IN THE SUPREME COURT OF
THE STATE OF KANSAS

In the Matter of the Appeal of **CHIEF INDUSTRIES, INC.**, Regarding Corporate Income Taxes for F.Y.E. 6-25-82 through 6-28-85.	))))	Appeal No. 93-69972-AS

STATEMENT IN SUPPORT OF MOTION FOR REHEARING AND MODIFICATION OF APPELLEE KANSAS DEPARTMENT OF REVENUE

INTEREST OF DECLARANT, MULTISTATE TAX COMMISSION: The Multistate Tax Commission is the official administrative agency of the MULTISTATE TAX COMPACT ("Compact"). Twenty States (counting the District of Columbia) have adopted the Compact through enactment of state legislation that makes the Compact an integral part of their respective statutory law. The State of Kansas has adopted the MULTISTATE TAX COMPACT, STATE & LOCAL TAXES: ALL ST. TAX GUIDE ¶701 *et seq.* (RIA 1994) (hereafter "MULTISTATE TAX COMPACT"), *codified at* K.S.A. 79-4301 *et seq.*, thereby becoming a party State entitled to membership within the Commission. MULTISTATE TAX COMPACT, art. VI.1.(a), *codified at* K.S.A. 79-4301, art. VI.1(a). In addition to its twenty party States, fourteen other states have signified through associate membership their commitment to the goals of the Multistate Tax Commission.[1] Upon chal-

[1]The current full members are the States of Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are the states of Arizona, Connecticut, Georgia, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Pennsylvania, Tennessee, West Virginia, and Wisconsin.

lenge, the U.S. Supreme Court upheld the Compact in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

Historically, the Compact was developed through the cooperative efforts of the States and multistate taxpayers in response to the criticisms, findings and recommendations of the Willis Committee, the congressional study that was sanctioned by Title II of Pub. L. No. 86-272, 73 Stat. 555, 556 (1959). *See* Corrigan, *A Final Review*, 1989 MULTISTATE TAX COMM'N REV. 1, 1 and 23; Hellerstein and Hellerstein, STATE AND LOCAL TAXATION 653 (5th ed. 1988). Specifically, the drafters of the Compact committed, and thereafter the party States have continued to commit, to strengthening Our Federalism by resolving the inherent conflict of having a single, national economy and a federal form of government. Our Federalism presupposes separate state taxing authority with regard to multijurisdictional commerce that is one of the sources of revenue for the States to discharge their separate spheres of responsibility. Uniformity in state principles of apportionment of multijurisdictional income promotes federalism by fostering fairness, thereby avoiding, among other things, duplicative taxation that otherwise would potentially interfere with such commerce, *Allied-Signal Inc.* v. *Director, Div. of Taxation*, 112 S.Ct. 2251, 2258 (1992) (severe multiple taxation has drastic consequences for national economy), while at the same time preserving to the States a revenue source from a segment of the economy that benefits from participation in the economy of the taxing State. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959) (interstate commerce should bear its fair share of the cost of state government in return for the benefits it derives from within the State); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977) (to same effect).

The purposes of the MULTISTATE TAX COMPACT that are recognized by Kansas statutes 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.

MULTISTATE TAX COMPACT, art. I; *codified at* K.S.A. 79-4301, art. I. These purposes disclose the Commission's vital and continuing interest in state tax issues that may affect the administration of state tax systems in the context of multijurisdictional commerce.

The party States are entitled to membership in the Multistate Tax Commission, the administrative arm of the Compact. The activity of the Commission that is directly implicated by the Court's decision in this case is its state tax uniformity effort. The Commission's state tax uniformity effort responds to the challenge of Our Federalism by seeking to avoid unnecessary conflicts with the Commerce Clause, whose policy is ultimately guarded by Congress and the courts. To the extent the Multistate Tax Commission is successful in its uniformity endeavors, there is less need for Congress or the courts to intrude on state legislative prerogatives in adopted tax systems.

