THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

Appellate Case No. 2019-001706

Amazon Services, LLC, ...Appellant,

v.

South Carolina Department of Revenue, ...Respondent.

The Department of Revenue's Response to the Tax Executives Institute's *Amicus Curiae* Brief

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Summary of Argument

As noted by the Department in its Return in Opposition to TEI's Motion for Leave to File its Brief, the TEI Brief does not provide any additional material or analysis that will aid this Court in its consideration of the issues in this case. To the contrary, the TEI Brief contains several material mischaracterizations of important facts in this case. The Department noted these issues in its Return and discusses some of them below. However, rather than attempt to correct every misstatement or incorrect assertion contained in the TEI Brief—of which there are unfortunately many—the Department respectfully refers the Court to the briefing of the parties in this appeal, where the issues pertinent to this case were fully and thoroughly addressed by the parties. Otherwise, the TEI Brief provides the Court with information and argument that is irrelevant to the issues in this case. The Department will briefly address several key arguments made by TEI in its Brief.

Argument

1. The "Marketplace Facilitator" Legislation Has No Bearing on this Case.

As with other Amazon-aligned *amici*, TEI points to the General Assembly's passage of "marketplace facilitator" legislation in 2019 as purported evidence that the 2016 provisions of the South Carolina Sales and Use Tax Act (the "Act") were ambiguous. This is incorrect. *See, e.g.*, *Whitner v. State*, 328 S.C. 1, 9, 492 S.E.2d 777, 781 (1997) ("Generally, the legislature's subsequent acts cast no light on the intent of the legislature which enacted the statute being construed . . . . Rather, this Court will look first to the *language* of the statute to discern legislative intent, because the language itself is the best guide to legislative intent." (internal quotation marks and citations omitted)). Importantly, the "marketplace facilitator" legislation contains a specific provision that it "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 in audit." S.214, 123d Session, 2019-2020 S.C. Gen. Assemb., § 1(5). As this matter was squarely in litigation at the time this legislation was passed, the express language of the "marketplace facilitator" legislation forecloses any party (or *amicus*) from relying on it in support of its position in this case, which is precisely what TEI has attempted to do.[1] Because the General Assembly has expressed its intent with respect to such pending litigation, there is simply no place for the marketplace facilitator legislation in this case.

This issue has already been thoroughly briefed by the parties to this case, so the Department respectfully refers the Court to its prior briefing on this issue. The Department will observe, however, that TEI's discussion of this legislation assumes that Amazon's sales platform looks just like other "marketplace facilitators" who are covered by the 2019 enactment. The truth, however, is that the "marketplace facilitator" legislation applied to and was meant to capture a host of taxpayers other than Amazon. Amazon, for its part, was squarely covered by the 2016 provisions of the Act because it performs every important task that a "seller" or "retailer" must perform to complete a retail sale, including presenting the good to the customer, taking the customer's money, communicating with the customer about the purchase and delivery of the good, and in many cases actually delivering the good to the customer itself. (*See* Resp.'s Final Br. at 3–12). TEI does not identify any other "marketplace facilitators" that complete all of these key tasks in effectuating a sale. Instead, TEI simply assumes that if the General Assembly has passed a law, it must have been about Amazon. That is not the case, however, and Amazon's sales tax liability in the first quarter

[1] This provision also precludes TEI's effort to rely on the Department Director's discussion of the proposed "marketplace facilitator" legislation before the General Assembly. That is, the Director's statements to the General Assembly about the legislation also are barred from consideration. The Department disagrees with TEI's characterization of those statements, but they are simply not relevant for the purposes of this appeal.

of 2016 must be determined by applying the provisions of the Act in force in 2016 to Amazon's particular business model. That is the analysis performed by the ALC in this case, and it was the correct analysis.

2. The History of Federal Nexus Law Has No Bearing on this Case.

TEI spends almost six pages of its Brief discussing the history of federal nexus law, insisting that "[t]he Department's attempt to hold Amazon Services responsible for tax imposed on transactions between third-party sellers and consumers must be examined in the full context of this country's decades-long nexus debate." (TEI Br. at 5). However, that is not true, and there is a very good reason why: in the first quarter of 2016, which is the tax period at issue in this case, Amazon had a very large distribution facility situated and operating in Lexington County, South Carolina. That means that, under any formulation of federal nexus law—whether before the U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) or after—Amazon had nexus with South Carolina. While *Wayfair* did have many important implications for how states go about taxing "remote sellers," that has nothing to do with this case because, at all times relevant to this case, Amazon had a physical presence in South Carolina, and was therefore not a "remote seller" for the purposes of South Carolina tax law.

The thesis of TEI's *Wayfair* and nexus discussion appears to be that South Carolina jumped the gun by auditing and collecting sales tax from Amazon before other states did in the post-*Wayfair* world. But while *Wayfair* no doubt had profound implications for Amazon's tax relationship with other states, it simply has no bearing on its sales tax relationship with South Carolina, nor does how other states choose to enforce their tax laws. Rather, Amazon's obligation to collect and remit sales and use tax in this state is a function of the particular provisions of the Act applied to Amazon's retail business platform. Once again, that is the only inquiry that is

relevant in this case, and the Department respectfully submits that this entire discussion in the TEI Brief can simply be disregarded by the Court.

