

**BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO**

In the Matter of the Protest of	)	
	)	DOCKET NO. 21957
[Redacted]	)	
	)	DECISION
Petitioner.	)	
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On March 12, 2009, the Idaho State Tax Commission’s (Commission) Income Tax Audit Bureau (ITA) issued a Notice of Deficiency Determination (NODD) to [Redacted] (petitioner) proposing additional income tax, penalty, and interest for taxable years 2004, 2005, and 2006 in the total amount of \$49,940. The petitioner filed a timely protest and petition for redetermination. The petitioner was informed of his appeal rights. The Idaho Code section 63-3045(2) hearing was held on June 1, 2010. The Commission, having reviewed the file, hereby issues its decision.

**A. IN GENERAL**

The petitioner is a resident [Redacted] and files an Idaho nonresident individual income tax return. The petitioner is engaged [Redacted] within Idaho, [Redacted] he receives a commission, he owns an interest [Redacted] business within Idaho, and he owns or owned various properties [Redacted]. For example, the record reflects that the petitioner paid taxes on property [Redacted], and that on June 4, 2007, the petitioner exchanged his 21.25 percent interest [Redacted] home plus a [Redacted] condo for real property [Redacted].

On the returns filed by the petitioner for taxable years 2004 through 2006, he reported Idaho source income [Redacted] commissions, investments [Redacted], and gain from the sale of [Redacted] real property.

The petitioner disagrees with the ITA’s adjustments to the amount of income the petitioner reported from his ownership in a partnership (the partnership), and he objects to the

ITA's method of determining the amount of Idaho source income subject to Idaho taxation relating to the petitioner's federal Sch. C real estate sales business.

1. Partnership Flow-Through Adjustments

The petitioner is a general partner of the partnership. The ITA adjusted the amount of Idaho source income flowing from the partnership to the petitioner which resulted in increasing the amount of the petitioner's Idaho source income as follows:

<b>Table 1 – ITA's NODD Adjustment</b>	<b>2006</b>	<b>2005</b>	<b>2004</b>
Partnership Idaho source income	-\$3,467	\$6,028	\$14,399
Petitioner's profit/loss percentage	50%	50%	50%
Idaho source income	-\$1,734	\$3,014	\$7,200
Less amount previously reported	-11,203	0	0
Idaho adjustment	<u>9,469</u>	<u>3,014</u>	<u>7,200</u>

In Docket No. 21958, the Commission's findings resulted in the elimination of the ITA's adjustments as shown in **Table 1** above. Since the only adjustment for taxable year 2004 was the adjustments flowing from the partnership, that portion of the NODD relating to taxable year 2004 is resolved in the petitioner's favor with no additional monies due from the petitioner on taxable year 2004.

The remaining issue for the Commission to resolve is how to determine the amount of Idaho source income from the petitioner's federal Sch. C business relating to [Redacted] taxable years 2005 and 2006.

2. Federal Sch. C Businesses

The petitioner is engaged in several sole proprietorships [Redacted].

On his federal income tax return, the petitioner reported the following federal Sch. C activity relating his [Redacted] business:

<b>Table 2 – Federal Sch. C Real Estate Sales</b>	<b>2006</b>	<b>2005</b>
Gross receipts	\$640,901	\$449,767
Advertising	-50	0
Car and truck	-4,372	-4,801
Commissions and fees		-225
Insurance	-1,462	-770
Travel	-2,541	-220
Meals	-879	-1,855
Depreciation	-5,773	-5,085
Taxes and licenses	-422	-143
Legal and professional	-3,518	-2,883
Wages	-8,715	-9,669
Repairs and maintenance	-934	
Supplies	-1,748	-2,720
Boat expense	-2,082	-2,844
Gifts	-4,473	-3,716
Signs	-1,792	-1,023
Education	-75	-171
Other client expenses	-750	-7,390
License		-733
Dues and subscriptions	-2,927	-2,451
Parking and tolls	-1,325	
Postage or printing	-1,115	-862
Telephone	-4,553	-3,380
Permits	-75	-1,087
Other or miscellaneous	-1,138	-1,420
Net Sch. C income	<u>\$590,182</u>	<u>\$396,319</u>

