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<tr><td>SUPREME COURT, STATE OF COLORADO
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<tr><td>Colorado Court of Appeals, Webb, Lichtenstein, Berger, No. 2016CA1316

District Court, City and County of Denver, Judge A. Bruce Jones, Case No. 2015CV31175</td></tr>
<tr><td>Petitioners:
Department of Revenue of the State of Colorado and Michael Hartman, in his official capacity as the Executive Director of the Department of Revenue of the State of Colorado,

v.

Respondent:
Oracle Corporation and Subsidiaries.</td></tr>
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<tr><td colspan="2">BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION
IN SUPPORT OF PETITIONERS</td></tr>
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

☒ It contains 4,587 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/Bruce Fort
Signature of attorney or party

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INTEREST OF THE *AMICUS*

The Multistate Tax Commission (Commission) files this brief as amicus in support of the Colorado Department of Revenue (the Department) urging reversal of the Court of Appeals' decision below.

The Commission is an intergovernmental state tax agency established in 1967 by the Multistate Tax Compact. The purposes of the Compact include facilitating the proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases, and the promotion of uniformity or compatibility in significant components of tax systems. Multistate Tax Compact, Art. I.[1]

In addition to acting as the administrative agency for implementing the Compact, the Commission, through its member states,[2] develops proposed model state tax laws and regulations,

[1] The Compact is codified in Colorado as § 24-60-1301, C.R.S. Colorado has been a member of the Multistate Tax Compact since 1968. *See* 1968 Colo. Sess. Laws, p. 175 § 1.

[2] Fifteen states and the District of Columbia are currently members of the Compact, but every state except Nevada participates in the Commission's programs and activities. See www.mtc.gov/members. This

conducts joint state tax audits, facilitates voluntary disclosure and tax compliance, and provides litigation and amicus support in important state tax cases. Article IV of the Compact incorporates the Uniform Division of Income for Tax Purposes Act (UDITPA), which provides a framework for determining the amount of a multi-jurisdictional taxpayer's income that can be attributed to the taxing state based on the percentage of the taxpayer's property, payroll, and sales "factors" located in (sourced) to that state.[3]

The Commission's interest in this case is predicated on the Compact's mandate to facilitate the proper determination of state tax liability of multijurisdictional businesses. The lower court's interpretation of Colorado's water's-edge unitary combined filing statutes would lead to an understatement of the taxpayer's liability in

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brief is filed by the Commission, and not on behalf of any of its member states, except Colorado.

[3] In 2015, the Commission's members voted to amend several substantive provisions of Article IV (UDITPA) to encourage the states to modernize their apportionment methodologies in a uniform manner. The amendments to Article IV are unrelated to the issues in this appeal. Colorado has recently enacted legislation conforming to many of those changes, applicable to tax years beginning in 2019. H.B. 18-1185, codified as § 39-22-303.6, C.R.S.

this case and would open the door for other Colorado taxpayers—and potentially taxpayers in other states—to game the system by shifting income to untaxed non-operational domestic entities.

While it is this Court's duty to properly interpret and apply Colorado statutes, those statutes share language with other states and are based on a shared history. That history includes negotiations between the states and the federal government regarding the proper contours of the unitary business group used to apportion the income of multinational enterprises. A proper reading of this shared history, and the proper application of the rules of statutory construction, leads to a different result than the one reached by the lower court.

ARGUMENT

I. Colorado's adoption of formulary apportionment principles and unitary combined filing are intended to capture all of a taxpayer's income generated within the state; the lower court's construction of those laws contravened that legislative intent and contravened well-established rules of statutory construction.

A. This court has consistently applied Colorado's formulary apportionment principles in tandem with the statutory authority to adjust income and expenses among related parties as furthering the same goal of fairly measuring the amount of income generated by taxpayers within the state.

