BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of [Redacted] Petitioner.	))))))	DOCKET NOS. 19106, 20474, and 21711 DECISION

PROCEDURAL HISTORY

This is a multistate corporate income tax matter. The Income Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Tax Commission) issued a Notice of Deficiency Determination (NOD) to [Redacted] ([Redacted] or Petitioner) dated August 31, 2005, in Docket No. 19106. The NOD issued to the Petitioner was in the amount of $475,936 and concerned the taxable years ending December 31, 2001, December 31, 2002, and December 31, 2003. The Petitioner in response filed a protest on October 11, 2005, and requested an informal conference. The Petitioner also filed a supplemental protest on June 14, 2006, on the same day as the informal conference. Supplemental protest information was submitted on September 28, 2006.

As a result of the protests and informal conference it was determined that primary issues protested by the Petitioner involved issues in taxable year ending December 31, 2000, which impacted taxable years 2001 through 2003. Because the protest was for taxable years 2001 through 2003 and because taxable year 2000 had never been audited, the Petitioner and the Tax Commission both agreed to first have the Petitioner file amended returns for taxable year 2000 and for the Tax Commission to complete an audit before proceeding further.[1]

[1] The original Idaho returns filed [Redacted][Redacted] characterized the contested transactions as business income.

The audit was completed by the Bureau and an NOD dated June 28, 2007, was provided to the Petitioner for the taxable year ending December 31, 2000 (Docket No. 20474). The Petitioner filed a protest dated August 24, 2007, for the 2000 taxable year. An informal conference was then held on April 9, 2008, to hear the new protest, as well as to revisit any necessary issues in the previous protests. Pursuant to discussions at the April 9, 2008, informal hearing, the Petitioner submitted numbers for gross receipts in the sales factor denominator to the Tax Commission in correspondence dated July 11, 2008, along with further arguments in support of their protests and documentation requested by the Tax Commission.

In November 2007, the Tax Commission also received [Redacted] for taxable years 2000 and 2001, from the Petitioner. Based upon the information obtained in the [Redacted], the Tax Commission issued a separate NOD for taxable years 2000 and 2001 dated November 19, 2008 (Docket No. 21711).

The Tax Commission sent a letter dated December 11, 2008, incorporating the gross receipts numbers provided by the Petitioner on July 11, 2008, into the NODs for taxable years 2000, 2001, 2002, and 2003. The Petitioner filed a protest dated January 20, 2009, in Docket No. 21711.

The Tax Commission sent a letter dated March 31, 2009, asking the Petitioner if it wanted an informal hearing in Docket No. 21711. In a letter dated May 15, 2009, to the

Petitioner, the Tax Commission indicated that, in phone discussions with the Petitioner, it was determined that another hearing would not be held nor further information submitted and that a decision would be issued in Docket Nos. 19106, 20474, and 21711. The Tax Commission now issues a decision in these matters.

ISSUES PROTESTED

First, the Petitioner asserts that $1.8 billion received due to a failed merger by one of its subsidiaries [Redacted] should be nonbusiness income.

Second, the Petitioner asserts that proceeds received from the sale of one of its subsidiary's divisions, [Redacted], should be nonbusiness income.

Third, the Petitioner asserts that its gain on the sale of one of its subsidiary's ownership in stock in another company, [Redacted], should be nonbusiness income.

Fourth, the Petitioner asserts that its gain on the sale of one of its subsidiary's converted stock, [Redacted], should be nonbusiness income.

Fifth, the Petitioner asserts that it is entitled to a refund for taxable year 2000 because this year was included [Redacted]. In the event the Petitioner's refund claim is untimely, the Petitioner asserts it is entitled to adjust any net operating losses and carry them forward to reduce gains in subsequent years.

Sixth, the Petitioner provided gross proceeds documentation [Redacted]. The auditor incorporated those numbers into the Petitioner's sales factor denominator, and this was reflected in the numbers provided to the Petitioner in the Tax Commission's letter to the Petitioner dated December 11, 2008. The Petitioner agrees with how the numbers were incorporated into the Petitioner's sales factor denominator. However, the Petitioner continues to challenge the characterization of the transactions as giving rise to business income.

