IN THE SUPREME COURT OF THE STATE OF OREGON

THE SHERWIN-WILLIAMS COMPANY, Plaintiff/Respondent, v. DEPARTMENT OF REVENUE, State of Oregon, Defendant/Appellant.	Tax Court No. 4127 Supreme Court No. S46023

Brief *Amicus Curiae* of the Multistate Tax Commission
in Support of
Department of Revenue, Defendant-Appellant

On Appeal from the Oregon Tax Court,
The Hon. Carl N. Byers, Presiding

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE INTEREST OF *AMICUS* MULTISTATE TAX COMMISSION IS TO PRESERVE STATE INCOME TAX UNIFORMITY TO THE PRACTICAL EXTENT POSSIBLE AS A MEANS FOR PRESERVING THE SOVEREIGNTY OF THE STATES TO TAX MULTISTATE INCOME FOR ITS FAIR SHARE. 1

II. THE ISSUE PRESENTED IS WHETHER THE DENOMINATOR OF THE SALES FACTOR OF UDITPA'S THREE FACTOR FORMULA FOR THE APPORTIONMENT OF MULTISTATE INCOME INCLUDES THE TOTAL AMOUNTS RECEIVED (INCLUDING RETURN OF CAPITAL) FROM REDEMPTION UPON MATURITY OR SALE OF DEBT INSTRUMENTS USED FOR INTERIM INVESTMENT OF WORKING CAPITAL. 7

A. *Sherwin-Williams Repetitively Invests And Reinvests Its Idle Working Capital In Short-Term Debt Securities.* 8

B. *The Mechanics Of Three Factor Apportionment of Multistate Income.* 10

C. *Operation Of The Sales Factor.* 11

III. THE TOTAL AMOUNTS RECEIVED FROM REDEMPTION UPON MATURITY OR SALE OF DEBT INSTRUMENTS USED FOR INTERIM INVESTMENT AND REINVESTMENT OF WORKING CAPITAL DO NOT CONSTITUTE GROSS RECEIPTS AND ARE NOT INCLUDIBLE IN THE SALES FACTOR. 14

IV. NEITHER THE TOTAL AMOUNTS RECEIVED NOR THE INTEREST PORTION OF THOSE AMOUNTS CAN REASONABLY BE ATTRIBUTED TO ANY PARTICULAR INCOME PRODUCING ACTIVITY OF TAXPAYER AND BOTH ARE THEREFORE PROPERLY EXCLUDED FROM THE SALES FACTOR. 20

A. *OAR 150-314.665(3)(3)(b) (repealed) Was An Appropriate Administrative Rule And Was Not Contrary To The Statute.* 20

Page

B. *In Determining The State of The Greater Proportion of Income Producing Factors, The Tax Court Ignored The True Extent of The Income Producing Activities From Which The Disputed Income Was Derived.* 22

C. *The Example of OAR 150-314.665(3)(3)(b) (repealed) and MTC Reg. IV.18.(c).3* (second paragraph*) (1973) Is Consistent With A Throw-Out Of Amounts Received From Routine Working Capital Investments, Because Taxpayer has Merely Held These Investments.* 27

V. CONCLUSION 30

TABLE OF AUTHORITIES

CASES:

Allied-Signal Inc. v. *Director, Div. of Taxation,* 504 U.S. 768, 777-778 (1992) 4,17,28

American Tel. & Tel. Co. v. *Director, Div. Of Taxation,* 194 NJ Super 168, 476 A2d 800 (1984) 5,19

American Tel. & Tel. Co. v. *State Tax Appeals Bd.,* 241 Mont 440, 787 P2d 754 (1990) 5

Appeals of Pacific Tel. & Tel. Co., Cal. State Bd. Equalization (May 4, 1978), 1978 Cal. Tax Lexis 91 5,11-12,16,19

ASARCO Inc. v. *Idaho Tax Comm'n,* 458 U.S. 307 (1982) 28

Atlantic Richfield Co. v. *Dept. of Revenue,* 301 Ore 242, 722 P2d 727 (1986) 5

Northwestern States Portland Cement Co. v. *Minnesota,* 358 U.S. 450 (1959) 1

Protest of X, docket 12155 (Idaho Tax Comm'n), CCH [Idaho] Tax Reptr ¶ 400-291 (June 1998) 5,8,10

Springfield Education Ass'n v. *Springfield School Dist. No. 19,* 290 Ore 217, 621 P2d 547 (1980) 21

Page

The Sherwin-Williams Co. v. *Idaho State Tax Comm'n* (4th Dist., Ada County, No. CV-OC98-02376D) 8

The Sherwin-Williams Co. v. *Indiana Dept. of State Revenue*, 673 NE2d 849 (Ind. Tax Ct. 1996) 5,8

The Sherwin-Williams Co. v. *Huddleston*, 1998 Tenn. App. Lexis 701 (Tenn. Ct. App. 1998), *on petition* to Tenn. Sup. Ct., No. (Ct. App.) 01-A-01-9711-CH-00651 5,8,9,18

Twentieth Century-Fox Film Corp. v. *Dept. of Revenue*, 299 Ore 220, 700 P2d 1035 (1985) 5

United States Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978) 3

University of Oregon Co-Operative Store v. *Dept. of Revenue*, 273 Ore 539, 542 P2d 900 (1975) 21

STATUTES AND REGULATIONS:

Sec. 448, Internal Revenue Code of 1986 15

Sec. 448(b), Internal Revenue Code of 1986 15

MULTISTATE TAX COMPACT, STATE AND LOCAL TAXES: ALL ST. TAX GUIDE ¶701 *et seq.* (RIA 1995), *codified in* ORS 305.655 1,2,3

art. I 2

art. IV. 3

art. IV.1.(g). 7,12,16,29

art. IV.2. 10

art. IV.16.(a). 12

art. IV.17. 12

art. IV.18. 10

Page

MTC Allocation and Apportionment Regulations, STATE & LOCAL TAXES: ALL ST. TAX GUIDE ¶630 *et seq.*, p. 604 (RIA 1995), <www.mtc.gov/uniform/ADOPTED.HTM> 4

MTC Reg. IV.18.(c). 26

MTC Reg. IV.18.(c).(3) (*first paragraph*) (1973) 29

MTC Reg. IV.18.(c).(3) (*second paragraph*) (1973) 21,22,26,27,29

MTC Reg. IV.18.(c).(4) (1997) 26

Prop. MTC Reg. MTC Reg.IV.2.(a), <www.mtc.gov/uniform/grossrct.htm> 20

OAR 150-314.665(3)(3)(a) 29

OAR 150-314.665(3)(3)(b) (repealed) 7,20,21,26,27,29

ORS 305.655 3

ORS 314.610(7) 7,12,15,29

ORS 314.615 10

ORS 314.650(1) 11

ORS 314.665(2)(a) 12

ORS 314.665(4) 12

ORS 314.665(6)(a) 15

ORS 314.670 7,10

Temp. Treas. Reg. §1.448-1T(f)(2)(iv) (1993) 15

Treas. Reg. §1.448-1T(f)(2)(iv)(A) (1993) 15

Page

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BLACK'S LAW DICTIONARY 703 (6th ed. 1990) 15

Gene Corrigan, *A Final Review*, 1989 MULTISTATE TAX COMM'N REV. 1 2

H.R. REP. NO. 952, 89th Cong., 1st Sess., Pt. VI (1965) 2

Joseph DiStefano, untitled article, (Gannett News Service Jan. 25, 1996), available in Nexis, News Library, GNS File 6,17

