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

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 SOUTH CAROLINA MANUFACTURERS ALLIANCE IN SUPPORT OF APPELLANT AMAZON SERVICES, LLC

Samantha K. Trencs (Bar No. 101882)
Eric S. Tresh*
Maria M. Todorova*
Chris R. Lee*
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth Street, NW Suite 700
Washington, DC 20001-3980
Phone: (202) 383-0534
samanthatrencs@eversheds-sutherland.com
erictresh@eversheds-sutherland.com
mariatodorova@eversheds-sutherland.com
chrislee@eversheds-sutherland.com

* *Pro hac vice forthcoming*

Counsel for
South Carolina Manufacturers Alliance

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF INTEREST AND ASSISTANCE TO THE COURT

The South Carolina Manufacturers Alliance ("SCMA") respectfully submits this brief as *Amicus Curiae* in support of Appellant Amazon Services, LLC, urging this Court to reverse the decision of the Administrative Law Court ("ALC"). That court improperly held that the South Carolina Department of Revenue ("Department") can retroactively change its interpretation of the tax law to require marketplace facilitators to collect sales tax on behalf of third parties, without a change in the law, without following the required rule-making procedures, and without providing advance notice to impacted taxpayers ("ALC's Order").

The SCMA is a tax-exempt organization under section 501(c)(6) of the Internal Revenue Code and is the manufacturing industry's association in South Carolina, serving as its government liaison for over one hundred years. The SCMA's goal is to be the voice of manufacturers to the state's legislative and regulatory branches of government, as well as to promote and preserve the economic health of manufacturers in South Carolina by seeking positive action in state government. The SCMA emphasizes that maintaining strong manufacturing industries in the state will foster and promote the strength of South Carolina's economy. Manufacturing companies make significant capital investments in South Carolina and create a substantial number of jobs in the state. For example, in 2020, the manufacturing sector accounted for approximately 17% of South Carolina's gross domestic product and approximately 12% of the State's total employment. Manufacturers also pay 5% of all property taxes in South Carolina. Manufacturing businesses' long-term decisions regarding where to make investments require an understanding of the long-term impact of tax obligations imposed by a state.

The SCMA has a significant interest in the outcome of this case because the Department's unilateral, retroactive change in its interpretation of the tax law raises substantial concerns about its members' ability to understand the tax law when they make decisions to invest and conduct

business in South Carolina. Lack of predictability concerning taxpayers' state tax obligations makes it difficult, if not impossible, to make sound investment decisions that are critical to business success. The ALC's Order improperly validates the Department's attempt to retroactively replace its longstanding practice with its audit position; flies in the face of fundamental principles of sound tax policy; and jeopardizes South Carolina's widely respected business climate.

For these reasons and for the reasons set forth further below, this Court should reverse the ALC's Order.

STATEMENT OF THE ISSUES ON APPEAL AND STANDARD OF REVIEW

SCMA 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 Appellant in its Final Opening Brief ("Appellant's Br.") and Final Reply Brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENTS

This case raises a number of issues bearing on the ultimate question of whether Amazon Services had an obligation to collect sales tax on behalf of third-party sellers at the time when the tax law imposed that obligation only on the third party making the sale. There are many reasons why Amazon Services should not be required to collect sales tax on behalf of third parties prior to the Legislature's enactment of such an obligation in 2019. The SCMA's concern relates to a single issue: whether, without any change in the tax law, the Department can retroactively change its longstanding interpretation of a tax statute by replacing it with a "new" administrative policy, developed during audit, and retroactively create a new tax obligation by enforcing that change.

Prior to April 26, 2019, the responsibility for any state sales tax obligations under South Carolina law was borne only by the parties to the transaction – the seller and the purchaser. Appellant's Br. at 40 (noting the Director admitted "[t]here is no law related to the taxation of third party sales"); S.C. Code Ann. § 12-36-70 (as effective before April 26, 2019). It is therefore not

surprising that for years, the Department did not require Amazon Services to collect sales tax on sales made by third parties. Appellant's Br. at 20, 41 (noting the Committee stated the Department reports that "this statutory change would allow it to force internet marketplace retailers, such as Amazon and eBay, to collect and remit sales tax on items sold by third-party vendors through the marketplace sites"). Effective April 26, 2019, the South Carolina Legislature changed the law to expand the responsibility for collecting sales tax beyond the parties to the transaction, and Amazon Services has been collecting and remitting the tax on third-party sales after that date. 2019 S.C. Acts 21; S.C. Code Ann. § 12-36-70.

However, the ALC improperly held that the Department can retroactively apply this new law and change its longstanding policy and practice while conducting an audit of the taxpayer. Effectively, the ALC's Order permits the Department to apply the new tax law retroactively to transactions that were completed long before 2019.

Unfortunately, this is not the first time the Department has retroactively changed its longstanding practice during the course of a subsequent audit. In *Duke Energy Corp. v. S.C. Dep't of Revenue*, Appellate Case No. 2020-001542 (filed Nov. 24, 2020), the Department abruptly changed its fifteen-year practice regarding the application of an investment tax credit and applied those changes retroactively. Taxpayers' right and ability to rely on the Department's practices that are known for a sufficient period of time are paramount to creating a climate that encourages business and investment in the state.