Seventh, the Petitioner asserts that if the transactions are deemed to give rise to business income, then including this as business income in the Petitioner's apportionable base will unfairly reflect its business activities in Idaho. The Petitioner asserts that these transactions had no connection with its business activities in Idaho. The Petitioner asserts that this income should be excluded from its apportionable base pursuant to Idaho Code § 63-3027(s) to fairly represent its business activities in Idaho.

Eighth, Petitioner asserts that the 10% penalty imposed by the Bureau be abated in light of its arguments presented.

Having reviewed the issues presented by the Petitioner, the Tax Commission now proceeds to address the underlying facts and provide an analysis of the Petitioner's arguments.

SUMMARY OF FACTS

[Redacted] Breakup Fee

The Petitioner, through its subsidiary [Redacted], entered into a merger agreement [Redacted] on November 3, 1999. Shortly thereafter [Redacted], [Redacted], entered into the picture and acquired [Redacted] The merger agreement with the Petitioner was terminated on February 6, 2000. [Redacted] paid a $1.8 billion breakup fee to the Petitioner. The Petitioner wants Idaho to consider the $1.8 billion as nonbusiness income for taxable year 2000. A portion of the $1.8 billion was used to reduce debt and for general corporate purposes, including payment of dividends to stockholders. According to the Bureau, the $1.8 billion was used for business purposes.

The Petitioner contends that the $1.8 billion should be considered nonbusiness income. The Petitioner contends that it was never unitary [Redacted]. The Petitioner also contends that the $1.8 billion breakup fee was an extraordinary and unusual occurrence.

[Redacted] Agricultural Division

[Redacted] acquired [Redacted] in a hostile takeover in 1994. [Redacted] The Petitioner sold the [Redacted] division during taxable year 2000.

The Petitioner contends that the sale proceeds of $1,044,094,652 in asset value and $35,778,186 in stock should be nonbusiness income. Petitioner explains that this should be the case because the [Redacted] division was a separate unit before 1994 and remained separate after 1994 when the Petitioner acquired [Redacted]; as part of the 1994 purchase of [Redacted], the Petitioner intended to sell the [Redacted] division and use those proceeds to pay for the purchase of [Redacted]; the Petitioner was not unitary with the [Redacted] division and never had the intention to become unitary; the sale of the [Redacted] division was a complete liquidation of a line of business and an extraordinary one-time corporate event and removed the Petitioner from the [Redacted] business; the [Redacted] business was not an integral part of the Petitioner's overall [Redacted] business and was operated autonomously from Petitioner's operations; and the Petitioner never intended to operate the agricultural division.

[Redacted]

[Redacted] acquired 53% ownership of [Redacted] in 1993. [Redacted] ownership was restricted and [Redacted] was allowed two out of ten board member positions. The Petitioner acquired [Redacted] on November 11, 1994, in a hostile takeover. This acquisition included the Petitioner obtaining [Redacted] ownership interests [Redacted]. [Redacted] was a publicly traded company. In October 2000, the Petitioner converted a $450 million note into 15.5 million [Redacted] shares raising its ownership level to 55%. In November 2000, the Petitioner sold approximately 60.5 million [Redacted] shares reducing its ownership level from approximately 55% to 41%. In December 2001, the Petitioner voted its [Redacted] shares in favor of an acquisition [Redacted] where one share [Redacted] converted to 0.440 shares of [Redacted] stock and $4.50 in cash. The Petitioner's share of [Redacted] stock became zero at that time.

The Petitioner claims it was not unitary [Redacted] and the auditor did not combine [Redacted] with the Petitioner in the 2001 through 2003 audit. The Petitioner claims it was merely a top-level investor with comparable oversight. The Petitioner acknowledges that it co-promoted [Redacted], but argues that business relationship was not sufficient to create unity between the two companies.

[Redacted] was combined [Redacted] for tax years 1994 – 1999 on the original returns filed by the taxpayer. Since [Redacted] reported losses for all of these years the losses reduced business income for 1994 – 1999.

[Redacted]

[Redacted] announced its intention to acquire [Redacted] in 2001. In December 2001, [Redacted] and [Redacted] signed a merger agreement. When [Redacted] and [Redacted] merged, the Petitioner's [Redacted] stock converted to [Redacted] stock resulting in Petitioner owning 8% [Redacted]. In the fourth quarter of 2002, the Petitioner sold 67,050,400 shares of its [Redacted] stock. In the first quarter of 2003 the Petitioner sold its remaining interest [Redacted] which was 31,235,958 shares.

