

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF JUDGMENTS, ORDERS AND RULINGS UNDER REVIEW	ii
TABLE OF AUTHORITIES	iii
CONCISE PROCEDURAL HISTORY AND STATEMENT OF FACTS	1
INTEREST OF AMICUS CURIAE	2
PRELIMINARY STATEMENT	3
ARGUMENT	4
I. UNCERTAINTY IN THE ADMINISTRATION OF THE CBT IMPOSES HIGH COSTS NOT ONLY ON TAXPAYER BUSINESSES, BUT ON THEIR EMPLOYEES, INVESTORS, AND CONSUMERS	4
CONCLUSION	10

TABLE OF JUDGMENTS, ORDERS AND RULINGS UNDER REVIEW

Amicus Chamber of Commerce of the United States of America ("Chamber") incorporates by reference the table of judgments, orders and rulings under review listed by petitioner MCI Communication Services, Inc. in its July 16, 2018 petition for certification.

TABLE OF AUTHORITIES

CASES

Chapman v. Comm’r,
618 F.2d 856 (1st Cir. 1980) 5

F.M.C. Stores Co. v. Borough of Morris Plains,
100 N.J. 418 (1985) 4

General Building Products Corp. v. Director, Division of
Taxation,
15 N.J. Tax 213 (App. Div. 1995), aff’g, 14 N.J. Tax 232 (Tax
Ct. 1994) 3

General Trading Co. v. Director, Div. of Taxation,
83 N.J. 122 (1980) 4, 10

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8 N.J. Tax 338 (1986) 4

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Toyota Motor Credit Corp. v. Director, Division of Taxation,
30 N.J. Tax 321 (App. Div. 2017), aff’g, 28 N.J. Tax 96 (Tax
Ct. 2014) 3

United States v. Byrum,
408 U.S. 125 (1972) 5

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Univ. Press 1986) 8

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Methodology,
66 Nat’l Tax J. 239 (2013) 9

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Tax Rates on Business Investment,
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of a Corporate Profits Tax,
66 Bull. of Econ. Research 1 (2014) 9

Jennifer Gravelle, Corporate Tax Incidence: Review of General
Equilibrium Estimates and Analysis,
66 Nat’l Tax J. 185 (2013) 9

Kenneth Klassen et al., <u>Geographic Income Shifting by Multinational Corporations in Response to Tax Rate Changes</u> , 31 J. Acct. Res. 141 (1993 supp.)	9
Leigh Osofsky, <u>The Case Against Strategic Tax Law Uncertainty</u> , 64 Tax L. Rev. 489, 499-501 (2011)	6
Li Liu & Rosanne Altshuler, <u>Measuring the Burden of the Corporate Income Tax Under Imperfect Competition</u> , 66 Nat'l Tax J. 215 (2013)	8
Marsha Blumenthal & Charles Christian, <u>Tax Preparers</u> , in <u>The Crisis in Tax Administration</u> 201 (Henry J. Aaron & Joel Slemrod eds., 2004)	6
Press Release, Dep't of the Treasury, <u>Treasury Secretary Paul O'Neill Statement on Treasury's Plan to Combat Abusive Tax Avoidance Transactions</u> (Mar. 20, 2002)	8
Robert Carroll, <u>Special Report No. 169: The Corporate Income Tax and Workers' Wages: New Evidence from the 50 States</u> , Tax Foundation Special Report 1-5 (Aug. 2009)	8
Seth H. Giertz & Jacob Feldman, Mercatus Ctr., <u>The Economic Costs of Tax Policy Uncertainty: Implications for Fundamental Tax Reform</u> 15 (2012)	6
Steven J. Davis et al., Am. Enter. Inst., <u>Business Class: Policy Uncertainty Is Choking Recovery</u> (Oct. 6, 2011)	6

CONCISE PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Chamber incorporates by reference the procedural history and factual background listed by petitioner MCI Communication Services, Inc. in its July 16, 2018 petition for certification.

INTEREST OF AMICUS CURIAE

Amicus curiae Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs on issues of concern to its members and the broader business community, including cases in state courts.

Many of the Chamber's members and affiliates are New Jersey taxpayers. The Chamber's members and affiliates thus are particularly concerned with the clear, predictable, and fair application of New Jersey's Corporation Business Tax ("CBT"), which can have a significant impact on small and large businesses that operate across the state. As such, and consistent with its goals, the Chamber respectfully requests the Court grant its motion to appear as amicus curiae here in recognition of the significance of the issues in this case to its membership.

