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

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.

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR PROFESSIONALS IN TAXATION IN SUPPORT OF APPELLANT AMAZON SERVICES, LLC

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INTEREST OF THE AMICUS CURIAE

The Institute for Professionals in Taxation ("IPT") is a non-profit educational organization founded in 1976 under the laws of the District of Columbia. IPT's organizational purposes include the promotion of uniform and equitable administration of taxes. It is also the only professional organization that educates, certifies, and establishes strict codes of conduct for state and local income, property, and sales and use tax professionals who represent taxpayers.

IPT has more than 4,100 members representing more than 1,400 corporations, firms, and taxpayers throughout the United States and Canada. Represented within IPT's membership are most of the Fortune 500 companies and numerous small businesses. Member representation spans the industry spectrum, including aerospace, agriculture, manufacturing, wholesale and retail, communications, healthcare, financial, oil and gas, hospitality, transportation, and other sectors. IPT's members are liable for sales and use taxes in various jurisdictions, including South Carolina. IPT has an interest in this matter because its members have an interest in the fair, predictable, and efficient administration of sales and use taxes. IPT is concerned that the decision below undermines these interests.

STATEMENTS AND STANDARD OF REVIEW

IPT adopts the Statement of the Issues on Appeal, the Statement of the Case, the Statement of the Facts, and the Standard of Review as set forth by Final Opening Brief of Appellant Amazon Services LLC ("Amazon").

INTRODUCTION

One of the most significant societal trends in the last decade has been the rise of electronic commerce and with it, the ability of vendors to remotely reach an ever-increasing consumer base. This rise in e-commerce created two challenges for state legislatures. The first—spurred by the

Supreme Court's decision in *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018)—was requiring online retailers to collect tax on their sales to in-state purchasers. The second challenge, which grew out of the first, was extending the tax collection obligation to online marketplaces that facilitate sales by online retailers.

In South Carolina, the first "challenge" was no challenge at all. On July 9, 2018, the Director for the South Carolina Department of Revenue ("Department") explained in a letter to the General Assembly that state law already required online retailers to collect tax under its broad definition of "seller": "[T]he General Assembly does not need to enact new legislation to collect sales and use tax from remote retailers since S.C. Code § 12-36-70 permits such collections." *See* Letter from Hartley Powell, Dir., S.C. Dep't of Revenue to the General Assembly (July 9, 2018). According to the Director, South Carolina was ahead of the curve when it came to addressing the first challenge.

The Director could not say the same with respect to the second challenge. The very next day, the Director urged a House subcommittee to close a "gap" in South Carolina law. *See* Testimony of Hartley Powell, Dir., S.C. Dep't of Revenue to House Oversight Subcomm. on Econ. Dev., Transp. & Natural Res. of the Legislative Oversight Comm. (July 10, 2018). According to the Director, the gap existed because there was "no law related to taxation of third party sales." Ex. 207, R. 1506. While the definition of "seller" was broad enough to encompass online retailers, it did not contemplate a person who facilitated, rather than made, taxable sales. Throughout 2018, the Director urged the General Assembly to "close[] the gap" by amending the definition of "seller" to include online marketplaces. *See, e.g.,* Ex. 194, R.1263 at 6:13–15, 8:40–50. The General Assembly agreed, passing Act 21 in April 2019, which amended which amended the

definition of "seller" to include a "marketplace facilitator." 2019 S.C. Act 21 (effective April 26, 2019).

Notwithstanding that amendment—and the General Assembly's obvious intent to close a "gap" in the law—the Administrative Law Court in this case held that, *prior* to Act 21, the definition of "seller" unambiguously captured online marketplaces. IPT urges this Court to reject that erroneous conclusion under a fundamental principle of statutory interpretation: "[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." *Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 76, 188 S.E. 508, 509–10 (1936). A close reading of the ALC's decision, coupled with the General Assembly's implicit rejection of that decision in Act 21, shows that the Director was right all along: South Carolina law had a gap—that is, an ambiguity—regarding the tax collection obligations of online marketplaces. Under well-settled law, that ambiguity must be resolved in Amazon's favor.