The Petitioner contends that due to its small ownership [Redacted] and that [Redacted] was a publicly traded company it was merely a stockholder, no unity existed between it and [Redacted], and the Petitioner did not include [Redacted] on its unitary return. The Petitioner acknowledges it co-promoted [Redacted], but asserts that those business interests were not enough to create unity or make the sale proceeds business income.

DISCUSSION

In a series of cases culminating in Allied-Signal v. Director, Div. of Taxation, 504 U.S. 768 (1992), the United States Supreme Court provided an analytical framework for determining the constitutional restraints on state apportionment of income.[2] As discussed below, the Court held that it is not always necessary to find a unitary relationship between the businesses before apportioning income for state taxation.

The investment in a non-unitary business also can result in business income if the investment serves an operational purpose and is, in itself, part of the unitary business. The Allied-Signal Court described two occurrences where apportionment of income would be consistent with the Due Process and Commerce Clause provisions of the United States Constitution. First, apportionment will be permitted if there is unity between the payor and the payee. That is, apportionment is permitted if the payor and the payee are engaged in the same unitary business.

The second occurrence upon which apportionment of income will be permitted is if the transaction from which the income is derived "serves an operational function" as opposed to an "investment function." Id. at 788. "The essential question under the operational-function test is whether the intangible asset is part of the corporate taxpayer's own unitary business, not whether two separate corporations are engaged in a common enterprise." Walter Hellerstein, State Taxation of Corporate Income From Intangibles: Allied-Signal And Beyond, 48 Tax L. Rev. 739, 791 n.315 (1993).

The United States Supreme Court in Allied-Signal clearly indicated that a taxpayer can derive apportionable income from an operational transaction even though there is no unity between the payor corporation and the payee corporation. The Allied-Signal Court left the remaining test largely undefined; however, it provided one practical example of what may be referred to as

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[2] [Redacted].

"operational unity." According to the Court, "a State may include within the apportionable income of a nondomiciliary corporation the interest earned on short-term deposits in a bank located in another state if that income forms part of the working capital of the corporation's unitary business, notwithstanding the absence of a unitary relationship between the corporation and the bank." Allied Signal, 504 U.S. at 787-788. Thus, income earned on the investment of idle working capital can constitutionally be apportioned among the various states in which the corporation conducts its unitary business operations.

The Court also gave another indication of the breadth of this business income test when it cited footnote 19 of Container Corporation. In footnote 19 of Container Corp., Justice Brennen, writing for the majority, stated that "[a]s we made clear in another context in *Corn Products Co. v. Commissioner*, 350 U.S. 46, 50-53, 76 S.Ct. 20, 23-24, 100 L.Ed. 29 (1955), capital transactions can serve either an investment function or an operational function." Container Corp. 463 U.S. at 180 n.19.

Another important point that can be gleaned from the language in footnote 19 of Container Corp. is that transactions other than the short-term investment of idle working capital may be business income. The fact that the Court cited with approval the Corn Products Co. v. Commissioner decision is significant. As explained by Professor Hellerstein:

> In *Corn Products*, the Supreme Court held that a company engaged in converting corn into syrup and other products realized ordinary income and loss on the sale of corn futures even though such futures were not literally excluded from the "capital asset" definition under I.R.C. § 1221. Because the taxpayer's transactions in corn futures were designed to protect its manufacturing operations against increases in the cost of its principal raw material and to assure a ready source of supply of corn if needed, the Court held that the resulting profits and losses should be characterized consistently with Congress' perceived intent "that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss." *Corn Products*, 350 U.S. at 52.

> The case spawned the doctrine under which gain or loss from the sale of intangible assets, frequently stock in other corporations, was held to be ordinary gain or loss because the asset was "**bought and kept not for investment purposes, but only as an incident to the conduct of the taxpayer's business**." *John J. Grier Co. v. United States*, 328 F.2d 163, 165 (7th Cir. 1964). . . .
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> Income from intangible assets falling under the Corn Products doctrine thus would be apportionable under the operational-function test. . . .

