IN THE UTAH SUPREME COURT

UTAH STATE TAX COMMISSION, Appellant, v. SEE'S CANDIES, INC., Appellee.	Case No. 20160910-SC

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF APPELLEE, SEE'S CANDIES, INC.

On appeal from the Fourth Judicial District Court
The Honorable Samuel D. McVey
No. 140401556

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INTEREST OF THE *AMICUS CURIAE*

The Council On State Taxation ("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 objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities, a mission COST has steadfastly maintained since its inception.

Today, COST has grown to an independent membership of approximately 600 of the largest multistate corporations engaged in interstate and international business representing industries doing business in every state. COST members represent that segment of the nation's business sector that is most directly affected by state taxation of interstate and international business operations.

COST's members are very interested in this case because the outcome could significantly impact COST's members by denying them lawful deductions. The case also would create substantial uncertainty for COST's members because many of them conduct a substantial amount of business in Utah, employ a significant number of Utah residents, and own an extensive amount of property in Utah.

As *amicus*, COST has participated in numerous significant United States Supreme Court and state tax cases over the past 40 years. Most recently, COST has filed as an *amicus curiae* briefs at the U.S. Supreme Court in *Comptroller of Treas. of Maryland v. Wynne*, 135 S. Ct. 1787 (2015); *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124 (2015); and *Alabama Dep't of Revenue v. CSX Transp.*, 135 S. Ct. 1136 (2015). COST can provide a

unique perspective to this Court given its history of engaging in issues of state and local taxing powers in the context of our federal system. Specifically, COST can provide an overview of similar issues addressed by other states as well as state and local tax policy issues that this Court should consider in making its decision.

This case addresses an important question of whether it is reasonable for a taxpayer to rely upon the arm's length pricing principles as contained within Internal Revenue Service ("IRS") transfer pricing regulations for guidance in interpreting Utah statutory language that is virtually identical to an Internal Revenue Code provision, where the state taxing authority has promulgated no rules or other guidance on which taxpayers may rely on when seeking to comply with the Utah tax code provision. The determination of this issue has implications beyond the taxpayer's deduction at issue in this case; thus, it is important to *amicus's* broad membership.

STATEMENT OF THE ISSUE

Amicus Curiae adopts the Statement of the Issue, Standard of Review, and Statement of the Case submitted by Plaintiff-Appellee See's Candies, Inc.

DETERMINATIVE PROVISION

Utah Code section 59-7-113:

> If two or more corporations (whether or not organized or doing business in this state, and whether or not affiliated) are owned or controlled directly or indirectly by the same interests, the commission is authorized to distribute, apportion, or allocate gross income or deductions between or among such corporations, if it determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any such corporations.

STATEMENT OF FACTS

See's Candies, Inc. (“See’s”) is a California-based corporation that has business operations in Utah, including the ownership and operation of retail stores in the State, at which candy products are sold. R. 506; F. ¶ 1. See’s is part of a large consolidated group for federal corporate income tax purposes that also includes Columbia Insurance Company ("Columbia"). R. 506; F. ¶ 1-3. Although Columbia and See’s are related to each other, they are not part of a unitary business. R. 506; F. ¶ 31. Like most other states, Utah’s Legislature has chosen to impose an insurance premiums tax on insurance companies, such as Columbia, in lieu of taxing the insurance companies’ net income. R. 505; F. ¶ 24. Thus, for Utah tax purposes, See’s and Columbia do not file on a combined basis. R. 506; F. ¶ 31.

As permitted by Utah law, See's deducted from its income royalty payments made to Columbia for use of Columbia’s intellectual property (sold by See’s to Columbia in 1997). R. 502; F. ¶ 5. The amount of the royalty payments made by See’s to Columbia

was determined pursuant to a valuation study and transfer pricing study in 1997 that determined the value of the intellectual property and what an "arm's-length" fair market rate would be for a third-party licensing that property pursuant to Internal Revenue Code provision 26 U.S.C. § 482 ("IRC § 482"). R. 503; F. ¶ 9.

