14-765-cv

United States Court of Appeals for the Second Circuit

American International Group, Inc.,

Plaintiff-Appellant,

v.

United States of America,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York
No. 09 Civ. 1871 (LLS)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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RULE 26.1 DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is not a publicly traded corporation. It has no parent corporation, and there is no public corporation that owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.[1]

The Chamber's members rely on the predictable and certain application of the tax laws in order to plan their business operations in both the short and long terms. In this case, the district court adopted a broad interpretation of the judge-made "economic substance" doctrine to override the foreign tax credit provisions of the Internal Revenue Code, and (in conflict with the Fifth and Eighth Circuits) improperly recharacterized foreign tax benefits to conclude that the challenged transactions had no economic substance. These rulings create uncertainty and con-

[1] All parties consent to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and this Court's Rule 29.1, the Chamber certifies that: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person, other than the Chamber, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

fusion in companies' ordinary business planning. The Chamber submits this brief to illustrate the problems that the district court's approach would create for businesses.

SUMMARY OF ARGUMENT

I. Every participant in the Nation's economy benefits from the predictable and certain application of the Internal Revenue Code. When taxpayers cannot assess their tax liability in advance, they may overreport their tax burden or simply shy away from uncertain transactions altogether. Those costs are passed on to nearly every actor in the economy: to workers through lower wages and fewer jobs; to investors through lower rates of return on capital; and to consumers through higher prices. Uncertainty also stunts economic growth, discourages business expansion, and encourages investors to take their money overseas, where tax laws might be more predictable.

The "economic substance" doctrine is a judge-made rule that permits courts, in certain circumstances, to deprive a taxpayer of tax benefits to which it would otherwise be entitled under the plain terms of the Internal Revenue Code. As a non-statutory doctrine, it is inherently uncertain and unpredictable. And as a doctrine applied *post hoc*, it undermines taxpayers' settled expectations about their tax liability potentially years after the relevant transactions occurred. Thus, as precedents of the Supreme Court and this Court confirm, the doctrine should be applied

narrowly, and only when clearly warranted. Yet the district court's decision below incorrectly adopted a broad view of the economic substance doctrine that greatly expands its proper scope.

It is undisputed that American International Group, Inc. ("AIG") executed several transactions that were effectively large loans with foreign lenders at favorable interest rates, the proceeds of which were then invested at favorable rates as part of AIG's spread banking business, resulting in a significant profit. *See* SPA4-5, 11. It is also undisputed that AIG paid taxes to foreign governments as part of these transactions. And it is undisputed that AIG complied with the extensive statutory and regulatory requirements entitling it to a tax credit against its foreign taxes. Finally, it is undisputed that Congress enacted the foreign tax credit to protect taxpayers from the evils of double taxation. Yet instead of ending the inquiry there and granting the tax credit, the district court invoked the economic substance doctrine, which imposed on AIG the additional burden of proving that the transactions at issue comported with congressional intent in some other, ill-defined respect.

It was erroneous to impose that additional burden on AIG. To ensure the predictable and certain application of the tax laws, a taxpayer's payment of foreign taxes and compliance with the foreign tax credit statute and regulations should conclusively establish that granting the credit would comport with the congressional purpose of avoiding double taxation.

II. This Court should decline the district court's invitation to create a circuit conflict. The outcome below relies on the district court's decision not to follow holdings of the Fifth and Eighth Circuits, both of which preclude the Commissioner from invoking the economic substance doctrine to manipulate the application of the foreign tax credit. Only by using a creative accounting method proffered by the Commissioner's expert was the district court able to conclude that AIG's challenged transactions lacked economic substance. The decisions of the Fifth and Eighth Circuits were correct, and this Court should follow those decisions to avoid creating nationwide uncertainty in this important area of tax law.

ARGUMENT

I. The Economic Substance Doctrine Should Be Applied Narrowly, Especially Where Congress Has Expressed A Clear Intent To Avoid Double Taxation.