Michael D. Herbert, Benjamin F. Miller, Jordan P. Weiss, *Sales Factor And Intangibles: What's Up And What's Down*, 5 ST. TAX NOTES 1102 (Nov. 8, 1993) 29

Roy E. Crawford & Russell D. Uzes, *Income Taxes: The Distinction Between Business and Nonbusiness Income*, TAX MGMT. MULTISTATE (BNA 1996) 2

Walter Hellerstein, *State Taxation of Corporate Income from Intangibles* 57 n.531, TAX MGMT. MULTISTATE TAX (BNA 1996) 23, 26

William J. Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 TAXES 747 (1957) 10,13

William J. Pierce, *Uniform Act Urged as Practical Method to Lighten State Tax Compliance Burden*, 12 J. TAX'N 83, 84 (1960) 11,16

T.R. Reid, *The Making of an Empire*, 192 NAT'L GEOGRAPHIC 12 (Jul. 1997) 1

I. THE INTEREST OF *AMICUS* MULTISTATE TAX COMMISSION IS TO PRESERVE STATE INCOME TAX UNIFORMITY TO THE PRACTICAL EXTENT POSSIBLE AS A MEANS FOR PRESERVING THE SOVEREIGNTY OF THE STATES TO TAX MULTISTATE INCOME FOR ITS FAIR SHARE.

Amicus, Multistate Tax Commission ("Commission"), files this brief in support of the Department of Revenue of the State of Oregon. The Commission views the decision below as having the unfortunate effect of creating more diversity in state income taxation of interstate and foreign commerce, resulting in a greater chance for divergent forms of taxation of multistate income, increased compliance complexity, and inappropriate tax planning. This result has the potential to lessen the sovereignty of the States to require interstate and foreign commerce to pay its fair share of state taxes. *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959) (States may require business exclusively engaged in interstate commerce to pay its fair share of state taxes). In addition, a state tax system should not place a disproportionate burden of taxation on its captive, in-state taxpayers. *Cf.* T.R. Reid, *The Making of an Empire,* 192 NAT'L GEOGRAPHIC 12, 36 (Jul. 1997) (commerce in remote Roman provinces that benefited from *pax romana* but was unwilling to contribute to its maintenance cost resulted in local, captive taxpayers being bled white). Reid's observation suggests that a society that loses its willingness to pay taxes as a cost of a civilized society is at risk of losing that society.

The Commission is the administrative agency of the Multistate Tax Compact, MULTISTATE TAX COMPACT, STATE AND LOCAL TAXES: ALL ST. TAX GUIDE ¶701 *et seq.* (RIA 1995) ("Compact"), an interstate compact proposed

to the States in 1966 by the National Association of Attorneys General and the National Legislative Council. Roy E. Crawford & Russell D. Uzes, *Income Taxes: The Distinction Between Business and Nonbusiness Income* 4, TAX MGMT. MULTISTATE (BNA 1996). The Commission was formed to respond to the immediate need for substantial reform in state taxation of interstate commerce in order to preserve recognized tax sovereignty the States enjoyed (and continue to enjoy) with respect to interstate (and now foreign) commerce. The purposes of the Compact, which became effective in 1967 when the required minimum number of States had adopted it, are to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
2. Promote uniformity or compatibility in significant components of tax systems.
3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
4. Avoid duplicative taxation.

Compact, art. I. These purposes are consistent with the perceived objections to state income taxation of interstate commerce that were identified by Congress at the time it was contemplating the enactment of legislation regulating and preempting state taxation. 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."); Gene Corrigan, *A Final Review*, 1989 MULTISTATE TAX COMM'N REV. 1, 23.

Twenty-one States (including the District of Columbia) have adopted the Compact through the enactment of legislation that makes the Compact a part of their respective state statutory law. Oregon, a party State of the Compact, has codified the Compact as a part of Oregon law at ORS 305.655.[1] One State has joined as a sovereignty member, a class of membership that entitles the State to full consultative membership without having enacted the Compact into the State's statutory law. Nineteen States, in addition to the twenty-one party States and one sovereignty member State, have expressed their commitment to the goals of the Commission without statutory enactment of the Compact by joining as associate member States.[2] The U.S. Supreme Court upheld the validity of the Compact in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

Central to the existence of the Commission is the promotion of uniformity in the approach of the States' taxation of interstate and foreign commerce. Thus, Article IV of the Compact incorporates almost word for word the Uniform Division of Income for Tax Purposes Act, 7A UNIFORM LAWS ANNOTATED 331 (WEST 1985) ("UDITPA"). The Commission has also promulgated recommended regulations that interpret UDITPA for possible use by the States. These recommended regulations promote uniformity in

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[1] When this brief cites provisions of UDITPA as adopted by Oregon, a parallel citation will be made to the comparable provision of the Compact that, as the text notes, is also a part of Oregon statutory law.

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

the day-to-day administration of state income taxation of interstate commerce. See MTC Allocation and Apportionment Regulations, STATE & LOCAL TAXES: ALL ST. TAX GUIDE ¶630 *et seq.*, p. 604 (RIA 1995) ("MTC Reg.").[3]

While the past accomplishments of the Commission evidence the sincerity of the commitment of the Commission's party States to uniform state income taxation of interstate commerce, the need for increased uniformity in state income taxation of interstate (and foreign) commerce has not lessened from the time of the Commission's founding. The economy of the modern world is becoming less centered on local business and more organized around interstate and international commerce. Responding to the criticisms of Congress and the U.S. Supreme Court's concern for multiple taxation, *Allied-Signal Inc.* v. *Director, Div. of Taxation,* 504 U.S. 768, 777-778 (1992) (severe multiple taxation has drastic consequences for national economy), that can arise from a lack of uniform division of income rules, States must remain vigilant to avoid significant deviations in taxing approaches. Any State that applies its income tax to interstate commerce should be concerned with fair apportionment, state tax uniformity and ease of compliance. Adequate concern in these areas will assure that an enterprise engaged in interstate business will be subjected to tax on no more than one hundred percent of its income and will not be faced with an unreasonable compliance burden. Oregon has recognized these values as a

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[3] The MTC Allocation and Apportionment Regulations are also available at the Commission's webpage, <www.mtc.gov/uniform/ADOPTED.HTM> (visited Mar. 13, 1999).

part of UDITPA. *Atlantic Richfield Co.* v. *Dept. of Revenue*, 301 Or 242, 722 P2d 727 (1986); *Twentieth Century-Fox Film Corp.* v. *Dept. of Revenue*, 299 Or 220, 700 P2d 1035 (1985).

