

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

RECEIVED

Dec 30 2020

APPEAL FROM THE ADMINISTRATIVE LAW COURT

SC Court of Appeals

Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2019-001706

Trial Court Case No. 17-ALJ-17-0238-CC

Amazon Services, LLC,Appellant,

v.

South Carolina Department of Revenue,Respondent.

**REPLY OF THE INSTITUTE FOR PROFESSIONALS IN TAXATION TO
RESPONDENT'S RETURN IN OPPOSITION**

M. Dawes Cooke, Jr., Esq.
Justin P. Novak, Esq.
John W. Fletcher, Esq.
BARNWELL WHALEY
PATTERSON & HELMS, LLC
288 Meeting Street, Suite 200 29401
P.O. Drawer H
Charleston, SC 29402
Tel: (843) 577-7700
Fax: (843) 577-7708
mdc@barnwell-whaley.com
jnovak@barnwell-whaley.com
jfletcher@barnwell-whaley.com

R. Gregory Roberts, Esq.
Jonathan E. Maddison, Esq.
(*pro hac vice* applications to be filed)
THE ROBERTS LAW GROUP, PLLC
100 Fisher Avenue, #1160
White Plains, NY 10602
Tel: (914) 719-3385
groberts@multistatesalt.com
jmaddison@multistatesalt.com

INTRODUCTION

The Institute for Professionals in Taxation (“IPT”) respectfully submits this Reply to the South Carolina Department of Revenue’s (the “Department”) Return in Opposition (“Opposition”) to IPT’s Motion for Leave to File an *Amicus Curiae* Brief (“Motion”).

The Department opposes IPT’s participation as *amicus curiae* for two primary reasons. First, the Department asserts that IPT does not have an interest in the outcome of this appeal because IPT’s members do not operate business models similar to Amazon. According to the Department, if a party’s facts are not sufficiently similar to the facts in the appeal, the party cannot have an interest in the outcome of the litigation. The Department’s second argument is not against the Motion itself, but rather the brief IPT conditionally filed with the Motion. The Department urges the Court to deny IPT’s Motion because, in the Department’s opinion, the brief “is not helpful to the Court.” Opposition at 4.

Both arguments should be rejected. The Department’s argument that IPT lacks a sufficient interest in this case is baseless, has no support in the law, and runs counter to the purpose of *amicus curiae* participation. The Department’s argument that the brief is not helpful is similarly baseless and reflects nothing more than the Department’s disagreement with the analysis provided by IPT.

STANDARD

Amicus curiae briefs are governed by Rule 213 of the South Carolina Appellate Court Rules (“SCACR”). Under this rule, an *amicus curiae* brief may be filed “only by leave of the appellant court granted on motion, or at the request of the appellate court.” Rule 213 imposes two specific requirements on the motion for leave: it “shall identify the interest of the applicant” and “shall state the reasons why a brief of an *amicus curiae* is desirable.”

ARGUMENT

I. IPT has a sufficient interest in the outcome of this appeal.

IPT has an interest in this matter because its members have an interest in the fair, predictable, and efficient administration of sales and use taxes. IPT is concerned that the decision below undermines these interests. Specifically, and as discussed in IPT's conditionally-filed brief, IPT is concerned that the ALC decision (1) is inconsistent with two principles of statutory construction specific to tax laws that are intended to protect taxpayers from unjust enforcement actions; and (2) threatens the separation of power between the executive and legislative branch by allowing the Department to extend and enforce an inadequate law, irrespective of the fact that the Department's own Director testified that the law in question was inadequate, and the General Assembly enacted new legislation to address the law's shortcoming. This combination threatens the fair and predictable administration of South Carolina tax law, something in which all IPT members have an interest.

The Department contends that IPT does not have an interest in the outcome of this appeal because IPT "does not assert that any of its members operate a similar business model" to Amazon. Opposition at 3. By way of background, IPT is comprised of more than 4,100 members representing over 1,400 corporations, firms, and taxpayers throughout North America. At the risk of stating the obvious, some of those 1,400 taxpayers do operate business models similar to Amazon. Indeed, this is not the first case in which IPT has filed an *amicus* brief in support of an online marketplace. Just last year, IPT filed an *amicus* brief in the Louisiana Supreme Court to advance its members' interest in the fair and predictable application of Louisiana's tax laws to businesses like Amazon. *See* Brief for the Institute for Professionals in Taxation as *Amicus Curiae* in Support of Wal-Mart.com USA, LLC, 2020 WL 499760, Case No. 2019-C-00263 (La. 2020).