States use formulary apportionment because it is exceedingly difficult or impossible to determine the precise geographical location of income generation of a "unitary" business. Much of the flow of value between interdependent business segments is not quantified or captured for purposes of determining the geographic location where the business's net income is earned.[4] So-called transactional accounting, which seeks to determine both intercompany revenues and expenses, as

[4] In a very simple example, it would be difficult for a state to accurately determine the relative profits arising from a manufacturing center in one state and selling activity in a second state, since both activities are necessary to generate profits. *See, e.g., Underwood Typewriter* v. *Chamberlain*, 254 U.S. 113, 120 (1920).

well as their geographic source, is subject to imprecision and manipulation. Therefore, all states have chosen formulary apportionment to facilitate enforcement and administration of income taxes on multistate businesses.[5]

In *Joslin Dry Goods Co. v. Dolan*, 615 P.2d 16 (Colo. 1980), this court followed *Edison California Stores Corp. v. McColgan*, 183 P.2d 16 (Cal. 1947) and similar cases from Oregon[6] and Illinois[7] in holding that it was necessary to include even separately incorporated segments of the unitary business in the apportionable base in order to fulfil the legislature's mandate to "tax all the income that Colorado can constitutionally tax," citing *Coors v. Colorado*, 517 P.2d 838 (Colo. 1973). The court found that mandate most clearly evidenced by § 39-22-303(5), C.R.S.,[8] the statutory delegation of authority to the tax

[5]The considerations which supported the states' application of formulary apportionment principles are discussed at length in *Container Corp. of America v. Franchise Tax Bd.,* 463 U.S. 159 (1983), a decision which would also play a pivotal role in Colorado's adoption of water's-edge reporting in 1985.
[6] *Coca Cola Company v. Dep't of Revenue*, 533 P.2d 788 (Or. 1975).
[7] *Caterpillar Tractor Co. v. Lenckos*, 395 N.E.2d 1167 (Ill. 1979).
[8] The statute, now codified at § 39-22-303(6), C.R.S., has since been amended, but no authority has suggested that those amendments

commissioner to reallocate income and expenses among related parties to more clearly reflect income.

In *Lone Star Steel Co. v. Dolan,* 668 P.2d 916 (Colo. 1983), the same principles were advanced in extending Colorado's combined filing system to a domestic corporation with foreign sales and foreign dividends. Colorado thus joined California and ten other states in concluding that formulary apportionment at the worldwide level was the most appropriate means to capture the income generated by unitary businesses operating partially within the state.

The holding in *Lone Star* was premised on the Supreme Court's decision in *Container Corp. of America v. Franchise Tax Bd.,* 463 U.S. 159 (1983), which upheld California's use of world-wide combined reporting (WWCR), rejecting claims that the state's failure to use the international norm of transactional reporting violated the foreign commerce clause, U.S. Const. art. I, § 8.

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evidence a change in the legislature's intent to capture all income generated within the state.

B. Colorado's adoption of a "water's-edge" combined filing system more closely aligns the state's tax regime with the federal territorial system of taxation.

The *Container* decision provoked concern in the business community and the U.S. Treasury, triggering calls for congressional preemption of the states' use of formulary apportionment entirely. In September of 1983, the U.S. Treasury created a "Worldwide Unitary Taxation Working Group," composed of representatives of the U.S. government, CEOs of some of the world's largest corporations, and various state officials including three governors. The Working Group reached a broad agreement calling for the states to voluntarily move to a "water's-edge" combined filing system that would exclude most foreign corporations from the combined report.

Following the Working Group's recommendations, the states "acted with unusual legislative speed" in moving from WWCR to water's-edge reporting. [9]

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[9] Hellerstein & Swain, *State Taxation*, ¶8.18 (W.G. & L. 3rd ed. 2016). Oregon's adoption of water's-edge reporting in 1984 was followed closely by similar enactments in Colorado, Arizona, Idaho, Indiana, Montana, New Hampshire, North Dakota and Utah in 1985. California and Minnesota followed in 1986 and 1987, respectively. *Id.*

Use of the "water's-edge" filing method allowed the states to conform their apportionment bases to the federal tax base. The federal tax system aligns domestic income with domestic expenses, while relying on various code provisions such as 26 U.S.C. § 367(d)(imposing tax on overseas transfer of intangible property) and "transfer-price" auditing under 26 U.S.C. § 482 to prevent income shifting to foreign subsidiaries.[10]

C. The exception for "80/20" companies was designed to address concerns arising from taxation of foreign businesses, and was not intended to create a tax shelter for domestic holding companies.

