No. S127086

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GENERAL MOTORS CORPORATION et al.,	)	**Case No. S127086**
Plaintiffs and Appellants.	)	
vs.	)	**(Ct. App. No. B165665; L.A.S.C. Case No. BC269404)**
FRANCHISE TAX BOARD,	)	
Defendant and Appellant.	)	

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF DEFENDANT-APPELLANT, FRANCHISE TAX BOARD

Court of Appeal, Second Appellate District, Division Two
Case No. B165665

Superior Court for the County of Los Angeles Case No. BC269404
(Hon. Mary Ann Murphy, Judge)

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INTEREST OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION

Amicus Curiae Multistate Tax Commission (Commission) files this brief in support of Defendant-Appellant Franchise Tax Board (FTB). The Commission agrees with the FTB and the California Court of Appeal that returns of principal should not be included in the sales factor used for apportioning a taxpayer's business income under the Uniform Division of Income for Tax Purposes Act (UDITPA). The importance the Commission attaches to a correct and uniform construction of UDITPA on this point induced the Commission to promulgate two uniformity recommendations, both of which are consistent with the FTB's position and the current rule of law in the overwhelming majority of other states (FTB's Answer Brief [FTB's Br.] at pp. 19-22), and is our primary motivation for filing this brief today.

In addition, the Commission files to express its agreement with the FTB that nothing in UDITPA, or in unitary theory in general, requires or even implies that tax credits earned by one taxpayer member of a combined group must be usable by other members of the combined group. Indeed,

the Commission's own draft model statute on combined reporting limits the use of credits to the individual taxpayer that earns them, unless the statutory language of a particular credit specifically provides otherwise.

The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967 when the required minimum number of states adopted it.[1] (See RIA State & Local Taxes: All States Tax Guide ¶ 701 *et seq*. (2005).) Article IV of the Compact incorporates UDITPA almost word for word. And, Article VII charges the Commission with interpretation of UDITPA through promulgation of model regulations. (Compact, Art.VII.1.) Forty-seven states are now members of the Commission, including California which enacted the Compact in 1974.[2] (See Cal. Stats. 1974, c. 93.) The substantive provisions of the Compact are found in California Revenue & Taxation Code[3] section 38006. California also enacted UDITPA separately in 1966, prior to its adoption of the Compact. (See Cal. Stats. 1966, c. 2; Rev. & Tax. Code, § 25120 *et seq.*)

The Commission's statutory responsibility to recommend uniform interpretations of UDITPA addresses what is perhaps the most fundamental purpose of the Compact – to "promote uniformity or compatibility in

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[1] The U.S. Supreme Court upheld the validity of the Compact in *United States Steel Corp.* v. *Multistate Tax Comm'n* (1978) 434 U.S. 452.

[2] In addition to California, the current full members are the states of Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The five sovereignty members are the states of Florida, Kentucky, Louisiana, New Jersey and Wyoming. The associate members are the states of Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia, and Wisconsin. The project members are the states of Iowa, Nebraska and Rhode Island.

[3] Hereinafter referred to as Rev. & Tax. Code.

significant components of tax systems" (Compact, Art. I; Rev. & Tax. Code, § 38006, Art. I) and it promotes a key directive of UDITPA – that it "shall be interpreted to effectuate its general purpose to make uniform the law of those states that enact it." (Rev. & Tax. Code, § 25138; see also Compact, Art. I; Rev. & Tax Code, § 38006, Art. I and Art. XII.) This purpose is central to the very existence of the Compact, which was the states' answer to an urgent need for reform in state taxation of interstate commerce, especially through the development of uniformity. (See, e.g., H.R. Rep. No. 952, 89th Cong. 1st Sess., Pt. VI, at 1143 (1965) ["While each of the state laws contains its own inner logic, the aggregate of these laws – comprising the system confronting the interstate taxpayer – defies reason. Indeed, so varied are the provisions concerning jurisdiction, division of income, and tax base, that it is rare to find a statement which is true of all income tax states."].) Substantial lack of uniformity had resulted in burdensome complexity, uncertainty, compliance problems, serious administrative challenges, duplicate taxation and less than full apportionment of income. If the states failed to act, Congress stood ready to enact reform itself through federal legislation that would preempt and regulate state taxation.[4]

