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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 the South Carolina Manufacturers Alliance's *Amicus Curiae* Brief

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Summary of Argument

As noted by the Department in its Return in Opposition to the South Carolina Manufacturers Alliance's ("SCMA") Motion for Leave to File its Brief, the SCMA brief does not provide any additional material or analysis that will aid this Court in its consideration of the issues in this case. Indeed, like the many other "friend of Amazon" briefs that have been submitted, the SCMA brief does not address the issues that are actually before this Court. Instead, SCMA claims, without any support, that the Department retroactively changed its long-standing interpretation of the South Carolina Sales and Use Tax Act (the "Act") and, in doing so, retroactively imposed a tax obligation upon Amazon. (SCMA Br. at 2). Based on this inaccurate claim, SCMA then makes the sensational and unfounded argument that this "bait-and-switch approach of changing its longstanding policy" is becoming a "disturbing and shocking trend" that "poses a serious threat to South Carolina's business climate and economy." (*Id*. at 6, 8). However, and thankfully for the South Carolina business climate and economy, SCMA misstates the facts of this case and lacks a fundamental understanding of the applicable law.

SCMA's brief and its recitation of irrelevant arguments and issues is, therefore, entirely unhelpful. It also is particularly inappropriate here as it appears SCMA has interjected these extraneous and invented issues into this case primarily to prop up a different contested appeal of another taxpayer and member of SCMA, Duke Energy Corporation, pending before this Court. It does so without disclosing its relationship with Duke Energy or the fact that SCMA's counsel also represents Duke Energy in that pending appeal. SCMA's failure to make these disclosures is telling and demonstrates, along with its irrelevant and incorrect arguments, that it is not really a "friend of the Court."

Argument

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

A. The Department did not change any long-standing interpretation.

The focus of SCMA's brief—and the reason it claims to have an interest in this matter—is the alleged retroactive change by the Department of a long-standing interpretation. (SCMA Br. at 2 (claiming the Department "retroactively change[d] its longstanding interpretation of a tax statute . . . and retroactively created[d] a new tax obligation by enforcing that change.")). SCMA claims that such changes raise "substantial concerns about its members' ability to understand the tax law . . . ." (*Id*. at 1). The glaring problem with these claims is that neither the Department nor Amazon has ever asserted that the Department possessed a long-standing interpretation of the Act that would be entitled to deference in this case. The ALC specifically found in its Final Order that there was no such long-standing interpretation for the purposes of this case. (*See* **R. pp. 16–17 n.22** (Final Order at 16–17 n.22) ("In this case, the Department admitted it had no-longstanding [sic] interpretation of the Sales and Use Tax Act as applied to third-party sellers or marketplace facilitators in an online marketplace. Therefore, the Court finds the Department has no long-standing interpretation that is entitled to deference in this case.")). Amazon did not appeal from this finding, and in fact called attention to it in its Opening Brief in this appeal. (*See* Final Opening Brief of Appellant at 16 ("The Department admitted that, as of the first quarter of 2016, there was no . . . long-standing Department policy . . . relating to the sales-tax implications of third-party sales in online marketplaces.")). So SCMA's assertion that the Department actually did possess a long-standing interpretation applicable to this case, and that the interpretation favored Amazon's position in this case, is both totally unsupported by the record and directly contrary to the Appellant's own position in this appeal, which SCMA baldly claims to support.

Notwithstanding a complete lack of support in the record, SCMA declares that "[f]or 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." (SMCA Br. at 4). SCMA even goes as far as to contend that "for years, the Legislature acquiesced to the Department's longstanding practice of not requiring marketplaces to collect and remit taxes on third-party sales . . . ." (*Id*. at 5). This overstatement conveniently ignores the factual context that existed prior to Amazon's arrival in South Carolina. Neither Amazon nor SCMA have identified any online marketplace operator that—prior to 2011—had a physical presence (i.e. nexus) in South Carolina that would obligate it to collect and remit sales tax to the State for the sales it facilitated on its marketplace. Thus, to the extent the Department's "practice" did not require operators of online marketplaces to collect and remit sales tax, it was solely because those marketplaces lacked nexus with South Carolina.

That changed in 2011. Amazon wanted to build a large distribution facility in Lexington County, but doing so would create nexus and subject Amazon to the same sales tax obligations as any other South Carolina retailer. So, Amazon lobbied for and received a special sales tax exemption for its first five years of operation. *See* S.C. Code Ann. § 12-36-2691 (2014).[1] The legislative sales tax collection exemption was in place until the first quarter of 2016—the period

[1] 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. 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*. The physical presence 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).

at issue in this case. In other words, prior to the audit at issue in this case, 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, while it is technically true that Amazon was not required to collect and remit sales tax to South Carolina prior to the first quarter of 2016, it was not because of a long-standing interpretation or policy of the Department acquiesced to by the Legislature—it was because Amazon had no physical presence in South Carolina and then—once it did—the Legislature temporarily exempted Amazon from its sales tax obligations.

When the Moratorium expired and 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, SCMA's argument that the Department retroactively changed an interpretation of the Act and retroactively imposed a new tax obligation upon Amazon is baseless. It is just another hollow complaint from another purported *amici* that, it would appear, lacks a full and complete understanding of the events in this case. Of course, as discussed *infra* in Section II, the real (albeit undisclosed) purpose of SCMA's

brief is known, which helps explain why it would make such an irrelevant and erroneous argument here.