The decision below rests entirely on the district court's application of the judge-made "economic substance" doctrine, under which, even if a taxpayer complies with every statutory and regulatory requirement of the tax laws, a court may later deprive it of benefits to which it would otherwise be entitled. SPA2. If applied broadly, the economic substance doctrine would necessarily create great uncertainty for taxpayers. Accordingly, the Chamber writes to emphasize the high costs of tax uncertainty, which have been widely recognized by both courts and commentators.

A. Companies Rely On Predictability In Application Of The Tax Laws, Whereas Unpredictability Imposes Costs On All Participants In The Nation's Economy.

The Supreme Court and the courts of appeals have long recognized the general need for taxpayers to have certainty and predictability in the application of tax laws. "[I]n tax law," the Supreme Court has emphasized, "certainty is desirable." *United States v. Generes*, 405 U.S. 93, 105 (1972). Indeed, the Supreme Court has stated (and this Court has reiterated) that "tax law . . . can give no quarter to uncertainty." *Thor Power Tool Co. v. Comm'r*, 439 U.S. 522, 543 (1979), *quoted in RCA Corp. v. United States*, 664 F.2d 881, 888 (2d Cir. 1981). Similarly, this Court has explained that "certainty" is one of the "important goals of the federal tax scheme." *Estate of Borax v. Comm'r*, 349 F.2d 666, 670 (2d Cir. 1965).

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). As economists, researchers, and other commentators have concluded, uncertainties in

the tax laws impose high costs on taxpayers, and those high costs are shared by all participants in the Nation's economy.

First, uncertainty in 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."). 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 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). 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*, 64 Tax & Budget Bull. 1, 2 (2011). 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 transactions at issue in this case. These compliance and administrative costs are dead-weight losses to the economy. As the Treasury Department itself has recognized, "[t]he 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).

Second, the relevant research makes clear that the costs of uncertainty—overpayment, forgoing business expansion, and compliance expenses—are not borne by businesses alone. Instead, these costs harm every actor in the economy, including workers, investors, and consumers.

Labor. The costs of uncertainty can land on various participants in the economy. Although there are no conclusive economic studies addressing which participants bear the greatest burdens, there is a broad consensus that globalization increases the share borne by workers. *See* Li Liu & Rosanne Altshuler, *Measuring the Burden of the Corporate Income Tax Under Imperfect Competition*, 66 Nat'l Tax J. 215, 233 (2013). Moreover, it is clear that increasing costs to businesses from tax uncertainty causes depressed wages for workers. *See*, *e.g.*, David F. Bradford, *Untangling the Income Tax* 133-39 (1986); *see also* Robert Carroll, Tax Found., *Special Report No. 169: The Corporate Income Tax and Workers' Wages: New Evidence from the 50 States* 1-5 (2009) (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 overseas. *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. Large multinational companies, in particular, are likely to shift investment away from the United States when domestic tax burdens increase or become less predictable. *See* Osofsky, *supra*, at 494. In this respect, uncertainty in the tax laws' application inhibits capital investment in the United States. *See* R. Glenn Hubbard *et al.*, *Have Tax Reforms Affected Investment?*, *in* 9 Tax Policy and the Economy 131, 145-46 (James M. Poterba ed., 1995) (concluding that "prior knowledge of changes in tax parameters can improve forecasts of asset investment").

Consumers. In some instances, "corporate tax rate changes have been passed on . . . to consumers in the form of higher prices." J. Richard Aronson *et al.*, *The Potential for Short-Run Shifting of a Corporate Profits Tax*, 66 Bull. of Econ. Res. 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, courts should strive to apply the Internal Revenue Code and its implementing regulations in ways that enable certain, predictable tax planning.

B. The Supreme Court And This Court Have Invoked The Economic Substance Doctrine To Override The Internal Revenue Code Only In A Narrow Category Of Cases.

