IN THE SUPREME COURT OF THE STATE OF OREGON

COMCAST CORPORATION AND SUBSIDIARIES, Plaintiff, Appellant on Review, v. **DEPARTMENT OF REVENUE,** Defendant, Respondent on Review.	Tax Court Regular Division Case No. TC-RD 5265 Supreme Court No. S064698

BRIEF OF *AMICUS CURIAE* MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PLAINTIFF-APPELLANT COMCAST CORPORATION AND SUBSIDIARIES

Review of the Decision of the Oregon Tax Court
Honorable Henry C. Breithaupt, Judge

Date of Opinion: January 27, 2017
Author of Opinion: Breithaupt, J.

Names and Addresses of Counsel on Following Page

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BRAD S. DANIELS 021578
STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
brad.daniels@stoel.com

Attorneys for Motion Picture Association of America

GREGORY A. CHAIMOV, 822180
MARK P. TRINCHERO, 883221
Davis Wright Tremaine LLP
1300 SW 5th Ave, Suite 2400
Portland, OR 97201
gregorychaimov@dwt.com
marktrinchero@dwt.com
Attorneys for Plaintiffs-Appellants

BENJAMIN GUTMAN 160599
MARILYN HARBUR 802517
ROLF MOAN 924077
DENISE FJORDBECK
Department of Justice
1162 Court Street, NE
Salem, OR 97301
benjamin.gutman@doj.state.or.us
marilyn.harbur@doj.state.or.us
rolf.moan@doj.state.or.us
denise.fjordbeck@doj.state.or.us

Attorneys for Defendants-Respondents

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STATEMENT OF IDENTITY

The Motion Picture Association of America, Inc. ("MPAA") is a not-for-profit trade association founded in 1922 to address issues of concern to the U.S. motion picture industry. Its members are: Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.[1] The MPAA members and their affiliates are the leading producers of audiovisual works in the theatrical, television, and home entertainment markets. They license their content both to corporate affiliates and to unrelated third parties for broadcast, and they also license their works for distribution through a variety of other means, including movie theaters, cable operating systems and satellite distributors, television stations, airlines and hotels, and internet platforms (e.g., Netflix, Hulu and Amazon).

One of the core functions of the MPAA is to represent its members' position before various government agencies and in court on significant

[1] The MPAA's members are members of affiliated groups of companies, including Viacom, Inc., NBC Universal Media LLC, The Walt Disney Company, Time Warner, Inc. and Twenty-First Century Fox, Inc., which are, or may be, directly impacted by the Department of Revenue's actions in this case.

issues affecting its members and the motion picture and television industry more broadly.

INTEREST OF *AMICUS CURIAE*

The MPAA has a strong interest in this litigation because it believes the Department of Revenue's (the "Department") interpretation of the statutes relating to interstate broadcasters under ORS 314.680 to 314.690 is an unauthorized expansion of the law. The Department's interpretation would apply the special apportionment formula under ORS 314.684 not only to a corporation that is an "interstate broadcaster," but also to separate affiliated corporations that are not "interstate broadcasters," but who are members of the same consolidated return group for Oregon purposes.

Appellant Comcast Corporation and Subsidiaries ("Comcast") has warned that the Department's expansive statutory interpretation will lead to absurd results and subject a company to the special apportionment formula under ORS 314.684 regardless of how small its gross receipts from "interstate broadcaster" activity are in relation to its total gross receipts. (Appellant's Opening Brief at 6.) In response, the Department stated that "there is nothing in the record to show how the department or the Tax Court has applied [the term 'interstate broadcasters'] to other companies. Thus,

Comcast can only offer supposition as to what other companies might be included in the statutory definition of interstate broadcasters." (Respondent's Answering Brief at 20.)

Comcast's warning does not go far enough. Immediately before the last brief of the parties was filed in this case, the Department issued Notices of Assessment to one of the MPAA members in which it applied the special apportionment formula for interstate broadcasters under ORS 314.684 to all of the MPAA member's affiliated corporate entities, including those which are not themselves interstate broadcasters and have no gross receipts from broadcasting.[2] Plainly, the absurd result alluded to by Comcast is not merely hypothetical.