As the ensuing discussion reveals, the ALC's Decision and the Department's repeated attempts to retroactively change the law fly in the face of the South Carolina Legislature's acquiescence to the Department's longstanding administrative practice; they raise due process

concerns and offend fundamental principles of sound tax policy; and they seriously threaten business investment, growth, and employment in South Carolina.

ARGUMENTS

I. The Department should not be allowed to retroactively replace its longstanding policy, practice, and interpretation of a tax statute with its audit position.

For years, the Department did not require operators of online marketplaces like Amazon Services to collect and remit sales tax on sales made by third-party sellers. Appellant's Br. at 17, 40 (noting the Director testified "[a]bsolutely, it will not be retroactive, right." and that "[t]there is no law related to the taxation of third party sales."). Indeed, the Department routinely accepted sales tax collection payments from the third-party sellers themselves. *Id.* at 20, 35. The Department's longstanding policy and practice was entirely consistent with South Carolina tax law in effect prior to April 26, 2019, which imposed sales tax collection and remittance responsibilities only on the seller and purchaser. In fact, the Department admitted there was no statute, regulation, letter ruling, or any other administrative authority requiring online marketplaces to collect sales tax on third-party sales made through their marketplace. *Id.* at 40-41 (noting that the Director admitted that "[t]here is no law related to the taxation of third party sales" and that legislative change was needed to "ensure that online marketplace retailers collect/remit sales tax.").[1] It was

[1] In 2018, the Department's Director told the South Carolina Legislative Oversight Committee that legislative "change" was necessary to "ensure that online marketplace retailers collect/remit sales tax." Appellant's Br. at 41. The Committee later stated that the Department recommended changes "to ensure that online third-party sales will be subject to tax" and that the Department "report[ed] that this statutory change would allow it to force internet marketplace retailers, such as Amazon and eBay, to collect and remit sales tax on items sold by third-party vendors through the marketplace sites." *Id*. The Committee further acknowledged that without this change the Department "would have the right to collect sales tax directly from some third-party sellers, but it predicts that the significant administrative burden of collecting from so many individuals and companies would result in a large percentage of these taxes going uncollected." *Id.* Specifically concerning Amazon Services, the Committee stated, "if there had been a law like this in 2016, Amazon's additional sales tax liability for that year would have been $57 million." *Id.* at 41-42.

not until April 26, 2019 when, for the very first time, the Legislature imposed a sales tax collection obligation on marketplaces with regard to third-party sales. 2019 S.C. Acts 21; S.C. Code Ann. § 12-36-70 (effective April 26, 2019).

If the South Carolina Legislature disagreed with the Department's longstanding interpretation of the sales tax laws as applied to marketplaces for periods prior to April 2019 or believed that a law change was necessary prior to that time, it would have done what it did in 2019 much sooner. *See generally Etiwan Fertilizer Co. v. South Carolina Tax Comm'n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950) ("where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons." (Emphasis added).) Instead, for years, the Legislature acquiesced to the Department's longstanding practice of not requiring marketplaces to collect and remit taxes on third-party sales prior to the enactment of the 2019 law change. The Department should not be allowed to usurp the role of the Legislature and retroactively do what the South Carolina legislators chose not to do prior to 2019, just because it no longer likes its prior, longstanding practice. And it certainly should not be permitted to retroactively replace that longstanding practice with its new litigation position developed on audit.

But this is not the only time the Department has attempted to retroactively renege on its longstanding practice and replace it with a new litigation position developed on audit. Just as in this case, in *Duke Energy*, the Department had a longstanding practice and policy of interpreting and applying a tax statute allowing an investment tax credit. Initial Brief for Appellant at 9-10, *Duke Energy Corp. v. S.C. Dep't of Revenue*, Appellate Case No. 2020-001542 (filed Nov. 24, 2020). Since the enactment of that statute more than fifteen years ago, the Department allowed

utility taxpayers to claim up to $5 million in investment tax credits per year. *Id.* And just as in the case of Amazon Services, during the course of its subsequent audit of the taxpayer in that case, the Department radically changed its longstanding position and retroactively limited the credit amount to $5 million in total for the lifetime of the taxpayer. *Id.* at 11-12. The Department did so without prior notice; without rulemaking; without issuing any guidance explaining its sudden change to its longstanding interpretation of the law, to which the legislature had acquiesced for more the fifteen years; and despite the lack of any changes in the law. *Id.* The Department should not be allowed to play the game of "gotcha!" by administratively and retroactively changing its longstanding policies and practices during audit, without prior notice or rulemaking and without any statutory authority. This Court's intervention is therefore necessary to halt this disturbing and shocking trend.

II. The Department's retroactive application of its litigation position developed on audit offends bedrock principles of sound tax policy and risks undermining the state economy.

