

IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

STAPLES, INC., ET AL.,

v.

MARYLAND COMPTROLLER OF THE TREASURY

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH
TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE
MARYLAND COURT OF APPEALS

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May 9, 2019

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To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States as Circuit Justice for the Fourth Circuit:

Applicants Staples, Inc. and Staples the Office Superstore, Inc. (collectively “Applicants”) request a 29-day extension from May 23, 2019, to and including June 21, 2019, within which to file a petition for a writ of certiorari to review the judgment of the Maryland Court of Appeals in this case.

The Maryland Court of Special Appeals entered judgment on August 9, 2018. Applicants timely filed a motion for reconsideration, which the Court of Special Appeals granted. The Maryland Court of Special Appeals issued a revised opinion on November 16, 2018. App., *infra*, 1a-29a. Applicants timely filed a petition for a writ of certiorari with the Maryland Court of Appeals, which was denied on February 22, 2019. App., *infra*, 30a. A petition for a writ of certiorari is currently

due on May 23, 2019. This application is being filed more than ten days before that date. *See* S. Ct. R. 13.5, 30.2.¹

The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257(a). Copies of the opinion of the Court of Special Appeals and the order of the Maryland Court of Appeals denying review are attached to this application. App., *infra*, 1a-30a.

1. This case involves the constitutionality of Maryland corporate income tax assessments. In Maryland, a corporation is taxed on its net income (i.e., after the deduction of expenses) that is apportioned to the State. Md. Tax-Gen. Code Ann. §§ 10-301, 10-402 (2003). A corporation's income is apportioned based on a formula consisting of the corporation's property, payroll and receipts. Md. Tax-Gen. Code Ann. § 10-402(c)(1) (2003). To clearly reflect income apportioned to Maryland, the Comptroller of the Treasury (the "Comptroller") may, if circumstances warrant,

¹ To comply with this Court's Rule 29.6, Applicants state that Staples, Inc. is a wholly owned subsidiary of Arch Parent, Inc. Arch Parent, Inc. is a wholly owned subsidiary of Arch Parent Holdings, Inc. Arch Parent Holdings, Inc. is majority owned by Arch Superco, Inc. and no publicly traded corporation owns 10% or more of Arch Parent Holdings, Inc. Arch Superco, Inc. is not a publicly traded company. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Staples the Office Superstore, Inc. is now known as Staples the Office Superstore LLC. Staples the Office Superstore LLC is a wholly owned subsidiary of Office Superstore West LLC. Office Superstore West LLC is a wholly owned subsidiary of Office Superstore East LLC. Office Superstore East LLC is a wholly owned subsidiary of USR Parent, Inc. USR Parent, Inc. is a wholly owned subsidiary of USR Intermediary, Inc. USR Intermediary, Inc. is a wholly owned subsidiary of USR Topco Holdings, Inc. USR Topco Holdings, Inc. is a wholly owned subsidiary of USR Superco, Inc. USR Superco, Inc. is not a publicly traded company. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

deviate from the generally applicable statutory apportionment formula and use an alternative apportionment formula. Md. Tax-Gen. Code Ann. § 10-402(d) (2003).

Here, the Comptroller asserted his alternative apportionment authority to: (1) impose tax on a portion of Applicants' gross receipts, without the deduction for Applicants' expenses; and (2) create an apportionment formula that was calculated using only the property, payroll and receipts of other corporations – not those of Applicants. App., *infra*, 23a.

2. In *Container Corp. of America v. Franchise Tax Bd.*, 103 S. Ct. 2933, 2942 (1983), this Court stated that an apportionment formula must, under the Due Process and Commerce Clauses, be fair. The Court went on to provide that

[W]e will strike down the application of an apportionment formula if the taxpayer can prove by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportions to the business transacted in that State or has led to a grossly distorted result.

Id. (internal quotation marks and citations omitted).

In analyzing whether the Comptroller's apportionment method passed constitutional muster, the Court of Special Appeals stated that the same formula used by the Comptroller in this case was used by the Comptroller in *Gore Enterprise Holdings, Inc. v. Comptroller of the Treasury*, 437 Md. 492 (Md. 2014). App., *infra*, 20a. As the Maryland Court of Appeals held that the alternative apportionment formula was constitutional as imposed on the corporations at issue in *Gore*, the Court of Special Appeals stated that same formula was constitutional here. *Id.* at 22a-23a.

However, the proper analysis is whether the apportionment formula appropriately attributes Applicants' income to the State or whether the formula results in the attribution of Applicants' income to the State that is out of all appropriate proportions to the business transacted there – not whether the apportionment formula is constitutional for other taxpayers. *See Norfolk & W.R. Co. v. Missouri State Tax Comm'n*, 88 S. Ct. 995, 1002 (1968) (stating that “[t]he facts of life do not neatly lend themselves to the niceties of constitutionalism; but neither does the Constitution tolerate any result, however distorted, just because it is the product of a convenient mathematical formula which, in most situations, may produce a tolerable product”).

3. In *Hans Rees' Sons, Inc. v. North Carolina*, 51 S. Ct. 385, 389 (1931), this Court determined that the State's apportionment method that resulted in over 250% more income being attributed to the State than the taxpayer's alternative apportionment method was “out of all appropriate proportion to the business transacted by the [taxpayer] in that State.”

Applicants presented an economic benchmark by which to evaluate the Comptroller's alternative apportionment formula, which established that the Comptroller's method resulted in 503% and 2,776% more income being taxed by Maryland. The Court of Special Appeals did not address this benchmark. App., *infra*, 1a-29a.

4. In determining whether an apportionment formula leads to a grossly distorted result, this Court has stated that:

[W]hen a taxpayer comes forward with strong evidence tending to prove that the [apportionment] formula will yield a grossly distorted result in its particular case, the State is obliged to counter that evidence or to make the accommodations necessary to assure that its taxing power is confined to its constitutional limits. If it fails to do so and if the record shows that the taxpayer has sustained the burden of proof to show that the tax is so excessive as to burden interstate commerce, the taxpayer must prevail.

Norfolk & W.R. Co., 88 S. Ct. at 1003.

5. Applicants request a 29-day extension of time within which to file a petition for a writ of certiorari seeking review of the Maryland Court of Special Appeals' decision and the Maryland Court of Appeals' denial of review and submits there is good cause for granting the request.

a. This case presents an important question regarding when income attributed to a State is out of all appropriate proportions to the business transacted in that State and/or leads to a grossly distorted result. Moreover, the Maryland Court of Special Appeals' decision cannot be reconciled with this Court's precedents.

The additional time Applicants seek here will allow counsel to investigate further the manner in which the Court of Special Appeals' decision conflicts with the decisions of this Court in the 88 years since *Hans Rees*'

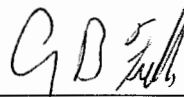
b. In addition, counsel for Applicants had and have a number of other obligations during the period for preparation of the petition before various State courts and administrative tribunals.

CONCLUSION

For these reasons, Applicants request that the Court extend the time within which to file a petition for a writ of certiorari in this matter to and including June 21, 2019.

Dated: May 9, 2019

Respectfully submitted,



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