In a previous audit of See's for tax years 1995 through 1998, the Multistate Tax Commission ("MTC") determined that the agreement entered into by See's and Columbia had a valid business purpose and was not made with an objective of tax avoidance. R. 506; F. ¶¶ 27-28. During that audit, the MTC's only recommended adjustment was to reduce See's allowable royalty deduction by 10 percent (to represent an increase in Columbia's capital and to reflect See's business activities in Utah). R. 506; F. ¶¶ 27-28. The Commission reached the same conclusion by adopting the MTC's recommendation for this tax period for its own audit of the same issue. R. 506; F. ¶ 29. [1]

In 2009, the Commission conducted another audit of See's for tax years 1999 through 2007. R. 506; F. ¶ 32. Although this subsequent audit period had identical material facts as the previous audit period, the Commission, contradicted its earlier conclusion and disallowed See's entire deductions, claiming that full disallowance is required to clearly reflect income. R. 507; F. ¶ 38. After an extensive trial *de novo*, the Tax Court rejected the Commission's position and found that the deductions for See's royalty payments should be allowed, based on a rationale similar to that used in See's

[1] While the MTC conducted the audit, it is the Commission and the application of Utah's tax law that ultimately determines whether a taxpayer should be assessed for any additional tax.

prior audit by the Commission (10 percent reduction). R. 528-534. The Commission subsequently appealed the Tax Court's decision to this Court, and the issue is now pending before this Court. R. 536-37.

SUMMARY OF ARGUMENT

This case addresses an important question of whether it is reasonable for a taxpayer to rely upon the arm's length pricing principles as contained within IRS transfer pricing regulations for guidance in interpreting statutory language that is virtually identical to an Internal Revenue Code provision and where the Utah State Tax Commission ("Commission") has provided no administrative guidance on how it would apply its transfer pricing statute. Utah Code Ann. § 59-7-113 ("Section 113") contains language that is virtually identical to IRC § 482, a transfer pricing law that can be traced back to 1921. *See* Revenue Act of 1921, ch. 136, § 240(d), 42 Stat. 260, P.L. 67-98 (1921). The IRS has spent nearly a century administering and regulating transfer pricing matters. The Commission, however, has not promulgated any rules or guidance on which taxpayers may rely when seeking to comply with the Utah tax code provision.

In circumstances such as this, it is important for taxpayers to have clear published guidance to ensure fair, efficient, and transparent tax administration for taxpayers. Without transparent guidance as to how the Commission will interpret and apply the law, the Commission would have unfettered discretionary authority to alter its position on the law for different taxpayers and different tax years, undermining taxpayers' faith in the fair, predictable, and certain administration of the law.

ARGUMENT

I. THE COMMISSION SHOULD NOT BE PERMITTED TO CHANGE A LONGSTANDING INTERPRETATION OF SECTION 113 WITHOUT NOTICE AND RULEMAKING

Both Section 113 and IRC § 482 use the same terminology: transfer pricing adjustments may be made "clearly to reflect the income" of two or more transactions between members of a related group. The Utah Legislature added Section 113 to its corporate income tax law in 1993; however, 24 years later, the Commission still has not promulgated any rules pursuant to Section 113. *See* 1993 Utah Laws Ch. 169, §16 (S.B. 179). Nor had the Commission done so in the decades during which Section 113's predecessor, Utah Code Ann. § 59-13-17 ("Section 17"), was effective. In other words, the Commission has neither indicated how it would administer Section 113 nor explained how its administration of Section 113 differs from the IRS's administration under a substantially similar law—IRC § 482. The Commission has the experience and expertise to promulgate administrative rules. Specifically, there are over 100 rules that have been issued by the Commission, including _____ rules interpreting Utah's Corporate tax laws, which are contained in Utah Administrative Code Titles R861, R865, R867, R873, R877 and R884. With ample opportunity to do so, however, the Commission has chosen to promulgate only one (unrelated) rule under Utah's Corporate Income Tax on the allocation of net income and a handful of Franchise Tax rules (also unrelated) that are generally applicable to corporate taxpayers. *See, e.g.,* Utah Admin. Code R865-3C-1, Utah Admin. Code R865-6F-l, *et seq.*

Utah is not unique in the enactment of its tax laws and promulgation of rules. Like other states, Utah's Legislature enacts laws and it allows its administrative agencies to promulgate rules to further clarify the intended operation of its laws. Of course, those interpretations by an administrative agency of the law must be done consistently within the intended scope of a law enacted by the state's legislature.