ARGUMENT

I. The ALC's analysis highlights the ambiguity in the tax laws.

This case implicates fundamental principles of statutory interpretation. As the ALC's decision recognizes, "[t]he first question of statutory interpretation is whether the statute's meaning is clear on its face." Final Order, R.15 (Sept. 10, 2019) (quoting *Wade v. Berkeley Cty.*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002)). If so, "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). Conversely, if the statute is ambiguous, the general rule is that "a court must apply the rules of statutory interpretation to resolve the ambiguity and discover

the intent of the legislature." *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 874 (2012). In tax enforcement cases, however, courts are guided by two additional principles.[1] First, "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, any substantial doubt being resolved in his favor." *Cooper River Bridge,* 182 S.C. at 76, 188 S.E. at 509–10. Second, "in statutes levying taxes, the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used and if the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer." *Id.* (citing *United States v. Merriam*, 263 U.S. 179 (1923)). Reviewing the ALC's decision through these interpretive lenses makes clear that this Court should find that the applicable law is ambiguous.

A. Applying the first interpretive principle as articulated in *Alltel* makes clear that the term "seller" is ambiguous with respect to Amazon's tax collection obligations.

The central question is whether Amazon, as an online marketplace, was a "seller" and "engaged in the business of selling" tangible personal property under South Carolina law prior to the enactment of Act 21. Amazon contends that it was not a seller under prior law and, alternatively, that the law was ambiguous with respect to its tax collection obligations as an online marketplace. The ALC rejected both arguments and held that Amazon was unambiguously a "seller" under prior law. The ALC's circuitous route to reach this conclusion demonstrates that the applicable law was, at best, ambiguous with respect to Amazon's tax collection obligations.

[1] While this brief refers to these as two separate interpretative principles, we recognize that the principles are related, pursue the same goal, and are animated by similar concerns. Both principles were clearly set forth in *Cooper River Bridge*, 182 S.C. at 76, 188 S.E. at 509–10 (1936). Thereafter, some courts applied both principles, while others applied only one or the other. Nevertheless, South Carolina courts continue to apply both principles as a restraint on the Department's enforcement of the tax laws.

"Seller" is a defined term in the tax statutes, so the ALC's analysis should begin and end with that definition. The definition of "seller," however, does not expressly capture someone who *facilitates* sales between buyers and sellers. So in order to bring Amazon within the meaning of the term "seller," the ALC focuses instead on the obscure use of the word "consignment" in the definition of "gross proceeds of sales." The ALC then connects the word "consignment" to the definition of "seller," specifically the subsection that includes "every person . . . selling or auctioning tangible personal property whether owned by the person or others." S.C. Code Ann. § 12-36-70(1)(a). The ALC's interpretation of these two provisions is as follows:

> Recognizing consignees as sellers for the purpose of the Sales and Use Tax Act is consistent with the statutory definition of "seller," which includes persons selling or auctioning tangible personal property of others, which is what a consignee does.

Final Order, R.20. The linchpin of the ALC's decision is the meaning of the word "consignment," as it is the link back to the definition of "seller." The ALC acknowledges that South Carolina law does not define "consignment," yet nevertheless concludes that "the relationship between Amazon . . . and Merchants functions as a consignment-type relationship. . . ." *Id.* at 46. To the ALC, this "consignment-*type*" relationship is sufficient to bring Amazon within the definition of "seller."

Applying the first interpretive principle, however, demonstrates the ALC's error. As a threshold matter, the ALC's reliance on the word "consignment" to determine the meaning of "seller" is reason enough for this Court to find the statute was ambiguous with respect to Amazon's tax collection obligations. Analyzing the ALC's interpretation of the word "consignment" further shows why the ALC's decision cannot stand.

With respect to the first principle, the absence of a definition of the word "consignment" is fatal to the ALC's analysis under the South Carolina Supreme Court's decision in *Alltel Communications v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012). *Alltel* involved South Carolina's corporate license fees and whether a wireless communications service provider fell within the reach of the statutorily-undefined term "telephone company." The Supreme Court unequivocally answered in the negative: "the absence of a statutory definition" creates an ambiguity with respect to an operative term; this ambiguity "raises substantial doubt regarding the section's application to [Alltel]" and, under this principle of statutory interpretation, that doubt "must be resolved in favor of [Alltel]." *Id.* at 320 & n.3, 731 S.E.2d at 872 & n.3. In other words, *Alltel* applied the first interpretive principle—that is, refusing to bring a person within the ambit of a tax law under ambiguous language—by searching for a definition of the operative language in the relevant statutes. Here, the ALC decision recognizes that the operative term—"consignment"—is not defined. As that term is the ALC's essential link back to the term "seller," this court should effectuate the *Alltel* decision and find that, at best, the word "consignment" is ambiguous and, in turn, cannot be the basis for including Amazon within the definition of "seller."