Hellerstein, State Taxation Of Corporate Income From Intangibles: Allied-Signal and Beyond, 48 Tax L. Rev. 739, 793-94 n.319 (1993) (emphasis added).

The Petitioner cites the recent decision by the United States Supreme Court in MeadWestvaco Corp. v. Illinois Dept. of Revenue, ___ U.S. ___, 128 S. Ct. 1498, 170 L.Ed.2d 404 (2008), contending that the Court's decision further supports their nonbusiness income treatment of the income from the transactions in question. The Tax Commission contends that the Mead decision does not support the Petitioners position. Instead, the Court clarified its ruling in Allied Signal and the role of the operational function test.

> We explained that situations could occur in which apportionment might be constitutional even though "the payee and the payor [were] not ... engaged in the same unitary business." 504 U.S., at 787, 112 S.Ct. 2251. It was in that context that we observed that an asset could form part of a taxpayer's unitary business if it served an "operational rather than an investment function" in that business.

Mead, 128 S.Ct. at 1507. The Court further explained that:

> . . . our references to "operational function" in *Container Corp.* and *Allied-Signal* were not intended to modify the unitary business principle by adding a new ground for apportionment. The concept of operational function simply recognizes that an asset can be a part of a taxpayer's unitary business even if what we may term a "unitary relationship" does not exist between the "payor and payee." See *Allied-Signal,supra*, at 791-792, 112 S.Ct. 2251 (O'Connor, J., dissenting); Hellerstein, State Taxation of Corporate Income from Intangibles: *Allied-Signal* and Beyond, 48 Tax L.Rev. 739, 790 (1993) (hereinafter Hellerstein). In the example given in *Allied-Signal*, the taxpayer was not unitary with its banker, but the taxpayer's deposits (which represented working capital and thus operational assets) were clearly unitary with the taxpayer's business. In *Corn Products*, the taxpayer was not unitary with the counterparty to its hedge, but the taxpayer's futures contracts (which served to hedge against the risk of an increase in the

> price of a key cost input) were likewise clearly unitary with the taxpayer's business. In each case, the "payor" was not a unitary part of the taxpayer's business, but the relevant asset was. The conclusion that the asset served an operational function was merely instrumental to the constitutionally relevant conclusion that the asset was a unitary part of the business being conducted in the taxing State rather than a discrete asset to which the State had no claim.

Mead, 128 S.Ct. at 1507-1508. Pursuant to the Court's rulings, when determining the nature of a particular asset, the issue is whether the asset is directly connected with the unitary business or a stand-alone asset with no connection to the unitary business. The connection with the Petitioner's business versus the passive investment distinction also is the fundamental factor in determining whether specific income is business or nonbusiness income under Idaho law.

Under Idaho law, business income is defined as all "income arising from transactions and activities in the regular course of the taxpayer's trade or business and includes income from the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitutes integral or necessary parts of the taxpayer's trade or business operations." Idaho Code § 63-3027(a)(1). Nonbusiness income is all income other than business income. Idaho Code § 63-3027(a)(4). The Tax Commission interprets the statute to take full advantage of Idaho's constitutional authority to apportion income.

Idaho Code § 63-3027 sets forth two separate and independent definitions of the term "business income." Union Pacific v. Idaho State Tax Com'n., 136 Idaho 34, 28 P.3d 375 (2001). According to the Idaho Supreme Court, the first definition for business income is "income arising from transactions and activity in the regular course of the taxpayer's trade or business." Id. at 38 – 39, 28 P.3d at 379 – 380. This definition is referred to as the "transactional test."

The second definition of business income includes "income from the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitutes integral or necessary parts of the taxpayer's trade or business operations." Union Pacific, 136 Idaho at 38 – 39, 28 P.3d at 379 – 380. This definition is referred to as the "functional test."

The transactional test is concerned with income arising from the ordinary course of the taxpayer's trade or business operations. In contrast, the functional test is concerned with income derived from property that is utilized in or otherwise directly connected with the taxpayer's trade or business. Union Pacific, 136 Idaho at 38 – 39, 28 P.3d at 379 – 380.

There is no requirement under the functional test that the income arises from transactions and activities in the regular course of the taxpayer's trade or business. Union Pacific, 136 Idaho at 39, 28 P.3d at 380. The key determination is whether the property acquired, managed, or disposed of, was directly connected with the taxpayer's business operations.