The promise of uniformity established by the states' adoption of the Compact and UDITPA was critical to preserving the recognized tax sovereignty the states enjoyed, and continue to enjoy, with respect to interstate and now foreign commerce. Today, the need for uniformity in state taxation has only intensified as our modern economy becomes less centered on local business and increasingly organized around interstate and

[4] The Willis Committee, a congressional study of state taxation of interstate commerce sanctioned by Title II of Pub. L. 86-272, 73 Stat. 555, 556 (1959), made extensive recommendations as to how Congress could regulate state taxation of interstate and foreign commerce.

international markets. Responding to the criticisms of Congress and the U.S. Supreme Court,[5] the states must be ever more vigilant to avoid significant deviations in taxing approaches.

Against this backdrop of desired uniformity, General Motors (Taxpayer) advocates a distinctly minority view of the term "gross receipts" that fails to interpret UDITPA's definition of "sales" properly. The definition of "sales" is a core provision of UDITPA's division of income rules, as "sales" are the basis for one of the three factors used to apportion multistate business income. The definition of "sales" will therefore have a very large impact on the apportionment formula and, in turn, important implications for uniformity. Where the sales factor is double or multiple-weighted, as it is now in California and the majority of other states, this impact is even larger. Deviation from a uniform understanding of this central term would significantly upset the goal of both UDITPA and the Compact to avoid duplicative taxation and ensure full apportionment. (See William J. Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 Taxes 747, 748 (1957).) Duplicative taxation was also an objectionable characteristic of non-uniform state income taxation identified by Congress. (H.R. REP. NO. 1480, 88th Cong., 2nd Sess. (1964) at p. 389.)

This case provides a good illustration of the potential for less than full apportionment should California adopt Taxpayer's proposed non-uniform definition of "gross receipts." If returns of principal are improperly included in the sales factor as Taxpayer proposes, those returns would be sourced to the location of its treasury function in New York, which would cause a larger share of Taxpayer's total multistate business income to be apportioned to New York. Such a formula, although

[5] *Allied-Signal Inc. v. Director, Div. of Taxation* (1992) 504 U.S. 768, 777-778 (severe multiple taxation has drastic consequences for national economy).

incorrect, would not result in duplicate or less than full taxation if both California and New York were to adopt it. Rather, it would simply be the case that more income would be sourced to New York and an equal, lesser amount would be sourced to California. But if California were to adopt a formula shifting income to New York, while New York did not adopt the formula, then there would be less than full apportionment of the Taxpayer's income. Indeed, that is precisely what would happen should California adopt the Taxpayer's position because New York, like most other states, does not utilize Taxpayer's proposed formula.[6] By the same token, should California adopt this position while other states have not, any multistate taxpayer whose treasury function is located in California would be subject to duplicate taxation. And the amount of double taxation or less than full apportionment could be significant.

The significance of this issue for balanced and uniform apportionment led the Commission to promulgate two model uniform regulations. Both regulations interpret UDITPA to exclude returns of principal from the sales factor, consistent with the FTB's position, the decision of the courts below in this case and the current rule of law in the overwhelming majority of other states (FTB's Br. at pp. 19-22.) Your *Amicus* respectfully urges this Court, an important and respected interpreter of UDITPA, to reach the same conclusion. As support, we set out the rationale which the Commission followed in reaching this conclusion in our

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[6] New York Business Corporation Franchise Tax Regulation Art. 9-A § 4-4.1; see also N.Y. Corp. Tax Advisory Op. TSB-A-88(21)(C) p. 2 (1988 Pet. No. C880718A *The Lomas & Nettleton Co.*) ("The gross proceeds from the sales of certificates greatly exceeds the profit, if any, realized on such sales. … Accordingly, if such gross proceeds were included in the computation of Petitioner's 'business receipts,' as that term is used in sections 4-4.1 and 4-4.6 of the Business Corporation Franchise Tax Regulations …, Petitioner's New York business receipts factor could be distorted and disproportionate in size to its payroll and property factors.")