In a letter dated July 7, 2008, the petitioner described his [Redacted] activity and its connection to Idaho as follows:

[Redacted]

The petitioner treated 8 percent of his [Redacted] business activity and 100 percent of his [Redacted] activity as Idaho source income as follows:

<b>Table 3 – Federal Sch. C</b>	<b>2006</b>	<b>2005</b>
Sch. C - Real estate sales business	\$47,215	\$31,704
Sch. C - Real estate development	\$397	-\$3,203

In support of his position that no more than 8 percent of his [Redacted][Redacted] business should be treated as Idaho source income, the petitioner provided the Commission with a copy of his weekly Day-Timer calendar tracking various appointments including the time the petitioner reportedly was in Idaho [Redacted]. The petitioner spent 145 hours in calendar year 2006 and 167 hours in calendar 2005 as follows:

**Table 4 - Hours Worked in Idaho According to the Petitioners Records**

<b>Calendar Year 2006</b>				<b>Calendar Year 2005</b>			
<b>Week</b>	<b>Hours</b>	<b>Week</b>	<b>Hours</b>	<b>Week</b>	<b>Hours</b>	<b>Week</b>	<b>Hours</b>
1	5	27	4	1	0	27	0
2	0	28	3	2	7	28	9
3	0	29	0	3	0	29	11
4	0	30	4	4	0	30	8
5	7	31	0	5	4	31	8
6	5	32	7	6	0	32	8
7	5	33	4	7	5	33	8
8	0	34	4	8	3	34	0
9	0	35	0	9	15	35	5
10	8	36	4	10	12	36	3
11	14	37	2	11	5	37	0
12	0	38	6	12	0	38	4
13	3	39	0	13	0	39	0
14	0	40	0	14	0	40	7
15	3	41	2	15	6	41	0
16	0	42	3	16	0	42	0
17	8	43	0	17	4	43	0
18	3	44	0	18	13	44	0

**Table 4 - Hours Worked in Idaho According to the Petitioners Records (Cont.)**

<b>Calendar Year 2006</b>				<b>Calendar Year 2005</b>			
<b>Week</b>	<b>Hours</b>	<b>Week</b>	<b>Hours</b>	<b>Week</b>	<b>Hours</b>	<b>Week</b>	<b>Hours</b>
19	5	45	0	19	3	45	4
20	0	46	0	20	0	46	0

21	3	47	0	21	0	47	3
22	7	48	2	22	0	48	0
23	7	49	3	23	3	49	0
24	11	50	0	24	0	50	4
25	3	51	0	25	5	51	0
26	<u>0</u>	52	<u>0</u>	26	<u>0</u>	52	<u>0</u>
Subtotal	<u>97</u>		48		<u>85</u>		82
First half of year			<u>97</u>				<u>85</u>
Total for taxable year			<u>145</u>				<u>167</u>

ITA disagrees with the approach the petitioner used to calculate the amount of Idaho source income associated with his Federal Sch. C [Redacted]. ITA determined that the Idaho factors that the petitioner should have used for his real estate sales business is as follows:

