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 Institute for Professionals in Taxation's *Amicus Curiae* Brief

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Summary of Argument

As noted by the Department in its Return in Opposition to IPT's Motion for Leave to File its Brief, the IPT Brief does not provide any additional material or analysis that will aid this Court in its consideration of the issues in this case. The IPT Brief concerns itself entirely with the argument that the relevant statutes contained in the South Carolina Sales and Use Tax Act (the "Act") in 2016 are ambiguous and that Amazon should receive the benefit of that ambiguity. This point was thoroughly addressed by the parties to this case in their respective briefs, and the Department incorporates its arguments in that regard here by reference. (*See* Resp.'s Final Br. at 33–44). At bottom, IPT bases its ambiguity argument on two points: (1) the ALC's analysis in this case, and particularly the ALC's discussion of consignment sales in its Final Order, reveals that the Act is ambiguous, and (2) the General Assembly's enactment of "marketplace facilitator" legislation in 2019 reveals that the 2016 provisions of the Act were ambiguous. Both assertions, however, are fundamentally flawed, and are based on important misconstructions of the subject matter discussed. The Department will briefly address each argument in turn.

Argument

1. The IPT Brief Misconstrues the Administrative Law Court's Order.

Before issuing its Final Order in this case, the ALC conducted a three-day evidentiary hearing in which it heard testimony and oral argument on the issues related to Amazon's liability for collecting and remitting sales and use tax under the Act. The ALC received over 200 exhibits into evidence, and also considered extensive pre- and post-hearing briefing from the parties on these issues, including dispositive motions. The ALC's Order when it issued was over 50 pages long, containing extensive factual findings and a thorough examination of Amazon's business model, the manner in which transactions are conducted on the Amazon website, and Amazon's

particular involvement in and control over those transactions. The Order also carefully and thoughtfully applied Amazon's business model to the relevant provisions of the Act in order to determine whether Amazon fit the statutory definitions for a "retailer" and "seller," S.C. Code Ann. § 12-36-70, as well as a "person engaged or continuing within this State in the business of selling tangible personal property at retail," S.C. Code Ann. § 12-36-910(A), and ultimately determined that Amazon did meet those definitions.

Despite this extensive analytical backdrop for the ALC's final decision, reading IPT's brief would lead one to the conclusion that the ALC confined its analysis to whether Amazon operates like a consignment shop and, having determined that it does, summarily concluded that Amazon must be a retailer for purposes of the Act. (*See* IPT Br. at 5 ("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.'")). That is hardly the case. The ALC's thorough and well-reasoned Order is before the Court in this appeal, and it speaks for itself. A plain reading of that Order demonstrates that the ALC's analysis was not confined to whether Amazon operates like a consignment shop, but rather the ALC wove this illustration into its meticulous application of the relevant provisions of the Act to Amazon's business model. That the ALC found the consignment sales model helpful by comparison and discussed it in the Order does not somehow render the Act ambiguous—it rather offers further support to the ALC's conclusion that, any way you slice it, Amazon is engaged in the business of selling tangible personal property at retail in South Carolina. *See, e.g.*, S.C. Code Ann. § 12-36-90 (2014) (including within the definition of "gross proceeds of sales," "the proceeds from the sale of property sold on consignment by the taxpayer").

IPT's stark oversimplification of the ALC's Order in this regard is no more than a straw man—a transparent logical fallacy designed to avoid a reality of South Carolina law that has

confounded Amazon from the outset of this case: the Act declares as a "retailer" and a "seller" "every person . . . selling or auctioning tangible personal property *whether owned by the person or others*." § 12-36-70 (emphasis added). Indeed, as the Department has pointed out consistently in this case, the only meaningful difference between transactions for which Amazon agrees it must collect and remit sales tax to South Carolina, and transactions for which it insists it has no such obligation, is that title to the good belongs to someone else. South Carolina law, however, is clear that title to the goods is not determinative of one's obligation to collect and remit sales tax for a transaction. Amazon's repeated and creative efforts to get around this unambiguous statutory language—the latest manifestation of which is contained in the IPT Brief—do not square with the statutory language or the ALC's decision. Nothing about the ALC's analysis demonstrates that the Act is ambiguous, and this argument should be rejected by the Court.

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

Likewise, the "marketplace facilitator" legislation enacted by the General Assembly in 2019 also does not impact this case or demonstrate that the statutory provisions at issue in this case are ambiguous or must be construed in favor of the taxpayer, as IPT asserts. *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)). In fact, 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 IPT has attempted to do in its Brief.

Regardless, this issue has been thoroughly briefed by the parties to this case, and the Department will once again respectfully refer the Court to its prior briefing on this issue. The Department will note, however, that IPT's argument is built upon another false assumption: because the General Assembly passed a law to make clear that any actors qualifying as "marketplace facilitators" must collect and remit sales and use tax to the Department, then that must mean that Amazon did not fall under the prior definitions of "seller" and "retailer" in the Act. But the General Assembly does not only pass laws just for Amazon. Rather, the General Assembly has the responsibility to craft policies that apply to all taxpayers. That is precisely what the General Assembly did in 2019—those provisions enacted by the General Assembly in the "marketplace facilitator" legislation apply to a range of taxpayers other than Amazon, and were meant to achieve certainty about those actors' obligations under South Carolina law going forward.

To be sure, Amazon falls into those newly enacted definitions as well, but that does not mean that Amazon did not fall into the prior definitions of "seller" and "retailer," and of "person engaged or continuing within this State in the business of selling tangible personal property at retail" in the Act. To answer that question, the ALC conducted a thorough analysis of Amazon's business model and selling activities, and it found that the particular manner in which Amazon transacts business on its website made it liable to collect and remit sales tax to the Department under the 2016 provisions of the Act. (*See* Final Order at 18–19 ("[E]ven though Amazon Services' business model is new and not specifically referenced in the Act, the novelty of its business model does not mean the application of the Act to Amazon Services is necessarily ambiguous such that

it requires a resolution in Amazon Services' favor.")). IPT's assertions that later enactments by the General Assembly disprove this conclusion are incorrect and they should be rejected by the Court.

Conclusion

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

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Respectfully submitted,

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