The Commission submits that the decision of the Oregon Tax Court adopts a minority view of the proper determination of the sales factor. This minority understanding of the sales factor raises the unfortunate potential for duplicative taxation, unnecessary complexity in compliance, and raises the greater potential for inappropriate tax planning to the benefit of multistate taxpayers and to the detriment of single, in-state, captive taxpayers. The potential for duplicative taxation arises because other jurisdictions following the majority rule will exclude the total amounts received from the interim investment and reinvestment of idle working capital in short-term securities from the sales factor.[4]

Thus if Oregon adopts the Tax Court ruling, Oregon will require inclusion of the total amounts received from interim investment of idle working capital in the sales factor when the multistate company has its treasury function

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[4] A later part of this brief notes that the Multistate Tax Commission has recommended a uniform regulation that excludes total proceeds, including even the interest income element of total proceeds. See part IV, below. Around thirteen States in addition to Oregon have adopted this regulation. There are also cases that conclude total amounts received from interim investment of idle working capital are not properly included in the sales factor but that the income element is. *The Sherwin-Williams Co.* v. *Huddleston*, presently upublished but available at 1998 Tenn. App. Lexis 701 (Tenn. Ct. App. 1998), *on petition* to Tenn. Sup. Ct., No. (Ct. App.) 01-A-01-9711-CH-00651; *Protest of X*, docket 12155 (Idaho Tax Comm'n), CCH [Idaho] Tax Reptr ¶ 400-291 (June 1998); *The Sherwin-Williams Co.* v. *Indiana Dept. of State Revenue*, 673 NE2d 849 (Ind. Tax Ct. 1996); *American Tel. & Tel. Co.* v. *State Tax Appeals Bd.*, 241 Mont 440, 787 P2d 754 (1990); *American Tel. & Tel. Co.* v. *Director, Div. Of Taxation*, 194 NJ Super 168, 476 A2d 800 (1984); *Appeals of Pacific Tel. & Tel. Co.*, Cal. State Bd. Equalization (May 4, 1978), 1978 Cal. Tax Lexis 91.

Taxpayer notes that even opinions of other courts suggesting a possible contrary approach under those States' tax systems were greeted by legislative change. See Brief in Support of Plaintiff's Motion for Summary Judgment 13-14, filed in *The Sherwin-Williams Co.* v. *Dept. of Revenue*, Oregon Tax Court No. 4127.

located in Oregon, while other States will not. The different apportionment formulas will have the potential to reach more than 100% of the Oregon taxpayer's apportionable income, to the detriment of multistate taxpayers whose treasury function is located in Oregon.

Compliance burdens will arise, because multistate taxpayers will need to keep in mind that the Pacific coastal State between Washington and California has its own concept of the sales factor. Simplification that is an inherent part of the uniformity effort will be compromised.

The greater potential for inappropriate tax planning will also arise for the well-informed taxpayers that seek to avoid the potential for duplicative taxation noted above. These taxpayers will knowingly locate the treasury function in a State that does not tax or provides an effective low rate of tax for income attributable to the regular and recurring investment of idle working capital. There is at least one State that has made its laws quite compatible with this objective. Joseph DiStefano, untitled article, (Gannett News Service Jan. 25, 1996), available in Nexis, News Library, GNS File. Of course, tax planning in of itself is not inappropriate. But the tax planning promoted by the Tax Court's ruling would be inappropriate here, because the planning promotes a division of income result that is inconsistent with economic reality. Income under the philosophy of UDITPA should be based upon the location of the actual income producing activities that are responsible for the realization of the income to be apportioned. See Part IV.B., below.

II. THE ISSUE PRESENTED IS WHETHER THE DENOMINATOR OF THE SALES FACTOR OF UDITPA'S THREE FACTOR FORMULA FOR THE APPORTIONMENT OF MULTISTATE INCOME INCLUDES THE TOTAL AMOUNTS RECEIVED (INCLUDING RETURN OF CAPITAL) FROM REDEMPTION UPON MATURITY OR SALE OF DEBT INSTRUMENTS USED FOR INTERIM INVESTMENT OF WORKING CAPITAL.

The issue presented is whether the denominator of the sales factor should include the total amounts received (including return of capital) from redemption upon maturity or sale of debt instruments used for interim investment and reinvestment of then idle working capital. The matter specifically places construction of UDITPA's definition of sales for purposes of calculating the sales factor, ORS 314.610(7), Compact art. IV.1.(g)., and the legality of a long-standing regulation of the Department of Revenue, OAR 150-314.665(3)(3)(b) (repealed), on the table. As the Department of Revenue has framed the issue, no issue is presented as to the power of the Department to require an adjustment in the apportionment formula of Sherwin-Williams under ORS 314.670. Nevertheless, even with UDITPA's adjustment provision not in issue, UDITPA clearly requires that the sales factor exclude the total amounts received from interim investment of idle working capital.

Before getting to the specific issue of this matter, it is necessary to describe the operations of Sherwin-Williams and then to understand the general mechanics of the three-factor formula for apportionment of multistate income and the specific mechanics of the sales factor within that formula.

A. *Sherwin-Williams Repetitively Invests And Reinvests Its Idle Working Capital In Short-Term Debt Securities.*

The record in this case is scant by any measure. Sherwin-Williams chose not to be very specific as to its interim investment and reinvestment of its idle working capital. This reticence may reflect what has happened when adjudicators are well apprised of Sherwin-Williams' method of operation. *The Sherwin-Williams Co.* v. *Huddleston*, currently unpublished but available at 1998 Tenn. App. Lexis 701 (Tenn. Ct. App. 1998), on petition to Tenn. Sup. Ct., No. (Ct. App.) 01-A-01-9711-CH-00651; Protest of X, docket 12155 (Idaho Tax Comm'n), CCH [Idaho] Tax Reptr ¶ 400-291 (June 1998);[5] The Sherwin-Williams Co. v. Indiana Dept. of State Revenue, 673 NE2d 849 (Ind. Tax Ct. 1996).

However, the admitted facts from the proceedings in the Tax Court and from the legitimate collateral sources noted above establish the crux of what is at issue. Sherwin-Williams had the practice of investing and reinvesting its working capital in debt instruments. Complaint, ¶ VII, Ore. Tax Court No. 4127; Stipulation, nos. 4 and 5, Ore. Tax Court No. 4127; Tr 3, Ore. Tax Court No. 4127. This investment and reinvestment operated to put the money not currently needed in the business at work until it was needed. Stipulation, no. 5, Ore. Tax Court No. 4127. Among other forms of investments, Sherwin-Williams invested and reinvested in commercial paper, corporate bonds and certificates of deposit. Exhibit A to Sherwin-

[5] Although the reported decision of the Idaho State Tax Commission is redacted, we know this decision involves Sherwin-Williams from the public filing of The Sherwin-Williams Company in its pending Idaho court appeal of the decision of the Idaho State Tax Commission. *The Sherwin-Williams Co.* v. *Idaho State Tax Comm'n* (4th Dist., Ada County, No. CV-OC98-02376D) (attachment to complaint).

Williams' Brief in Support of Plaintiff's Motion for Summary Judgment at A-23, Ore. Tax Court No. 4127. The placement of the investments and reinvestments came from Sherwin-Williams' treasury personnel located in Ohio. Stipulation, no. 5, Ore. Tax Court No. 4127.

Although the record here does not provide much specificity of Sherwin-Williams' actual investments, Sherwin-Williams' practice is illustrated further in a case that Sherwin-Williams brought on the same types of transactions in the State of Tennessee for tax years 1987-1990 that are common to four of the six years at issue here. *The Sherwin-Williams Co.* v. *Huddleston, supra.* The Tennessee Court of Appeals, after noting there was little in factual dispute, described the activities of Sherwin-Williams in these terms:

> On a daily basis, the treasury personnel consolidated the bank accounts of the Plaintiff's various locations in the states where Sherwin-Williams conducts its business operations. The treasury personnel determined the cash position of [Sherwin-Williams] and its future funding needs. Any excess cash was invested in short-term interest bearing securities with various maturities. For example, Sherwin-Williams wire transferred $11,000,000 for a one day deposit to the Signet Bank on January 3, 1990. The next day, January 4, 1990, Signet Bank wire transferred the principal amount of $11,000,000 back to Sherwin-Williams plus interest in the amount of $2,539.93. Generally, all working capital transactions involve investments in which Sherwin-Williams makes an investment of funds in short-term interest bearing securities. Sherwin-Williams will usually hold the securities to maturity but if necessary to meet cash requirement, Sherwin-William will sell such securities.