Table 5 - Idaho Factors	Taxable Year 2006			Taxable Year 2005		
	Denominator	Numerator	Percentage	Denominator	Numerator	Percentage
<b>Idaho sales factor</b>						
Commissions	\$640,901	\$558,105	87.0813%	\$449,767	\$326,117	72.5080%
Multiplier			<u>2</u>			<u>2</u>
<b>Idaho sales factor doubled</b>			174.1626%			145.0160%
<b>Idaho payroll factor:</b>	\$8,715	\$0	0.0000%	\$9,669	\$0	0.0000%
<b>Beginning property:</b>						
Vehicle 1	\$0			\$17,905		
Vehicle 2	29,841			0		
Boat trailer	1,268			1,268		
<b>Ending property:</b>						
Vehicle 1	0			0		
Vehicle 2	29,841			29,841		
Boat trailer	<u>1,268</u>			<u>1,268</u>		
Subtotal	\$62,218			\$50,282		
Divided by	<u>2</u>			<u>2</u>		
Averaged owned	31,109			25,141		
Capitalized rent	<u>0</u>			<u>0</u>		
<b>Idaho property factor</b>	<u>\$31,109</u>	<u>\$27,090</u>	87.0813%	<u>\$25,141</u>	<u>\$18,229</u>	72.5080%

Based upon the Idaho factors, the Idaho apportionment factor to be applied against the petitioner's federal Sch. C [Redacted] was determined by the ITA as follows:

<b>Table 6 – Idaho Apportionment Factor</b>	<b>2006</b>	<b>2005</b>
Idaho sales factor (doubled)	174.1626%	145.0160%
Idaho payroll factor	0.0000%	0.0000%
Idaho property factor	87.0813%	72.5080%
Total percentage	261.2440%	217.5240%
Divided by	4	4
Idaho apportionment factor	65.3110%	54.3810%

The ITA next calculated the amount of Idaho source income that the petitioner was required to report to Idaho and then compared their calculation to the amount the petitioner reported on his Idaho return and made the following adjustment:

<b>Table 7 – ITA Federal Sch. C Adjustment</b>	<b>2006</b>	<b>2005</b>
Sch. C. net income	\$590,182	\$396,319
Idaho apportionment factor	65.3110%	54.3810%
Idaho source income	\$385,454	\$215,522
Less amount reported	47,612	28,501
Idaho adjustment	\$337,842	\$187,021

In **Table 7**, when determining the actual amount of Idaho source income adjustment relating to the [Redacted] business, the ITA inadvertently included the [Redacted] business (see **Table 3**) as part of the “amount reported.”

## **B. LAW AND ANALYSIS**

It is undisputed that the petitioner received Idaho source gross income in excess of \$2,500 in taxable years 2005 and 2006; thus requiring the petitioner to file an Idaho nonresident or part-year resident income tax return. Idaho Code section 63-3030(a)(2).<sup>1</sup>

<sup>1</sup> References to Idaho Code or Rules refer to the Idaho Code or Income Tax Administrative Rules in effect for the taxable year 2007 unless otherwise stated.

When the petitioner filed his returns, he attached a statement to his Idaho return stating that, since he spends approximately 8 percent of his time in Idaho, he is allocating 8 percent of his [Redacted] business to Idaho. His approach is similar to the calculation found in Idaho Income Tax Administrative Rule 270 (IDAPA 35.01.01.270), which states, in pertinent part:

**270. IDAHO COMPENSATION -- IN GENERAL (RULE 270)**  
Section 63-3026A(3).

**01. In General.** If an individual performs personal services, either as an ... agent, independent contractor or otherwise, both within and without Idaho, the portion of his total compensation that constitutes Idaho source income is determined by multiplying that total compensation by the Idaho compensation percentage.

**02. Definitions.**

**a.** The Idaho compensation percentage is the percentage computed by dividing Idaho work days by total work days.)

**b.** The term Idaho work days means the total number of days the taxpayer provided personal services in Idaho for a particular employer or principal during the calendar year.

**c.** Total work days means the total number of days the taxpayer provided personal services for that employer or principal both within and without Idaho during the calendar year. For example, a taxpayer working a five (5) day work week may assume total work days of two hundred sixty (260) less any vacation, holidays, sick leave days and other days off.

**d.** Total compensation means all . . . commissions, contract payments, and other compensation for services, including sick leave pay, holiday pay and vacation pay, that is taxable pursuant to the Idaho Income Tax Act if earned by a resident of Idaho.

