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 National Retail Federation's *Amicus Curiae* Brief

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Summary of Argument

As noted by the Department in its Return in Opposition to the National Retail Federation's ("NRF") Motion for Leave to File its Brief, the NRF Brief does not provide any additional material or analysis that will aid this Court in its consideration of the issues in this case. Indeed, the NRF Brief does not substantively reach the issues that are before this Court at all. Instead, NRF simply assumes the conclusion upon which its argument is based, and then spends almost the entire length of its brief describing all the severe and terrible things that can happen when taxpayers are assessed taxes for which they could not have expected to be liable because they are beyond what is provided for in the applicable tax statute.

It is a very good thing, then, that the Department's assessment of sales and use taxes to Amazon in this case was neither contrary to the South Carolina Sales and Use Tax Act (the "Act") nor unexpected. To the contrary, the legal landscape for online retailers selling in South Carolina, and their obligation to collect and remit sales and use tax to the state, were quite clear in the first quarter of 2016. Indeed, they were clear in the first quarter of 2011. *See Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 102, 705 S.E.2d 28, 35 (2011) ("The application of the tax to 'every person engaged . . . in the business of furnishing accommodations' also reveals that the legislature intended 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*." (emphasis added)). That, coupled with the fact that the Act has for many years unambiguously imposed the obligation to collect sales tax "upon every person engaged or continuing within this State *in the business of selling* tangible personal property at retail," S.C. Code Ann. § 12-36-910 (emphasis added), and has defined as a "retailer" and "seller" "every person . . . selling or auctioning tangible personal property *whether owned by the person or others*," S.C. Code Ann. § 12-36-70(a)

(emphasis added), left little doubt in the first quarter of 2016 about the responsibility of online retailers generally—and, given the particular manner in which it operates its online retail sales platform, Amazon specifically—to collect and remit sales and use tax to the Department.[1]

The assertion in NRF's Brief that this body of law was overlooked or could not have been ascertained by Amazon at the time it began remitting sales tax to the Department in the first quarter of 2016—but only for half of the sales taking place on its retail website—strains credulity. The further assertion that the Department's assessment of Amazon and the ALC's well-reasoned decision in this case will lead to widespread failures of other, unrelated retailers, or turn South Carolina into "an impossible environment in which to run a business," (NRF Brief at 7), is nothing short of fantastical. Respectfully, the issues of substance in this appeal and which merit this Court's attention have already been fully briefed by Amazon and the Department. NRF's inapposite, "the-sky-is-falling" commentary adds nothing to this analysis, and it ought to be disregarded by the Court.

[1] In fact, the evidence of record demonstrates that, not only was Amazon aware of the fact that existing South Carolina law obligated it to collect and remit these taxes, but it sought and was the beneficiary of a statutory moratorium of that obligation as part of the incentives put in place to bring Amazon's distribution facility to South Carolina in the first place. As explained in the Department's brief in this appeal, in 2011, the South Carolina General Assembly passed the Distribution Facility Sales Tax Exemption (the "Moratorium") primarily to encourage investment by Amazon in South Carolina. *See* S.C. Code Ann. § 12-36-2691 (2014). The Moratorium was in place from 2011 through the end of 2015, and exempted companies from remitting sales and use tax under the existing law on goods sold in South Carolina if those companies maintained a distribution facility in the state meeting certain criteria as defined in the statute. *Id*. Amazon was the principal beneficiary of this exemption. (**R. p. 1028**) (Ex. 178 at 9). Prior to 2011, Amazon did not have a physical presence in South Carolina and, thus, had no obligation to collect and remit sales and use tax, (***id.***), which distinction itself was rendered moot by the U.S. Supreme Court's 2018 decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

Argument

1. The Department Did Not Retroactively Apply a Tax Obligation on Amazon.

The entirety of NRF's Brief is built upon the assumption that the Department, by assessing Amazon for sales and use tax in this case, applied a new and retroactive tax obligation upon Amazon, and thus illegally and unfairly assessed those taxes. NRF spends about a page reaching this conclusory determination, (NRF Brief at 2–3), and then uses this pronouncement as a springboard to launch into a seven-page discussion about how unfair and unexpected tax assessments can harm retailers.

However, as has been thoroughly addressed in prior briefing, neither the Department nor the ALC applied a new or retroactive interpretation of the Act upon Amazon. Rather, as is evident from the arguments and the provisions of law cited in this case and in the ALC's Final Order, both the Department and the ALC applied the plain language of the Act as it existed in 2016, informed by relevant cases interpreting the Act, to Amazon's business model in order to reach their determinations in this case. Amazon argued at length to the ALC that no provision of the Act captured its business model; however, the ALC rejected that argument: "[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." (**R. pp. 18–19**) (Final Order at 18–19). Ultimately, after a thorough analysis of the facts and the law in this case, the ALC issued a 54-page order explaining in detail why the 2016 provisions of the Act applied to make

Amazon liable for sales and use taxes for the sales taking place on its website during the period in question.[2]

NRF casually brushes aside the ALC's robust analysis and declares that "there was ample evidence" that Amazon's sales were not subject to the 2016 provisions of the Act, and that "[t]he ALC upheld the Department's position by creating new concepts not found in the statute." (NRF Brief at 3). NRF does not bother to explain what this evidence is, however. Then, in the same breath, NRF makes a statement demonstrating that it in fact has a fundamental misunderstanding of the circumstances in this case: "To be clear – the Department decided that Appellant was not **just** subject to sales tax liability for sales beginning in 2016 when the Department first decided to create this interpretation; Appellant was subject to sales tax collection liability on sales that had already occurred." (*Id.* (emphasis in original)).