B. The Department's and the ALC's application of Supreme Court precedent and the plain language of the Act as it existed during the period at issue is not "retroactive taxation."

SCMA, like several other *amici* in this case, mischaracterizes the Department's actions in auditing Amazon as "retroactive taxation." This case does not involve an attempt to apply a new law to prior tax periods. Contrary to SCMA's assertions, neither the Department nor the ALC applied the "marketplace facilitator" legislation enacted in 2019 to determine Amazon's sales tax collection obligations for the first quarter of 2016. Rather, as is evident from the arguments and the provisions of law cited in this appeal 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 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]

[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

Contrary to the unsupported arguments in SCMA's brief, this obligation to collect and remit sales and use tax also was quite clear in the first quarter of 2016. Indeed, it was clear in the first quarter of 2011.[3] *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 no doubt in the first quarter of 2016 about the responsibility of Amazon to collect and remit sales and use tax to the Department.[4]

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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.")). SCMA attempts to invoke this same "fairness" argument as well, but the parties to this appeal have already thoroughly addressed this 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).

[3] 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 the 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. *See supra* n.1.

[4] SCMA cites to the decision of the Louisiana Supreme Court in *Normand v. Walmart.com USA, LLC*, No. 2019-C00263, -- So.3d --, 2020 WL 499760 (La. Jan. 29, 2020) in purported support for its arguments. However, that decision has no relevance to this case because it involved another state's statute with different statutory definitions and provisions than the Act and did not involve Amazon or its specific business model.

II. SCMA's Brief Advancing Duke Energy's Interests Falls Well-Short of What Should be Expected from an *Amicus Curiae*.

At first glance, it is perplexing that SCMA—an association for manufacturers—would assert in this appeal—addressing the sales tax obligations of a retailer—the plainly erroneous and out-of-place arguments discussed above. However, SCMA's discussion in its brief of another case pending before this Court, *Duke Energy Corp. v. S.C. Department of Revenue*, Appellate Case No. 2020-001542 (filed Nov. 24, 2020), and a review of the signature block of SCMA's brief reveal the reason for such arguments. In the *Duke Energy* case, the appellant, Duke Energy, has asserted that the Department held a long-standing interpretation of a statute that ought to be viewed in favor of Duke Energy. And Duke Energy, which is a member of SCMA,[5] is represented in that case by the same counsel as SCMA in this case. Therefore, it appears counsel for SCMA/Duke Energy has attempted, at least collaterally, to use SCMA as a host to inject, under the guise of an impartial *amicus curiae*, additional arguments and briefing in support of Duke Energy's position in another case. That is not only improper, but it is directly contrary to the appropriate role of an *amicus curiae*. *See Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974) (describing an *amicus curiae* brief as a "'friend of the court' as distinguished from an advocate before the court"); *see also* 3B C.J.S. Amicus Curiae § 1 (2020) ("An amicus is one who, not as party but just as any stranger might, gives information for the assistance of the court on some matter of law in regard to which

[5] *See* SCMA, Member Directory, https://myscma.com/about-scma/member-companies/ (last visited July 15, 2021) (listing Duke Energy Corporation). Interestingly, notwithstanding its membership in the South Carolina Manufacturer's Alliance, Duke Energy recently argued in another tax appeal before this Court that it was not a manufacturer. Of course, the Department, the ALC, and this Court rejected that argument amongst others raised by Duke Energy in that case. *See Duke Energy Corp. v. S.C. Dep't of Revenue*, 410 S.C. 415, 764 S.E.2d 712 (Ct. App. 2014), aff'd as modified, 415 S.C. 351, 782 S.E.2d 590 (2016).

the court might be doubtful or mistaken rather than one who gives a highly partisan account of the facts.").

At the very least, the relationship between SCMA and Duke Energy, and the representation of both entities by the same counsel, should have been disclosed so the Court could evaluate the arguments of SCMA in the proper context. *See* Rule 213, SCACR (requiring a motion for leave to file an *amicus curiae* brief to "identify the interest of the applicant" and "state the reasons why a brief of an amicus curiae is desirable."). This is especially so considering that SCMA's brief spills significant ink discussing the *Duke Energy* case[6] and attempting to draw a crude analogy to this case, suggesting the Department is in the practice of tricking unsuspecting taxpayers by assessing them for taxes they never owed and could not have known that they owed. Not only is this a ridiculous assertion that has no place in either case, it is nothing more than the argument of another party in litigation against the Department. And SCMA's and its counsel's attempt to present such argument as that of an impartial *amicus curiae* is simply improper.

Conclusion

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

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[6] SCMA even cites to Duke Energy's initial brief filed in the other pending appeal and inappropriately frames arguments made by Duke Energy in that case as factual assertions and absolute truths. Of course, in addition to not disclosing that its counsel also represents Duke Energy in that case, SCMA fails to disclose that Duke Energy's arguments were rejected by the Administrative Law Court in that case and are far from the truths that SCMA presents them to be in its *amicus* brief.

Respectfully submitted,

s/ Andrew R. Hand

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