B. The ALC's reliance on the term "consignment" violates the second interpretive principle because it "extend[s]" the term seller "by implication" to encompass Amazon.

Alltel demonstrates how the first interpretive principle resolves this case. The second interpretive principle confirms that result. This principle instructs courts that "statutes are not to be extended by implication" beyond their ordinary meaning. The question, then, is whether the ALC extended the tax laws "by implication" to Amazon when it interpreted the word "seller" by

relying on the undefined term "consignment." To answer this question, consider some of the language used by the ALC to pull Amazon within the definition of "seller":

- "I find Amazon . . . functions *like a consignee* for the purposes of the Sales and Use Tax Act." Final Order, R.39.
- "Indeed, the strong *similarities between* the sales on the Marketplace and consignment sales cannot be ignored for the purpose of determining legislative intent when looking at the Sales and Use Tax Act as a whole." *Id.*
- "[T]he relationship between Amazon . . . and Merchants functions as a consignment-*type* relationship. . . ." *Id.* at 46.
- "Amazon . . . like a consignee, provides a service to the owner of a product that directly facilitates the sale of that product." *Id.* at 39.
- "Also like a consignee, Amazon . . . retains a percentage of the sales price as a fee. . . ." *Id.*

The ALC decision does not try to force Amazon within the "literal meaning of the word" consignment. And for good reason. Amazon's online marketplace is a far cry from traditional consignment shops, both in form and function. *See, e.g.* Appellant's Final Opening Brief. at 35–37. Instead, the ALC decision emphasizes the ways in which Amazon is *like* a consignee, and then uses the term as its statutory hook to reel Amazon within the definition of "seller." Once again, the *Alltel* case—and the lower courts' rulings in that case—demonstrate why the ALC's approach is inappropriate.

Alltel originated from cross motions for summary judgment, with both sides arguing that there was no issue of material fact regarding whether Alltel was a "telephone company." The ALC recognized that the term "telephone company" was not defined, but relied on a discrete provision

in a stipulation of facts to conclude that Alltel was not a "telephone company." *See Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, Op. No. 2010-UP-232 (S.C. Ct. App. filed April 7, 2010). The Court of Appeals, however, took issue with the ALC's resolution of the matter based on the stipulation of facts, concluding that it is the role of the judiciary, not the parties, to determine the "intent of the legislature regarding questions of law, such as the intent of a lawmaking body. . . ." *Id.* The court relied on its earlier decision in *Shea v. State Dep't of Mental Retardation*—importantly, not a tax case—for the proposition that "an important question of novel impression . . . should not be decided without fully developing the facts by means of trial." *Id.* (citing *Shea v. State Dep't of Mental Retardation*, 279 S.C. 604, 310 S.E.2d 819, 822 (Ct. App. 1983) *overruled by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (2018)). Accordingly, the court remanded the case for "additional fact finding" to determine whether Alltel was a "telephone company."

The South Carolina Supreme Court disagreed. Although generally "a court must apply the rules of statutory interpretation" to interpret and apply undefined terms in the applicable statutes, the Court recognizes that an undefined term in a tax imposition statute creates ambiguity, which must be construed in favor of the taxpayer. Accordingly, while the Court of Appeals ordered the ALC to engage in its familiar fact-finding endeavor, the Supreme Court simply ruled in favor of Alltel. This decision comports with the second interpretive principle. Weighing the similarities and differences between wireless service providers and traditional telephone companies was unnecessary. As the term "telephone company" was undefined, the statute was ambiguous; therefore, subjecting Alltel to the tax would have extended the statute beyond its plain meaning.

The ALC's comparison of Amazon and traditional consignment shops was inappropriate. Interpreting "consignment" to include Amazon because it is in a "consignment-*type*" relationship

extends the meaning of the term seller "by implication." This is precisely the result the second interpretative principle seeks to avoid—and a result that *Alltel* would have avoided altogether.

II. The General Assembly's passage of Act 21 implicitly rejects the ALC's decision and further shows that, at best, prior law was ambiguous with respect to Amazon's obligations as an online marketplace.

As suggested above, the General Assembly heeded the recommendation of the Director to enact new legislation clearly extending tax obligations to online marketplaces like Amazon. On April 26, 2019, the General Assembly passed Act 21 to require a "marketplace facilitator" to collect and remit tax on behalf of online sellers using its platform. 2019 S.C. Act No. 21 (effective April 26, 2019).

