

RECEIVED

Jul 20 2021

SC Court of Appeals

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 *Amici Curiae* Brief of the
Chamber of Commerce of the United States of America, Business Roundtable,
Internet Association, South Carolina Chamber of Commerce, and
Greater Columbia Chamber of Commerce**

SOUTH CAROLINA DEPARTMENT OF REVENUE

Jason P. Luther (Bar No. 78021)
P.O. Box 12265
Columbia, SC 29211
(803) 898-5131

WILLOUGHBY & HOEFER, P.A.

John M.S. Hoefer (Bar No. 2549)
Tracey C. Green (Bar No. 9342)
Chad N. Johnston (Bar No. 73752)
John W. Roberts (Bar No. 78889)
Andrew R. Hand (Bar No. 101633)
P.O. Box 8416
Columbia, SC 29202
(803) 252-3300

THE ACQUAVIVA LAW FIRM, LLC

Lauren Acquaviva (Bar No. 100528)
1092 Johnnie Dodds Blvd., Suite 112
Mount Pleasant, SC 29464
(843) 216-7728

Attorneys for Respondent

Table of Contents

Summary of Argument	1
Argument	2
I. The Department Did Not Retroactively Apply a Tax Obligation on Amazon.	2
II. Amazon’s Due Process Rights Have Not Been Violated.	5
Conclusion	6

Table of Authorities

	Page(s)
State Cases	
<i>Leventis v. S.C. Dep't of Health & Envtl. Control</i> , 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000).....	4
<i>Travelscape, LLC v. S.C. Dep't of Revenue</i> , 391 S.C. 89, 705 S.E.2d 28 (2011)	3, 4, 5
<i>Whitner v. State</i> , 328 S.C. 1, 492 S.E.2d 777 (1997)	4
State Statutes	
S.C. Code Ann. § 1-23-610(B)	4
S.C. Code Ann. § 12-36-70.....	3, 5
S.C. Code Ann. § 12-36-910.....	1, 3
S.C. Code Ann. § 12-36-1310.....	1
S.C. Code Ann. § 12-36-2691.....	5

Summary of Argument

As with other *amici* who have filed briefs in support of the Appellant Amazon Services, LLC (“Amazon”) in this appeal, the Chamber of Commerce of the United States of America, Business Roundtable, Internet Association, South Carolina Chamber of Commerce, and the Greater Columbia Chamber of Commerce¹ proclaim that the ALC’s Final Order finding Amazon liable for sales and use tax for the retail sales it made on its website during the first quarter of 2016 will render South Carolina an inhospitable place to do business. In order to make this outlandish argument, which the Chambers base upon the notion that Amazon’s due process rights have been violated in this case, the Chambers call on every source imaginable, from Lon Fuller to James Madison.

The reality, though, is that conducting a retail sale in South Carolina obligates a retailer to collect and remit sales and use tax for that transaction to the Department. *See* S.C. Code Ann. §§ 12-36-910, -1310. The concept that those who participate in and benefit from an economy must pay taxes to sustain the functions of its government is not a new one. *See* THE FEDERALIST NO. 30 (Alexander Hamilton) (“Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions.”). While Amazon would surely rather not be taxed, the question in this appeal is whether the law in place in the first quarter of 2016 required Amazon to remit taxes to South Carolina for retail sales taking place on its website during that time. The ALC determined that it did, after thoroughly examining the way that Amazon conducts those sales and applying those facts to the relevant provisions of the South Carolina Sales and Use Tax Act (the “Act”). Whether that

¹ For convenience, the Department will refer to these *amici* collectively as the “Chambers.”

determination is correct is the only question that is properly before this Court, and the exhaustive efforts by Amazon and its *amici* to make this case about anything else must fail.

Argument

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

Perhaps in the belief that repetition will create factual and legal substance, the Chambers repeat the erroneous refrain of other Amazon-recruited *amici* that the Department applied a retroactive tax obligation on Amazon. It did not. In fact, at no point in this case has the Department argued that anything other than the provisions of the Act in force in the first quarter of 2016 should be applied to determine Amazon's liability for taxes during that period. Nor did the ALC apply any law other than the relevant provisions of the Act in its Final Order determining Amazon's liability for sales and use tax during the period at issue. So, the idea that Amazon has somehow been subjected to a retroactive tax obligation in this case is fallacious and it is refuted simply by reading the ALC's Order.