Although the Working Group reached consensus about water's-edge reporting, no consensus was reached on two additional proposals from the business community: (1) that states exclude foreign source dividends from the tax base, and (2) that "U.S. Corporations with

[10] Under the federal consolidated filing regime, 26 U.S.C. § 1501-1505, most transactions between related domestic entities are eliminated, as they are for members of a unitary combined group, while transactions with foreign subsidiaries are treated as if the subsidiaries are third parties. The federal government also limits profit-shifting to non-consolidated foreign subsidiaries under Subpart F of the Internal Revenue Code.

primarily foreign operations, popularly known as '80/20 corporations' be treated as true foreign entities and excluded from the combined return." *Final Report of the Worldwide Unitary Taxation Working Group* at 14, *available at* https://archive.org/details/finalreportofwor00unit (last visited Aug. 9, 2018).

The argument for excluding 80/20 companies was that "their business activities occur primarily, perhaps evenly exclusively, overseas" (*Final Report* at 15) so that the entities should be treated similarly to true foreign entities. The proposal was intended to address the same concerns raised with respect to true foreign companies—that these entities might be subject to inconsistent taxing regimes, requiring conversion of foreign books of account to U.S. tax accounting standards.[11]

The proponents of the 80/20 exception explained:

> The proposed foreign business activities test is both substantial (80%) and substantive (payroll and property). This will guard against the use of 'shell' or 'paper' corporations to

[11] *But see Barclays Bank, P.L.C., v. California Franchise Tax Board*, 512 U.S. 298 (1994)(rejecting claims that compliance burdens imposed on foreign corporations under California's WWCR system violated the foreign commerce clause).

> avoid state taxes and prevent those not having primarily foreign operations from being excluded from the states' tax base.

Final Report at 15-16 (emphasis added).

The argument against the proposal was that the "property and payroll" test for an 80/20 company differed substantially from the 80% "source of income" test used by the federal government under 26 U.S.C. § 882, and thus, the proposed exclusion of these entities would also remove them from the federal statutory and audit regime which was designed to prevent income-shifting outside of the federal consolidated group. *Final Report* at 14-15.

Currently, ten states allow some form of 80/20 company exclusion, but the definition varies widely across states. Wisconsin, Michigan, and North Carolina exclude domestic foreign operating companies that have 80% or more of their "active business income" derived from non-U.S. sources.[12] Other states define an 80/20 company with reference to the

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[12] Wisconsin: WIS. ADMIN. CODE TAX § 2.61(2)(B); Michigan: MICH. COMP. LAWS § 206;607(3); North Carolina: N.C. GEN. STAT. § 105-130.5A(j);

overseas percentages of two factors, or all three factors.[13] Still other states reference percentages of *domestic* apportionment factors.[14] But no state (other than Colorado, under the lower court's interpretation) uses both a domestic activities test *and* a *foreign* activities test to define an 80/20 company. There would be no point in stating the same test in positive and negative terms. It should be noted that the term "80/20 companies" can also refer to the inclusion of *foreign* operating companies with 20% or more of their apportionment factors or gross income attributable to sources within the United States.[15] The language in in § 39-22-303(8), C.R.S. reflects the historical background for the rule and in fact integrates the policy considerations into the language of

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[13] Vermont: VT. CODE R. 10 060 040-5; Texas: 34 TEX. ADMIN. CODE § 3.590(b); Indiana: IND. CODE ANN. § 6-3-2-2(o); Illinois: 35 ILL. COMP. STAT. 5/1501(a)(27).