As the Department pointed out in its Return to NRF's Motion, this statement is demonstrably false. As the Court is now well aware, there was a law in place in South Carolina prior to 2016 that specifically exempted Amazon from the obligation to collect and remit sales and use tax to the Department, *see* discussion *supra* n.1, which was passed as an incentive for Amazon to place a large distribution facility in Lexington County, which facility would give Amazon nexus with South Carolina for tax purposes. *See* S.C. Code Ann. § 12-36-2691 (2014). Prior to that time,

[2] The ALC also rejected Amazon's argument that the Department's assessment of taxes from Amazon violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution because Amazon could not have had fair notice of its tax obligations. (*See* **R. pp. 48–50**) (Final Order at 48–50 ("Just because a new business structure is created does not mean that this new structure is immune from existing tax obligations or other legal obligations simply because the existing statutory scheme does not specifically incorporate this new business model.")). While NRF does not cite the Due Process Clause in its brief, it is apparent that its goal is to invoke this same "fairness" argument—just without having to meet the legal hurdles required to make such an argument. However, the parties to this appeal have already thoroughly addressed this "fairness" argument, (*see* Respondent's Final Brief at 44–48), which should be rejected by this Court for the same reasons it was rejected by the ALC, (*see* **R. pp. 48–50**) (Final Order at 48–50).

Amazon had no obligation to collect and remit sales tax to South Carolina, and the Department likewise had no basis or reason to examine Amazon's sales practices to ascertain its compliance with South Carolina tax law. *See Wayfair*, *supra* n.1 (overruling *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298 (1992)). Thus, the statement that Amazon "was subject to sales tax collection liability on sales that had already occurred" prior to 2016 in South Carolina is just wrong. How NRF managed to miss this highly relevant provision of law—which it must have done in order to sincerely make this statement to the Court—is mystifying, and it demonstrates that NRF cannot reliably assist the Court in this case.

NRF's larger point appears to be that the Department manufactured an interpretation of the Act in 2016 out of thin air in order to make Amazon liable for sales tax. But that is simply not true. Again, prior to the first quarter of 2016, the law in South Carolina was clear that Amazon was not subject to sales tax in in this state. Almost as soon as Amazon's obligation to collect and remit sales tax to the Department began, the Department was made aware that Amazon was only collecting and remitting the tax on half of its online sales, which led to the audit that is the subject of this case. When that audit revealed that Amazon bore all the characteristics of a retailer—including that Amazon accepts money directly from customers in exchange for tangible personal property—it determined that Amazon was responsible for collecting and remitting sales and use tax to the Department under the requirements of the Act. (*See* **R. pp. 999–1014** (Department Determination)). After a three-day evidentiary hearing and extensive arguments by Amazon and the Department, the ALC agreed. (**R. pp. 45–48**) (Final Order at 45–48). Thus, whether in presentation or in substance, NRF's argument that the Department unfairly or extralegally ambushed Amazon with an assessment for its tax obligations under South Carolina law has no

basis in law or in fact. It is rather a hollow complaint from an *amicus* that, it would appear, lacks a full and complete understanding of the events in this case.

Unfortunately, the NRF Brief is plagued throughout by important mischaracterizations of this case and extraneous argument built thereupon. On page seven, for example, NRF presents a hypothetical story about a state that decides to change its interpretation of its tax laws, and then rounds up every actor in the supply chain of a transaction, separately audits them, and ultimately "collects the tax three times for the transaction solely because it created a new interpretation that could not have been anticipated by any of the parties and applied that interpretation retroactively." (NRF Brief at 7). The Department is unsure why this fable has been offered to the Court, but notes that it is obviously not what happened in this case. Any suggestion by NRF to the contrary, if such is to be implied by NRF's telling this story in the first place, is both incorrect and inappropriate.[3] The assertion, implicit or otherwise, that the Department would ever seek to collect a tax two or three times is a ridiculous one, and it simply has no place in this appeal.

Ultimately, NRF's entire brief is premised on the conclusion that both the Department and the ALC applied an "aggressive and retroactive tax obligation" to Amazon. However, that is not true, and NRF never demonstrates or explains why it is true. The NRF Brief thus fails to provide the Court with any helpful material or analysis that will assist it in this case, and the brief should be disregarded by the Court in its entirety.

[3] Although, one of the other Amazon-aligned *amici* did seriously argue that this sort of double-taxation outcome was "likely" in this case. (*See* TEI Brief at 14). As it does here, the Department responded to and refuted this false assertion in its Response to TEI's Brief at 5–6.

2. Neither the Department nor the ALC "Re-Characterized the Facts" in this Case.

On page seven of its brief, NRF accuses both the Department and the ALC of "retroactively re-characteriz[ing] the facts of [the] transaction[s]" on the Amazon website, and further claims that "the evidence clearly shows the transaction was Amazon Services selling services to the third-party sellers." (NRF Brief at 7). That is an astounding and conclusory statement from an entity that had absolutely no involvement in the proceedings before the ALC and has had no involvement in this case whatsoever prior the filing of its Motion for Leave to file its brief. As with the other arguments made in its brief, NRF does not explain what this evidence is or substantiate its position at all. Rather, it simply makes this statement and then declares that South Carolina will now become "an impossible environment in which to run a business." (*Id.*)

In order to satisfy itself regarding the facts of this case, the ALC conducted a three-day evidentiary hearing in which it heard extensive testimony about the way transactions take place on Amazon's website. 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 and contained 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 examined Amazon's business model vis-à-vis 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.

The fact that NRF feels at liberty through its *amicus* brief to summarily dismiss the ALC's thorough and detailed conclusions in this case as "clearly" wrong, without explaining why, should signal to the Court the unreliability of NRF's arguments. Once again, NRF fails to explain its reasoning and thus provides the Court with nothing more than unsupported and unhelpful rhetoric.

Conclusion

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

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Respectfully submitted,

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