The sources discussed above illustrate the wisdom, in general, of applying the tax laws in a certain and predictable manner. As to the economic substance doctrine specifically—a doctrine that inherently overrides written law in favor of a *post hoc* judicial redetermination of tax consequences—the Supreme Court and this Court have confirmed that it should apply only to a narrow category of cases.[2]

The Supreme Court has held that the economic substance doctrine should be invoked only when the taxpayer entered into a transaction in which there was "*nothing* of substance to be realized" "beyond a tax deduction." *Knetsch v. United States*, 364 U.S. 361, 366 (1960) (emphasis added). And while courts have taken

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[2] In 2010, Congress codified certain aspects of the economic substance doctrine, with prospective application only. The statute did not modify existing judge-made law regarding "whether the economic substance doctrine is relevant to a transaction." 26 U.S.C. § 7701(o)(5)(C).

different approaches regarding the details of the economic substance inquiry—in particular, whether the inquiry is objective, subjective, or some combination of the two—it is clear that, under any formulation, the inquiry must be conducted in *absolute* terms: For a transaction to lack economic substance, there must be "*no* reasonable possibility" of profiting from it; the taxpayer must have "*no* business purpose" for engaging in it; the transaction "*can not* with reason be said to have purpose, substance, or utility apart from [its] anticipated tax consequences"; or the transaction must not have "*any* practicable economic effects other than the creation of income tax losses." *United States v. Coplan*, 703 F.3d 46, 90-92 (2d Cir. 2012) (emphases added) (quoting *Lee v. Comm'r*, 155 F.3d 584, 586 (2d Cir. 1998), and *Jacobson v. Comm'r*, 915 F.2d 832, 837 (2d Cir. 1990)), *cert. denied*, 134 S. Ct. 71 (2013); *see also* SPA19 (a transaction fails the economic substance test if it was executed for "*only* tax purposes" (emphasis added)). The categorical formulation of these inquiries confirms that the economic substance doctrine is not meant to be a broad exception to the Internal Revenue Code; instead, it displaces ordinary application of the tax laws only where the purpose of the taxpayer's activity was exclusively to obtain otherwise-unavailable tax benefits.

Similarly, this Court long ago explained that courts should take a "cautious approach" to applying the economic substance doctrine. *Nassau Lens Co. v. Comm'r*, 308 F.2d 39, 45-46 (2d Cir. 1962). This "cautious approach" is necessary

because Congress never intended for the "entire [Internal Revenue] Code," *sub silentio*, "to deprive the taxpayer in each case of freedom to choose between legal forms similar in a broad economic sense but having disparate tax consequences." *Id.* at 44-45. In other words, taxpayers are generally entitled to make business plans in reliance on the tax laws as written, without being second-guessed because of their desire to structure the transaction in a way that minimizes their tax obligations. *See Gregory v. Helvering*, 293 U.S. 465, 469 (1935) ("The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."). A broad interpretation of the economic substance doctrine, in contrast, would "empower the Commissioner" "to make *ad hoc* attacks on a whole variety of transactions" that are within the letter of the law. *Nassau Lens Co.*, 308 F.3d at 46. This Court's precedents thus confirm that courts should take a cautious approach to the economic substance doctrine, interpreting the doctrine narrowly to enable taxpayers to plan their conduct in reliance on the tax laws as written.

C. The District Court's Broad Application Of The Economic Substance Doctrine Is Particularly Inappropriate As Applied To The Foreign Tax Credit, Through Which Congress Expressed A Clear Intention To Avoid Double Taxation Of Foreign Income.

Rather than applying the economic substance doctrine narrowly, as dictated by the precedents discussed above, the district court applied it broadly, engaging in an unfocused and erroneous inquiry into congressional purpose.

The tax benefit at issue in this case is a foreign tax credit claimed by AIG. SPA1. The only effect of the claimed credit was to prevent AIG from being taxed twice on income earned by certain subsidiaries—once by a foreign government, and once by the United States. *See* AIG Br. 12. It is undisputed that AIG complied with all statutory and regulatory requirements to receive the tax credit, including actually paying taxes on the relevant income in the foreign countries. *See id.* at 5. Notwithstanding all of this, the district court embarked on an inquiry to determine if granting the tax credit would truly fit within Congress's presumed intent. SPA6-10.