In furtherance of its state tax uniformity objectives, the MULTISTATE TAX COMPACT incorporates and the party States utilize the principles of the Uniform Division of Income for Tax Purposes Act ("UDITPA"), 7A UNIFORM LAWS ANNOTATED 331 (WEST 1985), as the core of its apportionment and allocation rules for determining the income tax base of interstate business. MULTISTATE TAX COMPACT, art. IV; *codified at* K.S.A. 79-4301, art. IV. The Multistate Tax Commission has furthered the objectives of UDITPA by developing a series of regulations interpreting the interstices of UDITPA, both as to its general principles and its application to specialized industries. *See* MTC Allocation and Apportionment Regulations, STATE & LOCAL TAXES: ALL ST. TAX GUIDE ¶630 *et seq.* (RIA 1994).[2]

Party States joining the Multistate Tax Commission expressly contemplate that the Commission will develop uniformity recommendations taking the form of regulations. MULTISTATE TAX COMPACT, art. VII; *codified at* K.S.A. 79-4301, art. VII. Fostering state tax uniformity through voluntary state adoption of uniform state tax principles in the form of regulations recommended by the

[2]Because the Multistate Tax Commission has no supervening authority over the sovereignty of its party States, the uniformity provisions developed by the Commission, including its UDITPA regulations, are in the form of recommendations of action. MULTISTATE TAX COMPACT, art. VII.(3); *codified at* K.S.A. 79-4301, art. VII(3).

Commission remains central to the activities of the Multistate Tax Commission.

The uniformity provision relevant to this case is the portion of the Commission's regulations that pertains to the classification of apportionable, business income and, most specifically, the adoption of the functional test for apportionability. The Kansas Department of Revenue adopted the Commission's recommended rule as K.A.R. 92-12-73(b) (1979). This regulation reflects the Commission's and its party States' best judgment as to the proper meaning of apportionable business income under UDITPA, that is incorporated as a part of art IV. of the MULTISTATE TAX COMPACT. As subsequently discussed in this Statement, your Declarant further submits that its regulation reflects an administrative interpretation that best serves the interest of constitutional federalism.

By not recognizing the functional test in classifying income as apportionable, the Court's decision in this case frustrates the promotion of state tax uniformity in income taxation of multijurisdictional commerce, an adopted legislative policy of the State of Kansas. This deviation from the state income tax uniformity ultimately threatens federalism that would otherwise be strengthened through the recognition of the voluntary cooperative action of States, such as Kansas that was reflected in their adoption of the MULTISTATE TAX COMPACT and the underlying apportionment regulations. The Commission views this case as singularly important, because each party State of the MULTISTATE TAX COMPACT has both the opportunity and the responsibility to participate in the strengthening of federalism. Party States of the Compact have recognized the obligation to help strengthen federalism, because the virtue of federalism is demonstrated by its successful support of our democratic and republican government over a geographical area as large and as diverse as the United States for more than 200 years. *See Gregory* v. *Ashcroft*, 111 S.Ct. 2395, 2399-2400 (1991). The Multistate Tax Commission respectfully submits that the Court's decision in this case ignores a reasonable interpretation of the pertinent provision of UDITPA as collectively developed by the party States of the MULTISTATE TAX COMPACT to the potential injury of not only Our Federalism but also the State of Kansas.

UDITPA'S PRINCIPLE FOR CLASSIFYING APPORTIONABLE BUSINESS INCOME IS A NEUTRAL STATE TAX PROVISION THAT GOES TO THE CORE OF STATE TAXATION OF MULTIJURISDICTIONAL COMMERCE: As the foregoing suggests, the uniform principles that govern the apportionment of income attributable to interstate commerce is at the heart of preserving the States' sovereign right to tax multijurisdictional commerce. Inconsistent State approaches in the apportionment and allocation of income attributable to multijurisdictional commerce raises the specter of both over-taxation and under-taxation, (*see* next section of this Statement), a result that is injurious to taxpayers and States alike. The principle of apportionable, business income adopted by UDITPA can be effective in meeting the interest and expectations of both taxpayers and the States only if it is interpreted uniformly. Indeed, UDITPA, K.S.A. 79-3289, requires both the Kansas Department of Revenue and the Kansas courts to interpret the uniform act "to make uniform the law of those states which enact it." States that interpret the business income concept *unilaterally* without sensitivity to the unique issues that are raised by state income taxation of multijurisdictional commerce potentially undermine the States' capacity to ask multistate business to contribute its fair share to the cost of providing an ordered society. Undermining of state taxation of multijurisdictional commerce will diminish the State's tax base and thereby increase pressure on the captive, in-state taxpayer.