**03. Work Days.** Work days include only those days the taxpayer actually performs personal services for the benefit of the employer or principal. . . . The taxpayer has the burden of establishing non-Idaho work days. Documentation establishing non-Idaho work days may be required to support the Idaho compensation percentage used by the taxpayer.

**04. Multiple Employers.** If a taxpayer performs personal services both within and without Idaho for more than one (1) employer or principal, he shall

determine an Idaho compensation percentage separately for each employer or principal.

**05. Alternative Method.** If the Idaho compensation percentage does not fairly represent the extent of the taxpayer's personal service activities in Idaho, the taxpayer may propose or the Tax Commission may require an alternative method. For example, working hours may be a more appropriate measure than work days in some cases.

**a.** The taxpayer shall fully explain the alternative method in a statement attached to his Idaho individual income tax return.

**b.** The alternative method may be used in lieu of the method in Subsection 270.01 unless the Tax Commission expressly denies its use.

However, ITA argues that under Idaho law a sole proprietorship, operating within and without Idaho, shall apply the principles of allocation and apportionment of income set forth in Section 63-3027, Idaho Code, and related rules to determine the extent of proprietorship income that is derived from or related to Idaho sources.<sup>2</sup> The ITA did not disturb the petitioner's [Redacted] activity as 100 percent Idaho or the petitioner's showing that none of his [Redacted] activity is conducted within Idaho; however, the ITA did apply an apportionment formula (see **Tables 5 thru 7** above) to the petitioner's [Redacted] business.

1. Idaho's Apportionment Formula.

The most commonly used formula for dividing the income is found in the Uniform Division of Income for Tax Purposes Act (UDITPA). Idaho and many other states have adopted UDITPA either in whole or with modifications. Idaho Code section 63-3027(i) states that "[a]ll business [apportionable] income shall be apportioned to this state . . . by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus two (2) times the sales factor, and the denominator of which is four (4). . . ." Id. The property factor is

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<sup>2</sup> Idaho Income Tax Administrative Rule 265 (IDAPA 35.01.01.265)

computed by dividing the petitioner's property [Redacted] by its property located everywhere.<sup>3</sup> Likewise, the payroll factor is calculated by dividing the petitioner's Idaho payroll by its payroll everywhere.<sup>4</sup> And finally, the sales factor is derived by dividing the company's Idaho sales by its sales everywhere.<sup>5</sup> Many states, including Idaho, have modified the traditional three-factor formula so that the sales factor is double weighted.

The three-factor apportionment formula, by means of the location of a business's property, payroll, and sales, approximates the extent of the business activity in a given state.<sup>6</sup>

## 2. The Property Factor of the Apportionment Formula.

In general, the property factor of the apportionment formula for each trade or business of the taxpayer includes all real and tangible personal property owned or rented by the taxpayer and used during the taxable year in the regular course of its trade or business. The term real and tangible personal property includes land, buildings, fixtures, inventory, equipment, and other property of a tangible nature, but does not include coin or currency.<sup>7</sup>

The petitioner's only assets used in the petitioner's [Redacted] business appears to be a vehicle and a boat trailer. Since the petitioner could not document the actual usage of these assets within Idaho, the ITA used the ratio of Idaho [Redacted] commissions to total [Redacted] commissions to determine the Idaho property factor. Thus, for 2005 and 2006, the ITA's calculation of the petitioner's Idaho property factor was 72.5080 percent and 87.0813 percent, respectively.

## 3. The Payroll Factor of the Apportionment Formula.

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<sup>3</sup> Idaho Code section 63-3027(k).

<sup>4</sup> Idaho Code section 63-3027(n).

<sup>5</sup> Idaho Code section 63-3027(p).

<sup>6</sup> Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 164-169 (1983).

<sup>7</sup> Idaho Income Tax Administrative Rule 460.01 (IDAPA 35.01.01.460.01).