A. Taxpayers should be able to rely on the tax rules in existence at the time they engage in business in South Carolina.

Sound tax policy and administration require governments to provide taxpayers with certainty and fairness. Fairness is an essential attribute in a sound tax system, particularly systems that rely on voluntary compliance. For a tax system to be fair and perceived as fair, taxpayers must be able to rely upon the legislation, and the policies and practice of regulators in existence when business transactions and other taxable events occur. Governments may change their administrative tax policies and laws, but fairness demands that these changes be enforced prospectively, especially if they will have significant financial effects on taxpayers.

The Department's bait-and-switch approach of changing its longstanding policy and practice without notice or rulemaking and applying those changes retroactively creates a climate

of uncertainty that discourages investment. It is therefore detrimental to the South Carolina economy in the long term. Furthermore, the Department's emerging practice is particularly suspect given a system of divided government. The Legislature is charged with writing the laws, the executive branch is charged with administering them, and courts are charged with interpreting them as written. It is within the Department's province to form a reasonable policy with respect to the administration of a tax statute as enacted by the Legislature. Changing that longstanding policy without notice and applying those changes retroactively, however, cannot be reconciled with basic tenets of sound tax policy and administration because it disrupts settled taxpayer expectations.

Furthermore, the Department's attempt to retroactively impose sales tax collection obligation upon Amazon Services prior to the effective date of the marketplace facilitator statute violates South Carolina and federal constitutional guarantees of due process. U.S. Const. amend XIV, § 1; *accord Huber v. S.C. State Bd. of Physical Therapy Exam'rs*, 316 S.C. 24, 26-28, 446 S.E.2d 433, 435 (1994). A fundamental principle of due process is that laws must exist before a person can be required to comply with them. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "[R]egulated parties should know what is required of them so [that] they may act accordingly," and "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* A law or regulation that "fails to provide a person of ordinary intelligence fair notice of what is prohibited [or required], or is so standardless that it authorizes or encourages seriously discriminatory enforcement" violates this constitutional guarantee. *Id.* (citation omitted).

Like many states, South Carolina changed its law and now requires marketplace facilitators like Amazon Services to collect and remit sales tax on sales made by third parties through its website, effective April 26, 2019. However, unlike other states, the Department seeks to

retroactively apply this collection and remittance obligation to tax periods prior to that effective date and in direct contravention to its longstanding practice. Indeed, this tactic has already been rejected by another state's highest court. *Normand v. Wal-Mart.com USA, LLC*, No. 2019-C-00263, --- So.3d ---, 2020 WL 499760 (La. Jan. 29, 2020). This Court should do the same in this case.

B. The Department's emerging practice poses a serious threat to South Carolina's business climate and economy.

Economic development is critical to the welfare of South Carolina. Tax certainty and predictability is an important component of investment and other commercial decisions and can have significant impacts on economic growth. For manufacturers especially, investing in a particular state is a long-term decision and requires transparency into the long-term, expected tax obligations. Manufacturing is the economic backbone of South Carolina. The average salary for manufacturing jobs is well above the South Carolina average. Manufacturing employs approximately 12% of South Carolinians through more than 5,000 businesses and accounts for approximately 17% of the state's gross domestic product. Expanding manufacturing operations in South Carolina is essential for the state's economy and essential for its tax revenue.[2]

The Department's bait-and-switch approach of continuously disregarding its own longstanding practices and policies would make South Carolina an inhospitable place to conduct business. When the Department changes its longstanding policy and practice without any warning, without change in the law, or without any published guidance, it disrupts South Carolina taxpayers' settled expectations and impacts businesses' decision to locate in the state. This is especially true when the Department seeks to retroactively apply those changes as it has done in this case and in

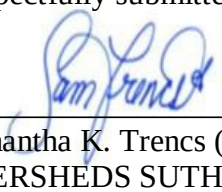
[2] *SC Manufacturing Facts*, South Carolina Manufacturers Alliance, https://myscma.com/sc-manufacturing-facts/ (last visited May 28, 2021).

Duke Energy. Indeed, allowing the Department to retroactively change a company's tax obligations prior to any change in law or any change in published guidance would make it impossible for businesses to have any certainty as to their tax obligations, it would inevitably cast doubt on their decision to continue to invest or establish operations in South Carolina, and it will negatively impact the South Carolina economy.

CONCLUSION

For the foregoing reasons, SCMA respectfully requests that this Court reverse the ALC's Decision below.

Respectfully submitted,



Samantha K. Trencs (Bar No. 101882)
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth Street, NW Suite 700
Washington, DC 20001-3980
Phone: (202) 383-0534
samanthatrencs@eversheds-sutherland.com

Eric S. Tresh*
Maria M. Todorova*
Chris R. Lee*
EVERSHEDS SUTHERLAND (US) LLP
999 Peachtree Street, NE, Suite 2300
Atlanta, GA 30309
Phone: (404) 853-8000
erictresh@eversheds-sutherland.com
mariatodorova@eversheds-sutherland.com
chrislee@eversheds-sutherland.com

**Pro hac vice* motion forthcoming

Counsel for
South Carolina Manufacturers Alliance

June 1, 2021