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SC Court of Appeals

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.

**RESPONDENT'S RETURN IN OPPOSITION TO TAX EXECUTIVES INSTITUTE'S
MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF**

SOUTH CAROLINA DEPARTMENT OF REVENUE

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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 Tax Executives Institute’s (“TEI”) Motion for Leave to File an *Amicus Curiae* Brief (the “Motion”) filed on January 7, 2021. For the reasons discussed below, TEI 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 TEI 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 seven months later, TEI 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 Hoefer 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

TEI 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. TEI asserts that its “members, as in-house tax professionals advising their companies regarding tax responsibilities, are concerned with the essential traits of a sound tax system – fairness, certainty, and notice.” (Motion at 3). But this nebulous statement does not explain how TEI 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. Amazon's position is fully represented in this appeal, and TEI does not assert that any of its members represent companies that operate business models similar to Amazon's, or that they do so in South Carolina. Thus, it is difficult to imagine, and TEI has not met its burden of demonstrating to this Court, how TEI's members will be affected by the outcome of this case.

Indeed, the fact that TEI waited over three years after the contested case was instituted, well over a year after this appeal was filed, and almost seven 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. The brief spends nearly six pages discussing the evolution of federal tax law regarding nexus, asserting that “[t]he Department’s attempt to hold Amazon Services responsible for tax imposed on transactions between third-party sellers and consumers must be examined in the full context of this country’s decades-long nexus debate.” (Brief at 5). The brief makes this assertion and engages in this lengthy discussion even though, at all times relevant to these proceedings, Amazon had a *physical presence* in South Carolina sufficient to establish nexus with this state under any of the standards discussed in the brief. Moreover, as the Department pointed out in its brief in this appeal, the standard for determining whether one has sufficient nexus with a state to make it subject to taxation in that state, and whether a certain person is the seller of a good or is “engaged . . . in the business of selling tangible personal property at retail” for the purposes of the South Carolina Sales and Use Tax Act, S.C. Code Ann. § 12-36-910(A), are different analyses altogether. (Final Brief of Respondent at 41–43). Thus, this entire discussion is an off-topic

digression from the issue in this appeal, and it will not aid the Court in its analysis of relevant South Carolina law in this case at all.

The Motion and the brief also misstate the events surrounding this case. For example, the Motion claims that the Department has attempted to hold Amazon liable for sales and use tax “long after the transactions occurred, and without advance notice or guidance.” (Motion at 2). However, the record below reflects that the Department sent an initial audit letter to an Amazon entity regarding Amazon’s sales tax collection practices on its website on March 24, 2016 for the first three months of 2016, (**R. pp. 663–64**) (Tr. 522–23), and that the Department was in communications with Amazon about its failure to collect and remit sales and use tax both before and after that time. The fact that March 2016 is now a few years behind us is due simply to the passage of time while the Department conducted its audit, and while Amazon appealed and litigated this case. It does not mean that Amazon was unaware of its tax collection obligations at the time these transactions took place,¹ or that the Department was not diligent in its efforts to achieve Amazon’s compliance with those obligations.

TEI’s further assertion that, “if the ALC’s decision stands, South Carolina would receive a windfall,” and “the State will likely collect tax twice on many sales at issue in this case if the Department is permitted to assess Amazon Service for taxes,” (Brief at 14), likewise contains no support whatsoever in the record in this case. TEI cites nothing for this statement, other than an

¹ TEI’s brief conspicuously omits any discussion of the 2011 Distribution Facility Sales Tax Exemption, which exempted Amazon from the obligation to collect and remit sales and use tax in South Carolina until January 1, 2016. *See* S.C. Code Ann. § 12-36-2691 (2014) (the “Moratorium”). Amazon lobbied for passage of the Moratorium in connection with its placing a large distribution center in Lexington County, aware that the placement of this facility would give Amazon nexus with South Carolina, thereby making it liable to collect and remit sales and use tax to the state. (Final Brief of Respondent at 46–47). So the idea that Amazon was surprised by its tax obligations in South Carolina come January 1, 2016 is difficult to comprehend, as is TEI’s argument that the Department has somehow ambushed Amazon by its effort to collect these taxes.

article from the U.S. Government Accountability Office which concerns this case not at all. (*Id.*) Importantly, TEI's assertion also ignores the highly pertinent fact that the parties in this case specifically agreed, and the ALC specifically ordered, that the Department would calculate the precise amount of tax owed on the sales at issue in this case after Amazon's liability is determined in this litigation. (**R. pp. 1 n.1, 53**) (Final Order at 1 n.1, 53). As noted by the ALC in its Order, "[b]y agreement of the parties, this estimated amount was used to allow Amazon Services to proceed with this contested case, and the final amount will be determined at the Department level following the conclusion of this litigation." (**R. p. 1 n.1**) (Final Order at 1 n.1) ("The Department agrees it would be inappropriate to collect sales tax for the same transaction from two different taxpayers."). How TEI managed to overlook the first page of the ALC Order appealed from in this case before seeking leave to file an *amicus curiae* brief before this Court is baffling, and it illustrates not only the unhelpfulness of TEI's Brief for the purposes of this appeal, but also TEI's position as a friend of Amazon in this case rather than a friend of the Court. *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 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 that time. TEI's brief does not help answer this question. TEI was not involved in the proceedings below, nor did it seek leave to intervene in those proceedings. Indeed, the inaccuracy of its assertions in its brief highlights that TEI is simply not in a position to offer this Court any

information that will aid the Court's analysis in this case, and that its brief is instead designed merely to offer more briefing support for Amazon. That, however, is not the appropriate role for an *amicus curiae* in proceedings before this Court, and TEI's Motion should therefore be denied.

CONCLUSION

For the reasons explained above, this Court should deny TEI'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
January 19, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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, an attorney with 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 Tax Executives Institute'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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January 19, 2021
Columbia, South Carolina

EXHIBIT 1

Elizabeth P. Kurtz

From: Andrew R. Hand
Sent: Tuesday, January 19, 2021 11:19 AM
To: ermoore@murphygrantland.com; pmata@tei.org; John Von Lehe; Bryson Geer; cphillips@sidley.com; ctrela@sidley.com; rhochman@sidley.com; nconrad@sidley.com
Cc: Tracey Green; John Roberts; John Hoefer; Chad Johnston; Jason Luther; lauren@vivalawsc.com; Elizabeth P. Kurtz
Subject: Amazon Services, LLC v. S.C. Department of Revenue, Appellate Case No. 2019-001706
Attachments: 2021-01-19 Respondent's Filing Ltr to Kitchings re Return in Opposition to TEI's Motion for Leave to File an Amicus Brief.pdf; 2021-01-19 POS Respondent's Return in Opposition to TEI's Motion for Leave to File an Amicus Curiae Brief .pdf; 2021-01-19 Respondent's Return in Opposition to TEI's Motion for Leave to File an Amicus Brief.pdf

Good morning,

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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January 19, 2021

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Jan 19 2021

SC Court of Appeals

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

Dear Ms. Kitchings:

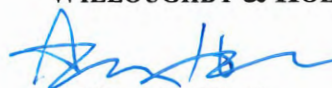
Attached for electronic filing by email and in accordance with Supreme Court Order 2020-05-29-02, part (c)(6), and pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondent South Carolina Department of Revenue respectfully submits its Return in Opposition to Tax Executives Institute's 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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