In seeking to preserve state sovereignty with regard to state taxation of multijurisdictional commerce through uniform state tax principles, the Multistate Tax Commission and the party States do not promote either a pro-State or a pro-taxpayer position. The principles that govern the classification of income derived from multijurisdictional commerce as apportionable operate neutrally. Neutrality of the principle means that it is not possible to know *in advance* whether the principle for classifying income as apportionable reflected in the regulation at issue will either benefit or disadvantage a particular taxpayer from a revenue perspective. While the individual taxpayer in this case faces an increased tax cost in Kansas if the disputed income is classified as apportionable, another taxpayer may well face decreased tax costs in Kansas from the application of the rule sought by the Kansas Department of Revenue. This can occur, for example, when the issue involves losses of an enterprise domiciled outside Kansas. Decreased Kansas tax cost may also occur when a Kansas domiciled taxpayer seeks to apportion income that would otherwise be allocable to Kansas. The interaction of tax rates, formulary-apportionment factor representation, and the components of the state tax base also make it difficult to generalize about the tax cost of the rule sought by the Kansas Department of Revenue. Preservation of the uniformity sought by UDITPA and the Commission's underlying regulation should not be viewed, therefore, as being motivated by a desire to maximize state tax revenues. The Court after all only sees taxpayers who seek to reduce their tax liability and not taxpayers whose tax liability has been already satisfactorily reduced by the rule adopted by the Kansas Department of Revenue. In the end, the Commission and its party States seek uniformity as the practical solution to ensure that multijurisdictional commerce pays its fair share, but no more than its fair share, of the cost of state government, a critical contributor to the success of Our Federalism.

THE ABSENCE OF THE FUNCTIONAL TEST FOR APPORTIONABLE INCOME IS CONTRARY TO THE PREVAILING PRACTICE OF THE PARTY STATES OF THE MULTISTATE TAX COMPACT AND FRUSTRATES FEDERALISM: The Kansas Department of Revenue has demonstrated that the rejection of the functional test for apportionable, business income is inconsistent with the prevailing practice of the Party States of the MULTISTATE TAX COMPACT that incorporates UDITPA. The significant and adverse consequences of deviation from this prevailing practice should be kept in mind:

1. The decision promotes "no-where income" for multijurisdictional enterprises not domiciled in Kansas. No-where income is multijurisdictional income that is not attributed to any State and

therefore is sheltered from *all* States' *jurisdiction* to impose an income tax. Avoidance of no-where income is necessary to ensure full accountability of multijurisdictional enterprises. In the absence of full accountability, multijurisdictional enterprises do not contribute a fair share to the maintenance of an ordered society and the burden of doing so falls increasingly on the captive, in-state taxpayer. (Full accountability that is urged here should not be confused with full taxability, which is a concept that neither the Multistate Tax Commission nor its party States promote. Full taxability argues that all income of multijurisdictional enterprises should be taxed as distinguished from being fully accounted for. Full accountability, on the other hand, allows each State to which the income is accounted to determine whether to tax the income or not.)

The decision in this case raises the potential of no-where income, because one State (Kansas) has allocated the entire income in dispute to a State (Nebraska) whose rules result in the apportionment of the same income. The interaction of the two States different rules cause some portion of the multijurisdictional income not to be attributed to any State.

2. The decision in this case potentially will cause Kansas domiciled, multijurisdictional enterprises to face duplicative taxation. Duplicative taxation arises, because one State (Kansas) will treat income not satisfying the transactional test as one hundred percent allocable to Kansas, while other States following the prevailing practice of employing both the transactional and the functional tests can reach the conclusion that the income is

apportionable by them under the functional test, the test not recognized in Kansas. The result for the Kansas domiciled company is that more than one hundred percent of its multijurisdictional income potentially will be subject to income taxation within the other States. *See* 1 1994 MULTISTATE CORPORATE TAX GUIDE I-516 (Panel 1994).

3. The presence of duplicative taxation will create pressure to grant relief to the overly-burdened multijurisdictional taxpayer, potentially resulting in a tax principle that will undo an implicit assumption of the decision in this case: *Income of a Kansas domiciled, multijurisdictional enterprise not satisfying the transactional test but satisfying the functional test will still be one hundred percent allocable to Kansas.* If this assumption is not constitutionally obtainable, then Kansas will face an even worse consequence than disadvantaging its domiciliary companies with potential duplicative taxation—a rule of allocation and apportionment of multijurisdictional income that only operates on a "taxpayer-always-wins-and-state-tax-department-always-loses" basis. This result obtains because multijurisdictional enterprises will rely on the statutory rule of this case (no functional test) when it is to its advantage to do so and the overriding U.S. constitutional rule (income satisfying the functional test of UDITPA may not be allocated one hundred percent to the State of commercial domicile) when that rule is more advantageous.

