for the products, or transfer title to the products.

The Department also claims that Amazon Services was on fair notice of its potential liability because it "lobbied for the passage of the 2011 Distribution Facility Sales Tax Exemption" and "had carefully examined … its tax obligations under South Carolina law prior to

the first quarter of 2016." (DOR Br. 46.) But this does not mean that Amazon Services had fair notice of its potential liability for sales tax *on third-party sales*. As the Department recognizes, the moratorium exempted out-of-state retailers who built distribution facilities in South Carolina from collecting or remitting sales tax for a period of time for *all* sales. (*Id.*) Amazon Services and other Amazon affiliates understood they had the responsibility to collect sales tax on sales of *their* products as retailers once the moratorium expired, and it is undisputed that they did so. The moratorium provided no notice to Amazon Services that the Department would suddenly claim in 2016 that it was responsible for collecting sales tax on *third-party* products.

B. The Department's Response Confirms That Amazon Services Is the Only Marketplace Facilitator That Has Been Forced to Bear the Retroactivity of the Department's Novel Interpretation.

The Department claims that Amazon Services cannot prove an equal protection violation because it "failed to submit any evidence at trial identifying any other taxpayer that is similarly situated to Amazon such to enable the ALC to perform an equal protection analysis." (DOR Br. 48.) But the evidence is in the Department's own admissions. The Department concedes that the 2019 legislation "applies not just to Amazon but rather to a broad range of entities that could be classified as 'marketplace facilitators.'" (*Id.* at 37.) And the Director of the Department admitted that, by virtue of this litigation, only Amazon Services would be subject to "retroactivity." (Ex. 194, R.1263 at 7:02-18.) Given these concessions, the Department cannot deny that it has singled out Amazon Services as the only marketplace facilitator forced to bear the retroactive effect of the Department's interpretation of the Tax Act. That is classic disparate treatment.

CONCLUSION

The ALC's decision should be reversed.

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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.

CERTIFICATE OF COUNSEL

The undersigned certifies that the foregoing Final Reply Brief of Appellant Amazon Services, LLC complies with Rule 211(b), SCACR.

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