

No. 03-19-00246-CV

IN THE THIRD COURT OF APPEALS,
AUSTIN, TEXAS

**BEST BUY STORES INC., through its assignees Paul Denucci, Rockey
Piazza, and Linda Piazza,**
Appellant,

v.

**GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS OF THE
STATE OF TEXAS; AND KEN PAXTON, ATTORNEY GENERAL OF
THE STATE OF TEXAS,**
Appellees

COUNCIL ON STATE TAXATION'S JOINDER IN BRIEF OF *AMICI CURIAE*
TEXAS RETAILERS ASSOCIATION AND NATIONAL RETAIL
FEDERATION IN SUPPORT OF APPELLANT

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TO THE HONORABLE THIRD COURT OF APPEALS:

Now comes *Amicus Curiae* Council On State Taxation (“COST”), a nonprofit trade association consisting of over five hundred multistate corporations engaged in interstate and international business, and advises the Court that it hereby joins in the *Amici Curiae* Brief filed by the Texas Retailers Association and National Retail Federation in the above referenced matter.

INTEREST OF AMICUS CURIAE

COST is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST’s mission is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities, a mission it has pursued since its inception. Many of COST’s multijurisdictional members conduct substantial business in Texas and employ many Texas citizens.

Over the past fifty years, COST has advocated for fair and equitable taxation of multijurisdictional businesses by educating and informing its membership, state legislators, tax administrators, and others of state and local tax issues impacting businesses. COST also actively files *amicus curiae* briefs in cases before the United States Supreme Court and state courts, including Texas. Notably, COST filed *amicus* briefs addressing Texas tax issues in *Sirius XM Radio Inc. v. Hegar*, petition for review pending, Case No. 20-0462, from the Third Court of Appeals, Austin, Case

No. 03-18-00573-CV; *Lockheed Martin Corp. v. Hegar*, 601 S.W.3d 769 (2020); and *Graphic Packaging Corp. v. Hegar*, 2017 Tex. LEXIS 597 (2017).

**RETAILERS SHOULD NOT BE REQUIRED TO REFUND TAX ON
ASSIGNED SALES TAX REFUND CLAIMS**

While COST does not support class action lawsuits for transactional taxes,¹ COST does believe sound tax and administrative policy allows purchasers, the true parties of interest, to directly claim sales tax refunds from a state. COST supports the *Amici Curiae* brief from the Texas Retailers Association and National Retail Federation as it relates to that issue and urges this Court to withdraw its opinion in this case.

Retailers acting as intermediaries for the State are already burdened with collection and remittance obligations for collecting Texas' state and local sales taxes. Retailers should not have to bear the litigation costs on complex tax issues when their customers seek a sales tax refund. Texas tax law allows a retailer to shift this burden to its customers by assigning its right to bring a tax refund to a third party as provided in Texas Tax Code section 111.104(b). This Court's decision, if not withdrawn, eviscerates a retailer's ability to assign its right to a third party and renders Texas Tax Code section 111.104(b)'s assignment provision meaningless.

¹ COST's policy position on class action lawsuits for transactional taxes, "Class Action Suits Should Exclude State and Local Transaction Taxes," is available at: <https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/cost-class-action-policy-statement-final.pdf>.

That result unfairly burdens Texas retailers by requiring them to refund its customers prior to the retailers knowing if the Comptroller will approve a refund.

Since 2000, COST has published a scorecard addressing the states' administrative tax practices to promote good tax policies and highlight those states which have poor tax practices. COST in April 2018 published a "Best and Worst of State Sales Tax Systems" Scorecard, in which Texas received a "D+" grade.² One issue addressed in the Scorecard was whether states provide fair refund procedures for both sellers and purchasers and if each state provides a written process (*e.g.*, a law, regulation, and/or assignment provision) that allows a purchaser to obtain a refund directly from the state. If the decision in this case stands, this Court will effectively bar purchasers, with a properly assigned interest in a refund claim from a retailer, from directly obtaining a refund from the Comptroller.

COST is not alone in encouraging states to provide a transactional tax refund procedure applicable to purchasers. The American Bar Association, Section of Taxation, issued a resolution in February 2011 recommending state legislative bodies enact its "Model Transactional Tax Overpayment Act."³ The stated purpose

² COST's "Best and Worst of State Sales Tax Systems" Scorecard is available at: <https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-studies-articles-reports/the-best-and-worst-of-state-sales-tax-systems-august-17-2018-final.pdf>.

³ The American Bar Association, Section of Taxation, "Model Transactional Tax Overpayment Act," is available at: https://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Sales_Use_Tax/ABA%20Model%20Act.pdf.

of the Act is to “outline procedures a purchaser may use to seek a refund of an overpayment of those state and local taxes; limit the ability of a purchaser to assert claims against a seller arising from or in any way related to an overpayment; and establishes rights and obligations of purchasers, sellers, and the taxing jurisdiction with respect to such overpayments.” The ABA Model Act highlights the importance of Texas providing purchasers with the ability to seek refunds, without requiring Texas retailers to first refund the tax. Otherwise, an onerous burden would shift to the seller to collect the tax back from a purchaser if the Comptroller denies the refund claim.

The *Amici Curiae*'s brief also highlights cases from two other states that are instructive.⁴ First, Indiana's Tax Court rejected the notion by the Indiana Department of Revenue that its tax law required a retailer to refund the tax to its customer to have standing to seek a refund. *Fresenius USA Marketing, Inc. v. Indiana Department of State Revenue*, 970 N.E.2d 801 (Ind. Tax Ct. 2012). The requirement the retailer refund the tax to a customer was held not to bar standing to pursue a refund. A retailer does not have to refund the tax to a customer to seek a refund. Rather, a retailer will only receive a refund it is entitled to, so long as it returns the tax to its customer. *Id.* at 805. Similarly, in 2018, the Georgia Supreme Court rejected “the [Department's argument] that the phrase “secure a refund” should

⁴ See *Amici Curiae*'s brief p. 9-10.

actually be read to mean “apply for a refund.” *New Cingular Wireless PCS, LLC v. Department of Revenue*, 813 S.E.2d 388, 392 (Ga. 2018). Further, the Supreme Court of Georgia noted “the construction offered by the Department in this case would upend this orderly and logical refund process and is, in fact, unreasonable.” *Id.*

Similarly, interpreting Texas Tax Code section 111.104(f) to impose a (standing) requirement that a retailer refund the tax before the Comptroller approves or denies a refund claim makes no sense and is unreasonable for assigned refund claims.

Conclusion

COST joins in the *Amici Curiae* Brief filed by the Texas Retailers Association and National Retail Federation and respectfully requests this Court withdraw its opinion in this case. Such withdrawal will avoid unreasonable administrative burdens imposed on Texas retailers and their customers in obtaining sales tax refunds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Texas Rules of Appellate Procedure, the undersigned hereby certifies that, on the ___ day of June 2021, a true and correct copy of this Joinder was served via e-service and/or email to counsel for all parties to the case, as identified below:

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