The district court correctly recognized that Congress's intent in adopting the foreign tax credit was to prevent the "very severe burden" of double taxation. SPA9 (citation omitted). Indeed, the Supreme Court has stated that "the primary design of the [foreign tax credit] was to mitigate the evil of double taxation." *Burnet v. Chi. Portrait Co.*, 285 U.S. 1, 7 (1932). The foreign tax credit "in effect treats the taxes imposed by the foreign country as if they were imposed by the United States." H.R. Rep. No. 83-1337, at 76 (1954). And thus the Supreme Court and this Court have repeatedly confirmed that Congress intended through the foreign tax credit to avoid double taxation. *See, e.g.*, *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132, 135 (1989) ("[T]he credit protects domestic corporations that operate through foreign subsidiaries from double taxation of the

same income."); *United States v. Campbell*, 351 F.2d 336, 339 (2d Cir. 1965) ("The purpose of the foreign tax credit is to prevent double taxation of income which United States citizens earn abroad." (internal quotation marks omitted)); *N.Y. & Honduras Rosario Mining Co. v. Comm'r*, 168 F.2d 745, 747 (2d Cir. 1948) ("[T]he purpose of the [foreign tax credit] was to 'mitigate the evil of double taxation' of domestic corporations on income derived from foreign sources." (quoting *Burnet*, 285 U.S. at 7)).

Yet instead of ending the inquiry into Congress's intent at that point, the district court pressed on, seeking to divine additional congressional purposes behind the foreign tax credit statute. For example, the court opined that "Congress intended the credit to facilitate *purposive* business transactions." SPA8 (emphasis added). The court also asserted that, through the foreign tax credit, Congress did not intend to create a "subsidy" but instead meant that it intended to "restor[e] the neutrality of the tax system." *Ibid.* Finally, the court cited *Goldstein v. Commissioner*, 364 F.2d 734, 742 (2d Cir. 1966)—a case that did not involve foreign tax credits—to conclude that courts should not grant foreign tax credits for transactions "that would not [have been] engaged in but for the system of taxes imposed by Congress." SPA10. Apparently influenced by these asserted congressional purposes, the court concluded that AIG was obligated to prove that its transactions were,

"apart from the tax benefits, . . . intended by Congress." *Ibid.* (citation and internal quotation marks omitted).

This was erroneous: Congress's intent to avoid double taxation on foreign income was already fully apparent, in general and as to specific details. The general principle—that Congress created the foreign tax credit to prevent double taxation—is undisputed. *Supra* at 13-14. And the specific conditions under which Congress intended to carry out that principle are fully set forth in the Internal Revenue Code and implementing regulations through a "byzantine structure of staggering complexity." AIG Br. 25 (internal quotation marks omitted). Congress specified its intent through this regime; no further speculation into congressional intent is necessary. *See id.* at 25, 28.

Thus, even assuming that the economic substance doctrine may apply to some types of tax benefits, the district court's searching inquiry into congressional intent was inappropriate and unnecessary with regard to the foreign tax credits at issue here. As discussed above, taxpayers rely on certainty and predictability in the tax laws in order to plan their future conduct. A taxpayer who (a) knows that the purpose of the foreign tax credit is to eliminate double taxation, (b) actually pays a tax on foreign income to a foreign government, and (c) complies with the extensive statutory and regulatory framework governing foreign tax credits, should be permitted to rely on receiving those tax credits. Taxpayers considering foreign

transactions should not be required to second- or third-guess whether Congress had some other hidden intent that would enable a court to invalidate the credits *post hoc*. Nor is there any merit to the government suggestion that Congress's secret intent was actually to impose double taxation on some set of taxpayers who have fully complied with the foreign tax credit statute and regulations.

* * *

The district court's approach creates great uncertainty for all U.S. taxpayers considering transactions in foreign jurisdictions, imposing dead-weight losses on the economy as a whole, and this Court should reject it. *See supra* Part I.A.[3]

II. Like Other Courts Of Appeals, This Court Should Prevent The Commissioner From Recharacterizing Foreign Tax Consequences In An Economic Substance Inquiry.

Apart from the district court's erroneously broad application of the economic substance doctrine discussed above, this Court should reverse the decision below for the independent reason that it creates a wasteful and unnecessary division of authority among the courts of appeals.

[3] The district court's opinion, if permitted to stand, also creates a confusing and unworkable Catch-22 for taxpayers. The court apparently believed that, under the economic substance doctrine, a taxpayer is only entitled to a tax benefit if it would have executed the same transaction even "but for" the benefit. SPA10. The necessary implication of this appears to be that no one who relies on a benefit is allowed to receive it; or else that a taxpayer can only receive benefits with respect to transactions that are so profitable that they would remain profitable even if taxed twice. *See* AIG Br. 30.