> In our view, in order for such income to be properly classified as business income there must be a more direct relationship between the underlying asset and the taxpayer's trade or business. The incidental benefits from investments in general, such as enhanced credit standing and additional revenue, are not, in and of themselves, sufficient to bring the investment within the class of property the acquisitions, management or disposition of which constitutes an integral part of the taxpayer's business operations. This view furthers the statutory policy of distinguishing that income which is truly derived from passive investments from income incidental to and connected with the taxpayer's business operations.

American Smelting, 99 Idaho at 933, 592 P.2d at 48. The important distinction is whether the property was directly connected with the taxpayer's unitary business activity or merely a passive investment.

In Container Corp, the Court, while citing the Mobil "factors of profitability" with approval, also made it clear that the overarching inquiry in determining whether two or more enterprises are engaged in a unitary business is the existence of a "sharing or exchange of value not capable of precise identification or measurement – beyond the mere flow of funds arising out of a passive investment or a distinct business operation – which renders formula apportionment a reasonable method of taxation." Container Corp, 463 U.S. at 166.

Similarly, in Edison California Stores, Inc. v. McColgan, 183 P.2d 16 (Cal. 1947), the California Supreme Court articulated what has since come to be known as the "contribution – dependency" test. Succinctly stated, if the operation of one company is dependent upon or contributes to the operation of another company, the operations are unitary. If there is no such dependency or contribution, the businesses are considered to be separate. *See* Edison, 183 P.2d at 21. The Idaho Supreme Court has cited with approval the contribution – dependency test first articulated in Edison. *See* Albertson's Inc. v. State, Dept. of Rev., 106 Idaho 810, 815 - 816, 683 P.2d 846, 851 - 852 (1984).

None of the cases require that either business contribute to one another or be dependent upon one another in an absolute or "macro" sense. A unitary business is not a passive investment and is not a distinct business operation. But where the facts and circumstances establish an interrelationship or flow of values that goes beyond a mere passive investment or a distinct business operation, it is likely that a unitary relationship exists "which renders formula apportionment a reasonable method of taxation."

Business income may arise whether or not two companies are unitary. The Petitioner is a major player in the [Redacted] industry. All of the transactions in this case appear to meet the Petitioner's overarching business goals to gain position, leverage, collaborate in research, and/or cooperate with other companies in their industries. All of the transactions in question are more than just passive investments or distinct business operations.

The Tax Commission's decision in a previous [Redacted] case, No. 16503, illustrates the Petitioner's buying and selling of businesses in their related industry to further its business goals. Income from these activities was determined to be business income in that decision.

The Petitioner originally included the [Redacted] breakup fee as business income on their year 2000 return. Their initial position was correct. The breakup fee proceeds were used to reduce debt and for general corporate purposes, including payment of dividends to stockholders. The [Redacted] deal was entered into for a clear business purpose of expanding the Petitioner's [Redacted] business and increasing economies of scale, centralizing management and functionally integrating the Petitioner and [Redacted]. The breakup fee was in lieu of these anticipated future savings and revenues. The breakup fee is business income.

The Petitioner owned more than 50% of [Redacted] division. The Petitioner included [Redacted] division and its subsidiaries in its combined Idaho corporate income tax returns from 1997 until 2000. Income or loss from the [Redacted] division was treated as business income. Any loss or gain from the sale of the [Redacted] division should also be treated as business income.

[Redacted] was a [Redacted] company in the same general line of business as the Petitioner. The Petitioner included [Redacted] in its combined Idaho corporate income tax returns from 1994 until 1999. Including [Redacted] as business income was advantageous for the Petitioner as [Redacted] reported losses for all of these years, which reduced business income for the Petitioner. From 1994 to 2000 the Petitioner owned more than 50% of [Redacted]. [Redacted] provided hundreds of millions in financing for [Redacted] building of a facility. The [Redacted]. The Petitioner had exclusive international rights [Redacted] and the licensing and marketing rights remained substantially the same before and after the [Redacted] stock sale.

[Redacted] was also in the same related business as the Petitioner and [Redacted]. The [Redacted].

In Idaho, a statutory presumption exists that income from stock or other securities is business income. The presumption is only overcome by clear and convincing evidence. Idaho Code § 63-3027(a)(1). The Petitioner has failed to overcome this presumption.

