

STATE OF MAINE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

Docket No. BCD-20-112

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APPLE INC.,  
Petitioner-Appellee,

v.

STATE TAX ASSESSOR  
Defendant-Appellant.

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On Appeal from the Cumberland County Superior Court  
Business and Consumer Docket  
Docket No. BCD-20-112

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**BRIEF OF *AMICI CURIAE* OF  
COUNCIL ON STATE TAXATION (COST) AND MAINE STATE  
CHAMBER OF COMMERCE**

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The Council On State Taxation (COST) respectfully submits this brief as *amicus curiae* in support of Plaintiff-Appellee, Apple Inc. Counsel for both Appellant and Appellee consented in writing to the filing of this brief.

### **Statement of Interest of Amici**

COST is a nonprofit trade association based in Washington, D.C. Its membership is comprised of approximately 550 of the largest multistate corporations engaged in interstate and international commerce, many of which do business in Maine. Its objective is to preserve and promote equitable and non-discriminatory state and local taxation of multijurisdictional business entities. In furtherance of this objective, COST has participated as amicus in numerous significant federal and state tax cases since its formation in 1969.

The Maine State Chamber of Commerce is a not-for-profit, membership-driven organization that was established in 1889. The State Chamber works with a network of approximately 5,000 businesses across the state of Maine, of varying sizes, from small to large. The Chamber is active on numerous public policy issues that affect the interests of Maine businesses, including taxation related issues.

This case is of special interest to *amici* because taxpayers have a justifiable expectation that business sensitive information will not become public. Appellant's overly-broad request to unseal sensitive business information irrelevant to the underlying issues before the court threatens a taxpayer's ability to rely on the long-

standing principle that confidential information is protected. Specifically, businesses have a legitimate interest in preserving the confidentiality of commercial and competitive information, including information relating to their contractual relationships. They should not have to forego this confidentiality simply because they decide to appeal a tax assessment. If the Superior Court's decision to seal certain confidential taxpayer information is reversed, it will discourage taxpayers from seeking recourse to Maine's judicial system and thus, compromise fair access to the courts.

### **Statement of Facts and Procedural History**

COST hereby adopts the Statement of Facts and Procedural History included in Appellee's Brief. Petitioner-Appellee Brief at 2-7.

### **Issues Presented for Review**

COST adopts the second Issue Presented for Review as set forth in Appellee's Brief. *Id.* at 8.

### **Argument**

#### **Taxpayers Have a Justifiable Expectation of Privacy**

Maine law protects confidential taxpayer information from public disclosure pursuant to Me. Rev. Stat. Ann tit. 36 § 191(1). Specifically, that subsection provides:

[I]t is unlawful for any person who, pursuant to this Title, has been permitted to receive or view any portion of the original or a copy of any

report, return or other information provided pursuant to this Title to divulge or make known in any manner any information set forth in any of those documents or obtained from examination or inspection under the Title of the premises or property of any taxpayer. This prohibition applies to both state tax and federal tax information filed as part of a state tax return.

As discussed at length by the Appellee, sensitive business information disclosed by the Appellee as part of an audit, was “provided pursuant to Title 36.” Apple Inc.’s Motion to Seal Confidential Information p. 6; *see also* Petitioner-Appellee Brief at 37-38. Accordingly, this information falls squarely in the category of confidential taxpayer information that should be protected from public disclosure. Filing an appeal invoking Maine’s judicial system does not alter such protection.

The Internal Revenue Code also requires that federal and state employees keep taxpayers’ income tax information confidential. Specifically, I.R.C. § 6103 provides that a taxpayer’s federal “[r]eturns and return information shall be confidential” and that “no officer or employee of any State, . . . shall disclose any return or return information obtained. . . .” Although this prohibition is not directly applicable here, because the information at issue is not part of the taxpayer’s federal tax return, the underlying policy reasons for its creation are analogous. I.R.C. § 6103 was enacted as part of the Tax Reform Act of 1976, because of the government’s use of “tax hit lists” based on information obtained

from tax returns. Michael G. Little, *Extra-Judicial Discussion of Taxpayer Information: The IRS Bully Is Still on the Block*, 43 FLA. L. REV. 1041, 1043-45 (1991). It is also important to note that “[t]he overriding purpose of section 6103 was to protect tax returns and return information from misuse by federal and state agencies.” *Id.* at 1045.

The rationale for the prohibition against the disclosure of confidential taxpayer information is simple: taxpayers have a reasonable expectation of privacy. The COST Board of Directors has adopted a formal policy statement in opposition to the disclosure and publication of confidential taxpayer information, which provides:

Taxpayers have a justifiable expectation of privacy. State departments of revenue audit business taxpayers on a regular basis to ensure that all relevant tax laws are appropriately enforced; releasing specific business tax returns or information from those returns to the public would serve no policy purpose.<sup>1</sup>

COST’s policy position generally focuses on the disclosure of confidential taxpayer information by the taxing agency itself or by legislative policy makers, but aspects of it apply in the judicial context as well. The facts in this case fully support the Superior Court’s finding to seal Appellee’s sensitive business information contained in its contracts with telecommunication carriers. Disclosing this information is not essential for the public to understand the Court’s decision;

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<sup>1</sup> See COST Policy Statement: <https://cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/confidentialityoftaxpayerinformation.pdf>.

however, disclosure of this information would inequitably provide information to Appellee's competitors.

