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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 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.

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

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INTRODUCTION

Pursuant to Rules 213 and 240(f) of the South Carolina Appellate Court Rules (“SCACR”), Tax Executives Institute, Inc. (“TEI”) respectfully submits this Reply to the South Carolina Department of Revenue’s (“Department”) Return in Opposition (“Opposition”) to TEI’s Motion for Leave to File an *Amicus Curiae* Brief filed on January 7, 2021 (“Motion”).

TEI is the largest organization representing taxpayers’ interests on issues associated with tax administration. TEI has nearly 7,000 members who manage the tax affairs of over 3,000 of the leading companies across all industry sectors in North America, Europe, and Asia. As discussed below, TEI has an interest in this appeal and possesses a unique perspective that would benefit this Court’s review and application of South Carolina law. Thus, TEI’s Motion should be granted.

PROCEDURAL POSTURE

This case is an appeal from the Administrative Law Court’s (“ALC”) final decision as to the Department’s determination and assessment of sales and use tax, penalties, and interest (the “Determination”) against Appellant Amazon Services, LLC (“Amazon Services”). The Department determined Amazon Services was a “seller” required to collect and remit sales and use tax based on the State’s law that pre-existed recent statutory amendments expressly authorizing the expansion of South Carolina’s sales tax obligations to include marketplace facilitators, such as Amazon Services, solely on a prospective basis. Amazon Services contested the Determination with the ALC on July 21, 2017. Following an evidentiary hearing in February of 2019, the ALC issued its Final Order affirming the Department’s Determination on September 10, 2019. Amazon Services filed its Notice of Appeal to this Court on October 10, 2019. Amazon Services and the Department submitted final briefs on June 11, 2020. On January 7, 2020, TEI filed its Motion and conditionally filed its *amicus curiae* brief (“*Amicus* Brief”).

STANDARD

Amicus curiae briefs are governed by Rule 213, SCACR, which allows a brief to be filed “only by leave of the appellate court granted on motion.” Under this rule, the motion for leave to file an *amicus curiae* brief must (1) “identify the interest of the applicant” and (2) “state the reasons why a brief of an *amicus curiae* is desirable.” As acknowledged by the Department in its Opposition, the determination of whether to grant leave to file an *amicus curiae* brief 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) (holding that the trial court did not abuse its discretion when it granted leave to file an *amicus curiae* brief).

ARGUMENT

I. **TEI Has an Interest in the Outcome of the Issues Raised in this Matter**

A. **TEI’s Mission Is Dedicated to the Development of Sound Tax Policy**

Unequivocal evidence of TEI’s interest in this matter lies in TEI’s mission—which includes “the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and compliance costs to the benefit of both government and taxpayers.”¹ As discussed in TEI’s *Amicus* Brief, sales tax is imposed on the sale of products and services within a state. Historically, sellers collect sales tax from the consumer and remit the tax to the State if the seller has nexus with the jurisdiction; if the seller does not collect and remit the sales tax, consumers are obligated to remit use tax to the State. Marketplace facilitators provide an online platform to facilitate sales between sellers and consumers, and thus introduce a new party to the traditional paradigm. Sound tax policy requires South Carolina to enact legislation clearly

¹ Tax Executives Institute, Inc., About, available at <https://www.tei.org/about> (last accessed Jan. 21, 2021).

delineating marketplace facilitators' responsibilities if the Department seeks to shift tax collection and remittance responsibility from sellers and consumers to marketplace facilitators.

Moreover, this case impacts all marketplace platforms that facilitated sales to South Carolina customers, not simply Amazon Services, as the ultimate issue this Court will decide is how South Carolina's pre-2019 laws should be interpreted and applied to marketplace facilitators. There is no dispute the Department waited until 2019 to amend its statutes or administrative regulations, and thus "[t]he Department did not provide marketplace facilitators notice of its intent to hold them responsible for" purported sales and use tax liability, "nor did it provide guidance to marketplace facilitators and third-party sellers concerning how the Department would administer the sales and use tax if marketplace facilitators were to undertake such responsibilities." *Id.* The ALC's decision both directly and adversely impacts TEI's mission because, as discussed in TEI's *Amicus* Brief, the ALC's decision "cannot be reconciled with principles of sound tax policy." (*Amicus* Brief at 2).

