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## United States Court of Appeals for the Second Circuit

The Bank of New York Mellon Corporation,
as Successor in Interest to The Bank of New York Company, Inc.,

*Petitioner-Appellant/Cross-Appellee*,

v.

Commissioner of Internal Revenue,

*Respondent-Appellee/Cross-Appellant*.

On Appeal from the United States Tax Court, No. 26683-09

**BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLANT/CROSS-APPELLEE**

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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 Tax 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 reclassified foreign taxes as non-tax "costs." These rulings create uncertainty and confusion in companies' ordinary business planning. The Chamber

[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.

submits this brief to illustrate the problems that the Tax 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 Tax Court's decision below

incorrectly adopted a "flexible" interpretation of the economic substance doctrine that greatly expands the proper scope of that doctrine. The Tax Court lifted the term "flexible" out of context from one of this Court's opinions, and used that misunderstanding as a basis for applying an infinitely malleable and indeterminate version of the economic substance doctrine.

Under this "flexible" approach to the doctrine, the Tax Court ignored the substantial economic benefits that The Bank of New York Mellon Corporation ("BNY") enjoyed from the "STARS" transaction in question—specifically, a large loan at a favorable interest rate that BNY used profitably to finance its banking operations—because those benefits depended on application of a foreign tax credit to avoid double taxation. The Tax Court's decision to sever these benefits from the transaction as a whole, and to claim that the transaction lacked economic substance because it was profitable only because of the tax credit, was unfounded. This application of the economic substance doctrine could not have been predicted by BNY when planning this transaction. Nor did the Tax Court articulate any predictable rule by which taxpayers' future transactions might be subject to "bifurcation" in this manner.

The Tax Court's broad treatment of the economic substance doctrine is particularly inappropriate in the specific context of the tax benefit at issue here—a foreign tax credit. Congress has expressed a clear intent to protect companies

earning foreign income from double taxation on that income. Unlike other tax benefits to which the economic substance doctrine might apply, the foreign tax credit cannot be used as a portable loss that can be used to reduce unrelated tax obligations. Instead, where it applies, the foreign tax credit acts simply as a dollar-for-dollar reduction of taxes that have already been paid to a foreign government. If it applies "flexibl[y]" at all, the economic substance doctrine should be interpreted narrowly in these circumstances given Congress's clearly expressed intent to avoid double taxation.

**II.** This Court should reject the Tax Court's invitation to create a circuit conflict. The outcome below relies on the Tax Court's decision not to follow holdings of the Fifth and Eighth Circuits, which precluded the Tax Court from treating foreign taxes as non-tax "costs" in determining whether a transaction has economic substance apart from any tax consequences. Only by using this creative accounting method was the Tax Court able to conclude that the STARS transaction 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 Regarding The Tax Benefit In Question.

The decision below rests entirely on the Tax 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. SPA3. 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 uncer-

tainty 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 STARS transaction at issue in this case. These compliance and administrative costs are deadweight 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 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 pur-

[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); *see also* BNY Br. 30 n.13.

pose, 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). 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 Tax Court Violated These Principles By Applying The Economic Substance Doctrine In A Broad, “Flexible,” And Inherently Unpredictable Manner.

The Tax Court failed to adhere to the narrow scope of the economic substance doctrine by adopting a broad, “flexible” interpretation of the doctrine, while paying no heed to the uncertainty and unpredictability that its approach would create. SPA28; *see also* SPA31.

The crucial step of the Tax Court’s analysis was its decision to “bifurcate” the STARS transaction. SPA30. It segregated BNY’s business purpose for engaging in the STARS transaction—namely, a large loan at a favorable interest rate—from the trust structure that was a prerequisite to achieving that business purpose.

*See* SPA30-31; *see also* BNY Br. 51-53.[3] The Tax Court cited a handful of cases that, as BNY has explained, do not support subdividing an integrated transaction into disaggregated pieces. SPA30-31; *see also* BNY Br. 51. Beyond these cases, however, the only justification that the Tax Court offered for its approach was the conclusory statement—devoid of caselaw citations—that "[a] contrary application would undermine the *flexibility and efficacy* of the economic substance doctrine." SPA31 (emphasis added).