PRELIMINARY STATEMENT

The Chamber agrees with petitioner MCI Communications Services, Inc. ("Petitioner") that the decision below warrants review by this Court. As Petitioner rightly explains, the Appellate Division's decision conflicts with New Jersey's fundamental principle of imposing its Corporation Business Tax ("CBT") solely on a separate-entity basis, and that decision misapplies applicable precedent, including General Building Products Corp. v. Director, Division of Taxation, 15 N.J. Tax 213 (App. Div. 1995), aff'g, 14 N.J. Tax 232 (Tax Ct. 1994), and Toyota Motor Credit Corp. v. Director, Division of Taxation, 30 N.J. Tax 321 (App. Div. 2017), aff'g, 28 N.J. Tax 96 (Tax Ct. 2014). See Petition for Certification on Behalf of Plaintiff/Petitioner MCI Communications Services, Inc. ("Petition") at 11-19.

The Chamber agrees that the decision below "upend[s] New Jersey's separate reporting requirements, sowing uncertainty among the Division of Taxation (the 'Division') and corporate taxpayers in the calculation and reporting of CBT" and creating "additional burdens for untold New Jersey businesses in computing and reporting CBT." Petition at 2, 10. Starting in 2019, New Jersey will adopt a combined reporting scheme just like the federal scheme. That prospective decision provides clarity and certainty for businesses. But the retroactive decision of the Division here upends taxpayers settled and reasonable expectations, and

undermines predictability and clarity in the application of New Jersey's tax law for this and all prior tax years.

The Chamber writes separately to emphasize the real costs to the taxpayer and to the economy that this uncertainty creates, and why it necessitates this Court's review. Taxpayers should be able to calculate their tax liabilities with predictability and certainty. Uncertainty, on the other hand, stunts economic growth, discouraging business expansion and encouraging businesses and investors to take their money to places where tax laws are more predictable. The costs of uncertainty are passed on to workers through lower wages and fewer jobs; to investors through lower rates of return on capital; and to consumers through higher prices.

ARGUMENT

I. UNCERTAINTY IN THE ADMINISTRATION OF THE CBT IMPOSES HIGH COSTS NOT ONLY ON TAXPAYER BUSINESSES, BUT ON THEIR EMPLOYEES, INVESTORS, AND CONSUMERS.

As this Court has recognized, "the practicalities of taxation require certainty and predictability." F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 430 (1985); see also General Trading Co. v. Director, Div. of Taxation, 83 N.J. 122, 138 (1980) (recognizing "the public interest in tax certainty"). Indeed, it is widely recognized that "the tax law . . . can give no quarter to uncertainty." Thor Power Tool Co. v. Commissioner, 439 U.S. 522, 541-43 (1979); see also L.B.D. Const., Inc. v. Dir., Div. of Taxation, 8 N.J. Tax 338, 351 (1986) (highlighting "the

necessity of predictability and certainty in the administration of taxing statutes").

The need for certainty derives from the importance to taxpayers of planning their future conduct: "[M]uch tax planning must proceed on the basis of settled rules. Avoidance of risk and uncertainty are often the keys to a successful transaction." Chapman v. Comm'r, 618 F.2d 856, 874 (1st Cir. 1980). Thus, the harm flowing from uncertain application of the tax laws is taxpayers' inability to plan for the future. "When courts readily undertake [the] tas[k]" of "reexamin[ing]" tax law principles, taxpayers lose their ability to "rely with assurance on what appear to be established rules." United States v. Byrum, 408 U.S. 125, 135 (1972).

Unfortunately, as Petitioner explains, the decision below "sows needless uncertainty in both how the Division [of Taxation] administers the CBT regime and how taxpayers seek to comply with an ever-moving target." Petition at 10. As economists, researchers, and other commentators have concluded, this uncertainty in the administration and enforcement of the tax laws impose high costs on taxpayers, and those high costs are borne not only by taxpayer businesses, but by their employees, investors, and consumers.

First, uncertainty in the tax law imposes substantial costs on businesses and consumers with no resulting benefits. See, e.g.,

Leigh Osofsky, The Case Against Strategic Tax Law Uncertainty, 64 Tax L. Rev. 489, 499-501 (2011); see also Seth H. Giertz & Jacob Feldman, Mercatus Ctr., The Economic Costs of Tax Policy Uncertainty: Implications for Fundamental Tax Reform 15 (2012) (“[T]he fact that policy uncertainty adversely affects the economy is well established.”), available at https://www.mercatus.org/system/files/TaxUncertainty_Gietz_v1-0_1.pdf. Tax uncertainty is at the root of several types of harm, including overpayment of taxes and stunting of economic growth.

Overpayment. When tax law is uncertain, taxpayers tend to over-report their tax burden to avoid an audit or the expense of suing for a refund. See, e.g., Marsha Blumenthal & Charles Christian, Tax Preparers, in The Crisis in Tax Administration 201, 205 (Henry J. Aaron & Joel Slemrod eds., 2004). This uncertainty results in a transfer of assets away from businesses that is not required by tax law, and which would not occur if the governing rules were sufficiently clear.