In its economic substance analysis, the core question that the district court sought to answer was whether AIG's transactions were "expected to result in a significant pre-tax profit." SPA11. In determining whether the transactions were expected to be profitable, however, the district court deferred to the Commissioner's expert's accounting method that "re-characterized" and "adjust[ed]" the actual terms of the transactions. A3770; *see also* SPA14-15. Specifically, although in reality AIG paid its borrowing costs to the foreign lenders through tax-free distributions by AIG's subsidiary portfolio companies, the Commissioner's expert and the court below conducted the economic substance profitability analysis assuming those distributions were *not* tax-free. *See* SPA15-16 (AIG failed the economic substance test because the loans would not have been profitable "if the [portfolio company]'s distribution had been taxable"); SPA 21-22 ("the effects of that foreign tax benefit are removed" in the economic substance test); A3770 (expert declaration that "the impact of baked-in tax benefits" must be "re-characterized" and "adjust[ed]"). In the expert's hypothetical world, AIG's effective cost of borrowing would have been higher, and in that case the transactions would have "nett[ed] no gain." SPA15, 22.

As AIG has explained, recharacterizing and adjusting real cashflows into hypothetical, "grossed-up" cashflows conflicts with logic, case law, and established practice. AIG Br. 42; *see id.* at 39-40, 42-44, 47-51. *First*, permitting such

post hoc recharacterization thwarts business planning, in which taxpayers use real, not hypothetical, figures. *Id.* at 39-40, 42-43. *Second*, a correct "pre-tax" profitability analysis only removes the *challenged* benefit—it does not require "imagin[ing] a world without taxes" or tax laws altogether. *Id.* at 43 (internal quotation marks omitted). *Third*, the district court's approach will disrupt virtually all business transactions involving foreign countries, because a taxpayer considering a transaction will have to evaluate it under both *actual* foreign tax law *and* a hypothetical world in which foreign tax laws are identical to U.S. tax laws. *See id.* at 47-51.

The Chamber writes separately to emphasize that the district court's holding also creates an inadvisable circuit conflict on this issue, by breaking with the Fifth and Eighth Circuits. As the district court acknowledged in its order certifying this interlocutory appeal, those courts "have adopted the view that under the economic substance test, the foreign tax benefit given to a foreign entity and shared with a U.S. taxpayer should be included in the U.S. taxpayer's profit," which is directly contrary to the approach adopted by the Commissioner's expert and the court below. SPA22 (citing *Compaq Computer Corp. v. Comm'r*, 277 F.3d 778, 785 (5th Cir. 2001), and *IES Indus., Inc. v. United States*, 253 F.3d 350 (8th Cir. 2001)).

As discussed in Part I.A, *supra*, there are high economic costs to uncertainty in the tax laws. If this Court were to accept the district court's approach and reject

the approach taken by the Fifth and Eighth Circuits, the result would be immediate and widespread uncertainty regarding the foreign tax credit and the economic substance doctrine. *See* SPA22-23 (citing critical commentaries). Among the three circuits to address the issue, application of the doctrine would turn solely on the geographic region in which the doctrine was applied. And the Commissioner would undoubtedly be emboldened to press the same analytical approach endorsed by the district court in every circuit that has not yet resolved the issue. This would create uncertainty, imposing dead-weight economic losses nationwide. *See supra* Part I.A. Such uncertainty could persist until and unless resolved by the Supreme Court.

Given the lack of support for the district court's approach, the stable regime that has existed under *Compaq* and *IES* for 13 years, and the costs of uncertainty in this area, this Court should avoid creating an unnecessary conflict among the courts of appeals. The district court should be reversed on this independent ground.

CONCLUSION

The district court's order should be reversed.

Respectfully submitted,

July 7, 2014

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because it contains 4,491 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

July 7, 2014

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the foregoing brief using this Court's Appellate CM/ECF system, which effected service on all parties. I will cause six paper copies to be sent to the Court.

July 7, 2014

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