[14] Arizona: ARIZ. REV. STAT. ANN. § 43-1101(5)(b); California: CAL. CODE REGS. tit. 18, § 25110(d)(2)(B); Montana: MONT. CODE ANN. § 15-31-322(1).

[15] The Commission's 2005 *Model Combined Reporting Statute* requires inclusion of all domestic companies, and additionally requires partial inclusion of the income and factors of foreign companies deriving 20% or more of their gross income from intangible property transactions. See: http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/Combined%20Reporting%20-%20FINAL%20version.pdf.

the statute, by prohibiting the director from including true foreign operating companies in a combined report:

> (8) The executive director shall not require the inclusion in a combined report of the income of any C corporation which conducts business outside the United States if eighty percent or more of the C corporation's property and payroll, as determined by factoring pursuant to section 24-60-1301, C.R.S., is assigned to locations outside the United States.

No one argues that this prohibition applies to Oracle Japan Holding, Inc., since it did not conduct business outside the United States, nor did it have at least 80% of its property and payroll located outside the country.

3. A plain meaning analysis of Colorado's combined filing statute, §§ 39-22-303(6) through 39-22-303(13), C.R.S, does not support the exclusion of a domestic holding company from the combined return.

Water's edge reporting was only a part of the extensive combined reporting regime established by the Colorado legislature in 1985. The language of § 39-22-303(11), C.R.S., establishes six criteria for determining whether separate legal entities were engaged in a unitary business requiring inclusion on the combined report. Sections 39-22-303(12)(a) and (12)(b), C.R.S., establish requirements for common

ownership of "includable" members of the group. Subsection (c) provides:

> As used in this subsection (12), the term "includable C corporations" means any C corporation which has more than twenty percent of the C corporation's property and payroll as determined by factoring pursuant to section 24-60-1301, C.R.S., assigned to locations inside the United States.

The requirement of having at least 20% domestic property and payroll for inclusion in the water's edge report would not be arbitrary as applied to a foreign operating company. The test would also not be arbitrary if § 39-22-303(11) is viewed as a discretionary reporting provision, subject to adjustment under authority of § 39-22-303(6), for all but true foreign operating companies meeting the requirements of § 39-22-303(8).

The test would be arbitrary and even irrational as applied to a domestic company with no factors, but the lower court nonetheless held that the plain language was unambiguous and thus had to be applied by its literal terms, even though the result furthered no discernable policy goal. *Oracle Corp & Subsidiaries v. Dep't of Revenue of Colorado,* 2017 COA 152, ¶¶16, 31.

Ignoring § 39-22-303(8) entirely, the lower court concluded that Oracle Japan Holding, Inc., was not includable "[b]ecause 20 percent of zero is zero, a corporation without property or payroll meets this test." *Id.* at ¶23.

But even read in isolation, the subsection does not support the exclusion of a domestic company with no apportionment factors.

The language of § 39-22-303(12)(c), C.R.S. cannot be read to exclude pure holding companies from the combined report. First, this subsection assumes that the entity will have apportionment factors, as it references "the C Corporation's property and payroll" in order to establish the percentage located within the United States.

Nor did the lower court correctly characterize the mathematical formula to be applied. The statute calls for the calculation of a percentage, calculated by dividing the amount of the domestic factors of an entity by its overall (foreign and domestic) factors. Where the entity has no factors, as in this case, the formula requires that zero be divided by zero. As every algebra student knows, "zero divided by zero" is not

zero. It is, instead, an "indeterminate" number.[16] That is, the prohibition in § 39-22-303(12)(c) is a nullity as applied to a pure holding company. It can only apply to entities with property and payroll factors, and Oracle Japan Holding, Inc., has neither under the lower's court's determination.

The lower court's reading of § 39-22-303(12)(c) would exclude every holding company from the combined return. Had that extraordinary result been the legislature's intent, it certainly could have expressed it explicitly and directly, by providing that "…such report shall only include those members of an affiliated group of C corporations *with property or payroll factors* … ."