B. TEI Has Commented on Marketplace Facilitator Legislation in Other Jurisdictions

This case is not the first instance TEI has commented on marketplace facilitator legislation. As discussed in TEI's motion, TEI submitted an *amicus curiae* brief in *Normand v. Wal-Mart.com USA, LLC*, No. 2019-C-00263, 2020 BL 34018 (La. Jan. 29, 2020), "the only other case in which a taxing jurisdiction sought to extend collection and remittance responsibilities to marketplace facilitators without amending the law." (Motion at 3-4). The Louisiana Supreme Court accepted TEI's filing and agreed with TEI's reasoning, holding "there is no indication the legislature intended to tax intermediaries that are only tangentially involved in sales transaction, such as a marketplace facilitator relative to sales by third party retailers." *Walmart.com USA*, 2020 BL 34018, at *10. TEI is also in the process of filing comments on Canada's proposed marketplace

facilitator legislation, recently announced in Canada’s Fall Economic Statement. TEI’s comments will address administrative concerns regarding the Canadian government’s proposal. TEI’s participation in these initiatives further demonstrates TEI’s interest in the outcome of this case.

C. The Outcome of this Case Impacts TEI Member Companies

Further, although the Department suggests the outcome of this matter only impacts Amazon Services, Court of Appeals’ decisions are, of course, precedential in nature. The briefing in this matter reflects how judicial decisions ostensibly addressing the taxation of a specific industry can have a broader impact in subsequent matters. The Department’s own merits brief requests this Court to apply the South Carolina Supreme Court’s decision in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011), a case addressing whether a company was subject to sales tax because it was “in the business of furnishing accommodations to transients for consideration.” According to the Department, “[t]he *Travelscape* decision confirms the ALC’s conclusion that Amazon is in the business of selling tangible personal property at retail,” and “[t]he facts and analysis of *Travelscape* are very similar to this case.” (Department Brief at 23). It is wholly inconsistent of the Department to claim that TEI has no interest in this matter because “TEI does not assert that any of its members represent companies that operate business models similar to Amazon [Services’]” while at the same time arguing that the principles of a judicial decision addressing the sales taxation of one industry must be applied to another.

Regardless, TEI has many members who are employed by marketplace facilitators, as well as sellers and consumers making sales over online marketplaces. These companies are both directly impacted and interested in the outcome of this matter. Moreover, many other TEI members are employed by companies that own property, have employees, and make substantial sales in

South Carolina. All of these members have an interest in having this matter resolved in a manner that enhances the business community's trust in the administration of South Carolina's tax system.

The Department's attempt to block not only TEI's *Amicus* Brief, but also the *amicus* briefs conditionally filed by the Council on State Taxation and the Institute for Professionals in Taxation, is a disservice to this Court. The purpose of *amicus* briefs is to bring to the Court's attention the policy considerations and perspectives of persons who are not parties to the instant litigation. The Court is well-equipped to receive these *amicus curiae* briefs and consider the issues and arguments raised therein on their merits.

D. The Timing of TEI's Filing Bears No Indication of TEI's Interest in this Matter

The Department suggests the timing of TEI's submission of its Motion and *Amicus* Brief somehow "indicates that it in fact does not have an interest in this matter." (Opposition at 3). The Department's position is baseless. In most instances, TEI waits until a case reaches a state supreme court or the United States Supreme Court before weighing in on issues. TEI has thus engaged in this matter earlier than is typical. Moreover, Rule 213, SCACR, does not in any way indicate that the timing of an *amicus curiae* brief is reflective of the interest of the party filing that brief, and also does not impose a deadline for submitting an *amicus curiae* brief. In fact, Rule 213 states that an *amicus* brief "shall be limited to argument of the issues on appeal as presented by the parties," thus TEI could not have filed its Motion until after briefing had been completed by the parties and its Motion is timely under the SCACR. Since this Court has not yet set this matter for oral argument, it is difficult to understand why the Department believes the Motion has not been submitted within a reasonable timeframe to reflect TEI's concerns over the outcome of this matter.

II. TEI’s Submission of an *Amicus* Brief is Desirable Because it Provides This Court with a Full Context of the Development of Sales and Use Tax Law Regarding the Treatment of Marketplace Facilitators, as Well as Fairness Concerns Raised by the Department’s Position in this Matter

TEI’s participation in this matter is desirable and will benefit this Court because it contributes to this Court’s review and evaluation of the matter. TEI’s *Amicus* Brief outlines the contentious development of nexus laws throughout the nation over the past 50 years. This history demonstrates the Department’s attempt to collect the tax from marketplace facilitators is but one of a series of innovative, alternative theories that states have pursued to collect sales and use tax liabilities, borne from the realities that individual consumers rarely remit their use tax liability to the state and it is impractical for states to audit and assess each consumer individually.