[2] At least one other MPAA member has received audit workpapers in which the Department has applied the special apportionment formula for interstate broadcasters under ORS 314.684 to all of the gross receipts of the MPAA member's affiliated corporate entities, including those which are not themselves interstate broadcasters and which have no gross receipts from broadcasting.

STATEMENT OF THE CASE

Comcast is a global telecommunications conglomerate and generates receipts from a variety of services—such as cable television, high-speed Internet, and digital phone services. The Department determined that Comcast is an "interstate broadcaster" under ORS 314.680(3) because it derived some of its receipts from the transmission of one-way electronic signals as defined by ORS 314.680(1).

The Department further determined that Comcast is subject to the special apportionment formula for interstate broadcasters pursuant to ORS 314.684, and thus should include all of Comcast's receipts for the provision of services regardless of whether those services involved the transmission of one-way electronic signals. The Regular Division of the Oregon Tax Court (the "Tax Court") upheld the Department's determination on both issues in granting the Department's Motion for Partial Summary Judgment.

Comcast has not raised on appeal the question of whether it is an "interstate broadcaster" under ORS 314.680(3).[3] As such, the issue before this Court is limited to the scope of ORS 314.684.

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[3] As it is not at issue on appeal, the MPAA does not address in this *amicus* brief which entities should be included in the definition of an "interstate broadcaster" under ORS 314.680. However, the MPAA members

QUESTION PRESENTED

1. Assuming Corporation A is an interstate broadcaster under ORS 314.680(3), should the receipts of other corporations included in the same consolidated return group as Corporation A be subject to the special apportionment formula under ORS 314.684(3), even if the other corporations are not interstate broadcasters?

ARGUMENT

I. The Definition of "Interstate Broadcaster" Only Includes the Corporation with Broadcasting Activities, Not All Other Affiliated Corporations in Its Consolidated Return Group.

Unless otherwise provided, Oregon taxpayers are required to apportion income using a single sales factor. ORS 315.650. Under ORS 314.682(1), it is specifically provided that "ORS 314.680, 314.684 and 314.686 shall apply to the apportionment of the income of an interstate broadcaster."[4] ORS 314.684(3) states that "[t]he numerator of the sales factor shall include all gross receipts attributable to this state, with gross

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do not concede that any of their entities are "interstate broadcasters" under ORS 314.680.

[4] "Interstate broadcaster" is defined in ORS 314.680(3) to mean "a taxpayer that engages in the for-profit business of broadcasting to subscribers or to an audience located both within and without this state. The audience or subscribers ratio shall be determined by rule of the Department of Revenue."

receipts *from* broadcasting to be included as specified in subsection (4) of this section." (Emphasis added.)

ORS 314.684(4) provides what is termed the "audience factor" as it requires that "[g]ross receipts *from* broadcasting *of an interstate broadcaster* which engages in income-producing activity in this state shall be included in the numerator of the sales factor in the ratio that *the interstate broadcaster's* audience or subscribers located in this state bears to its total audience and subscribers located both within and without this state."[5] (Emphasis added.)

ORS 314.680(2) defines "gross receipts from broadcasting" as "all gross receipts *of an interstate broadcaster* from transactions and activities in the regular course of *its* trade or business except receipts from sales of real or tangible personal property." (Emphasis added.)

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[5] The Department also has promulgated a regulation that provides:

> In general, if a taxpayer broadcasts to subscribers or to an audience that is located both within and without this state and *the broadcaster* is taxable in another state under the provisions of ORS 314.620, then the *interstate broadcaster* is required to use an audience factor to determine the amount of gross receipts from broadcasting attributable to this state.

OAR 150-314-0465(1) (emphasis added).