Holding companies have presented a dilemma for states where combination is based on standards intended for operational companies, such as "functional integration." *See, e.g., Blue Bell Creameries, L.P. v Roberts,* 333 S.W.3d 59, 71 (Tenn. 2011)(noting that "traditional tests for unity" were ill-suited to holding companies.) But courts have

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[16] *See, e.g.,* http://mathforum.org/dr.math/faq/faq.divideby0.html. "Division by zero is an operation for which you cannot find an answer, so it is disallowed."

generally concluded that non-operational corporations holding unitary assets (and debt) should be included in a combined return. *See, e.g., Appeals of PBS Building Systems*, Cal. S.B.E. Dkt. No. 94-SBE-008, Nov. 17, 1994.[17]

Sections 39-22-303(8) and 39-22-303(12)(c) should be read in harmony. There is no indication they are designed to accomplish different goals. Instead, given the history and the context, they should be read to exclude corporations with predominantly foreign operations from the combined return. It is only in the isolated context of a domestic holding company with no property or payroll that any incongruity arises. And in that context, § 39-22-303(12)(c) can never apply, by its terms.

II. The lower court erred in failing to consider the history, context, and purpose of the statutory system as a whole.

A. Tax statutes are not an exception to the ordinary rules of statutory construction.

"[R]easonable statutory interpretation must account for both

[17] The authors of the leading treatise on state income taxation conclude that excluding such entities would be "to play Hamlet without the Prince." Hellerstein & Swain, *State Taxation*, ¶ 8.11[3][d] (W. G. & L. 3rd. Ed. 2016).

'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Utility Air Reg. Grp. v. EPA,* 134 S. Ct. 2427, 2442 (2014), quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997).

The fundamental principle that statutes are construed to effectuate clear legislative purpose applies with full force in the field of taxation. *See, e.g., Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.,* 505 U.S. 214 (1992). This is true especially where text is susceptible to more than one reasonable interpretation. *Dep't of Revenue of Oregon v. ACF Indus., Inc*., 510 U.S. 332, 340 (1994). *See also Kohl's Dep't Stores Inc. v. Virginia Dep't of Taxation,* 803 S.E.2d 336 (Va. 2017). It is true even when an administrative agency has misapprehended the meaning of laws in past rulings or pronouncements. *Cf.*, *Tomlinson v. El Paso Corp.,* 653 F.3d 1281, 1291 (10th Cir. 2011).

As the dissenting opinion below explains, construing § 39-22-303(12)(c) to require the exclusion of domestic holding companies would prevent the state from fully taxing in-state earnings, the legislative

purpose identified in *Coors v. Colorado*, *supra,* without any apparent beneficial purpose. *Oracle*, 2017 COA 152 at 14-15.

The determination that a phrase is unambiguous does not act as a circuit-breaker to foreclose any analysis of the context in which the phrase is used.[18] Even where particular terms or phrases appear to be clear, they must not be construed in a way that defeats the statute's purpose. *Hewlett-Packard Co. v. State, Dep't of Revenue*, 749 P.2d 400 (Colo. 1988)(holding that reference to federal taxable income in § 39-22-304*(*1), C.R.S. was not intended to preclude inclusion of foreign subsidiaries in combined report). In *General Electric Co., Inc. v. Commissioner, New Hampshire Dep't of Revenue*, 914 A.2d 246 (N.H. 2006), the court considered a statute allowing a post-apportionment deduction for dividends received from a subsidiary doing business in the

[18] Further, this case does not present an opportunity for application of the oft-cited, rarely analyzed default rule that tax statutes should be construed in favor of the taxpayer. The statute at issue is an apportionment statute, not a tax imposition statute. A construction of § 39-22-303(12)(c). C.R.S. that created a blanket rule excluding holding companies would benefit this taxpayer, but it might have the opposite consequence for a taxpayer with corporate debt or losses in a holding company. *See U.B.S. Financial Services, Inc. v. Levin,* 893 N.E.2d 811 (Ohio 2008).

state. Despite the statute's straightforward language, the court looked to its purpose—preventing double taxation of in-state earnings—and construed the statute to avoid a "hyper-deduction" that the legislature could not have intended. 914 A.2d at 253.