Even though the Commission has not promulgated its own rules, the Utah Attorney General has issued longstanding guidance to taxpayers regarding the application of Section 113. *See* Office of the Attorney General, State of Utah, Informal Opinion No. 79-214 (December 5, 1979), 1979 WL 32559. This guidance provides that Section 113 should be interpreted in a manner consistent with the arm's length pricing principles within the IRC § 482 regulations. If the Commission (or the Legislature) believed that a different interpretation of Section 113 was required, it had ample opportunity to take action. It did not. Instead, for years, the Attorney General's guidance on the application of Section 113 remained in effect for taxpayers to rely on.

If the Commission intended to interpret Section 113 in a manner different than the arm's length principles within the IRC § 482 regulations and contrary to the guidance issued by the Utah Attorney General, then it should be required to have notified taxpayers through the issuance of administrative guidance to give them fair notice to comply with the Commission's rules and/or seek changes to these rules. The requirement for public notice and comment when promulgating an administrative rule is to afford taxpayers the opportunity to: 1) contact the Commission to request it to change its position; 2) work with legislators to modify the law; and/or 3) assert a legal challenge. The Commission,

however, never promulgated any administrative rules nor did it provide any other administrative guidance on Section 113. Thus, it deprived taxpayers of any knowledge that the Commission had taken a position inconsistent with the IRS's interpretation of the almost identically worded IRC § 482, that the Commission was taking a position inconsistent with the Attorney General's adoption of the IRS' interpretation of Section 482, and the opportunity to either comment on or challenge Commission's interpretation of Section 113. Consequently, it was appropriate for the Tax Court to hold that the Commission should exercise its discretion to clearly reflect income based on the arm's length principles of the IRC § 482 regulations until such time as it provides regulatory guidance of its own through its formal rulemaking process.

Nonetheless, without any public notice to the contrary, the Commission has abruptly changed its interpretation of Section 113 as applied to See's in its prior audit with the Commission. During that earlier audit, the Commission did not assert that Section 113 and IRC § 482 were dissimilar. Now, in this case, the Commission has stealthily decided to revise its position during the subsequent audit, asserting for the first time that the State's transfer pricing law, Section 113, will no longer be interpreted in the same manner as an almost identical transfer pricing law, IRC § 482.

Amicus is not arguing that the Commission lacks the authority to change a prior position in interpreting a law;[2] however, *amicus* urges this Court to reject the

[2] Of course, the Commission's authority to interpret Section 113 is limited by the statutory text and Legislative purpose, and its applications of Section 113 would be subject to *de novo* review in the courts.

Commission's position that it can arbitrarily change its position at any time (and in a manner inconsistent with Section 113 itself) without issuing public guidance and providing taxpayers with adequate notice. The Commission has rulemaking authority and is required to exercise this authority when an action taken by the Commission "prohibits an action," "provides or prohibits an action," "applies to a class of persons;" or is "explicitly or implicitly authorized by statute." *See* Utah Code Ann. § 63G-3-201(2). The Commission's nonpublic change to a long standing policy would be an action that would invoke the provisions of Section 63G-3-201(2) and require the Commission to promulgate a rule. In addition, the Commission is required to comply with the procedural provisions of the Utah Administrative Rulemaking Act (UARA) when promulgating such rules. Utah Code Ann. § 63G-3-301, *et seq*. For instance, the UARA requires the Commission to provide a notice period and to hold a public hearing prior to any rule becoming effective. *See* Utah Code Ann. § 63G-3-301; Utah Code Ann. § 63G-3-302. Thus, the Commission clearly had, and continues to have, the authority to promulgate a rule on this issue; however, to do so requires the Commission to provide adequate notice and to hold a public hearing to allow taxpayers and other interested parties an opportunity to be heard and provide input. The Commission has not done so. This is especially important if the Commission changes a prior interpretation to the detriment of a taxpayer, since a taxpayer should be able to rely upon how the Commission (and the Utah Attorney General) administered its laws in the past and on the generally accepted practice with regard to transfer pricing audits.