Irrespective of whether IPT’s members operate business models similar to Amazon, the Department’s proposed interpretation of Rule 213 is untenable and runs counter to the purpose of *amicus* briefs. The Department interprets Rule 213 to limit *amicus* participation to parties with facts similar to those at issue in the appeal. This interpretation unduly narrows the scope of *amicus* participation. If the Department’s interpretation is accepted, only parties with sufficiently similar facts as the litigants would be permitted to participate as *amicus*, thereby excluding a wide-range of neutral, policy-oriented organizations from serving as a friend of the court.

Moreover, the reasoning behind the Department’s interpretation cannot withstand close analysis. According to the Department, if IPT’s members do not operate a business model similar to Amazon, “it is difficult to imagine . . . how IPT’s members will be affected by the outcome of this case.”¹ Opposition at 3. The Department’s inability to “imagine” how the holding in one appeal affects the interest of a litigant in a future appeal is surprising, to say the least. The Department had no such imaginative shortcomings when authoring its merits brief in this appeal. In that brief, the Department asks the Court to apply the principles announced in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011)—a case involving whether a company is “in the business of furnishing hotel rooms”—to a case involving whether someone is “in the business of selling tangible personal property.” The Department cannot have it both ways. It cannot argue that factually distinct businesses have no interest in the outcome of this

¹ The Department further suggests that “the fact IPT waited over three years after the contested case was instituted, well over a year after this appeal was filed . . . indicates that it in fact does not have an interest in this matter” and therefore the Court should “deny the Motion for this reason alone.” Opposition at 3. The Department’s argument is, once again, baseless. The plain language of Rule 213 states that an *amicus* brief is “limited to argument of the issues on appeal as presented by the parties.” Rule 213, SCACR. Thus, IPT could not have filed its *amicus* brief prior to the merits brief being filed in this case. Moreover, there is no timeline by which *amicus* briefs must be filed. Therefore, the Court should not deny the Motion on this ground.

appeal, while simultaneously arguing for the extension of a case involving hotel rooms to a case involving tangible personal property.

This case—like almost every case—affects more than just the named parties. The Department’s proposed interpretation of Rule 213 is irreconcilable with this fact. Decisions have consequences, both to the immediate parties and future litigants. IPT seeks to participate as a friend of the Court because the ALC’s analysis, if upheld, has broader implications for all taxpayers regarding fundamental issues of statutory construction and the separation of powers.

II. IPT’s participation as *amicus* is desirable because it will provide the Court with a broader perspective regarding this appeal’s implications for principles of statutory interpretation and the separation of powers.

IPT’s participation in this case is desirable and will benefit the Court in three ways: (1) addressing fundamental issues of statutory interpretation unique to tax laws; (2) detailing how this case implicates the separation of powers between legislative and executive branches; and (3) providing this Court with a broader perspective regarding the role of statutory interpretation in maintaining that separation. How these principles interact with the present appeal—and why the ALC’s decision threatens them—is the overarching theme of IPT’s brief.

The Department, however, urges the Court to deny IPT’s Motion on the ground that IPT’s brief “is not helpful to the Court” because it merely “attempts to explain to the Court how to perform a statutory interpretation analysis in a tax case.” Opposition at 3. The Department goes as far as accusing IPT of making “demonstrably incorrect and uninformed” characterizations, constructing an “unhelpful straw man” for the court to consider, and in turn, “reveal[ing] itself to be little more than ‘a friend of Amazon’ brief, not a ‘friend of the Court’ brief.” Opposition at 4.