Similarly, in *Boston Bank Corp. v. Commissioner of Revenue*, 861 N.E.2d 450 (Mass. 2007), the state's highest court held that a deduction for "domestic dividends" was inapplicable to dividends from a real estate investment trust (REIT). Dividends of a corporate subsidiary are generally excluded from federal and state income tax to avoid double taxation, since the subsidiary's income from which the dividends are paid is also taxed. But REIT dividends paid are subject to federal tax, since the REIT is allowed a deduction from its taxable income for those dividends. The court considered the context in which the phrase "domestic dividend" was used, and declined to allow a deduction for REIT dividends based on a plain meaning analysis. *Cf., Yates v. United States*, 574 U.S. __, 103 S.Ct. 1074 (2015)(slip op.)(holding that for purposes of applying federal financial crimes statute prohibiting destruction of evidence under 18 U.S.C. § 1519, undersized fish were

not a "tangible object" as contemplated by Congress).

The rule that terms used in a tax statute should be construed to advance legislative purposes has particular application to UDITPA, since the statute provides authority to vary the standard apportionment formula in order to "… effectuate an equitable allocation and apportionment of the taxpayer's income." § 24-60-1301 art. IV(18), C.R.S. *See, e.g., Microsoft Corp. v. Franchise Tax Board,* 139 P.3d 1169 (Cal. 2006); *Media General Comm. v. South Carolina*, 644 S.E.2d 525 (S.C. 2010)(construing equitable apportionment provisions to require combined reporting).

Courts have, for example, declined to construe UDITPA's definition of "gross receipts" in a fashion which would result in a substantial under-reflection of income generated in the state. *See Duke Energy Corp. v. South Carolina D.O.R.,* 782 S.E.2d 590 (S.C. 2016). *Accord, Walgreen Drug Co. v. Ariz. Dep't of Revenue,* 97 P.3d 896 (Ariz. Ct. App. 2004); *Sherwin-Williams Co. v. Indiana*, 673 N.E.2d 849 (Ind. Tax Ct. 1996); *Amer. Tel. & Telegraph Co. v. Director, Div. of Taxation,* 476 A.2d 800, 802 (N.J. Super. Ct. App. Div. 1984). *See also Powerex*

Corp. v. D.O.R., 346 P.3d 476 (Or. 2015)(legislature did not intend apportionment of utility's income to turn on whether electricity's sub-atomic properties fell within the definition of "tangible property").

It is true that much of UDITPA is written in terms designed to promote ease of administration, including the measure of property based on acquisition cost, § 24-60-1301, art. IV(10), C.R.S., and the exclusion of independent contractors from the computation of the payroll factor. § 24-60-1301, art. IV(13), C.R.S. The Commission's model regulations recognize, however, that adequately measuring income generation may require flexibility in application to achieve equitable results. The Commission's *General Allocation and Apportionment Regulations* accordingly provide that the fair market rental value of property can be considered where property is used by the taxpayer at no cost. *See* Reg. IV.18(b)(2),[19] codified in Colorado as 1 CCR 201-3-IV.18.(b)(2).

The Commission agrees with arguments advanced by the

[19] *Available at* http://www.mtc.gov/getattachment/Uniformity/Adopted-Uniformity-Recommendations/FINAL-APPROVED-2018-Proposed-Amendments-to-General-Allocation-and-Apportionment-Regulat-_.pdf.aspx?lang=en-US.

Department in the case below that these regulations, and indeed the entire structure of UDITPA, supports a determination that Oracle Japan Holding, Inc., could be deemed to have domestic property and payroll factors for apportionment purposes, to the extent the holding company relied on domestic operational companies to conduct its asset-holding functions.

B. The lower court's construction of § 303(12)(c) would promote income shifting to domestic holding companies, undermining Colorado's effort to treat similarly-situated taxpayers the same.