"Broadcasting" is defined as "the activity of transmitting any one-way electronic signal by radio waves, microwaves, wires, coaxial cables, wave guides or other conduits of communications." ORS 314.680(1)

In the case of the MPAA member mentioned above, the Department's interpretation of ORS 314.680(1), 314.680(2), 314.680(3), 314.684(3) and 314.684(4) has resulted in the Department's use of the audience factor to include in the numerator of the sales factor gross receipts of separate corporate entities which are not themselves interstate broadcasters. Specifically, the Department has applied an audience factor to the gross receipts of separate corporate entities within the MPAA member's other business segments such as theme parks and resorts, sale of consumer products and studio entertainment—none of which are interstate broadcasters under ORS 314.680(3).

As demonstrated by the quoted language above in ORS 314.680(2), ORS 314.680(3), ORS 314.684(3), and ORS 314.684(4), in defining the term "interstate broadcaster" and how to apply the audience factor, Oregon law focuses on an individual taxpayer, not a group of corporations with which the taxpayer may be affiliated.

Under Oregon law, the term "taxpayer" is defined consistently with federal law and is considered to be an individual corporation, not an affiliated group of corporations. An "affiliated group" means "an affiliated group of corporations as defined in section 1504 of the Internal Revenue Code." ORS 317.705(1). Moreover, ORS 314.011(2)(a) specifically provides that "as used in this chapter, any term has the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required or the term is specifically defined in this chapter."

ORS 314.105(3) defines "taxpayer" to mean "any person or entity subject to tax under an applicable revenue law."[6] IRC section 7701(a)(1) provides that the term "'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation."

Moreover, Oregon is what is called a *Joyce* state.[7] This means that for apportionment purposes, each corporation in an affiliated group is treated separately, notwithstanding the fact the affiliated group may be conducting a unitary business. Indeed, the Oregon Legislature has codified the *Joyce* rule

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[6] Internal Revenue Code ("IRC") section 7701(a)(14) similarly defines "taxpayer" to mean "any person subject to any internal revenue tax."

[7] See *Appeal of Joyce, Inc.*, 66-SBE-070 (Nov. 23, 1966).

and specifically provided that in computing the Oregon apportionment percentage of a corporation that is a member of an affiliated group filing a consolidated federal return, "[t]hose members of an affiliated group making a consolidated federal return or a consolidated state return may *not be treated as one taxpayer* for purposes of determining … the composition of the apportionment factors used to attribute income to this state…" ORS 317.715(3)(b).[8]

In reviewing the relevant statutes herein, the Oregon Legislature has been crystal clear that the term "interstate broadcaster" means an individual taxpayer (ORS 314.680(3)), and not an affiliated group of corporations. Further, the Oregon Legislature has been equally clear that the special apportionment formula is to be applied to the "gross receipts from broadcasting of *an interstate broadcaster*" (ORS 314.684(4)), and not to the gross receipts of the affiliated group. Finally, the Department itself has acknowledged that the special apportionment formula under ORS 314.684(4) is to be applied to the gross receipts of the interstate broadcaster, not to its affiliated group (OAR 150-314-0465(1)).

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[8] See also *Estee Lauder Services, Inc. v. Department of Revenue*, 16 OTR-MD 279, 288 (2000), n. 10 ("Oregon recognizes the principle set forth in *Joyce*…").

In short, Oregon law is clear that the special apportionment formula for interstate broadcasters is to only be applied to the broadcasting receipts of an interstate broadcaster and not to the receipts of any other corporate entity in the interstate broadcaster's affiliated group.

II. The Department Must Not Be Allowed to Disregard the Plain Language of the Statutes and Regulations.

In the case of the MPAA member, which recently received Notices of Assessment, the interstate broadcaster apportionment formula is being applied by the Department to source to Oregon the receipts of separate corporate entities which are not interstate broadcasters under any definition. The specific corporate entities are engaged in a wide variety of activities such as theme parks and resorts, cruise ships, merchandising, sale of consumer products and studio entertainment.[9]

Plainly, Oregon law does not provide any support for the Department's actions. Indeed, as noted above, Oregon law is directly contrary to how the Department is applying the special apportionment formula for interstate broadcasters.