IPT’s brief is not a glorified “how-to” manual on statutory interpretation. Rather, the brief focuses on how the ALC’s decision undermines principles of fair and equitable tax regimes. The

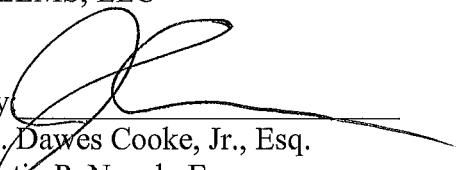
South Carolina Supreme Court adjudicates these principles through statutory construction. Neither party narrowly focused on how the ALC's decision comports with these principles, and therefore IPT seeks to file as *amicus* to fill that gap. Similarly, neither party presented the Court with the opportunity to consider how this case implicates the separation of powers between the executive and legislative branches.

The Department reaches the conclusion that IPT's brief is not helpful to the Court without acknowledging that the arguments serve a larger purpose: to animate the bedrock principles implicated by the ALC's decision and to offer a broader perspective for the Court to consider before deciding this appeal. Rather than explaining why that broader perspective is unhelpful or unnecessary, the Department chose to misrepresent IPT's arguments and question its legitimate role as a friend of the Court. This Court may ultimately decide that IPT's concerns are unwarranted or overstated. Whatever the Court decides, IPT respectfully asks that it be based on what the brief says, not on the Department's incomplete and biased summary.

IPT respectfully urges this Court to deny the Department's Opposition and grant IPT's Motion for Leave to File an *Amicus Curiae* Brief.

Respectfully submitted,

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By 
M. Dawes Cooke, Jr., Esq.
Justin P. Novak, Esq.
John W. Fletcher, Esq.
BARNWELL WHALEY PATTERSON &
HELMS, LLC
P.O. Drawer H (29402)
288 Meeting Street, Suite 200
Charleston, SC 29401
Tel: (843) 577-7700 Fax: (843) 577-7708
mdc@barnwell-whaley.com
jnovak@barnwell-whaley.com
jfletcher@barnwell-whaley.com

R. Gregory Roberts, Esq.
Jonathan E. Maddison, Esq.
THE ROBERTS LAW GROUP, PLLC
100 Fisher Avenue, #1160
White Plains, NY 10602
Tel: (914) 719-3385
groberts@multistatesalt.com
jmaddison@multistatesalt.com

*Counsel for The Institute for Professionals in
Taxation*

December 30, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Dec 30 2020
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2019-001706

Trial Court Case No. 17-ALJ-17-0238-CC

Amazon Services, LLC,Appellant,

v.

South Carolina Department of Revenue,Respondent.

PROOF OF SERVICE

I certify that I have served the *Reply of the Institute for Professionals in Taxation to Respondent's Return in Opposition*, pursuant to SCACR 213 on the parties in the above-captioned action by depositing a copy of it in the United States Mail, postage prepaid, on December 30, 2020, addressed to the counsel of record as follows:

Bryson M. Greer
John C. von Lehe, Jr.
NELSON MULLINS RILEY &
SCARBOROUGH LLP
151 Meeting St / 6th Floor
P.O. Box 1806 (29402-1806)
Charleston, SC 29401-2239
Phone: (843) 853-5200

Carter G. Phillips
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Phone: (202) 736-8000

Constantine L. Trela, Jr.
Robert N. Hochman
Neil H. Conrad
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
Phone: (312) 853-7000

Attorneys for Appellant Amazon Services, LLC

Jason P. Luther
SOUTH CAROLINA
DEPARTMENT OF
REVENUE
P.O. Box 12265
Columbia, SC 29211
Phone: (803) 898-5131

John M.S. Hoefler
Tracey C. Green
Chad N. Johnson
John W. Roberts
Andrew R. Hand
WILLOUGHBY &
HOEFFER, P.A.
P.O. Box 8416
Columbia, SC 29202
Phone: (803) 252-3300

Lauren Acquaviva
THE ACQUAVIVA LAW
FIRM, LLC
1092 Johnnie Dodds Blvd.,
Suite 112
Mount Pleasant, SC 29464
Phone: (843) 216-7728

Attorney for Respondent South Carolina Department of Revenue

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 

M. Dawes Cooke, Jr., Esq.

Justin P. Novak, Esq.

John W. Fletcher, Esq.

BARNWELL WHALEY PATTERSON &
HELMS, LLC

P.O. Drawer H (29402)

211 King Street, Suite 300

Charleston, SC 29401

(843) 577-7700 Fax: (843) 577-7708

*Counsel for The Institute for Professionals in
Taxation*