Argument, below. Our interest in providing this support, and in an affirmation of the reasonable lower court decision, is to maintain the extensive uniformity that currently exists regarding interpretation of the Compact and UDITPA on this fundamental point.

Your *Amicus* makes this request well knowing that the current condition of state income tax uniformity is not perfect. Yet the concept of "sales" is a fundamental one for the uniform division of income, and is currently as near to a uniform concept as we could hope to come.[7] We respectfully submit that a decision in this case which conflicts with that prevailing view, particularly from a jurisdiction such as California that impacts an exceptionally large segment of total interstate commerce, would pose a significant obstacle to the achievement of the purposes of the Compact and UDITPA.

ARGUMENT

I. The Commission Interprets UDITPA to Exclude Returns of Principal from the Sales Factor.

The issue presented is whether the UDITPA sales factor should include the returns of principal from various types of investments. This case specifically places construction of UDITPA's definition of "sales," a term fundamental to the calculation of the apportionment formula, on the table.

Under UDITPA, "sales" are defined as "all gross receipts of the taxpayer…." (Rev. & Tax. Code, § 25120(e).) But the term "gross receipts" is not further defined. Over the span of six years, from 1995 through 2001, the Commission analyzed the scope of the term "gross receipts" in the context of returns of principal. The Commission's analysis

[7] The FTB has identified 36 jurisdictions that have adopted the concept supported here. (FTB's Br. at pp. 19-22.)

was performed through the formal rulemaking procedures required for the development of uniform interpretations of UDITPA. These procedures involved three separate public hearings, extensive written and oral public comment and formal polling of the Commission's member states, all in accordance with Article VII.2. of the Compact. The Commission's procedures ultimately resulted in the promulgation of two model regulations, MTC Reg. IV.2(a)(5) (interpreting the definition of "gross receipts" to exclude returns of principal on investments), and MTC Reg. IV.18(c)(4) (disallowing returns of principal on investment from inclusion in the sales factor as distortive of the apportionment formula). Both clearly interpret UDITPA to exclude returns of investment principal from the sales factor.[8] Most states have now adopted one or both of these interpretations, whether through judicial, legislative or regulatory means, if not specifically through adoption of the Commission's model regulations. Your *Amicus* sets out the rationale for its interpretations below, and respectfully requests this Court consider the appropriateness of reaching a similar conclusion for like reasons.

A. Returns of Principal are Not Part of Gross Receipts.

The Commission's model Regulation IV.2(a)(5) defines "gross receipts" and states explicitly that returns of principal from investments of the type at issue in this case are not included within the meaning of that term for purposes of UDITPA:

> "Gross Receipts" are the gross amounts realized (the sum of money and the fair market value of other property or services received) on the sale or exchange of property…or the use of the property or capital (including rents, royalties, interest and dividends) in a transaction which produces

[8] The Commission's regulation MTC Regulation IV.18(c)(4) excludes *all* principal from the sales factor, including that associated with sales transactions occurring prior to the maturity date of an investment security (referred to as "direct sales" in the proceedings below in this case), as well as that associated with redemptions and repurchase agreements.

> business income.... *Gross Receipts, even if business income, do not include such items as, for example*:
>
> 1) *repayment, maturity, or redemption of the principal of a loan*, *bond, or mutual fund or certificate of deposit or similar marketable instrument*;
>
> 2) *the principal amount received under a repurchase agreement or other transaction properly characterized as a loan….*

(Emphasis added.)