The prospect for a federal constitutional restriction on the ability of a domicile State to allocate one hundred percent of multijurisdictional income satisfying the functional test, but not the transactional test, of UDITPA is real. A taxpayer may be able to avoid one hundred percent allocation of income that only satisfies the functional test, because one of the tests for constitutional, state income taxation of multijurisdictional commerce is the external consistency test of the fair apportionment prong of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). The external consistency test of the fair apportionment prong of *Complete Auto* requires income attributed to a taxing State to reflect a reasonable sense of how the income is generated. *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159, 169, *reh. denied*, 464 U.S. 909 (1983). If the income reflects the disposition of an asset that truly played a functional role in the unitary, multistate business, it seems odd that a domiciliary State would be in a position to claim that it is entitled to tax one hundred percent of the income. To allow the domiciliary State to claim all of the income in such a circumstance is to deny the valuable contribution made to the maintenance of the asset by the non-domiciliary States through the operation of the unitary business in that State. The net result of these observations, if valid, (*see Mobil Oil Corp.* v. *Comm' r of Taxes of Vermont*, 445 U.S. 425, 445-446 (1980) (raising questions about constitutional preference for taxation of unitary income from intangibles by allocation as opposed to apportionment)), is that the adoption of the transactional test as the sole test for apportionability will only operate to the detriment of Kansas and can never operate neutrally, that is, neither favoring nor disadvantaging the taxpayer or the State. Well-advised States, therefore, seek to conform their apportionment rules as closely as possible to the constitutional limits of apportionability.

4. Simple consideration of the practical consequences of the decision of this case discloses the bizarre nature of the rule that has been adopted. Kansas is not in a position to reject deductions of a multijurisdictional enterprise that are attributable to the maintenance and operation of property that is an integral part of the unitary business operating in Kansas, *i.e.*, property that fulfills a functional role in the unitary business. After all, Kansas could not inform a multijurisdictional enterprise that the depreciation and finance charges attributable to the maintenance of property used in a unitary business must be backed out of the apportionable income base, because there is some possibility in the future that the taxpayer may sell the same property at a tax gain by a transaction that will not occur within the "regular course of the taxpayer's trade or business." Yet, if such a sale realizing an economic gain occurs in the future, this Court's decision results in Kansas not being able to tax the gain, even though Kansas appropriately granted to the taxpayer the legislative grace of deductions attributable to the maintenance of that property during the prior tax years! That kind of result is a classic tax shelter that will shut down any income tax system—granting of tax deductions with no ability to recoup the deductions to the extent such deductions did not result in an economic effect.

ADOPTION OF THE UNIFORM RULE THAT RECOGNIZES BOTH THE TRANSACTIONAL TEST AND THE FUNCTIONAL TEST AVOIDS UNFORTUNATE

CONSEQUENCES TO STATES AND TAXPAYERS: The foregoing discussion discloses the real problem a State faces when it adopts an apportionment rule that conflicts with the prevailing practice of other States and deviates from the U.S. constitutional norm of apportionability. The non-conforming State creates a circumstance where both taxpayers and the taxing State are subject to being whipsawed. Arguably, the taxpayer may have a remedy against being whipsawed, because it is protected by the Commerce and Due Process Clauses of the U.S. Constitution. The State does not have the same potential relief, however, because the Commerce and Due Process Clauses *limit*, and do not empower, state taxing power. Adoption of the Commission's regulation as to the apportionability of income avoids these unnecessary complications, because the regulation conforms to the prevailing State practice and reflects the U.S. Supreme Court's recent adoption in *Allied-Signal Inc.* v. *Director, Div. of Taxation*, 112 S.Ct. 2251 (1992), of the functional test as a U.S. constitutional touchstone to determining apportionable income. (While it is true that the majority decision in *Allied-Signal* did not adopt UDITPA's business income definition as necessarily consistent with its constitutional rule, the four justice minority viewed UDITPA as being entirely consistent and the majority gave every indication that UDITPA's test probably was constitutional.)