The Tax Court's focus on preserving the "flexibility and efficacy of the economic substance doctrine" cannot be reconciled with the critical need, discussed above, for certainty and predictability in the application of tax laws. The Tax Court cited no authority at all for the proposition that the economic substance doctrine should be "efficac[ious]." And as to flexibility, the Tax Court took the word "flexible" out of context from this Court's decision in *Gilman v. Commissioner*, 933 F.2d 143 (2d Cir. 1991). *Gilman* used the word "flexible" only in connection with the two-prong subjective/objective inquiry into business purpose and economic substance, not with the initial question whether the doctrine is relevant. *See id.*

[3] The Tax Court later purported to conduct an alternative analysis of the "integrated transaction." SPA47-51. But that analysis makes similar bifurcation errors: The court ignored the profits that a large loan at a favorable interest rate allowed BNY to make, *see* SPA48, and also ignored the tax credit that was a prerequisite to the loan's viability, *see* SPA50.

at 148; *see also supra* at 10-11; BNY Br. 29 (addressing *Gilman*'s two-prong inquiry).

Under *Gilman*, the economic substance doctrine is "flexible" only in the sense that, if the doctrine is triggered, courts may need to undertake a subjective inquiry, an objective inquiry, or both. *See* 933 F.2d at 148. *Gilman* does not mean, as the Tax Court implied, that courts have flexibility in deciding when the doctrine should be triggered, or flexibility in conducting the analysis by bifurcating and analyzing separately portions of an integrated transaction. Nor does *Gilman* mean that courts have the flexibility to apply the economic substance doctrine in any manner that would make it more "efficac[ious]." SPA31. Instead, the economic substance doctrine should be applied in a narrow and predictable manner. As BNY has explained at length, the STARS transaction had ample economic substance under established law. *See* BNY Br. 31-37. The Tax Court's conclusion that it lacked economic substance expands the economic substance doctrine well beyond its narrow contours and was thus erroneous.

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

The serious problems created by the Tax Court's broad, "flexible" interpretation of the economic substance doctrine—including the high costs created by uncertainty and unpredictability in the tax laws, and its inconsistency with cases re-

quiring a narrow interpretation of the doctrine—are sufficient to warrant reversal. Yet the Tax Court's errors are even more apparent given Congress's clearly expressed intention to avoid imposing double taxation on foreign income.

The main tax benefit at issue in this case is a foreign tax credit claimed by BNY. SPA3; *see also* BNY Br. 17, 23-26. The only effect of the claimed credit was to prevent BNY from double taxation—once by the United Kingdom, and once by the United States. *See* BNY Br. 29-30. It is undisputed that BNY complied with all statutory and regulatory requirements to receive the tax credit, including actually paying taxes on the relevant income in the United Kingdom. *See id.* at 21-22.

As BNY has explained, *see* BNY Br. 23-24, and as the Tax Court itself recognized, *see* SPA51, Congress enacted the foreign tax credit regime for precisely the purpose that BNY invoked it: "[T]he 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 for-

eign 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)).

In this respect, the foreign tax credit is distinguishable from other types of tax benefits to which the economic substance doctrine might apply: As BNY has explained, the foreign tax credit cannot be used to create a portable deduction or credit that a taxpayer could (for example) apply against unrelated income to reduce its overall tax bill. *See* BNY Br. 29-30. Instead, the foreign tax credit's only effect is to avoid a second round of taxation on income that has *already* been taxed by a foreign government. Moreover, Congress and the IRS have carefully delineated the proper scope of the foreign tax credit through an "exacting framework" of laws and regulations. *Id.* at 24-26. It is particularly unlikely that Congress would adopt such a complicated regime to prevent double taxation while simultaneously intending to grant broad discretion for courts to ignore that regime, and impose double taxation, under an economic substance approach. Even if there are some deductions or credits to which the economic substance doctrine might properly apply,

therefore, the Tax Court's application of that doctrine to override a clearly expressed congressional intent to avoid double taxation was inappropriate.

## II. Like Other Courts Of Appeals, This Court Should Prevent The Commissioner From Recategorizing Foreign Taxes As "Costs."