The Petitioner has also failed to overcome the presumption that the Tax Commission's determination of business income in these matters is correct. Albertson, 106 Idaho 810 (1984).

Carryovers and Refunds

The [Redacted] Division, and part of the [Redacted] transaction occurred in the year 2000. Any refund and the carrying forward of net operating losses is at issue only if the transactions at issue are characterized as giving rise to nonbusiness income. Neither the Petitioner's request for a refund nor its request to apply the loss carryback and carryforward provisions need be addressed because the Tax Commission has determined that all of these transactions gave rise to business income.

Only in the event that all four of the above mentioned transactions were deemed to give rise to non-business income would the Petitioner receive any favorable tax treatment under IDAPA 35.01.01.201. However, it is worthwhile to note that, even if one or all of the transactions in question in 2000 had been deemed to give rise to business income, a refund would still not have been available. No refund is allowed for closed years or, in other words, years beyond the statute of limitations for seeking a refund under IDAPA 35.01.01.880.03.a. Regardless of whether the income is characterized as business or nonbusiness, no refund would be allowed.

Petitioner also argues that because taxable year 2000 was open because of a federal audit, a refund should be available. However, any issues reviewed [Redacted] would have not have concerned business/nonbusiness income issues as these are Uniform Division of Income for Tax Purposes Act or in other words state issues. Idaho Code § 63-3072(d). The [Redacted] is not concerned with the allocation of income between states, because the [Redacted] collects taxes on corporations regardless of state boundaries.

Sales Factor Denominator

Nominal adjustments were made after the Petitioner provided the sales factor gross receipts numbers to the Tax Commission in 2008. The Petitioner agrees with the modifications the Tax Commission has made to the NODs to reflect the correct sales factor gross receipts. This issue is no longer in dispute.

Distortion

The Constitution imposes no single apportionment formula on states, and the Court has declined to undertake the essentially legislative task of establishing a single constitutionally mandated method of taxation. Goldberg v. Sweet, 488 U.S. 252, 261 (1989). A "margin of error [is] inherent in any method of attributing income among the components of a unitary business." Container Corp., 463 U.S. at 184. Such a formula need not "identify the precise geographic source of a corporation's profits." Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978). Under these standards articulated by the Supreme Court, states are given wide latitude in developing a formula that can be used to apportion the business income of a single multistate entity or of a unitary business.

Although states are given wide latitude in fashioning their respective apportionment formula under the United States Constitution, Idaho's apportionment statute recognizes that there are instances in which the standard apportionment formula does not accurately reflect the extent of the unitary group's business activity in the state of Idaho. Idaho Code § 63-3027(s) provides that, in certain instances, either the taxpayer or the Tax Commission can request an alternative apportionment when standard apportionment fails to accurately reflect the taxpayer's business activity that occurs in Idaho.

Alternative apportionment is a rare exception, not the rule. The Idaho Supreme Court examined the alternative apportionment provisions and stated that "There is a very strong presumption in favor of the normal three-factor apportionment and against the applicability of the relief provisions." Union Pacific v. Idaho State Tax Commission., 139 Idaho 572, 576, 83 P.3d 116, 120 (2004), *citing* Roger Dean Enterprises, Inc. v. State, 387 So.2d 358, 363 (Fla., 1980). The party asserting alternative apportionment bears the burden of showing that the alternative apportionment is appropriate. Union Pacific, 139 Idaho at 576, 83 P.3d at 120 *citing* Burlington Northern, Inc. v. Idaho State Tax Comm'n, 121 Idaho 808, 828 P.2d 837 (1992). Departure from the standard apportionment formula should be avoided except where reasonableness requires a departure. Union Pacific, 139 Idaho at 577, 83 P.3d at 121, *citing* Pierce, The Uniform Division of Income for State Tax Purposes, 35 TAXES 747, 781 (1957). The Court then identified what grounds of "reasonableness" would support a deviation from the standard apportionment formula.

> "Reasonableness" has been defined as being made up of three elements: (1) the division of income fairly represents business activity and if applied uniformly would result in taxation of no more or no less than 100 percent of the taxpayer's income; (2) the division of income does not create or foster lack of uniformity among UDITPA jurisdictions; and (3) the division of income reflects the economic reality of the business activity engaged in by the taxpayer in the taxing state.