A complete lack of notice also raises due process concerns. Due process requires taxpayers receive adequate notice of the law, and this Court is well aware of taxpayer due process concerns, as it recently addressed that lack of due process afforded a taxpayer in *Jordan v. Jensen*, 391 P.3d 183 (Utah 2017). The *Jordan* case involved a tax sale of a property, and this Court determined that the tax sale violated the taxpayer's due process rights where the county conducted the sale without first notifying the taxpayer of the pending sale. *Id*. at 190. And, the county's argument that the taxpayer had "constructive notice" of the sale sufficient to trigger a statute of limitations where no actual notice was given was rejected by this Court. *Id*. at 195-96.

Similarly, in *Arizona Public Service Co. v. City of San Luis*, 2017 WL 3301768 (Ariz. App. 1st Div. Aug. 3, 2017), an Arizona Appellate Court held that a taxpayer could not be held liable for a tax that a local jurisdiction failed to publish. Rather, the court found that the taxpayer was entitled to follow the law as published and disseminated by the taxing authority itself. As observed by the court, to do otherwise, "would require the public to exercise a level of caution well beyond due diligence, in violation of due process principles." *Id.* at *3. Additionally, as stated in *Bldg. Officials & Code Adm'rs. v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980), "[d]ue process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions. . .. But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them." *Id.* at 734. By affirming the Tax Court's decision, this Court avoids any possible due process concerns.

This Court should affirm the Tax Court's ruling that the standard of "clearly to reflect the income" from transactions between two related parties is consistent with the arm's length principle within the IRC § 482 regulations and that See's reasonably relied on those regulations, the Commission's prior audit position, and guidance from the Utah Attorney General. Without any public change in its position, the Commission should not be allowed to reject well-established transfer pricing principles.

II. ARM'S LENGTH TRANSACTIONS ARE NOT SUBJECT TO SECTION 113 ADJUSTMENTS

Amicus supports See's position that the purpose of Section 113 and its analogue, IRC § 482, is to allow a tax agency to make adjustments to a taxpayer's income only if the transaction with a related party is not conducted at arm's length. *See* Brief for Plaintiff/Appellee, See's Candies at 17 (hereinafter "Appellee's Brief"). In contrast, where a transaction is conducted at arm's length between related entities, there should be no adjustment because the transaction between the related entities would be no different than if it had been conducted by unrelated entities. This point was made during the trial in this case where uncontroverted testimony was provided that the See's transactions were conducted on terms similar to comparable transactions between unrelated parties. R. 503; F. ¶ 13.

Addressing a different tax but relevant to this case, the Court of Appeals in Washington considered what constituted the fair market value of tobacco products to apply its excise tax. *U.S. Tobacco Sales and Marketing Co., Inc. v. Washington Dep't of Revenue*, 982 P.2d 652, 657 (Wash. App. Div. 2 1999). Specifically, the court held the

sales price of products sold between related entities that were subject to a valid transfer pricing study could be used to establish the base price to impose the excise tax on tobacco products when such transactions were between related entities. *Id*. at 659. The court determined this was allowed because the transfer pricing study demonstrated the tobacco products were sold at an arm's length transaction price. *Id*. This Court should do the same by upholding the Tax Court's decision.

In this case, the Commission is attempting to completely ignore the commonly accepted regime (*i.e.*, a transfer pricing study) used to determine whether a transaction is at arm's length. It incorrectly asserts that it has the power, without having provided notice to the public, to deviate from a widely adopted interpretation of how a substantially similar "IRC § 482 statute" should be used to adjust the income of related entities that are engaged in arm's length transactions.

Other state courts have recently analyzed the issue of how to interpret a state statute analogous to IRC § 482, taking the position that their state "IRC § 482 type" laws do not give their state tax agencies' unfettered discretion to adjust a taxpayer's income.[3] For example, the Indiana Tax Court recently decided *Rent-A-Center East, Inc. v. Indiana Dep't of State Revenue*, 42 N.E.3d 1043 (Ind. T.C. 2015), *review denied*, 46 N.E.3d 446 (Ind. 2016). In that case, the court held that a transfer pricing study that complied with IRC § 482 demonstrated that the taxpayer's return "fairly reflected its Indiana source