The Tennessee Court of Appeals also noted that for the four tax years in dispute that return of principal on the investment and reinvestment of the working capital represented 55.169% of an aggregate total of (i) Sherwin-Williams' sales for paint and related products, Sherwin-Williams' core

business, and (ii) the return of principal coming from the investment and reinvestment of working capital.[6]

B. *The Mechanics Of Three Factor Apportionment of Multistate Income.*

When a business is taxable in more than one State, the business is entitled to apportion its taxable income among the States in which it is taxable. ORS 314.615, Compact art. IV.2. As a convenience to multistate taxpayers and state tax administrators, William J. Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 TAXES 747, 748 (1957), almost all States employ formula apportionment to divide the multistate income between the States. *Apportionment Factors*, I 1998 MULTISTATE CORPORATE TAX GUIDE I-413, I-414 (Panel 1998). Generally the States have enacted either the Uniform Division of Income for Tax Purposes Act as a uniform act, or the provisions of UDITPA separately and not as a part of a uniform act, to establish the principles of formula apportionment. *Id.* Simply stated, formula apportionment under UDITPA or its provisions separately enacted establishes the principles for division of multistate income.

The UDITPA formula applies evidence of the multistate business' "business activities" conducted in the various taxing States to apportion the multistate income. See ORS 314.670, Compact art. IV.18. (If apportionment by the factors, among other things, do not fairly represent extent of taxpayer's *business activity*, relief possible.) The evidence of business

[6] Further suggestions of how Sherwin-Williams might have operated its treasury function of investing on an interim basis its idle working capital can be found in *Protest of X* [*The Sherwin-Williams Co.* (see n. 5, above)], docket 12155 (Idaho Tax Comm'n), CCH [Idaho] Tax Reptr ¶ 400-291 (June 1998). This decision is not directly relevant to the actual circumstances of this case, however, since the tax years at issue are different.

activity employed is the multistate business' use of property (capital) and employees (labor) and the consummation of sales (marketing). These three concepts are the foundation of the three factors or business activities that are used in UDITPA to apportion multistate income: the property factor, the payroll factor, and the sales factor.

The factors measure the contribution of each taxing State to the production of the income as surrogates for tracing each specific activity that contributed to the realization of the income—a highly impractical task. Only the contributions of capital, labor and sales are employed. Each taxing State determines its relative proportion of each factor by the ratio of the dollar value of the taxing State's part of the factor to the dollar value of the total (or everywhere) factor. Then the taxing State averages these three ratios, sometimes with extra weight given to the sales factor, as is now the case in Oregon beginning on and after July 1,1995, ORS 314.650(1), to determine the apportionment fraction. The apportionment fraction is then applied to the tax base of the entire apportionable income of the multistate business to determine the amount of the multistate income that is attributed to the taxing State for income taxing purposes.

C. *Operation Of The Sales Factor.*

One of the factors used to divide multistate income under UDITPA is the sales factor. The sales factor reflects the contribution of the State in which the sales are made. 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 Tel. & Tel. Co.*, Cal. State Bd. Equalization (May 4, 1978),

1978 Cal. Tax Lexis 91. UDITPA gives specific directions on calculating the sales factor by reference to *each* sale. Under UDITPA one must necessarily analyze *each* sale, because each sale must be located for purposes of calculating the taxing State's *aggregate* proportion (the numerator) of total or everywhere sales (the denominator).

UDITPA defines the dollar value of each sale for purposes of calculating the sales factor in terms of "gross receipts." Specifically, UDITPA states,

> [***] As used in this Article, *unless the context otherwise requires*:
>
> * * *
>
> (***) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article.
>
> * * *

ORS 314.610(7), Compact art. IV.1.(g). (emphasis added). UDITPA does not define its term "gross receipts." And as observed above, the actual sales factor is calculated by including in the numerator the sales that are attributed to the taxing State and in the denominator all or everywhere sales. In calculating the numerator of the sales factor for sales of tangible personal property, sales are generally attributed to the State to which the goods are shipped. ORS 314.665(2)(a), Compact art. IV.16.(a).

The rule for other types of sales, that is, sales of "other than tangible personal property," provides that the sales are attributed to the State within which the greatest proportion of the "income producing activity" is performed, based on "costs of performance." ORS 314.665(4), Compact art. IV.17. UDITPA does not define the terms "income producing activity" or "costs of performance." Nor does UDITPA state what should happen in the

attribution of sales when it is impossible or impractical to determine the State with the greatest amount of income producing activity, based upon costs of performance.

The drafters of UDITPA clearly recognized at the time UDITPA was developed that the alternative rule for attributing sales, that is, sales of "other than tangible personal property," would not provide a universal solution for all types of these other sales. William J. Pierce, *The Uniform Division of Income for State Tax Purposes, supra,* at 780. It is also probably fair to observe that the rule for sales of "other than tangible personal property" largely was developed with a focus on traditional services and *not* the sale of intangibles, although intangibles are clearly included in the literal terms of the provision. See *Id.*

Calculation of the sales factor is important to taxpayer's Oregon tax liability. Any increase in the denominator of the sales factor (the increase represents an actual gross receipt or receipts properly includible in the sales factor) without an increase in the numerator of the sales factor (the increase is not properly attributable to Oregon) reduces the sales factor (a larger denominator with no adjustment in the numerator reduces the quotient) and the overall average of all three factors. The result is a reduction in the amount of multistate income of the taxpayer that is subject to tax in Oregon. Taxpayer here seeks to increase the denominator of the sales factor dramatically with total amounts received from its working capital investments in short-term debt securities without attributing any of those amounts to Oregon.

III. THE TOTAL AMOUNTS RECEIVED FROM REDEMPTION UPON MATURITY OR SALE OF DEBT INSTRUMENTS USED FOR INTERIM INVESTMENT AND REINVESTMENT OF WORKING CAPITAL DO NOT CONSTITUTE GROSS RECEIPTS AND ARE NOT INCLUDIBLE IN THE SALES FACTOR.

In the proceedings in the Tax Court, Sherwin-Williams supported its argument for inclusion of all amounts received (including return of capital) by relying upon what it supposed was UDITPA's plain meaning of sales and its defining component "gross receipts." Yet urging a plain meaning construction of sales and "gross receipts" is misplaced for two reasons. First, UDITPA cautions against literal application of its definitions. Second, there is no accepted or universal understanding of the term "gross receipts."