Colorado's tax system, like the tax systems of virtually all states, is undoubtedly designed to ensure fairness and equality in its application to similar taxpayers. Those guarantees form the foundation for any taxing regime built upon the public's voluntary compliance with the laws. Surely it was not the goal of the Colorado legislature to create "an ongoing cat and mouse game of taxpayers finding loopholes and the legislature closing them." *Oracle*, 2017 COA 152, at ¶ 42.[20]

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[20] The lower court's citation of *United States v. Carlton*, 512 U.S. 26 (1994) to support the "cat and mouse" view of taxation may be revealing. *Carlton* upheld retroactive legislation fixing an unintended drafting error in the estate tax. The lower court was perhaps

The most significant indicator that the Colorado legislature did not want to be in the business of perpetually fixing loopholes on a prospective basis is the retention of Colo. Stat. § 39-22-303(6) in the state's combined filing statutes. This statute gives broad powers to the tax commissioner to prevent abuse by reallocating income and expenses among related parties in order to clearly reflect income. Most states have similar remedial statutes adopting language from 26 U.S.C. § 482. *State Taxation*, ¶ 8.12, pp. 8-293-294.

Colo. Stat. § 39-22-303(6) may have direct application to this case if § 39-22-303(12)(c) is construed to create a carve-out for domestic holding companies. Income from unitary business activities can be shifted to domestic holding companies with relative ease under 26 U.S.C. § 351 and similar non-recognition provisions in the federal tax law intended to encourage capital reallocation among domestic entities.[21] While UDITPA equates the presence of property, payroll and

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acknowledging that its interpretation of § 39-22-303(12)(c) has created a significant enough loophole to warrant remedial legislation with retroactive effect.

[21] Boris I. Bittker and James S. Eustice, *Federal Income Taxation of*

sales in a state with income generation, a holding company has none of those attributes. When income arising from unitary business activities is shifted to a domestic holding company, the Colorado apportionment factors of the unitary business remain the same, but those factors are now applied against a smaller income base.

The case of *HMN Financial, Inc. v. Commissioner of Revenue,* 782 N.W.2d 558 (Minn. 2010) demonstrates how entities such as 80/20 companies can be used as vehicles to shelter income. HMN established a wholly-owned REIT to receive the income from its real estate lending activities, which then paid taxable dividends to the REIT's shareholder, an 80/20 company in the Cayman Islands consisting of a single employee with a rented office space. The income was then returned to the bank by its subsidiary as a domestic dividend subject to an 80% deduction. 782 N.W.2d at 563.[22]

Corporations and Shareholders, ¶ 3.01 (W.G. & L. 7th ed. 2000).

[22] Despite the admitted tax motivations for establishing the 80/20 company, the Minnesota Supreme Court allowed the 80% deduction, declining to recognize a state common-law sham transaction doctrine. *Compare, TD Banknorth, N.A. v. Dep't of Taxes*, 185 Vt. 46, 967 A.2d

Put in more colloquial terms, income has been separated from expenses, creating an imbalance that distorts fair taxation. *See, e.g., Wal-Mart Stores East, Inc. v. Hinton,* 676 S.E.2d 634 (N.C. Ct. App. 2009); *In re InterAudi Bank F/K/A Bank Audi (USA),* New York Tax Appeals, DTA No. 821659 (4/14/11). It is these anomalous results that § 39-22-303(6) and similar statutes are designed to prevent.

1148 (Vt. 2008). Significantly, Minnesota did not assert any statutory authority similar to C.R.S. § 39-22-303(6) allowing adjustment of income and expenses among related parties. The Minnesota legislature has since eliminated its 80/20 exception to water's edge reporting. Minn. Laws 2013, C. 143, Art. 6, § 34.

CONCLUSION

The decision below misapplies the language of the principal statutes at issue while failing to consider the legislature's purpose in allowing an exception to the state's water's-edge combined reporting system. If allowed to stand, the Court of Appeals' decision would undermine the state's statutory system for fairly measuring the business earnings of multijurisdictional taxpayers.

Respectfully submitted this 13th day of August, 2018,

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