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[3] See also *Microsoft Corp., Inc. v. Office of Taxation and Revenue,* OAH Case No. 2010-OTR-00012 (D.C.O.A.H. May 1, 2012), where both the taxpayer and Washington D.C.'s Office of Tax and Revenue ("OTR") agreed IRC § 482 provisions applied; however, Microsoft successfully argued the methodology used by OTR was incorrect.

income." *Id*. at 1055. Just as in this case, Rent-A-Center East's transaction with a related member was found to have a valid business purpose. *Id*. at 1052. In reaching its decision, the Indiana Tax Court rejected the Indiana Department of Revenue's position that it could disregard the taxpayer's transfer pricing study because, among other reasons, it concerned "federal, not Indiana law." *Id.* at 1049. In explaining its reasoning, the Court said "…a comparison of the text of Indiana Code § 6-3-2-2(m) with the text of IRC § 482 inescapably demonstrates their similarities." *Id.* at 1050.

Further, in the same year, the Indiana Tax Court again held that IRC § 482 transfer pricing provisions and the IRS's arm's length standard were relevant to determine if there were "inappropriate tax avoidance mechanisms [used to] distort the true generation of income …" in *Columbia Sportswear USA Corp. v. Indiana Dep't of State Revenue*, 45 N.E.3d 888, 896 (Ind. T.C. 2015), *review denied*, 50 N.E.3d 147 (Ind. 2016).

The Supreme Court of Tennessee also held that the Tennessee Tax Commissioner did not have the authority pursuant to Tennessee's transfer pricing law, Tenn. Code Ann. § 67-2723(c), to reduce the State's dividends received deduction. *Kellogg Co. v. Olsen*, 675 S.W.2d 707 (Tenn. 1984). The Court stated, "[t]he Commissioner's authority under § 67-2723(c)(1) is not properly invoked to rewrite what she perceives to be an unwise provision in the statutory scheme." *Id.* at 709. "The complete disallowance of a deduction exceeds the Commissioner's authority under § 67-2723(c)(1). *Kellogg Co.*, 675 S.W.2d at 710 (*citations omitted*).

In this case, the Commission has not only rejected the arm's length principle, but it has also suggested a remedy not sanctioned by the Utah Legislature. In focusing on the related (non-unitary[4]) entities being subject to different taxing regimes (*i.e.,* See's, which is subject to Utah's corporate income tax, in contrast to Columbia, which is subject to Utah's insurance premiums tax), the Commission has usurped the Utah Legislature's authority by fashioning its own version of an add-back statute whereby otherwise lawful deductions are disallowed simply because they arise from transactions between related parties. In other states, this wholesale reversal of lawful deductions would require legislation, but the Commission in this case claims the power, to itself, to deny deductions, in its sole authority and without reasonable standards. This type of unchecked authority violates the principles of separation of powers and virtually every principle of sound tax administration.

If the Utah Legislature wanted the Commission to have the powers to add back expenses paid to related entities in certain situations, it could have done so (and still can do so) by enacting such a law. For example, in Illinois, which is also a combined reporting state like Utah, the Illinois legislature has given the Illinois Department of Revenue the ability to add back certain income paid to related entities. *See* 35 Ill. Comp. Stat. § 5/2-203(b)(2)(E-12). It should be noted, however, that this does not grant the Illinois Department of Revenue unfettered authority to make adjustments. Rather, the Illinois Department's authority is limited to certain situations. *See, e.g.,* 35 Ill. Comp.

[4] Utah is a combined reporting state for related businesses that are unitary (which See's and Columbia are not). *See* R. 506, F. ¶ 31.

Stat. § 5/2-203. Whether an add-back provision is needed in this State is up to the Utah Legislature— but it is not appropriate for the Commission to utilize such a mechanism without statutory authority to impose such an assessment on the Plaintiff/Appellee.

III. SOUND TAX POLICY DOES NOT AUTHORIZE STATE TAX ADMINISTRATORS TO HAVE UNFETTERED DISCRETION TO MAKE ADJUSTMENTS.

Amicus agrees with See's that the interpretation offered by the Commission, that the plain language of Section 113 allows it to make adjustments to transactions that are determined to be at arm's length with a related entity, would provide the Commission a blank check to make any adjustment it wants when it deems it necessary "clearly to reflect the income" between related parties. *See* Appellee's Brief at 41-42. This would allow the Commission to override certain decisions made by the Utah Legislature (*See, e.g.,* Appellee's Brief at 41-42) without ever providing any additional standards or guidance in which to interpret Section 113. In this alternate reality, the Commission would be completely free to do as it pleases so long as it uses the magic words—that the adjustment was necessary "clearly to reflect the income." Such unfettered discretion, simply cannot be what the Utah Legislature intended when Section 113 was enacted.