WESTERN NATURAL GAS SHOULD BE RECONSIDERED, BECAUSE THE MULTISTATE TAX COMMISSION, AN INSTRUMENTALITY OF THE STATE OF KANSAS FOR PURPOSES OF MAKING RECOMMENDATIONS ON MATTERS OF

State Tax Uniformity, Adopted A Reasonable Interpretation Of UDITPA Subsequent To That 1968 Decision And Kansas As A Party State Of The Multistate Tax Compact Implemented The Recommendation In 1979 Consistent With State Legislative Policy To Foster State Tax Uniformity: The Court states that no "compelling reason" has been shown for reexamination of *Western Nat'l Gas Co.* v. *McDonald*, 202 Kan. 98, 446 P.2d 781 (1968). The Commission respectfully disagrees and urges the Court to reexamine that case in light of the interests served by state tax uniformity.

The compelling reason for reexamination of *Western Nat'l Gas Co.* is the Commission's *and the party States' collective* adoption in 1973 of recommended regulations that accurately reflect the legislative intent of UDITPA's definition of business income. This recommendation was made by the Commission in its capacity as a statutorily created instrumentality of the State of Kansas and the other party States to make uniformity tax recommendations to solve the issues inherent in state taxation of multijurisdictional commerce. The recommendation reflects the considered judgment of the multistate membership of the Commission *on a matter inherently requiring cooperative action among the States*. As such, independent of even the principle that was being recommended, the recommendation is an event subsequent to this Court's decision in *Western Nat'l Gas* that justifies this Court's re-examination of the apparent adoption of the "restrictive transactional test" as the exclusive test for apportionable, business income. The subsequent adoption of the recommendation by the Kansas Department of Revenue in 1979 should, consistent with the recommendation of the Commission, be viewed as furthering the established legislative policy of Kansas to foster state income tax uniformity in an area that requires state tax uniformity. To rule otherwise is both inconsistent with a reasonable interpretation of UDITPA and potentially destructive of the States' sovereignty over multijurisdictional commerce.

The reasonableness of the recommendation made by the Commission regarding the proper classification of apportionable, business income under UDITPA and the MULTISTATE TAX COMPACT is overwhelmingly established.

First, there are the significant and adverse consequences described above that will result from the decision in this case, if it is permitted to stand. These adverse consequences should inform the Court that adoption of the "restrictive transactional test" as the exclusive test for apportionable, business income is wrong.

Second, no one can reasonably quarrel with the *uniform* act's legislative intent of the term business income that has been well-documented by the Kansas Department of Revenue. *See* Br. of Appellee, 21-26. This legislative intent leaves no room for ambiguity about the intended meaning of the disputed provision.

Third, the language of the business income definition provision itself, if closely analyzed, just does not permit the tortured interpretation given to it by Lisonbee, *State of the Law of Nonbusiness Gain*, 7 J. ST. TAX. 333 (1989), that was relied upon by the Court. This observation has several different facets:

First, the adoption of the so-called "restrictive transactional test" as the sole indicator of apportionable, business income renders the conjunctive clause, "... and includes income from tangible and intangible personal property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations ....", meaningless. Thus, if the purpose of the conjunctive phrase is to modify the transactional test and not to establish a second test of apportionability, it is unclear how the conjunctive phrase would modify the transactional test. It is unlikely there would be circumstances where the income being classified would satisfy the restrictive transactional test as "arising from transactions and activity in the regular course of the taxpayer's trade or business" and not also satisfy the conjunctive phrase as a modifier to the transactional test. Indeed, the passage of Lisonbee's article quoted by the Court equates the two phrases to meaning the same thing. If the conjunctive phrase has a statutory purpose and is not mere surplusage, the conjunctive phrase must be directed to something distinct from reviewing transactions and activity in the regular course of the taxpayer's trade or business.

Second, the phrase "acquisition, management, and acquisition" in the conjunctive phrase refers to the condition of ownership, that is, the *ownership* of the property must be integral to the taxpayer's regular trade or business operations. This interpretation of the conjunctive phrase assigns a reasonable meaning to the statutory words that the "restrictive transactional test" would not. Thus, if a taxpayer's acquisition, use, and disposition of the property serves an operational function in the taxpayer's regular trade or business, income attributable to the property is apportionable.