As stated in TEI’s *Amicus* Brief, “[t]he states began to consider marketplace facilitator laws . . . in earnest” after the U.S. Supreme Court’s decision upholding South Dakota’s economic nexus statute in *South Dakota v. Wayfair*, 138 S.Ct. 2080, 2099. (*Amicus* Brief at 9). TEI’s *Amicus* Brief also addresses the policy issues and questions the National Conference of State Legislatures, Multistate Tax Commission, and states have grappled with when opting to pursue such legislation. Contrary to the Department’s claim, discussion of the evolution of nexus standards is not “an off-topic digression from the issue in this appeal,” but instead is necessary context to understand why states began seeking changes in law to require that marketplace facilitators collect and remit sales and use tax on third-party marketplace sales. This context demonstrates the fundamental unfairness of the ALC’s decision to impose sales and use tax collection and remittance requirements on marketplace facilitators before South Carolina enacted a statute doing so.

Relatedly, TEI’s *Amicus* Brief outlines the broader administrative complications and tax fairness concerns raised by the ALC’s decision—concerns which, as outlined above, have the potential to impact South Carolina taxpayers beyond Amazon Services if the ALC’s decision is

upheld. Contrary to the Department’s assertion, TEI has not overlooked the timing of the Department’s initial audit letter or the portion of the ALC’s Order addressing how tax will be calculated if the Court holds Amazon Services liable. (Opposition at 4.) TEI’s *Amicus* Brief addresses the administrative burdens that are created when a taxing agency seeks to impose liability before the state has enacted a taxing statute expressly imposing tax collection responsibilities on a party previously not required to undertake such duties. The Department’s assessment of Amazon Services does not constitute notice; moreover, the Department’s agreement that “it would be inappropriate to collect sales tax for the same transaction from two different taxpayers” (ALC Decision at 1, fn. 1) does not assuage the fact that business consumers may have remitted use tax on transactions and that it is inherently more difficult to determine the correct amount of tax due – years after the sales have been made. These problems would have been easily avoided if South Carolina enacted a marketplace facilitator law in advance of the Department assessing Amazon Services. Moreover, as discussed above, the outcome of this case has broader implications for taxpayers other than Amazon Services. The Department’s quibbles are merely a distraction from the fairness concerns that are a problem of the Department’s own making.²

² For example, the Department may now believe that it had been “diligent in its efforts to achieve . . . compliance” with its position that marketplace facilitators must collect and remit sales and use tax prior to the amendments to South Carolina’s sales and use tax laws in 2019. (Opposition at 4). But it is notable that the Department previously urged the South Carolina Legislature to pass the 2019 amendments – years after assessing Amazon Services – to “close[] the gap” so that “nobody has to guess” about which party was liable for sales tax on sales made by third parties over online marketplaces. (Ex. 194, R.1263 at 6:13-15, 8:40-50).

CONCLUSION

For all of these reasons, TEI respectfully urges this Court to deny the Department's Opposition and grant TEI's Motion for Leave to File an *Amicus Curiae* Brief.

Respectfully Submitted,

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
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Amazon Services, LLC Appellant,

v.

South Carolina Department of Revenue Respondent.

PROOF OF SERVICE

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., attorneys for *amicus* Tax Executives Institute, do hereby certify that I have served all counsel of record in this action with a copy of the pleading(s) herein below specified by e-mailing a PDF copy of the same to the following email addresses pursuant to SC Supreme Court COVID Order 2020-05-29-02:

Pleading: TAX EXECUTIVES INSTITUTE
REPLY TO RESPONDENT’S RETURN IN OPPOSITION TO MOTION FOR
LEAVE AN AMICUS BRIEF

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SENT VIA EMAIL WITH ATTACHMENTS TO:

The Honorable Jenny Abbot Kitchings
Clerk, SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: *Amazon Services, LLC v. South Carolina Department of Revenue*
Appeal from the Administrative Law Court
Docket No. 17-ALJ-17-0238-CC
Appellate Case No. 2019-001706

Dear Ms. Kitchings:

Attached please find for filing the following regarding the above-referenced case:

1. TAX EXECUTIVES INSTITUTE'S REPLY TO RESPONDENT'S RETURN IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE AN AMICUS BRIEF
2. Proof of Service.

By copy of this correspondence, we are serving all counsel of record of the attached documents by email.

If you have any questions or concerns at this point, please do not hesitate to call.

Very truly yours,

s/E. Raymond Moore, III

E. Raymond Moore, III

ERMIII/hws

Attachment

cc: All Counsel of Record (*sent via email*)