In general, the payroll factor of the apportionment formula for each trade or business of the taxpayer includes the total amount paid for compensation during the taxable year by the taxpayer in the regular course of its trade or business. Compensation means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services. Compensation includes the value of board, rent, housing, lodging, and other benefits or services the taxpayer furnished to employees in return for personal services if the amounts constitute income to the recipient pursuant to the Internal Revenue Code.<sup>8</sup>

The petitioner apparently employs individuals in his [Redacted] business; however, none of these employees perform duties within Idaho. It is unclear exactly what duties these employees performed on behalf of the petitioner's [Redacted] business. The Idaho payroll factor included in the NODD is zero as shown in **Table 6** above.

Subsequent to the issuance of the NODD, the ITA recommends that the payroll factor be excluded from the calculation "because the payroll is such an insignificant factor in the production of the business income in this case and appears to distort the actual income-producing activity in each state."<sup>9</sup>

#### 4. The Sales Factor of the Apportionment Formula.

Generally, gross receipts are included in the sales factor denominator and numerator.<sup>10</sup> In general, sales means all gross receipts of a taxpayer not allocated as nonbusiness income.<sup>11</sup> The sales factor for each trade or business of the taxpayer includes all gross receipts derived by the taxpayer from transactions and activity in the regular course of that trade or business.<sup>12</sup> For numerator purposes, the sales of tangible personal property will be assigned to the state in which

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<sup>8</sup> Idaho Income Tax Administrative Rule 500.01 and .02 (IDAPA 35.01.01.500.01 and .02).

<sup>9</sup> The ITA's Protest Summary write-up.

<sup>10</sup> Idaho Code section 63-3027(p).

<sup>11</sup> Idaho Code section 63-3027(a)(5).

<sup>12</sup> Idaho Income Tax Administrative Rule 525.01 (IDAPA 35.01.01.525.01).

the property is located.<sup>13</sup> Sales other than sales of tangible personal property (intangible property and services) are more difficult to source to a particular state. Sales other than sales of tangible personal property, such as commissions from the sale of real property, are sourced to the state in which the income-producing activity is performed.<sup>14</sup>

To provide guidance in determining whether income from sales other than sales of tangible personal property should be included in the Idaho numerator, the Commission has adopted an administrative rule defining the term “income-producing activity.” According to Idaho Income Tax Administrative Rule 550.02, “[t]he term income producing activity applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gains or profits.”<sup>15</sup>

The Commission has also adopted Idaho Income Tax Administrative Rule 550.05.d. dealing specifically with the performance of personal services.<sup>16</sup>

d. Gross receipts for the performance of personal services are attributable to Idaho to the extent the services are performed in Idaho. If services relating to a single item of income are performed within and without Idaho, they are attributable to Idaho only if a greater portion of the services were performed in Idaho, based on costs of performance. Usually if services are performed within and without Idaho, they constitute a separate income producing activity. In this case the gross receipts attributable to Idaho are measured by the ratio that the time spent in performing the services in Idaho bears to the total time spent in performing the services everywhere. Time spent in performing services includes the time spent in performing a contract or other obligation that generates the gross receipts. This computation does not include personal service not directly connected with the performance of the contract or other obligation, as for example, time spent in negotiating the contract.

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<sup>13</sup> Idaho Code section 63-3027(q).

<sup>14</sup> Idaho Code section 63-3027(r).

<sup>15</sup> IDAPA 35.01.01.550.02.

<sup>16</sup> IDAPA 35.01.01.550.05.d.

Under Idaho law, the focus of the “income-producing activity” inquiry is on the direct costs associated with the generation of the income in the taxpayer’s regular course of business.

