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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 Council on State Taxation's *Amicus Curiae* Brief

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Summary of Argument

As has unfortunately become a trend with *amici* filing briefs in support of Amazon in this matter, the COST Brief does not provide any additional material or analysis that will help this Court. The brief mostly rehashes positions that have already been thoroughly briefed by the parties to this case and provides unhelpful discussions of other states' laws and interpretations of those laws, or of federal law, which are not at issue in this case. The brief also misstates or misconstrues important facts contained in the record below. For example, the COST Brief opens with the conclusory pronouncement that Amazon does not sell tangible personal property via its website, but merely facilitates those sales, and lists in support of its position eight things that Amazon purportedly does not do. (COST Br. at 3). In truth, of the eight points listed, Amazon performs the identified tasks outright or, at a minimum, plays a critical or meaningful role in each of those tasks. Point one, for example, claims that Amazon does not "receive payments from customers," (*id.*), even though it most certainly does, as customers input their payment information directly to the website, which Amazon operates. (*See* Resp.'s Final Br. at 6, 9 n.8). Third-Party Merchants, for their part, have no right to receive payments directly from customers, and are prohibited from doing so. (Resp.'s Final Br. at 13). None of this is subject to serious dispute in this case.

Rather than attempt to correct every such misstatement or incorrect assertion contained in the COST Brief—of which there are many—the Department respectfully refers the Court to the briefing of the parties in this appeal, where such issues were fully and thoroughly addressed by the parties who actually have an interest in this case. However, the Department will briefly address several key arguments made by COST in its Brief.

Argument

1. The Administrative Law Court Did Not Erroneously Rely on *Travelscape*.

COST first tries its hand at distinguishing 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). The fact that this case has received so much attention and scrutiny in this appeal owes to the fact that it applies squarely to the issues in this case. Amazon and its *amici*, plainly aware of this, have cravingly searched for any possible method of discounting the applicability of this highly pertinent decision. COST's take is to repeat its conclusory (and incorrect) determinations about the nature of Amazon's business model and then invoke a string of cases from other jurisdictions for support. (COST Br. at 4–7). COST acknowledges in its Brief, however, that the online travel companies at issue in these cases "have both won and lost many of these cases, *depending on the specific statutory language and intent* as to whether the retailer (the hotel) or wholesaler/aggregator/reseller (the OTC) was responsible for collecting the tax." (*Id.* at 5 (emphasis added)). COST further admits that "[t]he crux of many state court cases that have found an OTC responsible for collecting room occupancy and sales tax on the retail price charge to its customers is finding that the OTC satisfied key indicia of a retailer *for purposes of the statute*." (*Id*. (emphasis added)).

Thus, rather than providing the Court with a reason to disregard the mandates of *Travelscape*, COST highlights that the correct analysis in this case must depend on the particular nature and purpose of the state statute being considered—here, the South Carolina Sales and Use Tax Act (the "Act"). The *Travelscape* Court examined this statutory scheme in the context of a highly congruent set of facts and determined that, while the term "furnish" as used in the Act invokes a "connotation of physically providing sleeping accommodations to customers," Travelscape was still statutorily obligated to collect and remit the tax because the Act's purpose is

to "levy the tax not merely on those physically providing sleeping accommodations, but on those entities, who were accepting money in exchange for supplying hotel rooms." 391 S.C. at 102, 705 S.E.2d at 35. The same is true here—Amazon can call itself whatever it would like, but at the end of the day, it accepts money through its website in exchange for tangible personal property, which places it firmly within the definition of a "person engaged . . . in the business of selling tangible personal property at retail" for purposes of the Act. *See* S.C. Code Ann. § 12-36-910(A). *Travelscape* is thus highly instructive in this case, and COST's invocation of various decisions from other states does not change that.

Indeed, this Court recently responded to entreaties from a taxpayer in a sales tax case to examine the laws and decisions of other states in order to determine what South Carolina law means:

> [T]his court does not have to follow other states' interpretations of their tax laws in interpreting [South Carolina] tax laws. *See State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 224, 837 S.E.2d 910, 917 (Ct. App. 2019) ("When there is no South Carolina case directly on point, our courts may look to persuasive authority from other jurisdictions."); *S.C. State Highway Dep't v. Wilson*, 254 S.C. 360, 366, 175 S.E.2d 391, 395 (1970) ("The decisions of courts from other jurisdictions are, of course, only persuasive authority."); *cf. Widenhouse v. Colson*, 405 S.C. 55, 59 n.2, 747 S.E.2d 188, 191 n.2 (2013) (noting a state is not "required to defer to another state's judgment regarding 'the disposition or devolution of realty' in the forum state" (quoting *Williams v. State of North Carolina*, 317 U.S. 287, 294 n.5, 63 S.Ct. 207, 87 L.Ed. 279 (1942)), or required "to apply the law of another state in an action in its own courts" (citing *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436-37, 64 S.Ct. 208, 88 L.Ed. 149 (1943))).

