

## South Carolina: Amazon responds to lawsuit seeking injunctive relief



David M. Kall | Thursday, December 7, 2017

Two weeks ago, we provided an [update](#) on the \$12.5 million unpaid tax dispute between the South Carolina Department of Revenue and Amazon Services, LLC, an affiliate of Amazon.com, Inc. That was shortly after the department took its case to the Administrative Law Court, filing an early November [motion](#) for an injunction that, if successful, would force Amazon to pay the millions in sales and use taxes, plus penalties and interest, that the department says Amazon owes on sales of third-party owned goods to in-state buyers. Prior to that, in June, the Department of Revenue had sent Amazon its [determination](#) in an attempt to collect the amount due without court intervention.

As we noted in our November update, the crux of the quarrel is whether the services that Amazon provides subject it to the unpaid taxes. The internet giant's Nov. 22, 2017 [objection](#) to the department's motion, which Bloomberg posted on line, "vigorously disputes the department's position" on third-party sales, as well as numerous other assertions contained in the motion. Ultimately, Amazon argues, "...the request for injunctive relief is a wild swing to compel unprecedented tax collection without justification or factual or legal basis."

Before the court can reach the substance of the case, it must decide whether the Department of Revenue can satisfy the conditions of injunctive relief. The majority of Amazon's Objection, therefore, attacks this question, making three contentions.

### Summary of arguments

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The first of these contentions is that the department is “legally barred from seeking and obtaining the requested relief.” Citing various provisions of South Carolina’s Revenue Procedures Act (RPA), Amazon claims that injunctive relief is not one of the “remedies afforded the department to collect a tax.” Instead, the “Department may collect taxes following standard assessment procedures ...and if collection is in doubt, it may follow jeopardy assessment procedures...The RPA does not mention injunctive relief, and no other law authorizes the department to pursue it.”

Second, Amazon maintains that even “if the department were authorized by law to seek injunctive relief (it is not), the specific injunctive relief requested by the department’s motion may not be granted as a matter of law because it relates to tax periods over which this Court lacks jurisdiction.” Amazon points to authority providing that “[i]n sales and use taxes cases, the court’s jurisdiction is limited to a review of final department determinations.” Because the department has only issued one determination, it must request a contested case hearing next, and only then would a court have the jurisdiction to “affirm, remand, reverse, or modify the agency’s action.”

As for the tax periods, reasons Amazon, the Department of Revenue identified specific dates, Jan. 1, 2016 to March 31, 2016, for which Amazon owes taxes, but requested injunction relief “beginning on some future date and continuing indefinitely.” This discrepancy also robs the court of the proper jurisdiction, says the Internet retailer.

Amazon’s third contention is that the department cannot meet its “burden of demonstrating the need for” an injunction, which it characterizes as “a drastic remedy...to be cautiously applied only when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected.”

### **Injunctive relief**

On this third contention, in order to obtain its injunction, the department “must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law.” Amazon condemns the department’s inability to satisfy these elements aggressively.

With respect to the first, irreparable harm, Amazon labels the Department of Revenue’s allegations of “financial risks,” and the “likely erosion” of South Carolina’s tax base” as “meritless,” in part because the department failed to provide “any real evidence that such harms are likely to occur...[it] simply recited a parade of hypothetical horrors, without any support.” The Objection goes on to pick apart various other allegations as being unsupported, or disingenuous, such as the department’s expectation that Amazon’s liability to the state is expected to reach \$10 billion by the end of the case, and that Amazon has failed to pay \$1.9 billion in taxes nationwide.

Regarding the second element that the department must prove, that it is likely to be successful on the merits, Amazon uses the department’s own words against it: “the department admits that its claim involves a ‘novel’ issue that, in the department’s view, might one day need to be decided by the United States Supreme Court.”

Amazon also accuses the department of “inaccurately” stating who has the obligation to collect taxes under South Carolina law:

Indeed, the actual text of South Carolina’s sales and use tax statutes is fatal to the Department’s position-and certainly undermines the contention that the Department’s success on the merits is “highly likely” because Amazon Services simply does not sell

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tangible personal property. Rather, Amazon Services merely provides services to those who sell on Amazon's website, including independent third-party sellers. The Department's regulations and rulings make clear that the services provided by Amazon Services are not subject to sales tax.

Finally, Amazon declares that the department cannot satisfy the third element, the absence of an adequate remedy at law. Once again, the department's own words come into play. Amazon takes the Department of Revenue's claim that it "cannot be certain that Amazon will be able to pay the amount in dispute" as absurdist, because it "can never have such 'certainty.'" But if this were a "truly a concern of the department, it should have utilized a different tactic, its jeopardy assessment procedures to immediately collect" the taxes.

Amazon disparages a number of other points in the department's motion as being factually incorrect or legally unsustainable, all to show that injunctive relief is not permissible. For example, the department asserts that injunctive relief will preserve the status quo, to which Amazon contends the opposite: that it is already complying with South Carolina laws, so forcing it to start collecting and remitting sales and use taxes shifts responsibility, "controverts the underlying purpose of an injunction, and is grounds alone for the motion's denial."

### Conclusion

In the end, Amazon concludes, "[b]ecause the department is legally barred from seeking or obtaining the relief requested, [it] has failed to meet its burden of demonstrating the need for injunctive relief... granting the relief requested would alter the status quo[.] [T]he department's motion should be denied without a hearing."



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