Maine Revenue Services' (MRS) auditors had access to such confidential information for purposes of making their tax assessment and the Superior Court also had access to the information for purposes of reaching its decision on the merits of the underlying substantive tax issue below. Title 36 clearly protects taxpayer confidential information in the hands of MRS, and a taxpayer should not be required to relinquish this protection to have the merits of a tax assessment reviewed by an independent tribunal.

There is no overriding need for the public to have access to the sensitive business information in this instance. The information under seal includes the monetary value of additional "commissions" received by the taxpayer and verbatim quotations from the contracts between the taxpayer and the telecommunication carriers. For commercial and competitive purposes, the confidentiality of this information is important to the taxpayer to keep its contractual relationships with key business partners from public disclosure. Conversely, the information is irrelevant to the public's understanding of the substantive tax issue here—whether the Maine sales tax base should include the subsidy payments and commissions as part of the sales price of iPhones. At best, the confidential information pertains to the "amount" of any additional tax



assessment (which is not disputed), not to whether an additional tax assessment is warranted in the first place.

If this disclosure of sensitive business information is not relevant to the public's understanding of the tax case, what purpose is achieved by the State in making it publicly available? In lieu of a reasonable explanation for the disclosure of confidential taxpayer information in this case, two illegitimate rationales must be considered: (1) to pressure the taxpayer into settling the case so that it will not be subject to the disclosure requirement; or (2) to publicly shame the taxpayer through the disclosure itself. Neither is an acceptable basis for making this information public. The State should not be allowed to use the threat of disclosure as leverage in litigation.

The Business and Consumer Docket was created to encourage the efficient resolution of commercial disputes. If public disclosure of private commercial contract terms that place a taxpayer at a competitive disadvantage is the price a taxpayer must pay for access to Maine courts, the result will undermine the judicial reform that created the Business and Consumer Docket.

Furthermore, disclosure of sensitive business information following an audit will have a chilling effect on taxpayers' willingness to provide information during an audit, making it more difficult for MRS to do its job. MRS's audit function is key to the State's ability to collect the correct amount of tax due. And, taxpayer

cooperation is a precondition to effective audits. If information a taxpayer turns over during an audit, which is protected during the audit cycle pursuant to 36 M.R.S. § 191(1), loses that protection when a taxpayer litigates an issue in the Supreme Judicial Court, then it is understandable that the taxpayer will resist voluntarily providing business sensitive information to MRS that may be pertinent to the audit. Again, without a sufficient reason for the disclosure of this information, why would the State want to unduly impede the audit process?

The policy objectives underlying Title 36 are similar to the policy objectives underlying other disclosure provisions found in state and federal law. Maine's "Freedom of Access" statute ("the FOAA") that governs access to public records (Title 1, Chapter 13, Subchapter 1 "Freedom of Access"), has certain legislatively defined exceptions that are analogous to those in Title 36. These include: "A. Records that have been designated confidential by statute;" and "C-1 Information contained in a communication between a constituent and an elected official if the information: (1) Is of a personal nature, consisting of: ... (b) Credit or financial information;" Title 1, Chapter 13, Subchapter 1, Sec. 402 (3). The purpose of the latter provision is clearly like the Title 36 bar on the disclosure of confidential taxpayer information, to protect the privacy of sensitive business information.

It is instructive to take note of some examples where business's private and proprietary information has been designated as confidential by the Maine

Legislature. The statutory examples include Me. Rev. Stat. Ann tit. 12 § 6173-A, which provides that certain business proprietary information submitted to the Department of Marine Resources under the provisions of the Maine Working Waterfront Protection Program will be kept confidential, is not subject to public dissemination and will be used only for the Department's internal analysis. Similarly, Me. Rev. Stat. Ann tit. 5 § 15302-A, which is part of the Maine Administrative Procedures Act, provides for the protection of certain business records from production under the Maine FOAA, including financial statements and tax returns. Finally, that same Title contain (in section 13119-A) within the Economic and Community Development provisions, an exception to access under the FOAA for proprietary information provided to the Department if it determines that release of the information would provide a competing business with an unfair advantage or would result in significant detriment to the party that provided the information to the Department. These are but a few examples of where the Maine Legislature has sought to protect the sensitivity of a business's confidential and proprietary information submitted to a State agency.

Similar to Maine's Freedom of Access law, the Freedom of Information Act (FOIA) protects confidential information at the federal level. In 2019, the U.S. Supreme Court opined on what constitutes "confidential" information protected from disclosure under the FOIA, holding that "[a]t least where commercial or

financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is ‘confidential’ within the meaning of [the exemption to disclosure under FOIA].” *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019). The taxpayer’s business sensitive documents clearly meet the test articulated by the U.S. Supreme Court—the taxpayer treated the information as private and it was provided to MRS under the premise it would not be made public. This Court should heed the guidance provided by the Supreme Court and keep this information private as required Maine law.

### **Conclusion**

This Court should affirm the Superior Court’s sealing of Appellee’s commercial and competitive information contained in its contracts with its business partners and uphold the long-standing rule against public disclosure of confidential taxpayer information supplied during audits. Taxpayers have a justifiable right to protect confidential documents from public disclosure, which should be respected by the State, particularly when there is no countervailing rationale for the disclosure of the business sensitive information.

Dated this 21<sup>st</sup> day, August 2020.



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**Certificate of Service**

I hereby certify that on August 21, 2020, I caused two copies of the foregoing BRIEF OF *AMICI CURIAE* OF COUNCIL ON STATE TAXATION (COST) to be served on counsel for the parties listed below, by depositing the same in the United States Mail, first class, postage prepaid, addressed as follows:

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