Books-A-Million, Inc. v. S.C. Dep't of Revenue, 430 S.C. 388, 396, 844 S.E.2d 399, 403 (Ct. App. 2020), *reh'g denied* (July 14, 2020). COST's resort to other states' laws and decisions must fail for the same reasons aptly stated by the Court.

As the ALC correctly determined, the language and reasoning of *Travelscape* is highly instructive regarding this case. Nothing in COST's arguments provides a credible basis for rejecting the ALC's analysis or the application of *Travelscape* to this case.

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

Despite the fact that nexus was not an issue raised by Amazon in this case, COST takes the Court on a journey of the evolution of federal nexus law and remote seller policies and legislation in other states, insisting that such is critical context for this case. That is wrong. The basis for COST's argument is the Supreme Court's decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), which removed the "physical presence" requirement from the federal nexus analysis and caused many states (including South Carolina) to re-examine their remote seller policies for the purpose of collecting sales tax from some retailers. However, *Wayfair* has nothing to do with this case because Amazon never raised nexus as an issue in this case and the question for the ALC—and this Court—is whether Amazon is engaged in the business of selling tangible personal property under the South Carolina sales tax statutes. Moreover, in the first quarter of 2016, Amazon had a very large distribution facility situated and operating in Lexington County, South Carolina. Thus, during the period at issue, Amazon had a physical presence in South Carolina and was not a "remote seller" for the purposes of South Carolina tax law. Amazon's sales tax remittance obligations to South Carolina under the Act were therefore not altered by *Wayfair*. Thus, while *Wayfair* no doubt had profound tax implications for many online retailers (including Amazon) throughout the country, it simply has no application to this appeal. The Department respectfully submits that this discussion in the COST Brief can be disregarded by the Court.

3. "Marketplace Facilitator" Legislation Has No Bearing on this Case.

Next, COST provides the Court with a lengthy history of statutory enactments in other states regarding the taxation of online retailers to support its argument that there is "need for new

legislative authority before expanding the definition of seller," (COST Br. at 7), as if that is what happened here. But the question here is the application of South Carolina law as it existed in the first quarter of 2016—the tax period at issue in this case—to Amazon's online retail business to determine whether it was, in fact, "engaged or continuing within this State in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-910(A). That is precisely the analysis performed by the ALC, which determined that Amazon did meet this definition. COST's copious citations to other states' laws do not inform the analysis of this state's laws in any meaningful way.

Likewise, the "marketplace facilitator" legislation enacted by the General Assembly in 2019 also does not affect 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 asserted by COST. *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). Because this matter was in litigation when the marketplace facilitator 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 COST has attempted to do.

This issue has already been thoroughly briefed by the parties to this case, so the Department will not belabor the point here, and respectfully refers the Court to its prior briefing on this issue.

Simply, nothing about the law passed by the General Assembly in 2019—which applied to a host of taxpayers other than Amazon—affects Amazon's sales tax liability in the first quarter of 2016, which must be determined by applying the provisions of the Act in force at that time to the particular manner in which Amazon sells tangible personal property on its website.

4. Tort Liability Cases from Other States Have No Bearing on this Case.

In its final effort to obtain refuge from the ALC's correct analysis of the case presented to it, Amazon entreats the Court to consider decisions from other jurisdictions regarding Amazon's liability in tort for goods sold on its website. The Department respectfully submits that such is, very plainly, a different question, legal rubric, and analysis altogether than the discrete issue of South Carolina sales and use tax law presented by this case. However, even if such cases were relevant, the Department notes that COST omitted from its discussion a recent case from the California Court of Appeal which held, after a thorough examination of Amazon's participation in and control over transactions on its website, that Amazon could be held strictly liable for a defective product sold on its website. *See Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. Aug. 13, 2020). So COST's recitation is not only irrelevant, but it is incomplete. This is further reason for the Court to disregard this argument.

Conclusion

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

Respectfully submitted,

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