The language of UDITPA clearly indicates that it is not to be taken too literally. The definition of "sales" is predicated by the important qualifier that the definition given is not to be applied in contexts demanding another understanding. See Part II.C., above. So a taxpayer's proffered plain meaning for the concept of sales and "gross receipts" hardly puts an end to inquiring whether the concept includes the return of capital from the redemption upon maturity or sale of debt instruments acquired as interim investments of idle working capital. UDITPA clearly warns that a definition should not apply if the incongruity of the result following the application of the definition suggests a different understanding. As is more fully discussed below, see Part IV, applying the taxpayer's understanding of "gross receipts" creates a huge incongruity. The definition has the potential to convert an ordinary and recurring banking function performed daily by countless

multistate businesses into a principle that would promote tax planning that bears little relationship to the true economics of dividing multistate income.[7]

Additionally, it is apparent from even a cursory examination of the meaning of gross receipts that the term means many things in different contexts. For example, BLACK'S LAW DICTIONARY 703 (6th ed. 1990) defines gross receipts as, "The total amount of money or the value of other consideration received from selling property or from performing services." This definition clearly puts at issue whether interest could even be found to constitute a gross receipt, regardless of whether the underlying return of the capital that produced the gross receipt could also. A regulation under § 448 of the Internal Revenue Code of 1986 defines gross receipts somewhat more expansively. Temp. Treas. Reg. §1.448-1T(f)(2)(iv) (1993). (An understanding of gross receipts is necessary under this provision, because cash basis accounting is permitted for taxpayers with "gross receipts" of less than $5,000,000. I.R.C. § 448(b).) The regulation's definition of gross receipts includes "total sales" and "all amounts received for services." Treas. Reg. §1.448-1T(f)(2)(iv)(A) (1993). The regulation further limits gross receipts to "income from investments," including "interest * * *, dividends, rents, royalties, and annuities." *Id.*

Now the reason for noting these definitions is not to suggest that either of them is what was meant by the term gross receipts in ORS 314.610(7) or

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[7] The concern expressed here is not mitigated by the amendment of Oregon's statutory definition of gross receipts. ORS 314.665(6)(a) (effective on or after Jan. 1, 1995). The issue involves the uniform act. Any interpretation by the Oregon Supreme Court, an important and respected interpreter of UDITPA, will impact how other States that have not amended the definition view the provisions of the Act.

Compact art. IV.1.(g). Rather, these definitions establish *a priori* that the definition of "gross receipts" as used to define the sales factor cannot become a simplistic parsing of the language. The reasonable approach to understanding what is meant by the term "gross receipts" requires an examination of the use to which the term is put in order to define the term in proper reference to the term's usage. This approach to construing the term "gross receipts" is after all what the proviso of the introductory sentence to the defined term actually requires. See quotation of the definition of sales at Part II.C., above.

Therefore, it is appropriate to note that gross receipts is used to define the sales factor as a way to determine the amount of the business activity in the form of selling that the multistate business has in the taxing State versus the other States in which the taxpayer is taxable. The purpose of UDITPA in using the sales factor is to recognize the proper contribution that the market States provide to the production of multistate income. William J. Pierce, *Uniform Act Urged as Practical Method to Lighten State Tax Compliance Burden, supra*, at 84; see also *Appeals of Pacific Tel. & Tel. Co., supra*. The destination aspect of the sales factor for tangible personal property also sought to minimize manipulation of sales operations to avoid taxes. *Id.* Manipulation is avoided, because a multistate business sells in a particular destination State for its market and not for its tax planning benefits.

Your *Amicus* submits that to accept the taxpayer's approach to defining gross receipts would undermine these understandings of UDITPA.

Taxpayer's approach would inappropriately convert the sales factor as applied to a daily banking function of a multistate business into a powerful tax planning tool. Instead of avoiding tax planning, an expressed concern for at least sales of tangible personal property, the sales factor would allow significant tax planning. Multistate business will enjoy an advantage over in-state rivals. The multistate business will locate the banking function of its treasury department in a tax advantageous State.[8] This move will shelter income so that taxation of the multistate business will not reflect the economics of three categories of business activities (capital, labor and sales) occurring in the taxing State that are the basis of the division of income rules. The separate rule for sales of "other than tangible personal property" should not embrace this result.

Nor is it accurate to counter these observations by claiming that the interim investment of idle working capital cannot properly be called a banking function, because the investments are being made in the market and not with a bank. The U.S. Supreme Court certainly views these kinds of activities as the equivalent of banking. *Allied-Signal,* supra, at 789-90 (short-term investment of working capital is analogous to a bank account or certificate of deposit). This understanding is reasonable. Consider the following scenario: A multistate taxpayer has a banking account into which it deposits and withdraws its cash on a *daily* basis. It cannot be seriously contended that each *daily* withdrawal constitutes a gross receipt of the

[8] At least one State is willing to promote this possibility. Joseph DiStefano, untitled article, (Gannett News Service Jan. 25, 1996), available in Nexis, News Library, GNS File.

amount withdrawn with the "sale" represented by these withdrawals being attributed to the location of the multistate taxpayer's treasury function. Now just because the modern corporation seeks greater return than is available from retail banking by placing its cash on a *daily* basis into short-term debt securities does not change the true nature of what is being done. The multistate business is parking its funds on a *daily* basis for gain from their use by others, *i.e.*, the payment of interest. The substance of the activity is still banking.

The danger of allowing the total proceeds derived from redemption upon maturity or sale of these short-term debt securities to constitute "gross receipts" that are includible in the sales factor is amply described in *The Sherwin-Williams Co.* v. *Huddleston*, currently unpublished but available at 1998 Tenn. App. Lexis 701 (Tenn. Ct. App. 1998), *on petition* to Tenn. Sup. Ct., No. (Ct. App.) 01-A-01-9711-CH-00651. Under taxpayer's proposed approach a one day deposit generating $2,539.93 in interest generates a gross receipts of $11,002,539.93. *Id.* This approach clearly becomes the proverbial tail wagging the dog, since the income element of this transaction is a mere 0.000230849 of the total amount received from the transaction. To allow the total amounts received to be treated as a gross receipt will allow marginal returns to overtake operational gross receipts. Hence, the Tennessee Court of Appeals noted that in the facts of that case the taxpayer's return of capital from transactions undertaken by the banking

function would constitute an average of 55.169% of the total gross receipts of the taxpayer.[9]

Your *Amicus* suggests that these observations are sufficient to justify heeding the warning of the introduction to UDITPA's definition of sales and its component "gross receipts." Whatever the meaning of these terms, that meaning is not to be taken too literally if doing so results in an absurd result. *American Tel. & Tel. Co.* v. *Director, Div. Of Taxation,* 194 N.J. Super. 168, 173, 476 A.2d 800, 802 (1984). Your *Amicus* respectfully submits that taxpayer's approach of including the total amounts received (including return of capital) from redemption upon maturity or sale of debt instruments used for interim investment and reinvestment of idle working capital is precisely the case calling for caution. Otherwise the purpose of the sales factor to reflect the contribution of the destination States into which Sherwin-Williams sells its core business products will largely be thwarted. *E.g., Appeals of Pacific Tel. & Tel. Co.,* Cal. State Bd. Equalization (May 4, 1978), 1978 Cal. Tax Lexis 91. And while some may contend that it is proper to include at least the interest portion derived from these investments, without the return of capital portion, the next section will disclose that this methodology is an incorrect application of UDITPA.[10]

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[9] The point in noting the Tennessee figure of 55.169% is not to contend that this is the exact figure that would be calculated for the taxpayer's factual circumstance in Oregon. The laws of the two States are not identical. The purpose is to show, however, that income from the core business of selling paint and related supplies is subsumed by the collateral activity of keeping idle working capital at work.

