

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Dec 21 2020

SC 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.

**RESPONDENT'S RETURN IN OPPOSITION TO COUNCIL ON STATE TAXATION'S
MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF**

SOUTH CAROLINA DEPARTMENT OF REVENUE

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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 Council On State Taxation’s (“COST”) Motion for Leave to File an *Amicus Curiae* Brief (the “Motion”) filed on December 9, 2020. For the reasons discussed below, COST 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. Nearly six months later, COST 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

COST 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. COST asserts that, “[b]y permitting COST to file an *Amicus Curiae* brief, the Court will benefit from the insight of COST and its members who will be directly affected by the Court’s decision in this extremely significant case.” (Motion at 3). But COST does not explain *how* its members “will be directly affected by the Court’s decision,” 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. COST does not assert that any of its members operate a similar business model, or that they do so in South Carolina. Thus, the Department struggles to imagine how COST's members will be affected by the outcome of this case in any way, much less directly so. Having failed to meet its burden of demonstrating an interest in this appeal, the COST's Motion should be denied.

Indeed, the fact that COST waited over three years after the contested case was instituted, well over a year after this appeal was filed, and almost 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. COST spends the majority of its brief citing and discussing other states' tax laws and decisions, which is simply not helpful for the analysis of South Carolina law the Court must perform in this case. The history of statutory enactments in other states regarding the taxation of online retailers, while perhaps academically interesting, has no bearing on the correct interpretation of South Carolina law as it existed in the first quarter of 2016, and how that law applies to Amazon's online retail business. The same is true with respect to other jurisdictions' treatment of Amazon in the products liability context, which is a different question, legal rubric, and analysis altogether than the discrete issue of South Carolina sales and use tax law presented by this case.¹ And, finally, COST's attempt to distinguish the Supreme Court of South Carolina's

¹ Even if it were relevant, the Department notes that COST omitted from its discussion a recent case from the California Court of Appeal which held, after a thorough examination of Amazon's participation in and control over transactions on its website, that Amazon could be held strictly liable for a defective product sold on its website. *See Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. Aug. 13, 2020). Such an oversight reveals COST's blind allegiance to Amazon and its position in this appeal, rendering COST's commentary and analysis more appropriately that of a "friend of Amazon," rather than the "friend of the court" that *amicus curiae*

decision in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), from this case likewise rests upon decisions from other jurisdictions regarding their tax treatment of online travel companies, even though COST acknowledges in its brief that these online travel companies “have both won and lost many of these cases, *depending on the specific statutory language and intent* as to whether the retailer (the hotel) or wholesaler/aggregator/reseller (the OTC) was responsible for collecting the tax.” (Motion at 5 (emphasis added)). And the application of *Travelscape* has been thoroughly addressed by the parties to the case in any event.

Respectfully, the arguments presented by COST, which rely overwhelmingly on non-South Carolina authorities and law, are simply not relevant to the considerations before this Court and will not aid the decisional process. Those arguments also reveal themselves to be little more than supplemental briefing in support of Amazon. *But see 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.”).

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

are required to be. *Ryan*, 125 F.3d at 1064 (“In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation . . . judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties’ briefs do not give us all the help [they] need for deciding the appeal.”); *see also Nat’l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (“The policy of this court is, therefore, not to grant rote permission to file an amicus curiae brief [and] never to grant permission to file an amicus curiae brief that essentially merely duplicates the brief of one of the parties . . .”).

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. Respectfully, COST’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 COST has failed to demonstrate that it actually has an interest in this appeal, counsels that COST’s Motion should be denied.

CONCLUSION

For the reasons explained above, this Court should deny COST'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
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SC Court of Appeals

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

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, awith the law firm Willoughby & Hoefler, P.A., has caused to be served this day one (1) copy of Respondent South Carolina Department of Revenue’s Return in Opposition to Council on State 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
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December 21, 2020
Columbia, South Carolina

EXHIBIT 1

Elizabeth P. Kurtz

From: Andrew R. Hand
Sent: Monday, December 21, 2020 5:34 PM
To: Bryson Geer; John Von Lehe (john.vonlehe@nelsonmullins.com); cphillips@sidley.com; nconrad@sidley.com; rhochman@sidley.com; ctrela@sidley.com; Felder, Madison; Hobart, Kay Miller
Cc: Tracey Green; Chad Johnston; John Hoefler; 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 COST's Motion for Leave to File an Amicus Brief.pdf; 2020-12-21 Respondent's Return in Opp to COST's Motion for Leave to File an Amicus Brief.pdf; 2020-12-21 POS Respondents' Return in Opp to COST'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,

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Attorney for S.C. Department of Revenue



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December 21, 2020

VIA ELECTRONIC FILING BY EMAIL

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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 Council on State 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

Page 2 of 2

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