Apart from the Tax Court's erroneous "flexible" and broad application of the economic substance doctrine, this Court should reverse the decision of the Tax Court for the independent reason that its decision would create a wasteful and unnecessary division of authority among the courts of appeals.

In its economic substance analysis, the core question that the Tax Court sought to answer was whether the STARS transaction "created a reasonable opportunity for economic profit." SPA31. It purported to conduct this analysis on a "non-tax" basis—*i.e.*, before tax considerations were taken into account. SPA32. At the threshold of this analysis, however, the Tax Court held that "foreign taxes" were actually "transaction costs" that should be *included* in the "non-tax" analysis. *Ibid.* In doing so, the Tax Court relied on two of its prior decisions, each of which was later reversed by the relevant court of appeals. *See* SPA32 n.9 (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 BNY has explained, this decision was erroneous because treating a foreign tax as a non-tax "cost" conflicts with logic and with longstanding Supreme Court precedents. BNY Br. 39-41. If the Commissioner were allowed to treat

some taxes as "costs," then virtually any transaction could be portrayed as presenting no opportunity for profit, and therefore lacking economic substance, because the taxpayer would in effect be obligated to prove that the relevant transaction "would be profitable even if taxed twice." *Id.* at 41-42. If this were the law, then the economic substance exception would swallow the rule; almost any transaction could be attacked as being unprofitable. *See id.* at 44-45. And such a regime would indisputably chill individuals' willingness to invest in almost any growth-producing transaction. *See supra* Part I.A. The Fifth Circuit's analysis in *Compaq* and the Eighth Circuit's analysis in *IES* correctly explain why it makes no sense to allow the Commissioner to "stack the deck" in this manner. *Compaq*, 277 F.3d at 782; *see also IES*, 253 F.3d at 354.

The Chamber writes separately to emphasize the inadvisability of creating a circuit conflict by breaking with the Fifth and Eighth Circuits. 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 Tax 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. 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 ap-

proach endorsed by the Tax 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.

Moreover, the Tax Court's thin justifications for declining to follow the decisions of the Fifth and Eighth Circuits are unpersuasive. *See* SPA32 n.9. *First*, the Tax Court stated, without explanation, that "[e]conomically, foreign taxes are the same as any other transaction cost." *Ibid.* Even assuming that a tax is (in some sense) a cost, the Tax Court did not attempt to explain why a foreign tax may be treated as a cost while a domestic tax should continue to be treated as a tax. *Second*, the Tax Court stated that foreign taxes should be treated as expenses in this case because "substantially all of the foreign taxes . . . stemmed from economically meaningless activity." SPA32 n.9. But whether the STARS transaction was "economically meaningless" was precisely the question that the court set out to answer; the Tax Court simply assumed its conclusion. *Third*, the Tax Court stated that treating a foreign tax as a tax "would fundamentally undermine the point of the economic substance inquiry," which, in its view, was to determine whether the transaction "makes economic sense" absent the tax "benefit." SPA33 n.9. By referring only to tax "benefit[s]," the Tax Court seemed to suggest that it was free to simultaneously account for tax *burdens* while ignoring *benefits*, but that is incor-

rect. In *Coplan*, this Court reaffirmed that the relevant question is whether the transaction had a purpose "apart from [its] anticipated tax *consequences*." 703 F.3d at 91-92 (quoting *Lee*, 155 F.3d at 586) (emphasis added). Thus, there is no basis for the Tax Court to subdivide "tax consequences" into "benefits" that it can invoke to trigger the economic substance doctrine and "costs" that it can simply ignore. *See Compaq*, 277 F.3d at 785; *see also* BNY Br. 39-40.

Given the lack of support for the Tax Court's approach, the persuasiveness of the Fifth and Eighth Circuits' holdings, and the economic costs of uncertainty in this area, this Court should decline the Tax Court's invitation to create a conflict among the courts of appeals. The Tax Court should be reversed on this independent ground.

**CONCLUSION**

The judgment of the Tax Court should be reversed.

Respectfully submitted,

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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 4,889 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.

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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.

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