

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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 NATIONAL RETAIL
FEDERATION'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 (“Department”) respectfully submits this combined return and memorandum in opposition to the National Retail Federation’s (“NRF”) Motion for Leave to File an *Amicus Curiae* Brief (the “Motion”) filed on January 29, 2021. For the reasons discussed below, NRF 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. Moreover, a review of the brief conditionally submitted (the “Brief”) demonstrates that NRF’s participation as an *amicus* in this case will not aid the Court’s inquiry in this matter. 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 NRF 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. Over seven months later, NRF 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

NRF 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. While NRF notes that it is “a trade association representing retailers located in and selling into South Carolina and subject to South Carolina’s taxing jurisdiction,” (Motion at 1), and while Amazon is indeed a retailer located in and selling into South Carolina for the purposes of the South Carolina Sales and Use Tax Act (the “Act”), *see* S.C. Code Ann. § 12-36-70, NRF’s only stated contention in this appeal is that it wishes

to address “the question of when a new and aggressively novel statutory interpretation can be applied by the Department of Revenue retroactively, reversing years of common practice and understanding,” (*id.*). However, that is not an issue present in this appeal because that is not what happened here.

Contrary to NRF’s contention, and as is evident from the parties’ filings and the ALC’s order, this case 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 the Act as it existed in the first quarter of 2016, which is when the Department’s audit of Amazon was initiated. The analysis undertaken by the ALC was specific to Amazon and its particular business model, and the application of the provisions of the Act to that business model. And, of course, Amazon’s position is fully represented in this appeal. Thus, while it is certainly true that cases have precedential value which can shape the law and potentially affect other, future litigants, the issue sought to be addressed by NRF in its brief is simply a non-issue for the purposes of this case. It is therefore difficult to imagine, and NRF has not met its burden of demonstrating to this Court, how it has a real and meaningful interest in the outcome of this case such as to justify its participation as an *amicus curiae*.

Indeed, the fact that NRF waited over three-and-a-half years after the contested case was instituted, well over a year after this appeal was filed, and over 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.

But there are other reasons to deny the Motion. A review of the proposed Brief itself demonstrates that it will not be helpful to the Court. The entire Brief is premised upon the notion that the Department, by enforcing the 2016 provisions of the Act with respect to the taxpayer in

this case, retroactively applied a new and extralegal interpretation of the Act upon Amazon. Having very nearly assumed this conclusion (*see* Brief at 2–3), NRF’s Brief then marches the Court through a seven-page parade of horrors, describing all of the severe and unpleasant things that can happen when a retailer is unexpectedly forced to pay sales tax on transactions that have long been completed, and for which the retailer could not have known it was responsible to collect the tax.

The problem with NRF’s overwrought exposition—which the Brief itself describes as an “Odyssean predicament,” (Brief at 8)—is that neither the Department nor the ALC retroactively applied a novel interpretation of South Carolina law to Amazon in this case. Rather, both the Department and the ALC applied the plain language of the Act, which defines a “retailer” as “every person . . . selling or auctioning tangible personal property *whether owned by the person or others,*” § 12-36-70 (emphasis added), as well as the Supreme Court of South Carolina’s directives in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 101, 705 S.E.2d 28, 34 (2011), which apply directly to online merchants such as Amazon who are “engaged . . . in the business of” selling things on the internet within this state. Certainly, these authorities were in place and well-established long before the tax period at issue in this case, and so the assertion that Amazon was caught off guard by its tax obligations with respect to retail goods that it sold in South Carolina beginning on January 1, 2016 is wholly unsupported by the law, not to mention the record in this case.

Highlighting NRF’s misunderstanding of the issues in this case is the following statement, which appears on page 3 of its Brief:

To be clear – the Department decided that Appellant was not **just** subject to sales tax liability for sales beginning in 2016 when the Department first decided to create this interpretation; Appellant was subject to sales tax collection liability on sales that had already occurred.

(emphasis in original). To be even clearer, however, that is wrong. As has been explained now in multiple filings in this case, prior to January 1, 2016, Amazon was exempted from collecting and remitting sales and use tax to South Carolina under the provisions of the 2011 Distribution Facility Sales Tax Exemption. *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 and thereby make it liable to collect and remit sales and use tax to the state. (*See* Final Brief of Respondent at 46–47).

Thus, prior to January 2016, when Amazon began collecting and remitting sales tax to the Department on only approximately half of its online sales, the Department simply had no reason or basis to audit Amazon or seek to determine whether its retail selling activities made it responsible under the Act for collecting and remitting tax on all of its online sales. As soon as Amazon’s tax collection responsibilities did arise and this discrepancy was observed, however, the Department promptly investigated the matter and ultimately initiated an audit for the first quarter of 2016, which is now the tax period at issue in this case. Likewise, all of the operative evidence about Amazon’s business model and selling activities contained in the record below concerns Amazon’s operations as they existed in the first quarter of 2016. Nothing about that audit or this litigation, however, seeks to hold Amazon liable for any transactions which occurred prior to January 2016—the law in South Carolina is quite clear that Amazon was not responsible for collecting and remitting sales and use tax on transactions that took place during that period of time.

Respectfully, NRF’s misunderstanding of this fundamental issue in this case illustrates that its perspective will simply not assist the Court in this matter. While perspectives of *amici* can certainly be helpful to the Court at times, the Department submits that briefs of *amici* that

misconstrue basic facts in the record below, or that fail to identify highly relevant provisions of law which contradict positions that are confidently asserted in the brief, are not only not helpful to the Court, but also risk misusing the Court’s valuable time and attention by forcing it to sort out what is accurate and what is not. Unfortunately, NRF’s willingness to engage in this kind of careless briefing reveals its position as merely a friend of Amazon in this case¹ rather than a friend of the Court, and that is not the appropriate role of an *amicus*. 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. NRF’s Brief does not help answer this question; indeed, the inaccuracy of its assertions in the Brief highlights that NRF 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. NRF’s Motion should therefore be denied.

¹ Indeed, Amazon has many friends in this case given the number of *amicus* motions already filed.

CONCLUSION

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

Respectfully submitted,

s/Andrew R. Hand

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