The Commission's rationale for this policy is that a return of principal from such investment is not a "receipt" at all. It is simply the return, by the borrower to the lender, of the lender's own principal. When these marketable debt instruments and repurchase agreements mature, the borrower returns the taxpayer's principal, along with an interest payment. The taxpayer is not "selling" its excess cash when it makes these investments. It is lending its excess cash and earning interest income as consideration for the loan. The transactions at issue in this case are essentially "leases" of excess cash.[9]

Because the return of principal from these investment transactions is, in conceptual economic and legal terms, simply the return of "leased" *intangible* property; for tax purposes it should be treated in a manner perfectly comparable to the return of leased *tangible* property. The value of leased tangible equipment is not considered "income" includable in gross receipts upon its return, nor should the value of leased intangible cash be included as gross receipts upon its return. In both cases the transaction at issue is a lease and not a sale. Thus, in both cases, only the "*amounts realized … on ... the use of the property or capital*" should be included in gross receipts. (MTC Regulation IV.2(a)(5) [emphasis added].) The mere

[9] *Nebraska Dept. of Revenue v. Loewenstein* (1994) 513 U.S. 123, 134.

fact that the returned intangible property may be in the form of cash should not cause it to be confused with a gross receipt.

Your *Amicus* respectfully submits, for the reasons stated above, that only the interest income, and not the return of principal, should be considered gross receipts and includable in the sales factor used to apportion business income under UDITPA.

B. Treating Returns of Principal as Gross Receipts Would Create Distortion.

Not only are returns of principal properly excluded from the sales factor because they are not "gross receipts," a rule which improperly allows for their inclusion would create unacceptable distortion of apportionment results. The distortion that would be created presents a distinct, but equally strong, rationale for their exclusion. Whatever surface plausibility there might be to stretch the term "gross receipts" to include returns of capital, the distortion it would create in the context of the apportionment sales factor renders such an interpretation unreasonable and unacceptable.

Through a treasury function, large sums of excess cash generated from the sales of a core product are invested and reinvested in short-term, often overnight, securities that return, often each day, the original capital investment plus a small amount of interest income. If these large sums of capital were continually re-counted as gross receipts attributable to the treasury function and added to the sales factor each time they were returned, then over the course of a year the total "gross receipts" improperly attributed to the treasury function from this multiple counting of the same funds could be enormous.

Several early decisions noted this potential for stunning distortion

and looked to Section 18 of UDITPA.[10] Likewise, the Commission promulgated an additional model regulation under Art. IV. Section 18 of the Compact to separately address the issue of distortion. MTC Regulation IV.18(c)(4)(a) provides:

> … If a taxpayer holds liquid assets in connection with one or more treasury functions of the taxpayer, and the liquid assets produce business income when sold, exchanged or otherwise disposed, the overall net gain or loss from those transactions for each treasury function for the tax period is included in the sales factor.

Adoption of this model regulation was predicated on the Commission's finding that inclusion of principal in the sales factor inherently produces incongruous results. The incongruity would not be limited to isolated cases, but would distort the apportionment results for every taxpayer that engages in a treasury function for the investment of its excess cash generated by sales of core product. And, because such a rule would allow for highly variable apportionment results with little or no change in income producing activity, distortion would also be evident in significant arbitrary variance in the apportionment results for similarly situated taxpayers.

1. Including Principal in the Sales Factor Would Distort the Apportionment Result for Each Taxpayer with a Treasury Function in Another State by Incorrectly Reflecting the Location of the Taxpayer's Income Producing Activities.

The philosophy of UDITPA is that multistate business income

[10] See *Appeals of Pacific Telephone & Telegraph Company,* Cal. St. Bd. of Equal. (May 4, 1978) 78 SBE 028; *American Telephone & Telegraph Co*. v. *State Tax Appeal Board* (Mont. 1990) 787 P.2d 754; *American Telephone & Telegraph Co.* v. *Director, Division of Taxation* (Tax Ct. 1982) 4 N.J. Tax 638, aff'd and modified (N.J. Super. App. Div. 1984) 476 A.2d 800, cert. denied (1984) 97 N.J. 627; *Sherwin-Williams* v. *Indiana Dept. of State Revenue* (Ind. Tax 1996) 673 N.E.2d 849.

should be apportioned based upon the location of the actual income producing activities that are responsible for its realization. The purpose of the sales factor in the UDITPA apportionment formula is to properly recognize the income producing activity of selling, *i.e.*, the contribution of the market states, to the creation of multistate business income. (William J. Pierce, *Uniform Act Urged as Practical Method to Lighten State Tax Compliance Burden,* 12 J.Tax'n 83, 84 (1960); see also *Appeals of Pacific Telephone & Telegraph Co.,* supra.)