Union Pacific, 139 Idaho at 577, 83 P.3d at 121, *citing* Twentieth Century-Fox Film Corp. v.

Dep't of Revenue, 299 Or. 220, 700 P.2d 1035 (1985). In sum, the party requesting alternative apportionment must demonstrate that standard apportionment results in a sufficient distortion of the Petitioner's business activity in the state; simply advocating a better method than the standard formula is not enough. Union Pacific, 139 Idaho at 122, 83 P.3d at 578, *citing* Appeal of New York Football Giants, (Opinion on Pet. Rhg., Calif. St. Bd. of Equalization, June 28, 1979).

The Petitioner has Idaho operations mainly for sales solicitations of the Petitioner's products and inventories. These include sales of products and inventories of the Petitioner's and the Petitioner's subsidiaries, [Redacted], which merged with the Petitioner on June 30, 2001, and [Redacted], which merged with Petitioner on December 31, 2001.

The Petitioner implies that standard apportionment does not reflect its business activities in Idaho. However, the Petitioner has not demonstrated why it would be "reasonable" to depart from the standard apportionment formula, as the term "reasonable" has been defined by the Idaho Supreme Court. Without more explanation, the Commission must conclude that alternative apportionment is not appropriate in this case.

Also, as to the facts presented in this case, the facts do not warrant alternative apportionment due to distortion based upon the argument that Idaho activity is so small that imposing the tax per Idaho Code would result in Idaho receiving an unjust and overly large tax in relation to the Petitioner's activities in Idaho.

CONCLUSION

It is well settled in Idaho that a Notice of Deficiency Determination issued by the Idaho State Tax Commission is presumed to be correct. Albertson's Inc. v. State, Dept. of Revenue, 106 Idaho 810, 814 (1984); Parsons v. Idaho State Tax Commission, 110 Idaho 572, 574-575, fn.2 (Ct. App. 1986). The burden is on the taxpayer to show that the tax deficiency is erroneous.

Id. Since the taxpayer has failed to meet this burden, the Tax Commission finds that the amount shown due on the Notice of Deficiency Determination is true and correct.

The Commission upholds NODs issued by the audit bureau. The Bureau also added interest, which interest will continue to accrue pending payment of the tax liability pursuant to Idaho Code § 63-3045(6), and penalty to the taxpayer's tax deficiency. The Tax Commission finds those additions appropriate as provided for in Idaho Code §§ 63-3045 and 63-3046.

WHEREFORE, the Notice of Deficiency Determination dated August 31, 2005, in Docket No. 19106, and the Notice of Deficiency Determination dated June 28, 2007, in Docket No. 20474, are hereby APPROVED and AFFIRMED as MODIFIED, and MADE FINAL, and the Notice of Deficiency Determination dated November 19, 2008, in Docket No. 21711, is hereby APPROVED, AFFIRMED, AND MADE FINAL.

Payment of $12,366 for taxable year 2000 was received on November 28, 2007, and a reduction for this payment is shown below.

IT IS ORDERED and THIS DOES ORDER that the refund claimed of $365,113 for taxable year 2000, as well as any other refunds claimed for carrybacks or carryforwards for net operating losses for the years in question, are also not allowed and that the taxpayer pay the following tax, penalty, and interest:

YEAR	TAX	PENALTY	INTEREST	TOTAL DUE
12/31/2000	$ 8,665	0	$ 3,701	$ 12,366
		LESS PAYMENT RECEIVED 11/28/2007		(12,366)
			AMOUNT DUE FOR 2000	0
12/31/2001	60	0	29	89
12/31/2002	121,431	12,143	48,739	182,313
12/31/2003	262,635	26,264	91,494	380,393
			TOTAL	$562,795

Interest is calculated through November 30, 2009.

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of the taxpayer's right to appeal this decision is enclosed. As set forth in the enclosed explanation the Petitioner must deposit with the Tax Commission 20% of the total amount due in order to appeal this decision. If 20% is deposited, in this case **$112,559**, it will be held as security for the payment of taxes until the appeal is finally resolved.

DATED this ________ day of _________________________ 2009.

IDAHO STATE TAX COMMISSION

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COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _______________ 2009, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[REDACTED] Receipt No. ______________________________