

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**Dec 21 2020**

APPEAL FROM THE ADMINISTRATIVE LAW COURT

**SC Court of Appeals**

Ralph K. Anderson III, Chief Administrative Law Judge

Appellate Case No. 2019-001706

Amazon Services, LLC, .....Appellant,

v.

South Carolina Department of Revenue, .....Respondent.

**RESPONDENT’S RETURN IN OPPOSITION TO INSTITUTE FOR PROFESSIONALS  
IN TAXATION’S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF**

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*Attorneys for Respondent*

Pursuant to Rules 213 and 240(e) of the South Carolina Appellate Court Rules (“SCACR”), Respondent South Carolina Department of Revenue (the “Department”) respectfully submits the within combined return and memorandum in opposition to the Institute for Professionals in Taxation’s (“IPT”) Motion for Leave to File an *Amicus Curiae* Brief (the “Motion”) filed on December 11, 2020. For the reasons discussed below, IPT has not met its burden of demonstrating either an interest in this appeal or its possession of unique information or perspective that would benefit the Court’s review and application of South Carolina law. The Motion should be denied.

### **PROCEDURAL POSTURE**

This is an appeal from the final agency decision of the Administrative Law Court (“ALC”) as to the Department’s determination and assessment of sales and use tax, penalties, and interest (the “Determination”) against Appellant Amazon Services, LLC (“Amazon”). The Department had determined that Amazon was not collecting and remitting sales and use tax in accordance with South Carolina law. Amazon filed a request for contested case hearing with the ALC challenging the Determination on July 21, 2017. An evidentiary hearing was held on February 4–6, 2019, and on September 10, 2019 the ALC issued its Final Order affirming the Department’s Determination. Neither IPT nor any other *amici* sought to intervene or file briefs with the ALC during the contested case proceedings. On October 10, 2019, Amazon filed its Notice of Appeal in this matter. Briefing of the appeal is complete, with the parties having filed their respective final briefs on June 11, 2020. Six months later, IPT filed the instant Motion seeking leave to file an *amicus curiae* brief pursuant to Rule 213, SCACR.

### **STANDARD**

Rule 213, SCACR requires a moving party to “identify the interest of the applicant” and also to “state the reasons why a brief of an *amicus curiae* is desirable.” “A brief of an *amicus curiae*

(literally ‘friend of the court’) may be filed only after obtaining leave of the appellate court via motion or at the appellate court’s request.” Jean Hoefler Toal, et al., Appellate Practice in South Carolina 439 (3d ed. 2016). The determination of whether to grant leave to file a brief as an *amicus curiae* under Rule 213, SCACR, is within this Court’s discretion. *See, e.g., Cook v. S.C. Dep’t of Highways & Pub. Transp.*, 309 S.C. 179, 184, 420 S.E.2d 847, 850 (1992) (finding no abuse of discretion in the granting of leave to file an *amicus curiae* brief). “An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J.).

### **ARGUMENT**

IPT has not met its burden, nor can it independently demonstrate, that it has an interest in the issues attendant to this appeal such that the Court would benefit from its voice and opinion on the interpretation and analysis of South Carolina law. IPT asserts that it “has an interest in this matter because its members have an interest in the fair, predictable, and efficient administration of sales and use taxes.” (Motion at 1). But this amorphous statement does not explain how IPT or its members will actually be impacted by the outcome of this case, which concerns the particular manner in which Amazon sells goods on its website, and whether those selling activities make Amazon liable for sales and use tax under South Carolina law. The analysis undertaken by the ALC was specific to Amazon and its particular business model, and the application of the provisions of the South Carolina Sales and Use Tax Act to that business model. IPT does not assert

that any of its members operate a similar business model, or that they do so in South Carolina. Thus, it is difficult to imagine, and IPT has not met its burden of demonstrating to this Court, how IPT's members will be affected by the outcome of this case.

Indeed, the fact that IPT waited over three years after the contested case was instituted, well over a year after this appeal was filed, and six months after the appeal was fully briefed by the parties, to seek leave to file its brief indicates that it in fact does not have an interest in this matter. The Court should deny the Motion for this reason alone.

Furthermore, a review of the proposed brief itself demonstrates that the brief is not helpful to the Court. Rather than provide the Court with new information or some additional helpful perspective, the brief attempts to explain to the Court how to perform a statutory interpretation analysis in a tax case. In doing so, the brief misconstrues the ALC's order and the record below in meaningful ways. For example, the brief criticizes the ALC's discussion of the consignment sales model in its analysis of Amazon's business model, calling it "[t]he linchpin of the ALC's decision." (Brief at 5; *see also* Brief at 6 (claiming that consignment "is the ALC's essential link back to the term 'seller' . . . .")). While the ALC's order does discuss consignment sales, it does so for the purpose of contextualizing and illustrating Amazon's sales platform, and to address what was essentially Amazon's central contention throughout the proceedings below—that it cannot have possibly sold something to which it did not have legal title. But rather than rising and falling on a discussion of consignment sales, the ALC's order appropriately focused throughout on the statutory language and definitions contained in the Sales and Use Tax Act in order to determine whether Amazon was "engaged . . . in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-910; *see also* S.C. Code Ann. § 12-36-70 ("Retailer' and 'seller' include every person . . . selling or auctioning tangible personal property *whether owned by the person or*

others . . . .”). The brief’s overemphasis of the order’s discussion of consignment sales is an unhelpful straw man that, respectfully, will not assist the Court in its analysis in this case.