Like the other briefs submitted by Amazon's *amici*, the Chambers' brief does not attempt to interpret the relevant provisions of the Act before making its argument about the grievous wrong that has been inflicted upon Amazon and the resulting terror it will cause in the business community. Rather, it simply frames the issue in this case as "whether Amazon Services should have collected and remitted sales tax on sales made not by it but by third parties, at a time when the existing statutory language and administrative framework clearly did not require them to do so." (Chambers Br. at 4). The Chambers' brief then goes on to cite a variety of "authority," but not the actual law (i.e., "the existing statutory law") that applies to this case.

Notwithstanding the Chambers' (and other Amazon *amici*) unsupported narrative, when the facts of this case are viewed in light of the relevant statutory framework, the inescapable

conclusion is that Amazon *was* the seller of the goods that were sold on its website in the first quarter of 2016. The ALC correctly concluded the evidence demonstrates that Amazon bears all the critical attributes of a seller under South Carolina law:

Indeed, during the entire transaction, the customer only interacts with Amazon Services. Amazon Services is the party present at the consummation of the sale who accepts money from the customer in exchange for the product. Amazon Services' actions are not the actions of a simple payment processor but are the actions of someone who is in the business of selling.

(R. p. 29) (Final Order at 29). As the ALC noted, it is this critical act of accepting money in exchange for tangible personal property that makes one a seller or a retailer, and “in the business of selling” under South Carolina law. *See* S.C. Code Ann. §§ 12-36-70, -910; *Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89, 102, 705 S.E.2d 28, 35 (2011). The uncontroverted evidence in this case demonstrates that Amazon—and only Amazon—performs this role in the sale of goods taking place on its website, as well as other crucial tasks incident to the sale of tangible personal property, leaving only Amazon to be the seller of those goods. This is a far cry from the Chambers’ conclusory pronouncement that Amazon “was not a party” to those sales. (Chambers Br. at 1).

The ALC’s conclusion is supported by the live testimony and over 200 exhibits detailing Amazon’s business model and operations that were presented during the ALC’s three-day evidentiary hearing. The ALC thoroughly and carefully analyzed the evidence and applicable law in its 54-page Order, and correctly determined Amazon’s tax obligations according to the relevant provisions of the Act in place during the first quarter of 2016. The Chambers may disagree with the outcome in this matter, but simply stating its opinion of what it thinks the outcome should have been (without any meaningful discussion of the law as applied to the facts) does not make its opinion “clearly” correct. It certainly does not mean the Department and ALC have offended the

most basic tenets of the rule of law by finding Amazon liable for sales and use taxes for goods that Amazon sold on its website during the period at issue.

The entirety of the Chambers’ brief rests upon a false premise. It cannot be that Amazon has been subjected to a retroactive application of the law if the law in force during the period at issue made Amazon liable to collect and remit sales and use tax. That was the only—and correct—analysis that the ALC performed; but it is this analysis that is conspicuously omitted from the submissions of the Chambers and other Amazon *amici*. These entities’ reluctance to confront the actual law that applies to this case—and their concerted efforts to present superfluous material² and convince this Court to chase a red herring instead—ought to signal to the Court the weakness of Amazon’s position in this appeal.³

² Like other Amazon *amici*, the Chambers pluck random statements out of context from submissions made to the General Assembly in the course of that body’s deliberations about the 2019 “marketplace facilitator” legislation as purported evidence of confusion about the 2016 provisions of the Act. Besides the fact that the Chambers distort and misuse these statements in their brief, they are entirely inapposite in these proceedings. *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)). The Chambers’ further assertion that the language of the Department Determination somehow demonstrates confusion about whether Amazon was liable for sales and use tax plainly misconstrues that Determination. Instead, the Determination reflects that, having learned from Amazon that Amazon Services, LLC operates the Amazon website, the Department found that Amazon Services, LLC was responsible for sales and use tax under South Carolina law, rather than some other Amazon entity as originally asserted by Amazon during the audit. (*See R. p. 1001 n.3*) (Department Determination).