By inflating gross receipts attributable to the income producing activity of the treasury function, the influence of the treasury function in the sales factor apportionment ratio could become entirely disproportionate to the portion of multistate business income that is actually earned through the "lease" of those funds, *i.e*., the interest income. Professor Hellerstein explains that distortion of taxpayers' overall apportionment results would occur because "there is no necessary correlation between the amount of receipts and the corresponding amount of income from certain types of intangible investments:"

> For example, the purchase at a discount of a thirty-day $1 million certificate of deposit at the beginning of each month and its sale or redemption at the end of the month would yield $12 million of receipts during the course of a year, whereas the purchase at a discount and subsequent sale or redemption of a one-year $1 million certificate of deposit would yield only $1 million of receipts. Yet the intangible interest income earned from these investments is likely to be quite similar and clearly will not vary by a factor of twelve.

Hellerstein & Hellerstein, *State Taxation* (3d ed. 2001) Part IV ¶9.18[4][c].

This example plainly illustrates the problem. If returns of principal are included in gross receipts, then "gross receipts" attributable to the treasury function could be inflated multiple times over with little or no increase in either the income producing activity taking place in the treasury

function state (the activity which the UDITPA sales factor is intended to reflect) or the income generated by that activity.

If the only function to be represented by the sales factor were a treasury function, this inflation would not be a problem. The sales factor apportionment numerators and denominators for the states in which the taxpayer does business would all simply vary proportionately and the apportionment result would not change.[11]

However, a huge incongruity arises if a treasury function is unitary with a core function,[12] so that total business income from both functions must be apportioned across the states in which each is performed, based in part on the relative amount of gross receipts contributed by each. Including principal attributable to the treasury function in gross receipts would allow for a significant shift in the percentage of total sales attributable to the treasury functions versus the core function. Gross receipts from the taxpayer's core function could become increasingly overwhelmed in the sales factor, depending on the average maturity period taxpayer chooses for its treasury function investments. As the length of the taxpayer's average maturity period drops, the gross receipts attributable to its treasury function would climb, and the unvarying receipts of the core function would become

[11] Indeed, the Commission's regulation allows an exception for taxpayers who are principally engaged in the business of purchasing and selling liquid assets. (MTC Reg. IV.18(c)(4)(C).) Of course, the exception only applies to the extent that the taxpayer's transactions actually generate sales "gross receipts" within the meaning of MTC Reg. IV.2(a)(5). In this manner, the "anti-distortion" regulation of MTC Reg. IV.18(c)(4) provides a back-stop to the gross receipts definition contained in MTC Reg. IV.2(a)(5), and prevents the sales factor from being distorted by sales of treasury investments before they mature (referred to as "direct sales" in the proceedings below in this case).

[12] In this case, Taxpayer's treasury function was unitary with its core function - - the manufacture, assembly and sale of motor vehicles and parts. (Ct. of App. Decision filed June 30, 2004, at pp. 3-5.)

increasingly underrepresented in the sales factor ratio. The result is that the amount of total business income apportioned to the states contributing to sales of the taxpayer's core product would become increasingly understated.

Even fairly small variations in average maturity periods for short-term investments could create large variations in the "gross receipts" attributable to the treasury function state. For example, a taxpayer could increase its "gross receipts" attributable to its treasury function, with little or no change in its income or income producing activity, by nearly 500 percent simply by changing the average maturity period for its investments from five days to one day.