The brief also misconstrues various statements contained in legislative presentations and materials related to the South Carolina General Assembly’s passage of “marketplace facilitator” legislation after the tax period at issue in this case, at one point even asserting that the General Assembly passed a law just for Amazon. (Brief at 10 (“Instead of amending the existing subsection of the definition, [the General Assembly] added an entirely new subsection to explicitly capture Amazon.”)). Aside from being demonstrably incorrect and uninformed, IPT’s mischaracterization of these events and statements is perhaps unsurprising given that it was not involved in the passage of this legislation, nor was it involved in the proceedings underlying this appeal at all. The inaccuracy of these assertions in its brief highlights that IPT is simply not in a position to offer this Court any information that will aid the Court’s analysis in this case, that its brief is instead designed merely to offer support for Amazon, and that the brief thus will not be helpful to the Court in this appeal. *Alexander v. Hall*, 64 F.R.D. 152 (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 the court might be doubtful or mistaken rather than one who gives a highly partisan account of the facts”). IPT’s proposed brief reveals itself to be little more than a “friend of Amazon” brief, not a “friend of the Court” brief.

In short, the question presented by this case is whether Amazon’s selling activities in the first quarter of 2016 made it liable for sales and use tax under South Carolina law as it existed at that time. That issue has already been fully and thoroughly briefed by the two parties with an actual

interest in this case—Amazon and the Department. For the reasons stated above, IPT’s brief does not illuminate these issues in any way, and it will not aid the Court’s inquiry in this matter. That, coupled with the fact that IPT has failed to demonstrate that it actually has an interest in this appeal, counsels that IPT’s Motion should be denied.

**CONCLUSION**

For the reasons explained above, this Court should deny IPT's Motion for Leave to File an *Amicus Curiae* Brief in this case.

Respectfully submitted,

s/ Andrew R. Hand

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Columbia, South Carolina  
December 21, 2020

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APPEAL FROM ADMINISTRATIVE LAW COURT  
Ralph King Anderson, III, Administrative Law Judge

**SC Court of Appeals**

Appellate Case No. 2019-0017006

Amazon Services, LLC, .....Appellant,

v.

South Carolina Department of Revenue, .....Respondent.

**PROOF OF SERVICE**

This is to certify that the undersigned counsel, a shareholder with the law firm Willoughby & Hofer, P.A., has caused to be served this day one (1) copy of Respondent South Carolina Department of Revenue’s Return in Opposition to Institute for Professionals in Taxation’s Motion for Leave to File an *Amicus Curiae* Brief via electronic mail at the email address as stated in the Attorney Information System and as set forth below:

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A copy of the email serving counsel as stated above is attached hereto as Exhibit 1.

s/Andrew R. Hand  
Andrew R. Hand, S.C. Bar No. 101633

December 21, 2020  
Columbia, South Carolina

# EXHIBIT 1

## Elizabeth P. Kurtz

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**From:** Andrew R. Hand  
**Sent:** Monday, December 21, 2020 5:33 PM  
**To:** Bryson Geer; John Von Lehe (john.vonlehe@nelsonmullins.com); cphillips@sidley.com; nconrad@sidley.com; rhochman@sidley.com; ctrela@sidley.com; mdc@barnwell-whaley.com; jnovak@barnwell-whaley.com; jfletcher@barnwell-whaley.com; groberts@multistatesalt.com; jmaddison@multistatesalt.com  
**Cc:** Tracey Green; Chad Johnston; John Hoefer; John Roberts; Jason Luther; lauren@vivalawsc.com; Elizabeth P. Kurtz  
**Subject:** Amazon Services, LLC v. S.C. Department of Revenue, Appellate Case No. 2019-001706  
**Attachments:** 2020-12-21 Respondents' Filing Ltr to Kitchings re Return in Opp to IPT's Motion for Leave to File an Amicus Brief.pdf; 2020-12-21 Respondents' Return in Opp to IPT's Motion for Leave to File an Amicus Brief.pdf; 2020-12-21 POS Respondents' Return in Opp to IPT's Motion for Leave to File an Amicus Brief.pdf

Good afternoon,

Attached for service upon you via your AIS email addresses are the following:

1. Filing letter to the Hon. Jenny Abbott Kitchings;
2. Respondent's Return in Opposition to the Motion for Leave to File an *Amicus Curiae* Brief; and
3. Proof of Service (without a copy of this email).

Should you have any difficulty opening any of these documents, please advise us. If you have any questions, do not hesitate to let us know.

Thank you,

Andrew Hand  
Attorney for S.C. Department of Revenue



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December 21, 2020

## VIA ELECTRONIC FILING BY EMAIL

The Honorable Jenny Abbott Kitchings  
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**Dec 21 2020**  
**SC Court of Appeals**

RE: *Amazon Services, LLC v. S.C. Dep't of Revenue*, Appellate Case No. 2019-001706

Dear Ms. Kitchings:

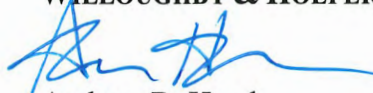
Attached for electronic filing by email and in accordance with Supreme Court Order 2020-05-29-02, part (c)(6), and pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondent South Carolina Department of Revenue respectfully submits its Return in Opposition to Institute for Professionals in Taxation's Motion for Leave to File an *Amicus Curiae* Brief. As permitted by Order 2020-05-29-02, part (c)(6), the attached filing is being made to the email address for the Court of Appeals. As also permitted by the Court, no other copies, whether paper or electronic, are being provided.

By copy of this letter, we are serving counsel for Appellant via email as permitted by Order 2020-05-29-02, part (g)(3) and attach is a proof of service to that effect.

If you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

**WILLOUGHBY & HOEFER, P.A.**



Andrew R. Hand

ARH/epk  
Attachments

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The Honorable Jenny Abbott Kitchings

December 21, 2020

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