3. There is Nothing Unfair about Amazon's Tax Obligations toward South Carolina.

TEI finally claims that the Department's assessment of sales tax against Amazon is "fundamentally unfair" because Amazon was not on notice of those obligations in the first quarter of 2016. Amazon made a similar argument in its brief when it asserted that the Department's assessment violated the Due Process Clause of the U.S. Constitution, which argument the Department fully addressed in its brief. (*See* Resp.'s Final Br. at 44–47). In short, the Court may presume that Amazon was on notice of the law in South Carolina in the first quarter of 2016, which included the definitions of "retailer" and "seller" under the Act, *see* S.C. Code Ann. § 12-36-70, as well as the South Carolina Supreme Court's decision in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), which left little doubt about online retailers' obligation to collect and remit sales and use tax in South Carolina. Amazon was on as much notice of South Carolina law as anyone else—and arguably more so than *Travelscape* was—so this argument fails.

Moreover, TEI conspicuously omits from this discussion the 2011 Distribution Facility Sales Tax Exemption, which exempted Amazon from the obligation to collect and remit sales and use tax in South Carolina until January 1, 2016. *See* S.C. Code Ann. § 12-36-2691 (2014) (the "Moratorium"). Amazon lobbied for passage of the Moratorium in connection with placing its large distribution center in Lexington County, aware that the placement of this facility would give Amazon nexus with South Carolina, thereby making it liable to collect and remit sales and use tax to the state. (Resp.'s Final Br. at 46–47). So, the idea that Amazon was surprised by its tax obligations in South Carolina come January 1, 2016, is especially difficult to comprehend, as is

TEI's argument that the Department has somehow ambushed Amazon by its effort to collect these taxes.

In making these "fairness" arguments, TEI makes a number of assertions that range from misleading to demonstrably false. The most egregious of these appears on page 14 of the TEI Brief:

> Moreover, if the ALC's decision stands, *South Carolina would receive a windfall* . . . . it is reasonable to assume some of the taxes in issue in this case have already been voluntarily remitted to the Department by in-state purchasers of the goods. Moreover, the Department may have previously audited and assessed consumers who purchased products from third-party sellers over Amazon Services' online platform. *Thus, the State will likely collect tax twice on many sales at issue in this case if the Department is permitted to assess Amazon Services for taxes*.

(emphases added). This assertion, however, is wrong. As the ALC observed on the very first page of its Final Order, Amazon and the Department reached an agreement at the outset of Amazon's appeal to the ALC to submit an estimated figure of assessed taxes in order to allow Amazon to proceed with its appeal. (*See* Final Order at 1 n.1). The parties agreed that, once Amazon's liability is determined in this litigation, the matter will return to the Department level, whereupon the final amount of assessed taxes will be determined to ensure that Amazon is not assessed for transactional taxes that may have already been collected. (*Id.*) In recognition of this, the ALC specifically ordered that "pursuant to the parties' agreement, now that the litigation is complete the Department will calculate the specific amount of tax owed on the sales at issue in this case." (*Id.* at 53).

The Department pointed out this error in its Return to TEI's Motion for Leave, and TEI responded in its Reply that, "[c]ontrary to the Department's assertion, TEI has not overlooked . . . the portion of the ALC's Order addressing how tax will be calculated if the Court holds Amazon Services liable," and then insinuated that the statement was merely illustrative of some larger point TEI intended to make. (TEI Reply at 8). But that is clearly not the way it was presented in TEI's

Brief, which sought to raise a serious alarm about double-collection of taxes—an alarm that was and is patently false. The Department brings this error to the Court's attention not only because it is a plainly incorrect statement of fact, but also because it speaks to the reliability of TEI's Brief, and further reveals that TEI's intentions in this case are to support Amazon rather than to meaningfully assist the Court in its analysis in this case.

On page 5 of its Brief, TEI raises Amazon's "tax collection services" as another purported example of taxpayer confusion, claiming that "Amazon Services remitted any collected tax to participating retailers, who reported and remitted the tax directly to the Department, and the Department accepted those revenues." (TEI Br. at 5). The only thing that is confusing about this arrangement, however, is why someone would ever collect a sales tax on someone else's behalf and then remit it to someone other than the taxing authority. As the ALC aptly observed at the hearing in this matter, this "service" provided by Amazon is confounding and raises the potential for fraud. (*See* **R. p. 387** (". . . but it sounds like that creates a potential fraud that a seller could have you collect the tax through Amazon Services/Payments, receive the money and then never give the – whatever state the money and pocket it and Amazon Services/Payments would never know."). Indeed, Amazon has no idea if those third parties ever actually remitted any of the "tax" it collected as part of this "service" to the appropriate taxing authority. The only thing Amazon is sure about is that it collected an additional fee for this "service." (*See* Resp.'s Final Br. at 15; **R. pp. 904–07**). In any event, this aspect of Amazon's business model only further illustrates that Amazon, as the point of sale for transactions on the website, is the entity that ought to be collecting and remitting sales and use tax to the state, as it is the only actor in the transaction who can.

In sum, there is nothing unfair about Amazon being asked to collect and remit sales tax in accordance with South Carolina law—indeed, it is the only logical outcome given the manner in

which Amazon operates its online sales platform, and it is the outcome that is required under the plain language of the Act. The reasons to the contrary offered by TEI are either unconvincing or simply incorrect.

Conclusion

For the reasons set forth above, this Court should reject the arguments by TEI as irrelevant and unpersuasive for purposes of this appeal.

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Respectfully submitted,

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