³ At page 9, the Chambers argue that “DOR may prevail only if it shows that Amazon Services’ understanding of the statute was unreasonable.” Actually, it is the other way around. As the party challenging the Department’s Determination, Amazon had the burden of demonstrating to the ALC by a preponderance of the evidence that the Determination was incorrect. *See Leventis v. S.C. Dep’t of Health & Envtl. Control*, 340 S.C. 118, 132–33, 530 S.E.2d 643, 651 (Ct. App. 2000); (*see also R. p. 15* (Final Order at 15) (finding that Amazon bears the burden of proof in this case)). Having failed to meet its burden at the ALC, Amazon now bears the burden once more to demonstrate to this Court that the ALC’s determination was erroneous. S.C. Code Ann. § 1-23-610(B); *Travelscape*, 391 S.C. at 96–97, 705 S.E.2d at 32. Once again, Amazon *amici* have turned

II. Amazon’s Due Process Rights Have Not Been Violated.

At its heart, the Chambers’ brief argues that Amazon’s due process rights have been violated by the Department’s assessment of sales and use taxes in this case. (*See* Chambers Br. at 6 (“DOR’s imposition of penalties upon Amazon Services violates the basic tenets of due process and the rule of law”). Amazon made a similar argument in its brief when it asserted that the Department’s assessment violated the Due Process Clause of the Fourteenth Amendment, an argument the Department fully addressed in its brief. (*See* Resp.’s Final Br. at 44–47).⁴ 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*, 391 S.C. 89, 705 S.E.2d 28, 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, so this argument fails.

Moreover, as with other Amazon *amici*, the Chambers conspicuously omit from their brief any discussion of 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 (for the first time) give Amazon nexus with South

the law applicable to this case on its head.

⁴ This argument was also roundly rejected by the ALC. (*See* **R. pp. 48–50** (Final Order at 48–50) (finding “no evidence that the Department imposed, or was trying to impose, pending legislation on Amazon Services to obligate Amazon Services to remit sales and use tax for these transactions” and noting “the folly of relying on unenacted legislation to interpret legislative intent or construe existing statutes.”)).

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 assertion that Amazon was surprised by its tax obligations in South Carolina come January 1, 2016, is just not true, as is the Chambers’ argument that the Department “blindsided” Amazon by its effort to collect these taxes. Amazon is and has always been keenly aware of its tax obligations under South Carolina law—it would just rather avoid them than follow existing law.

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 ALC found as much in its Order, and the Chambers’ assertions to the contrary are simply misplaced.

Conclusion

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

Signature Block on Next Page

Respectfully submitted,

s/ Andrew R. Hand

WILLOUGHBY & HOEFER, P.A.

John M. S. Hoefer (Bar No. 2549)

Tracey C. Green (Bar No. 9342)

Chad N. Johnston (Bar No. 73752)

John W. Roberts (Bar No. 78889)

Andrew R. Hand (Bar No. 101633)

P.O. Box 8416

Columbia, South Carolina 29202-8416

803-252-3300

jhoefer@willoughbyhoefer.com

tgreen@willoughbyhoefer.com

cjohnston@willoughbyhoefer.com

jroberts@willoughbyhoefer.com

ahand@willoughbyhoefer.com

S.C. DEPARTMENT OF REVENUE

Jason P. Luther (Bar No. 78021)

Chief Legal Officer

P.O. Box 12265

Columbia, SC 29211-9979

803-898-5110 (Telephone)

803-896-0171 (Fax)

Jason.Luther@dor.sc.gov

courtorders@dor.sc.gov

THE ACQUAVIVA LAW FIRM, LLC

Lauren Acquaviva (Bar No. 100528)

1092 Johnnie Dodds Blvd., Suite 112

Mount Pleasant, SC 29464

843-216-7728 (Telephone)

843-614-6423 (Fax)

Lauren@vivalawsc.com

Attorneys for S.C. Department of Revenue

Columbia, South Carolina
July 20, 2021