[10] Before moving on to the next section, your *Amicus* parenthetically notes that these concerns are what have propelled the uniformity effort of the Commission to consider a new uniform regulation, Prop. MTC Reg. IV.2.(a), to define "gross receipts." An earlier version of the definition is available at the Commission's webpage, <www.mtc.gov/uniform/grossrct.htm> (visited Mar. 10, 1999). The definition as it is now being examined, see Appendix A, would expressly exclude "repayment, maturity, or

IV. NEITHER THE TOTAL AMOUNTS RECEIVED NOR THE INTEREST PORTION OF THOSE AMOUNTS CAN REASONABLY BE ATTRIBUTED TO ANY PARTICULAR INCOME PRODUCING ACTIVITY OF TAXPAYER AND BOTH ARE THEREFORE PROPERLY EXCLUDED FROM THE SALES FACTOR.

A. *OAR 150-314.665(3)(3)(b) (repealed) Was An Appropriate Administrative Rule And Was Not Contrary To The Statute.*

Your *Amicus* presents this section without regard to the results on the issue of whether UDITPA's term "gross receipts" includes the total amounts received from debt securities used for interim investment and reinvestment of idle working capital. The UDITPA rule for attributing "sales of other than tangible personal property" does not require or suggest that either total amounts or even the interest portion of total amounts should be located in the State in which the taxpayer has its treasury function. The rule for locating these sales under the principle of the greater proportion of the income producing activity, based upon costs or performance, cannot reasonably be applied in these circumstances. The appropriate response to this practical impossibility is to eliminate the questioned amounts that arise from interim working capital investments, *however constituted*, entirely from the numerator and the denominator of the sales factor. This approach has the benefit of reflecting the full extent of the income producing activities that generated the funds of idle working capital whose time-value use is what produces the income from investment, *i.e.*, the entirety of the business operations of the taxpayer.[11]

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redemption of the principal of a loan, bond, certificate of deposit or similar instrument [and] the principal amount received under a repurchase agreement or other transaction properly characterized as a loan." (reformatted).

[11] In presenting the total throw-out approach your *amicus* notes that the decisions identified in note 4 have allowed, generally upon the concession of the state tax authority,

The total throw-out method advanced here is the rule found in the Oregon Department of Revenue's long-standing regulation OAR 150-314.665(3)(3)(b)(b) (repealed). This Oregon regulation was derived from the Commission's own current regulation that reflects the assumption of an unamended definition of the sales factor. See MTC Reg. IV.18.(c).(3) (*second paragraph*) (1973). The rule addresses a circumstance not governed by a provision of UDITPA, a circumstance where it is impractical to locate the greater proportion of the income producing activities based upon costs of performance. As a reasonable rule consistent with the purposes of UDITPA that fills in a *lacuna* or a gap, the regulation validly fills in the interstices of a provision of UDITPA that does not cover a particular circumstance. See *Springfield Education Ass'n* v. *Springfield School Dist. No. 19*, 290 Or 217, 227-28, 621 P2d 547, 555 (1980); *University of Oregon Co-Operative Store* v. *Dept. of Revenue*, 273 Or 539, 551, 542 P2d 900, 906 (1975).

The regulation in issue, OAR 150-314.665(3)(3)(b) (repealed), for the applicable tax years provided:

> Where business income from intangible property cannot readily be attributed to any particular income producing activity of the taxpayer, such income cannot be assigned to the numerator of the sales factor for any state and shall be excluded from the denominator of the sales factor. For example, where business income in the form of dividends received on stock, royalties received on patents or copyrights, or interest received on bonds, debentures or government securities results from the mere holding of the intangible personal property by the taxpayer, such

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the interest element to be reflected in the sales factor. However, none of these decisions critically analyzed whether UDITPA's rule of the greater proportion of income producing activities could reasonably be applied. This section concludes that the rule cannot reasonably be applied. The natural result should be, therefore, that even the "interest" element may properly be excluded from the sales factor.

> dividends and interest shall be excluded from the denominator of the sales factor.

This regulation is for all practical purposes identical to MTC Reg. IV.18.(c).(3) (*second paragraph*) (1973). Having explained the legitimacy of the regulation as filling in a gap in the governing statute, let us turn to what this regulation actually means and why it governs the disposition of this case.

B. In Determining The State Of The Greater Proportion Of Income Producing Factors, The Tax Court Ignored The True Extent Of The Income Producing Activities From Which The Disputed Income Was Derived.

The apparent theory of the Tax Court here is that the only income producing activity that can be tied to the production of the interest earned on the interim investment and reinvestment in short-term debt instruments is the activity of the taxpayer's treasury office in Ohio. This is a fair understanding of the Tax Court's ruling, because the record only references the treasury activities for determining which of the jurisdictions in which the taxpayer operates had the greater proportion of these activities. Yet this exclusionary calculation ignores other business activity that is far more responsible for the production of the investment income.

The income really comes "renting" funds accumulated from the income producing activities of the various locations of the business segments of the taxpayer. These segments make available on a daily basis their cash resources to the central treasury function for purposes of securing a time-value return on the aggregate idle working capital of the entire enterprise. In essence, the treasury function of choosing the amounts to invest and where to invest does not significantly contribute to the realization of the income

that is sought to be divided among the States. See Walter Hellerstein, *State Taxation of Corporate Income from Intangibles* 57 n.531, TAX MGMT. MULTISTATE TAX (BNA 1996). Professor Hellerstein, with respect to the property factor, but in the opinion of your *Amicus* with no less applicability to the sales factor, makes this observation in practical economic terms:

> It is not primarily the brilliance of a few portfolio managers that generates millions of dollars of interest income on short-term money market instruments, or, indeed, of capital gains from long-term investments. While the contributions of investment managers cannot be ignored, their contributions to the generation of intangible income are already reflected in a geographic sense by the payroll factor that includes their compensation, which presumably is commensurate with the marginal revenue that their advice generates. What generates the intangible income, of course, is the assets themselves, and the command over resources that they represent. To suggest that the geographical location of intangible property (and the income it produces) follows the location of investment managers is to let a very small tail wag a very large dog.

Id.

So it is submitted that if one is to analyze for the proper location of the income producing activities, one must look to *all* the income producing activities that generated the accumulated funds that were rented out to earn the investment income. True quantification of all the income producing activities, based upon costs of performance, cannot reasonably be limited to the treasury function activities. Proper determination of the greater proportion of the income producing activities of this investment income, based upon costs of performance, necessarily requires an examination of two additional types of income producing activities. First, there are the income producing activities that actually produced the aggregate funds that were then made available to be invested or rented out. Second, there is the

activity that dedicated these funds to centralized, as opposed to decentralized, investment. Both of these activities have associated costs of performance.

But abstract identification of these additional income producing activities and their associated costs of performance does not mean that one can readily apply the rule of the greater proportion. There is simply no reasonable method to quantify and then match these activities and costs for *each item* of income that is generated from the "sale of other than tangible personal property," as is required by the express rules of UDITPA. See Part II.C., above. The quantifying and matching examination mandated by UDITPA is totally impractical. In the words of the regulation, the investment income from Sherwin-Williams' interim investment of idle working capital cannot readily be attributed to any particular income producing activity.

Impracticality flows from the inability to determine with any precision what income producing activities, based upon costs of performance, actually contributed to the make up of the available funds that gave rise to income from the interim investment of idle working capital. The difficulty arises from the fungible nature of money and not knowing how to match the invested idle working capital with any particular income producing activity that produced the invested funds. There is, for example, no reasonable way to identify which activity of acquiring inputs for the production of the products sold, which sales activity, which corporate administrative activity, which borrowing activity, and the like, produced what accumulated funds.