For purposes of the cost of performance test, direct costs are determined according to generally accepted accounting principles and the accepted conditions or practices of the taxpayer’s trade or business.<sup>17</sup> Indirect costs relating to the generation of the income, such as compensation paid to officers and directors and other general and administrative costs, are not considered.<sup>18</sup> Additionally, Idaho Income Tax Administrative Rule 550.05.d. specifically states that the cost of performance computation “does not include personal service not directly connected with the performance of the contract or other obligation, as for example, time spent in negotiating the contract.”<sup>19</sup>

In the present case although the petitioner agrees with the ITA that the Idaho payroll factor would be zero, the petitioner disagrees with the ITA’s calculation of the Idaho sales and property factor. The petitioner argues that the real estate commissions he receives are gross receipts solely from the performance of personal services and not from the “[Redacted].”<sup>20</sup>

As gross receipts from the performance of personal services, the petitioner argues that, under Idaho Income Tax Administrative Rule 550.05(d), the gross receipts attributable to Idaho are measured by the ratio that the time spent in performing the services in Idaho bears to the total time spent in performing the services elsewhere.<sup>21</sup> However, the petitioner did not actually use a cost of performance approach in determining the Idaho receipts, and instead, he used an alternative approach based strictly upon an estimate of the amount of time he spent in Idaho.

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<sup>17</sup> Idaho Income Tax Administrative Rule 550.03 (IDAPA 35.01.01.550.03).

<sup>18</sup> Commission decision in Docket No. 21750 published in 2010.

<sup>19</sup> IDAPA 35.01.01.550.05.d.

<sup>20</sup> Petitioner’s representative’s letter dated May 13, 2009.

<sup>21</sup> Petitioner’s representative’s letter dated May 13, 2009.

As for the property factor, the petitioner argues against the ITA's use of the sales factor to determine the amount of the Idaho property factor; however, the petitioner did not provide a basis for his argument. Basically, because the petitioner could not document the actual usage of the vehicle and boat trailer in Idaho, the ITA used the Idaho sales factor ratio for the Idaho property factor ratio (see **Table 5** above).

Although the ITA found that the petitioner should have determined the amount of Idaho source income from his [Redacted] business by applying the allocation and apportionment provisions found in Idaho Code section 63-3027. In the NODD, the ITA argues that the standard apportionment approach contained in the statute does not fairly represent the petitioner's business activity within Idaho.

In the NODD, the ITA explains its reasoning for requiring the petitioner to use alternative apportionment as follows:

[Redacted]

Therefore, it is the ITA's belief that the location of the property [Redacted] is the best measurement of the Idaho sales factor.

As previously mentioned, the ITA, in an addition to the sales factor, included a payroll factor and a property factor in their apportionment formula approach.

Since the petitioner had not documented the use of the vehicle and boat trailer within and without Idaho, the ITA used the Idaho sales factor percentage for the Idaho property factor percentage.

Given that none of the petitioner's employees were performing duties within Idaho, the Idaho payroll factor in the ITA's apportionment formula was zero; however, subsequent to the issuance of the NODD, the ITA argues that the payroll factor should have been disregarded. The

ITA argues that the commission income is primarily based on the petitioner's own services, and not the services of employees, coupled with the fact that the payroll paid by the petitioner is such an insignificant factor in the production of the business income, the inclusion of the payroll factor distorts the actual income-producing activity in each state.

An alternative apportionment is warranted when (1) the standard apportionment provisions do not fairly represent the extent of the [Redacted]'s business taking place in this state, and (2) the proposed alternative apportionment formula is reasonable.<sup>22</sup>

Since the ITA and the petitioner both argue that the Idaho Code section 63-3027 standard apportionment approach (an UDIPTA approach) does not fairly reflect the petitioner [Redacted] activity within Idaho, in this type of unusual situation where both parties agree that standard UDITPA is inappropriate, the Commission need not apply a burden of proof.<sup>23</sup>