Concluding income from property is not apportionable on the basis of labeling the disposition of the property as occurring in an extraordinary transaction (because, for example, the taxpayer does not sell fixed assets with regularity) does not respond to the issue raised by the conjunctive phrase. If an asset used in the business is retired and sold with realization of income that fact supports apportionability, *unless the asset at the time of disposition was no longer integral to the taxpayer's regular trade or business operations*. This interpretation is reflected in the 1973 recommendation made by the Commission, and the regulations adopted by the Kansas Department of Revenue, in the provisions that recognized that a *business* asset can be converted to a *non-business* asset. *See, e.g.*, MTC Regs. IV.1.(c).1, *example vii*, and IV.1.(c)(2), STATE & LOCAL TAXES: ALL ST. TAX GUIDE ¶633 (RIA 1994). (The Kansas Department of Revenue has not adopted the examples of the MTC regulations but it has of course adopted the substantive rule discussed in the very regulation at issue in this case. K.A.R. 92-12-73(b) (1979).)

Third, as a matter of grammar the use of the conjunctive requires the subject of the definitional sentence, "business income," be inserted after the word "and". The conjunctive phrase, therefore, properly reads, "[Business income] includes income from tangible and intangible personal property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." This grammatical reading of the conjunctive phrase stands in contrast to the Court's interpretation that in effect renders the conjunctive phrase as reading, "~~and includes~~ [, including] income from tangible and intangible personal property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations."

Fourth, the cited argument advanced by Lisonbee, *State of the Law of Nonbusiness Gain*, 7 J. ST. TAX. 333 (1989), is terribly flawed. First, the functional test does not ignore the wording, "… integral part of the taxpayer's regular trade or business operations." The functional test recognizes that the ownership of the property giving rise to the disputed income must be an integral part of the taxpayer's regular trade or business operations. Second, requiring the disposition to be an integral part of the taxpayer's regular trade or business operations does not translate as contended into requiring the disposition to occur in the regular course of the taxpayer's business operations. An asset can be integral without requiring the disposition of that asset when it is no longer needed to occur in the regular course of the taxpayer's business operations. Replacement of an integral asset to a unitary business does not make the disposition of the asset being replaced and sold "non-integral." The whole act of replacement is integral to the unitary business, *i.e.*, an integral part of the taxpayer's regular trade or business operations. Your Declarant fails to see how retirement and sale of a business asset in an extraordinary transaction to allow the business to acquire a replacement asset or realize income for the furtherance of the unitary business makes the disposition less an integral part of the taxpayer's regular trade or business operations. The disposition in this circumstance is in furtherance of ("integral to") the taxpayer's regular trade or business operations. Lisonbee's translation of "integral part" as requiring the underlying transaction to occur in the regular course of the taxpayer's business operations is quite a leap that has not been successfully made.

CONCLUSION: This case raises one of the most fundamental of all issues affecting the ability of the States to apportion and tax income of multijurisdictional enterprises. The issue presented is not easily understood given its unusual context of requiring the interpreting State to be sensitive to the multistate aspects of the dispute. The issue commands respect for cooperative action among the States and not unilateral state actions and interpretations. States are not usually called upon to factor in multistate tax concerns in interpreting their law. Nonetheless, careful review of the relevant statutory provisions in this case, including the Kansas legislature's commitment to state tax uniformity as support for requiring multijurisdictional enterprises to pay a fair, but no more than a fair, share of the burdens of an ordered society, will disclose the appropriate decision to be made in these circumstances. Your Declarant, in the interest of promoting fairness not only to multijurisdictional enterprises but also to the in-state taxpayer respectfully urges the Court to re-examine its decision in this case. This Court would not be alone in having to wrestle a second time with determining the appropriate understanding of apportionable, business income. *District of Columbia* v. *Pierce Assocs., Inc.*, 462 A.2d 1129 (1983) (*Rehearing*). In the end, Declarant trusts that this matter will no longer appear to you now the way that it appears to have appeared to you then. *See Moldea* v. *N.Y. Times Co.*, 1994 U.S. App. LEXIS 9397 (D.C. Cir. 1994) (*Rehearing*).

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that on the ____ day of June 1994 a copy of the foregoing STATEMENT IN SUPPORT OF MOTION FOR REHEARING AND MODIFICATION OF APPELLEE KANSAS DEPARTMENT OF REVENUE was deposited in the U.S. Mails, postage prepaid and properly addressed to

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