Apart from the income producing activities and associated costs that generated the invested funds, there is also the income producing activity of granting the use of the accumulated funds for centralized investment. The cost of performance associated with this activity is at a minimum the imputed wholesale cost of gaining access to these funds for market investment of them. The costs of performance here might be quantified as what the contributing business segments lost in foregoing the opportunity to invest the available funds locally by the segments' transferring the opportunity of investment to the centralized treasury function. This cost is incurred by the local business segment, because each business segment has foregone its own right of investment. It is unrealistic to conclude that the centralized treasury function can gain access to capital belonging to the various business segments of the business without any associated cost for its access.

But once again, abstract identification of the associated cost of performance with the centralized interim investment of idle working capital does not support the conclusion that these costs can be readily determined in the specific. Costs of access to capital varies depending upon the length of the commitment to invest, the source of the capital (accumulated cash flow versus borrowed capital), and risk to name a few of the factors. These considerations inevitable lead to the conclusion that it is impractical to quantify the income producing activities, based upon costs of performance, that are inherent in the local segments granting access to their capital.

So the appropriate response when income cannot be attributed to any particular income producing activity, like the approach of the regulation, is to forego, or throw-out, the measurement of the costs of performance tied to the production of the income. The throw-out has the effect of apportioning the investment income in accordance with the remaining factors of the business. Throw-out is quite sensible in these circumstances, because as the foregoing examination of the income producing activities and their associated costs of performance indicates the investment income of idle working capital in short-term debt securities really reflects the entirety of the business—not just the limited treasury function in the central office. Hellerstein, *State Taxation of Corporate Income from Intangibles, supra*, 59-60 and n.549 (MTC regulation for sales factor for income from intangible property not readily attributable to any particular income producing activity of taxpayer similar to *equitable* rule assigning the income according to the factors of the business otherwise existing). The exclusion follows, because, in the words of the regulation, interim investment income of idle working capital "cannot readily be attributed to any particular income producing activity."[12] OAR 150-314.665(3)(3)(b) (repealed); MTC Reg. IV.18.(c).(3) (*second paragraph*) (1973).

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[12] The exclusion of the interest portion of the total amounts received is not inconsistent with the Commission's newly adopted uniformity regulation, MTC Reg. IV.18.(c).(4) (1997), available at the Commission's webpage, <www.mtc.gov/uniform/GENLA&A.PDF> (visited Mar. 13, 1998), that provides for the inclusion of net gains in some circumstances. The rule, which Oregon has not adopted, is conditioned on the other provisions of MTC Reg. IV.18.(c). (1973) not requiring an exclusion of the net gains. *Id.* The rule only posits simple multistate taxpayers for which the calculation of the greater proportion of income producing activities may be possible.

C. *The Example of OAR 150-314.665(3)(3)(b) (repealed) and MTC Reg. IV.18.(c).(3) (*second paragraph*) (1973) Is Consistent With A Throw-Out Of Amounts Received From Routine Working Capital Investments, Because Taxpayer has Merely Held These Investments.*

The Tax Court apparently believes the example of OAR 150-314.665(3)(3)(b) (repealed) and MTC Reg. IV.18.(c).(3) (*second paragraph*) (1973) illustrates the inapplicability of the regulation. The argument centers around the use of the phrase "the mere holding of the intangible personal property by the taxpayer." Specifically, the regulation states the following example:

> * * * [W]here business income in the form of dividends received on stock, royalties received on patents or copyrights, or interest received on bonds, debentures or government securities results from the mere holding of the intangible personal property by the taxpayer, such dividends and interest shall be excluded from the denominator of the sales factor.

OAR 150-314.665(3)(3)(b) (repealed) and MTC Reg. IV.18.(c).(3) (*second paragraph*) (1973).

The argument is that "merely holding" refers to a passive investment and not to investment activity that was an integral part of the business activity. Tr 3. In addition, the argument contends that application of the regulation to these circumstances is inconsistent with the classification of the investment income as business income. Tr 7. Apparently, the taxpayer argued in the Tax Court that the regulation only applies to non-business income, because that way the alleged inconsistency of classifying the income as business (apportionable) income can be avoided. However, the example is not inconsistent with the application of throw-our rule of the regulation in these circumstances.

The example for "mere holding" illustrates that the throw-out rule of the regulation applies when one cannot readily associate the income with a specific activity other than the making of the investment. If the income can be associated with an activity beyond the making of the investment then the location of that activity suggests the jurisdiction to which the income can be attributed for purposes of the sales factor. In this sense, the phrase "merely holding" refers to whether the investment was held for reasons beyond its contribution to the riches of the corporation. Stated another way, what one must ask in order to determine whether an investment is held for *more* is whether ownership of the asset fulfills a purpose of the unitary business beyond the generation of a return on capital.[13] If another purpose for the investment is manifest that purpose will suggest the proper jurisdiction to which to attribute the investment income.

A circumstance where investment in a debt instrument fulfills a purpose beyond merely generating a return on capital is an indebtedness incurred by a purchaser to the taxpayer-seller for the purchase of the taxpayer-seller's product. Here the acceptance of the debt of the purchaser furthers the unitary business of the taxpayer-seller beyond the generation of a return on capital, because acceptance of the debt promotes sales of the taxpayer's

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[13] If the only purpose for holding the intangible is to generate a return on capital, then there is a possibility that this passive investment will not generate income that is apportionable. See *Allied-Signal, Inc.* v. *Director, Div. of Taxation,* 504 U.S. 768, 784-88 (1992). This type of income is not apportionable as business income, because the U.S. Supreme Court has rejected what it calls the business purpose test of apportionable income. *ASARCO Inc.* v. *Idaho Tax Comm'n,* 458 U.S. 307, 325-28 (1982). But there is a noted exception to precluding the apportionment of income from passive investments. Income from passive investment of working capital is clearly apportionable. *Allied-Signal,* at 787-88, 789-90. No one can seriously claim, nor does taxpayer claim in this case, that income derived from passive investments of working capital is not apportionable.

product. Thus, the applicable regulations indicate that income from this kind of debt is readily attributable to the income producing activity of selling. OAR 150-314.665(3)(3)(a); MTC Reg. IV.18.(c).(3) (*first paragraph*) (1973).

Beyond these considerations, even if one concludes that a debt security is held for *more* than its return of capital, it is unclear what that conclusion would mean in any case. The example in OAR 150-314.665(3)(3)(b) (repealed) and MTC Reg. IV.18.(c).(3) (*second paragraph*) (1973) is merely an example. The example does not trump the operation of the general principle that the sales factor does not include income where income from intangibles cannot readily be attributed to any particular income producing activity of the taxpayer. The regular and routine investment of idle working capital by most multistate taxpayers precisely meets that principle for the reasons noted above.[14]

The additional suggestion made by the taxpayer that the regulation with its example is inconsistent with the disputed income's classification as business income [and therefore the regulation should only apply to nonbusiness income], Tr 7, is out of place. The only income that can be placed into the sales factor is income that is apportionable. ORS 314.610(7);Compact IV.1.(g). This conclusion is of course supported by

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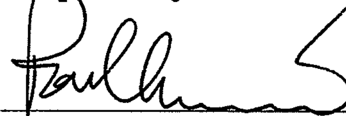
[14] Three commentators apparently reach a contrary conclusion in Michael D. Herbert, Benjamin F. Miller, Jordan P. Weiss, *Sales Factor And Intangibles: What's Up And What's Down*, 5 ST. TAX NOTES 1102 (Nov. 8, 1993) ("Presumably, activity exceeds 'mere holding' when a formal cash management function exists.") But no authority is cited for this conclusion. Nor does the article state what the consequences of this conclusion are. And the conclusion quite frankly does not square with the underlying principle as has been demonstrated in Part IV.B., above.

the axiomatic realization that one could not logically use a sale generating nonbusiness or allocable income as evidence of business activity for purposes of dividing apportionable income. Otherwise one would be using sales that have nothing to do with the income being apportioned to apportion that income.