After careful review of the positions set forth by the petitioner and by the ITA, it is the Commission's finding that the standard UDITPA would not fairly reflect the petitioner's business activity within Idaho. The Commission agrees with the ITA that it is the location of the underlying real property that should play the primary role in determining the amount of Idaho source income from the petitioner's [Redacted] business that the petitioner should report and pay Idaho tax on. In fact, in 2010, for purposes of alternative apportionment, Idaho Income Tax Administrative Rule 570.04.d. (IDAPA 35.01.01.570.04.d.) was added to reflect the Commission's position on commissions and other fees [Redacted] as follows:

**04. Commissions and Fee Income Related to the Sale of Another Taxpayer's Real Property.** Notwithstanding the provisions of Rule 550 of these rules, gross receipts from commissions or fees arising as a result of the personal services and activities associated with the selling of another taxpayer's real property shall be sourced to the state where the real property is located. (3-29-10)

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<sup>22</sup> Union Pacific v. Idaho State Tax Commission, 139 Idaho 572, 575, 83 P.3d 116, 119 (2004).

<sup>23</sup> Commission decision in Docket No. 11220 published in 1997.

As for the ITA's inclusion of a property factor and payroll factor in its apportionment formula factor as shown in **Table 5** above, and given the facts in this docket, the Commission does not agree with the inclusion of a property or payroll. Instead, in order to fairly represent the petitioner's business activity from his real estate sales activity within Idaho, **a single sales factor approach** based upon a ratio of commissions [Redacted] of all [Redacted] property should be employed when computing the amount of Idaho source net rental income or loss from the petitioner's [Redacted] business. Accordingly, the Commission, under the authority granted to it by Idaho Code section 63-3027(s), does hereby require the petitioner to employ the aforementioned single sales factor approach to determine the amount of Idaho source income derived from his [Redacted] business.

The percentages for taxable years 2005 and 2006 under a single sales factor approach [Redacted] would be as follows:

<b>Table 8 - Single Sales Factor:</b>	<u>Idaho</u> <u>Commissions</u>	÷	<u>Total</u> <u>Commissions</u>	=	<u>Idaho</u> <u>Sales Factor</u>
Taxable year 2006	\$558,105	÷	\$640,901	=	87.0813%
Taxable year 2005	\$326,117	÷	\$449,767	=	72.5080%

As a result of employing an apportionment formula different than that employed in the NODD, the adjustments in the amount of Idaho source income as well as the adjustment to the petitioner's income tax returns are as follows:

<b>Table 9 – Federal Sch. C Real Estate Sales:</b>	<b>2006</b>	<b>2005</b>
Net income (loss)	\$590,182	\$396,319
Idaho apportionment factor (see <b>Table 8</b> above)	87.0813%	72.5080%
Idaho source income	\$513,938	\$287,363
Amount reported on the petitioner's Idaho return	47,215	31,704
Adjustment	<u>\$466,723</u>	<u>\$255,659</u>

In summary, the ITA's adjustments included in the NODD for taxable years 2004, 2005, and 2006, relating to the petitioner's [Redacted] investment as shown in **Table 1** above are

reversed; the ITA's adjustment included in the NODD for taxable years 2005 and 2006, as shown in **Table 7** above relating to the petitioner's [Redacted] business are modified as shown in **Table 9** above; and the Commission declines to assert the penalty proposed in the NODD.

WHEREFORE, the Notice of Deficiency Determination dated March 12, 2009, is hereby MODIFIED, APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the petitioner pay the following tax, penalty, and interest:

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
2005	\$19,086	\$0	\$5,348	\$24,434
2006	35,537		7,728	<u>43,265</u>
			TOTAL DUE	<u>\$67,699</u>

Interest is calculated through December 15, 2010, and will continue to accrue at the rate set forth in Idaho Code section 63-3045.

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

An explanation of the petitioner's right to appeal this decision is enclosed.

DATED this \_\_\_\_ day of \_\_\_\_\_ 2010.

IDAHO STATE TAX COMMISSION

\_\_\_\_\_  
COMMISSIONER

### CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2010, 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.  
  
\_\_\_\_\_