This Court should, as a matter of good tax policy, reject the Commission's attempt to assert such unfettered discretion. Sound tax policy is grounded on certainty, fairness, transparency, and ease of administration and compliance. Each of these principles reinforces taxpayer confidence in the voluntary compliance system that is the backbone of our U.S. taxing regime. In particular, transparency is the key to providing taxpayers

with certainty of the amount of tax they can expect to pay, which is required for compliance.

A "transparent" tax law has been described by the American Bar Association as a law that applies "in a straightforward and predictable way." *ABA Statement of Policy Favoring Tax Simplicity, Stability, and Transparency,* ABA Section of Taxation News Quarterly, 18-20 (Fall 2008).[5] Further, the American Institute of Certified Public Accountants ("AICPA") has issued the following policy statement regarding the importance of transparency in the administration of tax laws:

> If taxpayers and their advisers cannot understand the tax system, they cannot evaluate the impact of that system. Beyond the fundamental aspect of actual and perceived fairness, proposing understandable changes to an understandable tax system would result in broader consensus on whether a change is necessary, wise, or effective. A tax that is not understandable can be easily retained or raised with little awareness among taxpayers about how the tax affects them. Without transparency, "gimmicks" such as deduction, exemption and credit phaseouts for raising revenue flourish and more appropriate, fundamental approaches such as increases in statutory tax rates are avoided.

American Institute of Certified Public Accountants, Tax Policy Concept Statement No. 3: Guiding Principles for Tax Law Transparency (September 2003).[6]

As discussed above, the Utah Legislature passed Section 113 in 1993 and still, in 2017, the Commissioner has not promulgated rules that either interpret that provision differently than the IRS regulations, promulgated to interpret on the almost identical IRC

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[5] Available at:
https://www.americanbar.org/content/dam/aba/publishing/aba_tax_times/statement.authcheckdam.pdf.
[6] Available at: http://www.aicpa.org/Advocacy/Tax/Pages/TaxAdvocacy-LegislationandPolicy.aspx.

§ 482, or put taxpayers on notice that they cannot rely on the well-established guidance put forth by the IRS and continually relied upon by taxpayers since 1935. *See* Reuven S. Avi-Yonah, *The Rise and Fall of Arm's Length: A Study in The Evolution of U.S. International Taxation*, 15 Va. Tax Rev. 89, 98 (1995). Without anything else to rely on, it is appropriate for taxpayers to look to the IRS's regulations for guidance. 26 C.F.R. § 1.482-0, *et seq.* For the Commission to now, over 20 years later, assert a diametrically different approach to a widely accepted transfer pricing approach between related entities is completely contrary to the sound policy principal of transparency, which should dictate tax laws. Unfortunately, the Commission appears to adopt nothing more than a "bait and switch" approach.[7] Without the issuance of regulatory guidance by the Commission, allowing the Commission to take a position it deems appropriate under Section 113, that is contrary to IRC § 482, provides the Commission with unfettered discretion. This Court should not give the Commission an unchecked stamp of approval that would grant the Commission unfettered discretion to assess taxpayers pursuant to Section 113. Tax laws need to be understandable and transparent, and the Commission's actions do not reflect these principles.

Sound tax policy also instructs us that a quality tax system facilitates taxpayer compliance by minimizing the time and effort necessary to comply with the law. For taxpayers to be able to comply with the law, however, they must at least be put on notice of those laws and the taxing authority's interpretations. This has broader significance

[7] *See Reich v. Collins*, 513 U.S. 106, 111 (1994), where the U.S. Supreme Court rejected such "bait and switch" tactics.

because of our historic system of voluntary compliance, which accounts for the vast majority of tax collections from taxpayers.