V. CONCLUSION

For the foregoing reasons, the Court should conclude that neither the total amounts received from the interim investment and reinvestment of idle working capital in short-term debt securities, nor the interest element of those amounts, constitute "gross receipts" that are includible in the sales factor of the taxpayer. Alternatively, the Court may conclude under the limiting language of the proviso to UDITPA's definitions that the term sales and its component "gross receipts" only refer to the interest income portion of total amounts received for redemption upon the maturity or sale of the short-term securities.

Respectfully submitted,



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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I filed the original and 15 copies of the Brief *Amicus Curiae* of the Multistate Tax Commission in Support of Department of Revenue, Defendant-Appellant, with the State Court Administrator, Records Section, on April 15, 1999, by then depositing them in the United States mail at the Post Office at Washington, D.C., first class, postage prepaid, and addressed to:

State Court Administrator
Records Section
1163 State Street
Salem, Oregon 97310

I further certify that on April 15, 1999, I served the Brief *Amicus Curiae* of the Multistate Tax Commission in Support of Department of Revenue, Defendant-Appellant, upon Michael R. Seidl, Michael T. Cummins, and Joseph F. Timmons, attorneys for The Sherwin-Williams Company, Plaintiff-Respondent, by then depositing in the United States mail at the United States Post Office at Washington, D.C., first class, postage prepaid, two full, true and correct copies thereof addressed to:

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I further certify that on April 15, 1999, I served the Brief *Amicus Curiae* of the Multistate Tax Commission in Support of Department of Revenue, Defendant-Appellant, upon HARDY MYERS, Attorney General of the State of Oregon, Attn: Robert W. Muir and Marilyn J. Harbur,

Assistant Attorneys General, Attorneys for the Department of Revenue, State of Oregon, Defendant-Appellant, by then depositing in the United States mail at the United States Post Office at Washington, D.C., first class, postage prepaid, two full, true and correct copies thereof addressed to:

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APPENDIX

Proposed Definition of Gross Receipts for Purposes of Determining the Sales Factor for Apportionment of Multijurisdictional Income

March 1, 1999

At its November, 1998 meeting, the MTC Executive Committee affirmed the plan of the hearing officers to engage in an "informal dialogue" with interested States and industry representatives to craft a definition of "gross receipts" that would be acceptable to both States and the taxpayer community. A second public hearing on the revised draft will be held May 4, 1999. Accordingly, attached for your review and comment is an amended draft of the proposed definition of gross receipts. The amendments reflect the public comments (written and oral) of interested parties and hearing participants received to date. For ease of comparison, we have forwarded a "red-lined" and a "clean" version of the definition.

Upon receipt of your comments and recommended changes (if any), to the amended draft, a third draft incorporating comments and recommended changes will be prepared and subjected to a second public hearing. Comments and other recommendations should be sent to Roxanne Bland, MTC Counsel, 444 North Capitol Street, N.W., Suite 425, Washington, D.C. 20001. Or, if you prefer, you may submit your contributions via fax (202/624-8819), or email (rbland@mtc.gov). To give MTC staff adequate time to review and incorporate submissions into the third draft, we would appreciate your comments by March 31, 1999.

To remind you, the MTC Uniformity Committee drafted a definition of "gross receipts" as a proposed amendment to the definitions section of MTC Reg. IV.2.(a). The term "gross receipts" is not currently defined in the Uniform Division for Income Tax Purposes Act (UDITPA) or in MTC regulations. The term appears in UDITPA at §1(g) under the definition of "sales" and becomes applicable in the MTC sales factor regulations under UDITPA §§15-17 and in various MTC regulatory provisions under UDITPA §18.

Multistate Tax Commission
Proposed Definition of Gross Receipts
February 8, 1999

D * R * A * F * T
(Double underlined text replaces strikethough text)

"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, the performance of services, or the use of property or capital (including rents, fees, royalties, interest and dividends) in a transaction which produces business income, in which the income or loss is recognized (or would be recognized if the transaction were in the United States) under the Internal Revenue Code. Amounts realized on the sale or exchange of property are not reduced for ~~basis or cost of goods sold or property sold~~ the cost of goods sold or the basis of property sold. Gross receipts, even if business income, do not include such items as ~~repayment, maturity, or redemption of the principal of a loan, bond, certificate of deposit or similar instrument, the gross principal amount received under a repurchase agreement or other transaction properly characterized as a loan, proceeds from issuance of the taxpayer's own stock or from sale of treasury stock, damages and other amounts received as the result of litigation, property acquired by a agent on behalf of another, tax refunds and other tax benefit recoveries, pension reversions, contributions to capital, or income from forgiveness of indebtedness.~~

- repayment, maturity, or redemption of the principal of a loan, bond, certificate of deposit or similar instrument,
- the ~~gross~~ principal amount received under a repurchase agreement or other transaction properly characterized as a loan,
- proceeds from issuance of the taxpayer's own stock or from sale of treasury stock,
- damages and other amounts received as the result of litigation, property acquired by a agent on behalf of another,
- tax refunds and other tax benefit recoveries,
- pension reversions,
- contributions to capital (except for sales of securities by securities dealers),
- income from forgiveness of indebtedness, or
- amounts realized as the result of short term investments or re-investments of principal in mutual fund accounts, money market accounts or similar instruments;
- amounts realized from exchanges of inventory that are not recognized by the Internal Revenue Code." (See IV.18(c) for proper treatment of receipts in the sales factor.)

~~Exclusion of an item from the definition of "gross receipts" is not determinative of its character as business or nonbusiness income.~~

Multistate Tax Commission
Proposed Definition of Gross Receipts
February 8, 1999

D * R * A * F * T

(Clean Version)

"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, the performance of services, or the use of property or capital (including rents, fees royalties, interest and dividends) in a transaction which produces business income, in which the income or loss is recognized (or would be recognized if the transaction were in the United States) under the Internal Revenue Code. Amounts realized on the sale or exchange of property are not reduced for the cost of goods sold or the basis of property sold. Gross receipts, even if business income, do not include such items as

- repayment, maturity, or redemption of the principal of a loan, bond, certificate of deposit or similar instrument,
- the principal amount received under a repurchase agreement or other transaction properly characterized as a loan,
- proceeds from issuance of the taxpayer's own stock or from sale of treasury stock,
- damages and other amounts received as the result of litigation, property acquired by a agent on behalf of another,
- tax refunds and other tax benefit recoveries,
- pension reversions,
- contributions to capital (except for sales of securities by securities dealers),
- income from forgiveness of indebtedness, or
- amounts realized as the result of short term investments or re-investments of principal in mutual fund accounts, money market accounts or similar instruments;
- amounts realized from exchanges of inventory that are not recognized by the Internal Revenue Code." (See IV.18(c) for proper treatment of receipts in the sales factor.)