A rule which allows gross receipts to be inflated in this manner would defeat the purpose of the UDITPA sales factor to reflect the proportionate location of all of the taxpayer's sales-related business activity. Income properly attributed to the core function states would essentially be misattributed to the treasury function state, as the sales factor is overwhelmed by inflated treasury function receipts.[13]

2. Including Principal in the Sales Factor Would Produce Distortion by Allowing Substantially Different Apportionment Results Across Similarly Situated Taxpayers.

In addition, including principal in gross receipts would allow for substantially different apportionment results between similarly situated taxpayers. If one taxpayer invested in securities with an average six month maturity to match its capital needs cycle and another invested overnight, the gross receipts attributable to the treasury function state of one would be hundreds of times that of the other. Thus, even if the two taxpayers had

[13] Because no states currently include such treasury function activity in their sales apportionment factor (FTB's Br. at pp. 19-22.), the misattributed income would essentially escape state taxation altogether.

identical income and location of business activity as measured by property, payroll and sales, the two could apportion a significantly different share of their income to each state in which they did business.

There is simply no rationale in tax policy that would support such a divergence in these taxpayers' apportionment factors, nor the consequential divergence in their state income apportionment results. Certainly, this amount of variation for essentially similarly situated taxpayers cannot have been the intended, and is not an acceptable, result of the UDITPA apportionment formula.

Your *Amicus* respectfully submits that only the interest income, and not the return of principal, should be considered gross receipts and includable in the sales factor used to apportion business income under UDITPA; and that, for the reasons stated above, adhering to this principle is necessary in order to avoid serious distortion, and potential manipulation, of the UDITPA sales factor and apportionment results.

II. Neither Unitary Theory Nor UDITPA Requires a Tax Credit Earned by One Member of a Unitary Group to be Usable by All Members.

The second issue presented is whether a tax credit earned by one member of a unitary group must be apportioned among, and usable by, all members of the unitary group. The Commission is in full agreement with the FTB that nothing in UDITPA, or in unitary theory in general, requires or even implies that tax credits earned by one taxpayer member of a unitary group must apportioned and usable by other members of the group. (FTB's Br. at pp. 48-73.)

The function of unitary theory and UDITPA together is to fairly apportion the net income associated with a unitary business among the multiple entities engaged in that business. (Rev. & Tax. Code, § 25121; see William J. Pierce, *The Uniform Division of Income for State Tax Purposes*,

35 Taxes 747, 747 (1957).) A combined report is essentially a worksheet for making these calculations. The combined report required in California does not disregard the separate identities of the unitary businesses taxpayer members. (FTB's Br. p. 48, 52-57.) Rather, it tells us the amount of the unitary business's net income to include in the tax base of each taxpayer member of the group. Each taxpayer member is then individually responsible for state tax based on its share of the unitary business's net income, together with the taxpayer member's own non-business income allocable to the state (and its apportioned share of the net income from any other unitary business in which it is engaged). (FTB's Br. p. 52-57.)

This identification and apportionment of total net income from a unitary business to its individual taxpayer members is necessary because net income forms the tax base for the corporate income tax. Unless the unitary business's net income—the tax base—is properly identified and apportioned, either multiple taxation or less than full apportionment of the taxpayer members' income can occur.

In this case, General Motors suggests that a tax credit must also be apportioned among the members of a unitary group. (General Motor's Opening Brief at p. 47.) But a tax credit is not part of the apportionable tax base. It is a legislative grant of an offset to a taxpayer's ultimate state tax liability. Even in the case of combined reporting, each individual taxpayer's state tax liability, and the application of any offsets to that liability, is established *after* its tax base has been apportioned and determined. There is simply no conceptual necessity for the apportionment of a tax credit.

In this case, the California Legislature has allowed a tax credit calculated based on the amount of certain expenses incurred by a taxpayer. (FTB's Br. at pp. 57-61.) That these expenses become part of the apportionable tax base does not in any way "deem" the *credit* to be

apportionable. There is certainly no reason why a legislature could not allow a credit to be earned by multiple taxpayers in accordance with how certain expenses are apportioned as opposed to incurred; but that is not what the Legislature has done in this case. (FTB's Br. at pp. 57-61.)

