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May 05 2021

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 THE MOTION FOR LEAVE TO
FILE AN *AMICI CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, INTERNET
ASSOCIATION, SOUTH CAROLINA CHAMBER OF COMMERCE, AND GREATER
COLUMBIA CHAMBER OF COMMERCE**

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 this return in opposition to the Motion for Leave to File an *Amici Curiae* Brief of the Chamber of Commerce of the United States of America, Business Roundtable, Internet Association, South Carolina Chamber of Commerce, and the Greater Columbia Chamber of Commerce¹ filed on April 26, 2021 (the “Motion”).

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 the Chambers 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. The Chambers filed the instant Motion seeking leave to file an *amici curiae* brief pursuant to Rule 213, SCACR on April 26, 2021.

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

¹ For convenience, the Department will refer to these *amici* collectively as the “Chambers.”

(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

The Chambers’ stated reason for seeking leave to file an *amici curiae* brief in this appeal is that their members have an interest in ensuring predictability in tax regulation and enforcement, and that the Department’s assessment in this case “would result in a shift in South Carolina’s tax law that is contrary to the State’s legislatively-established public policy.” (Mot. at 2). In making this argument, the Chambers echo many of the same, now very familiar, talking points that other Amazon-aligned *amici* have advanced in this case, and to which the Department has now repeatedly responded and refuted.

Rather than belabor these arguments, the Department will simply note once again that the concern offered by these *amici* is a hollow one because there was nothing unfair or unpredictable about the Department’s assessment of Amazon for sales and use tax in this case, nor was there

anything unfair or unpredictable about the ALC's thorough and well-reasoned order in this case. Both were based firmly on the plain language of the South Carolina Sales and Use Tax Act as it existed for the period in question, which both the Department and the ALC applied to the particularities of Amazon's business model to determine its liability for those taxes. This is evident from the legal arguments and evidence advanced by the parties in the case below and considered by the ALC, as well as the text of the ALC's order itself. Thus, the stated interest of these *amici* is a non-existent one, and the arguments offered in their brief will not assist the Court in this matter, rendering their brief undesirable for the purposes of Rule 213, SCACR. For this reason, the Department respectfully submits that the Chambers' Motion—which seeks only to present cumulative material to the Court—should be denied.

CONCLUSION

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

Respectfully submitted,

s/Andrew R. Hand

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Columbia, South Carolina
May 5, 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 the Motion for Leave to File an *Amici Curiae* Brief of the Chamber of Commerce of the United States of America, Business Roundtable, Internet Association, South Carolina Chamber of Commerce, and Greater Columbia Chamber of Commerce via electronic mail at the email addresses reflected 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
Andrew R. Hand, S.C. Bar No. 101633

May 5, 2021
Columbia, South Carolina

EXHIBIT 1

Elizabeth P. Kurtz

From: Andrew R. Hand
Sent: Wednesday, May 5, 2021 1:55 PM
To: Willoughby, Amanda; Matthews, Steve; bryson.geer@nelsonmullins.com; john.vonlehe@nelsonmullins.com; cphillips@sidley.com; ctrela@sidley.com; rhochman@sidley.com; nconrad@sidley.com
Cc: jason.luther@dor.sc.gov; John Hoefler; Tracey Green; Chad Johnston; John Roberts; lauren@vivalawsc.com; Elizabeth P. Kurtz
Subject: RE: Amazon Services, LLC v. SC Dept. of Revenue
Attachments: 2021-05-05 Respondent's Return in Opposition to Chambers Motion for Leave to File Amici Curiae Brief.pdf; 2021-05-05 POS SCDOR's Return in Opp to Chambers Motion for Leave to File an Amici Curiae Brief.pdf; 2021-05-05 Filing Ltr re SCDOR Return in Opp to Chambers Motion for Leave to File Amici Curiae Brief.pdf

Good afternoon,

Attached for service upon you 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 *Amici 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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From: Willoughby, Amanda <awilloughby@hsblawfirm.com>
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Subject: Amazon Services, LLC v. SC Dept. of Revenue

Appellate Case No. 2019-001706

Good afternoon. Attached for filing are the following:

- Motion for Leave to File Amici Curiae Brief
- Certificate of Compliance
- Proof of Service

Thank you.

Amanda Willoughby
Paralegal to Steve A. Matthews



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May 5, 2021

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RECEIVED

May 05 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(e) of the South Carolina Appellate Court Rules, Respondent South Carolina Department of Revenue respectfully submits its Return in Opposition to the Motion for Leave to File an *Amici Curiae* Brief of the Chamber of Commerce of the United States of America, Business Roundtable, Internet Association, South Carolina Chamber of Commerce, and Greater Columbia Chamber of Commerce. 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 and counsel for the *amici* via email as permitted by Order 2020-05-29-02, part (g)(3), and attached 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

May 5, 2021

Page 2 of 2

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