If the taxing agency in a state with a statute that is essentially identical to IRC § 482 has unfettered discretion to repudiate a prior audit position for a taxpayer, and assess it without regulatory guidance, then the state and local tax system of voluntary compliance will be seriously undermined and eroded. Again, the voluntary compliance system is the backbone of our American taxation system, and it requires taxpayers to on their own accord prepare and submit annual returns and other required filings. To prepare those returns taxpayers must have an understanding of the federal and state tax laws to be able to calculate the proper amount of tax. Large corporate taxpayers that file in multiple state and local jurisdictions (such as See's and *amicus's* other members) may be required to prepare and file hundreds of corporate income tax returns. To ease this compliance burden, it is imperative for taxpayers to reasonably rely on underlying federal interpretations where a state or local jurisdiction has adopted or incorporated an IRC provision or concept and has not promulgated diverging guidance of its own. Alternatively, if a state or local jurisdiction has decided that it does not want to follow the applicable federal authority, then it must put taxpayers on notice of that position. It is virtually impossible for a taxpayer to voluntarily comply with a system when a state taxing authority can change its position without any prior notice—especially with respect to the same taxpayer.

In addition to sound tax policy which mandates the Commission not be provided an unfettered grant of discretionary power, this Court and other state courts have also

concluded that a taxing agency should not have an "unfettered grant of discretionary power" that might deny taxpayers access to the judicial system. *See Jensen v. State Tax Com'n*, 835 P.2d 965, 968-69 (Utah 1992); *Frantz v. Palmer*, 564 S.E.2d 398, 403 (W. Va. 2001), *citing R Commc'ns, Inc. v. Sharp*, 875 S.W.2d 314, 318 (Tex. 1994). The position of the Commission is not consonant with sound tax policy and should be rejected.

IV. AFFIRMING THE DECISION BELOW PREVENTS UNFORESEEN FINANCIAL REPORTING CONSEQUENCES

The Tax Court's decision to not allow the Commission to adjust See's income based on the arm's length nature of See's transaction with Columbia is not only within the court's "'broad authority,' but [it is] also correct." Appellee's Brief at 3. The Tax Court's decision is also appropriate because it provides taxpayers with guidance regarding how Utah (at the least) and possibly other states should also interpret statutes like Section 113. Such guidance helps to prevent unforeseen financial reporting issues.

A reversal of the Tax Court's decision would create significant uncertainty in how Utah and other states would use provisions, similar to Section 113, that are based on a federal law. It could send a signal to other state and local tax agencies that they have unfettered discretion to impose additional tax beyond how those provisions are used by the IRS. It would unsettle guidance that taxpayers have come to rely on. This uncertainty also produces significant financial reporting issues for businesses. ASC 740 (formerly FAS 109) requires the reporting of uncertain tax positions on publicly reported financial

statements relied upon by the investing public.[8] Years that remain open for examination are included in the ASC 740 review. These negative financial reporting implications could have a detrimental impact on a corporation's value and corresponding stock price. This is another important reason why this Court should uphold the Tax Court's determination.

CONCLUSION

Based on the foregoing, *amicus* urges this Court to uphold the decision of Tax Court, which properly concluded that See's was entitled to a deduction for its royalty payment that was at arm's length and that the Commission lacked the authority to make an adjustment to this payment pursuant to Section 113.

Respectfully submitted this 18th day of August 2017.

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[8] ASC 740 is a financial accounting standard promulgated by the Financial Accounting Standards Board. An entity subject to ASC 740 must consider the effect of open tax years in its calculation of contingent tax liabilities. *See* Accounting Standards Codification 740-10-05-1 ("Th[is] Income Taxes Topic addresses financial accounting and reporting for the effects of income taxes that result from an entity's activities during the current and preceding years. Specifically, this Topic establishes standards of financial accounting and reporting for income taxes that are currently payable and for the tax consequences of all of the following: … a. Revenues, expenses, gains, or losses that are included in taxable income of ***an earlier*** or later year than the year in which they are recognized in financial income." (emphasis added).

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 5,562 words, excluding the portions of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Times New Roman.

DATED this 18th day of August 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August 2017, two true and correct copies of the foregoing Brief of *Amicus Curiae* Council On State Taxation in Support of Appellee, See's Candies, Inc., were served via U.S. mail, first-class postage prepaid, upon the following:

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