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[9] Other MPAA members have similar non-broadcasting business activities within their affiliated groups, including for example, motion picture production and distribution, theme parks, consumer products, licensing, video game production and distribution, development, production and licensing of live stage plays, among others.

In the Tax Court, Judge Breithaupt noted in footnote 6 of his decision that at the hearing, "there was a discussion of the possibility that some taxpayer might show that it engaged in multiple trades or businesses, only one of which was interstate broadcasting. The department indicated that what might follow in such a case would be the application of two or more apportionment regimes, with Broadcaster Statutes only applying to the separate broadcaster business."[10] The hypothetical situation posed by Judge Breithaupt is now a reality. The Department is currently applying the audience factor to not only the purported interstate broadcaster, but also to all other separate corporate entities in the interstate broadcaster's consolidated return group who are not themselves interstate broadcasters.[11]

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[10] In the Magistrate Division of the Tax Court, Magistrate Dan Robinson properly noted that each of the taxpayer's services must be evaluated separately for purpose of determining whether each of those services meets the definition of "interstate broadcaster" under ORS 314.680(3).

[11] The Department's application of the interstate broadcaster special apportionment formula to corporate entities which are not interstate broadcasters raises other problems as well. For example, when an affiliated group has corporate entities which are not interstate broadcasters, but which are subject to apportionment under a different special industry rule, such as OAR 150-314-0357 (motion picture and television film producers and producers of television commercials), the Department's position herein cannot be reconciled with, and in fact runs directly afoul of such special industry rules.

III. Conclusion

The MPAA is in full agreement with Comcast's position that only receipts from broadcasting activities of an interstate broadcaster should be subject to the special formula of ORS 314.684(4). Further, the MPAA is extremely concerned with the Department's unwarranted application of the audience factor under ORS 314.684(4) to separate corporate entities that are part of the same consolidated return group as the purported interstate broadcaster, but are not, under any definition, an interstate broadcaster. It is no longer a supposition or hypothetical situation. The Department must not be permitted to misapply the law in this area.

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For all the foregoing reasons, the MPAA respectfully requests that the Court reverse the decision of the Tax Court.

DATED: November 29, 2017.

Respectfully submitted,

/s/ Brad S. Daniels
BRAD S. DANIELS, OSB No. 025178
brad.daniels@stoel.com
STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
Tele: (503) 294-9854
Fax: (503) 220-2480

/s/ Jeffrey M. Vesely
JEFFREY M. VESELY, *Pro Hac Vice*
jeffrey.vesely@pillsburylaw.com
Annie H. Huang, *Pro Hac Vice*
annie.huang@pillsburylaw.com
PILLSBURY WINTHROP SHAW PITTMAN LLP
P.O. BOX 2824
San Francisco, CA 94126-2824
Attorneys for the Motion Picture Association of America

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DATED: November 29, 2017.

Respectfully submitted,

STOEL RIVES LLP

/s/ Brad S. Daniels

BRAD S. DANIELS, OSB No. 025178
Attorneys for Motion Picture Association for America

CERTIFICATE OF FILING AND SERVICE

I certify that on November 29, 2017, I efiled **BRIEF OF *AMICUS CURAE* MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PLAINTIFF-APPELLANT COMCAST CORPORATION AND SUBSIDIARIES** using the Appellate Courts Electronic Filing System with:

Rebecca Osborne
Appellate Court Administrator

and

Benjamin Gutman
Marilyn Harbur
Rolf Moran
Denise Fjordbeck
Department of Justice
1162 Court Street, NE
Salem, OR 97301
benjamin.gutman@doj.state.or.us
marilyn.harbur@doj.state.or.us
rolf.moan@doj.state.or.us
denise.fjordbeck@doj.state.or.us

Gregory A. Chaimov
Mark P. Trinchero
Davis Wright Tremaine LLP
1300 SW 5th Ave., Suite 2400
Portland, OR 97201
gregorychaimov@dwt.com
marktrincher@dwt.com

Dated: November 29, 2017.

/s/ Brad S. Daniels

Brad S. Daniels, OSB No. 025178
Of Attorneys for MPAA