Indeed, the Commission has drafted and approved for public hearing a proposed model uniform combined reporting statute that would follow the position taken by the FTB in this case.[14] Because members of the combined group are recognized as separate taxpayers, the proposed model statute adopts a consistent general rule that tax credits, unless otherwise specified by the statutory language creating a credit, are to be allowed only against the tax liability of the individual taxpayer that earned the credit, and are not allowed against the liabilities of other members of the combined group.[15]

Even beyond conceptual consistency, the benefits of the Commission's (and the FTB's) approach include simplicity and ease of administration. It is not at all clear how credits could reasonably by apportioned and tracked from year to year if the Taxpayer's position were adopted. For each credit earned by an individual taxpayer, a determination would need to be made as to whether the credit arose from an investment that was unitary business related and apportionable, or non-business related and not apportionable, or some of each. Taxpayers would need to separately track their use of credits and prioritize which credits were being

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[14] A copy of the Commission's proposed model statute is available on its web site at: http://www.mtc.gov/UNIFORM/CRDraftStatute11-11-04.pdf.

[15] Section 3.A.ii of the Commission's proposed model uniform statute states that "[e]xcept where otherwise provided, no tax credit … earned by one member of the group, but not fully used by or allowed to that member, may be used in whole or in part by another member of the group …."

applied first, in order to know whether a particular carryover credit were unitary business related and (possibly) available for use by the entire business in the second year, or not unitary business related and available for use only by that taxpayer in the second year. Some of both types of credit might carryover. Characterizing, apportioning and tracking the usage of different types of credits by multiple members of a unitary group, especially if the group members are changing from year to year, would certainly require a much more complex administration than that required under the approach utilized by the FTB and recommended by the Commission.

Your *Amicus* respectfully submits that, unless otherwise required by statute, a tax credit is available for use by the taxpayer that earned the credit, and not by all members of a unitary group; and that, for the reasons stated above, adhering to this principle is necessary in order to maintain consistency with the concept that members of a unitary group retain their identities as individual taxpayers, and to avoid excessive administrative burdens.

CONCLUSION

In the interest of maintaining state income tax uniformity in the application of UDITPA and the Multistate Tax Compact, *Amicus Curiae* Multistate Tax Commission respectfully suggests the Court adopt an interpretation of the sales definition in UDITPA that recognizes returns of principal are not gross receipts. Your *Amicus* makes this request well knowing that the current condition of state income tax uniformity is not perfect. Yet the concept of sales comes about as close to a uniform concept as anything. Maintaining the line on these definitions means that states have taken seriously the need to employ *uniform* division of income rules if they are to defend successfully state tax sovereignty against federal

regulation and preemption.

In addition, your *Amicus* respectfully suggests the Court recognize that neither unitary theory nor UDITPA would require or even imply the need to "apportion" credits among members of a unitary or combined group.

Respectfully submitted this ____ day of April, 2005.

____
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court (14)(c)(1), I hereby certify that this Amicus Curiae brief is in 13-point type and, according to the word count of the computer program used to prepare this brief, contains 6,068 words (including footnotes).

Dated: April ___, 2005

____

Shirley Sicilian
for Amicus Curiae
Multistate Tax Commission

PROOF OF SERVICE BY MAIL
(CCP 1013a, 2015.5)

I am employed by the Multistate Tax Commission, whose address is 444 North Capitol Street, N.W., Suite 425, Washington, D.C. 20001-1538. I am over the age of eighteen years and not a party to the within cause.

On April ____, 2005, I served a true copy of:

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF DEFENDANT-APPELLANT, FRANCHISE TAX BOARD

on the following by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Stephen J. Lew
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Court of Appeal
Second Appellate District
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Los Angeles, CA 90013-1213

Honorable Mary Ann Murphy
Judge of the Superior Court
111 North Hill Street, Dept. 25
Los Angeles, CA 90012-3117

I deposited such envelopes in the United States mail at Lawrence, Kansas with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April____, 2005, at Lawrence, Kansas.

____
Shirley K. Sicilian