Forgoing Business Expansion. “When businesses are uncertain about taxes, ... they adopt a cautious stance” because “it is costly to make a ... mistake.” Steven J. Davis et al., Am. Enter. Inst., Business Class: Policy Uncertainty Is Choking Recovery (Oct. 6, 2011), available at <http://www.aei.org/publication/business-class-policy-uncertainty-is-choking-recovery/>. Because “investors usually look at the longer

term tax structure in making major investment decisions," increasing uncertainty in the tax laws causes businesses to withhold capital from investments that could benefit both them and the economy. Duanjie Chen & Jack Mintz, New Estimates of Effective Corporate Tax Rates on Business Investment, Cato Institute, Tax & Budget Bulletin (Feb. 2011), available at https://object.cato.org/sites/cato.org/files/pubs/pdf/tbb_64.pdf. In many cases, it may be impossible to determine in advance whether a particular investment is worthwhile if its ultimate tax consequences are unpredictable.

Compliance Costs. Uncertainty in tax law also increases the costs of tax planning and compliance. Faced with unpredictable standards for determining whether the tax laws and regulations will be applied as written, taxpayers must pay considerable sums for advice from accountants and attorneys, or else bear the economic cost of shying away from bona fide opportunities that are both potentially profitable and tax efficient, such as the transaction at issue in this case. These compliance and administrative costs are deadweight losses to the economy. As the U.S. Treasury Department has recognized: "The cost of those lawyers and accountants adds to the price of every product, but they do nothing to make our factories more efficient, our computers faster or our cars more durable." Press Release, Dep't of the Treasury, Treasury Secretary Paul O'Neill Statement on Treasury's Plan to

Combat Abusive Tax Avoidance Transactions (Mar. 20, 2002),
available at <https://www.treasury.gov/press-center/press-releases/Pages/po2019.aspx>.

Second, these costs of uncertainty—overpayment, compliance expenses, and forgoing business expansion—are not borne by businesses alone. Instead, these costs are passed on to the economy as a whole, including workers, investors, and consumers.

Labor. There is extensive evidence that increased tax burdens on employers affect the wages of workers, particularly in a globalized economy. See Li Liu & Rosanne Altshuler, Measuring the Burden of the Corporate Income Tax Under Imperfect Competition, 66 Nat'l Tax J. 215, 215, 233 (2013) (estimating that a \$1.00 increase in corporate tax revenue decreases wages by approximately \$0.60); see also David F. Bradford, Untangling the Income Tax 133-39 (1986); Robert Carroll, Special Report No. 169: The Corporate Income Tax and Workers' Wages: New Evidence from the 50 States, Tax Foundation Special Report 1-5 (Aug. 2009), available at <https://files.taxfoundation.org/legacy/docs/sr169.pdf> (showing that states with higher corporate tax rates had lower worker wages).

Investors. When businesses over-report their tax burden, those additional tax costs are also borne in part by investors in the form of diminished return on capital. See Julie Anne Cronin et al., Distributing the Corporate Income Tax: Revised U.S. Treasury

Methodology, 66 Nat'l Tax J. 239, 260 (2013); Jennifer Gravelle, Corporate Tax Incidence: Review of General Equilibrium Estimates and Analysis, 66 Nat'l Tax J. 185, 211 (2013). A lower return on capital, in turn, results in less investment and a drag on economic growth. It also encourages investors to take their capital elsewhere. See, e.g., Kenneth Klassen et al., Geographic Income Shifting by Multinational Corporations in Response to Tax Rate Changes, 31 J. Acct. Res. 141, 141-43 (1993 supp.); Gravelle, supra, at 211.

Consumers. In some instances, "corporate tax rate changes have been passed on ... to consumers in the form of higher prices." See, e.g., J. Richard Aronson et al., The Potential for Short-Run Shifting of a Corporate Profits Tax, 66 Bull. of Econ. Research 1, 2 (2014). As a result, uncertainty in tax law likely causes consumers to pay higher prices for products—with no resulting increase in quality. In contrast, because certain and predictable application of the tax laws lowers costs to businesses, it also likely results in lower costs to consumers.

* * *

As courts and commentators have recognized, uncertain and unpredictable application of tax laws harms taxpayers, and ultimately the economy, by increasing their costs in a number of respects without any corresponding benefits. To minimize these dead-weight losses, New Jersey courts should strive to apply the

CBT in ways that enable certain, predictable tax planning, consistent with "the public interest in tax certainty." General Trading Co., 83 N.J. at 138.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the Court (i) grant its motion for leave to appear as amicus curiae, (ii) grant the petition for certification, and (iii) reverse the decisions of the Tax Court and the Appellate Division.

Respectfully submitted,


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