At the outset, it is worth noting that the mere fact that the General Assembly enacted any legislation to encompass online marketplaces undermines the ALC's determination that prior law unambiguously captured Amazon. As the South Carolina Supreme Court has recognized, "[t]here is a presumption that the Legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003). Why would the General Assembly need to act if existing law unambiguously captured online marketplaces?

Not only does the enactment of any law undermine the ALC's determination that prior law unambiguously applied to Amazon, but Act 21 also implicitly rejects the ALC's interpretation. To illustrate this point, consider how the General Assembly could have reaffirmed the ALC's conclusion that Amazon was a "seller" under prior law. As described above, the ALC concluded that Amazon fell within the definition of "seller" by reference to the term "consignment" in the definition of "gross proceeds from sales." From there, the ALC concluded that Amazon fell within

the subsection of the definition of "seller" that included every person "selling or auctioning tangible personal property whether owned by the person or others." S.C. Code Ann. § 12-26-70(1)(a). The General Assembly could have effectuated the ALC's decision by making a single change to the law: incorporate the term "marketplace facilitator" into the provision using the term "consignment." This would have been consistent with the ALC's view that the term "consignment" was intended to capture online marketplaces like Amazon. Importantly, the definition of "seller" would not need to be amended, since the ALC's decision found that consignees were already included in that definition under subsection (1)(a). Nevertheless, if the General Assembly wanted to further confirm the analysis of the ALC's decision, it could have included the term "marketplace facilitator" within the definition of seller. Such amendments would have arguably lent some support to the ALC's determination that prior law was unambiguous, as the legislative changes would have been relatively minor.

The General Assembly, however, chose a completely different path. While it did change the definition of "gross proceeds of sales," it did not amend the subsection in the definition of "seller." Instead of amending the existing subsection of the definition, it added an entirely new subsection to explicitly capture Amazon. Specifically, it enacted subsection (3) of § 12-36-70 that, when read in conjunction with the prefatory language, reads as follows: "Retailer and seller include every person: . . . operating as a marketplace facilitator, as defined in Section 12-36-71." S.C. Code Ann. § 12-36-70(3). So while the ALC determined that Amazon was a "seller" under § 12-36-70(1)(a), the General Assembly determined that a new subsection—§ 12-36-70(3)—was needed to capture companies like Amazon. It is particularly noteworthy that the legislative change to the definition of "seller" just described was advocated by none other than the Director himself, and at least as early as July 10, 2018. *See, e.g.,* Ex. 207, R.1506. While arguing that Amazon was

§ 2, By-laws of The Institute for Professionals in Taxation (June 26, 2019). IPT generally advances these goals through educational programs and professional conferences. But on rare occasions—when the stakes are high and the implications severe—IPT furthers its mission by submitting amicus briefs in state court. Why, then, does this brief focus on principles of statutory interpretation? Because those principles foster the sound tax policies this organization advances: a taxpayer's legal obligations under the law should be clearly stated, and the enforcement of those obligations should be equitable.

The Supreme Court of South Carolina champions these policies by recognizing that an ambiguous law cannot be the basis for extending the state's taxing power, and that tax laws cannot be applied "by implication" beyond their intended meaning. Implicit in these maxims is a commitment to the separation of powers. The power to enact tax laws resides in the General Assembly, while the power to enforce those laws belongs to the executive branch, exercised through the Department of Revenue. Justice Clarence Thomas described the balance of power in this way: "Before placing its hand in the taxpayer's pocket, the Government must place its finger on the law authorizing its action." *Boeing Co. v. United States*, 537 U.S. 437, 458 (2003) (Thomas, J. dissenting).

In this case, the Department placed its hand in Amazon's pocket without a law authorizing it to do so. Worse yet, the Department knew existing law had a "gap" and therefore did not authorize its action. It also knew that the General Assembly needed to enact a law to "close the gap." Indeed, it proactively urged the General Assembly to do so by amending the definition of "seller" to include a "marketplace facilitator." Rather than waiting for the legislative process work, the Department overstepped its authority by applying an ambiguous law against Amazon.

Respect for the separation of powers is not an aspiration, it is a command. IPT urges this Court to enforce this command by finding that the definition of "seller" prior to Act 21 was ambiguous with respect to Amazon's tax collection obligations.

Respectfully submitted,

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