IN THE UTAH SUPREME COURT

Utah State Tax Commission, *Respondent-Appellants,* v. See's Candies, Inc., *Petitioner-Appellee.*	**No. 20160910-SC**

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF APPELLANTS UTAH STATE TAX COMMISSION

On appeal from the Fourth Judicial District Court
The Honorable Samuel D. McVey
No. 140401556

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

The Multistate Tax Commission submits this brief as *amicus curiae* in support of the Utah Tax Commission and its use of Utah Code § 59-7-113 to allocate income and deductions between two subsidiaries of Berkshire Hathaway, Inc., See's Candies, Inc., and its related affiliate, Columbia Insurance Company, so as to clearly reflect the income of See's for tax purposes.

INTEREST OF AMICUS

The Multistate Tax Commission (MTC) is an intergovernmental state tax agency[1] established in 1967 by the Multistate Tax Compact in response to threatened federal preemption of state taxing authority. *See* the Compact as enacted by Utah, Utah Code § 59-1-801.5, Art. VI. Forty-eight states and the District of Columbia currently participate in the MTC's programs and activities.[2] The states had four purposes in forming the Compact, the first of which is to "[f]acilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes." Multistate Tax Compact, Art. I.[3]

Through the MTC and its various programs and committees, participating states cooperate to develop proposed model state tax laws and regulations, conduct joint state

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[1] The district court described the MTC as a "non-governmental" organization, which is incorrect. [Dist. Ct. Op. p. 6, No. 26].

[2] Compact members: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. Sovereignty members: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, and West Virginia. Associate Members: Arizona, California (FTB) (SBE), Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming.

[3] *available at* http://www.mtc.gov/The-Commission/Multistate-Tax-Compact#Article I

tax audits, facilitate voluntary disclosure and tax compliance, and provide litigation and amicus support in important state tax cases.[4] Utah has been an active participant in these programs and activities. Recently, the MTC formed the State Intercompany Transactions Advisory Service (SITAS) Committee to assist states in understanding the issues involved in properly allocating income and deductions between related companies. The issues in this case are of the utmost interest to the MTC.

SUMMARY OF ARGUMENT

The question in this case is whether Utah Code § 59-7-113 (Sec. 113) provides authority to the Commission to reallocate income and deductions between related companies so as to entirely eliminate the tax effects of a certain type of related-company arrangement—or whether, as See's argues, the Commission may only determine what is an "arm's-length" price for the transactions made possible by that arrangement. We argue that Sec. 113 itself provides the standard for the Commission's use of its authority—that is, to clearly reflect the income of the related companies. That standard can only be understood in the context of Utah's own tax system and critical legislative choices made by the Utah legislature. But the standard is further validated by treatment of analogous arrangements under the federal tax system and other state tax systems.

See's Candies, Inc. (See's) began making and selling candy in 1921. Berkshire Hathaway, Inc. (Berkshire) acquired See's in 1972. In 1997, after years spent

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[4] As we noted in our motion to file in this case, Berkshire Hathaway, Inc. and its subsidiaries, including See's Candies, Inc., were previously the subject of a joint audit under the MTC's audit program and counsel to the MTC, Bruce Fort, appeared in this case below as an expert witness.

successfully developing trademarks, service marks, trade dress, and other goodwill (trademark intangibles), See's transferred ownership of these trademark intangibles to Columbia Insurance Company (Columbia), another Berkshire subsidiary, in a tax-free transaction under 26 U.S.C. § 351 (IRC Sec. 351). As part of the same arrangement, Columbia immediately licensed that property back to See's for its continued use, and in exchange, See's paid Columbia a royalty for which See's claimed substantial state income tax deductions, reducing the income it reported for Utah tax purposes from its operations in the state.

Normally, under Utah's tax system, a corporation doing business in Utah which is part of a "unitary group" of related companies must compute and apportion its income collectively with the other members of that unitary group by filing a combined return. . Utah Code § 59-7-402. A tax-free transfer-and-license-back arrangement, like the one here, would have no tax effect at all under this system because the related-company income and deductions would be eliminated. *See* Utah Code § 59-7-404. But the circumstances of this case are unusual. See's owns only a minority interest in Columbia and Columbia is not subject to income tax in Utah, so the two companies would not be required to file a combined return. See's argues that under these specific circumstances, it should be allowed to take tax deductions for royalties paid to Columbia for the continued use of its trademark intangibles, provided the royalty rate is an arm's-length rate.

The only other case to address Sec. 113 is *Cont'l Tel. Co. of Utah v. State Tax Comm'n of Utah*, where this Court observed that the remedial language of Sec. 113 should be interpreted in light of the "conditions and necessities which they are intended to meet and the objects sought to be attained." 539 P.2d 447, 451 (Utah 1975). Given the arrangement at issue and that, as Berkshire subsidiaries, See's and Columbia are related parties, there is no question that the "conditions and necessities" of Sec. 113 are met. The question is what exactly Sec. 113 seeks to attain. The statute itself provides the answer—clear reflection of income—but does not further define that standard. This is not unusual for a remedial statute, however, and it does not mean that the Commission's authority is unlimited. Rather, the standard must be calibrated in the context of particular facts. To do so, this Court need only look to established norms, including the results achieved under Utah's own tax system in virtually every similar circumstance, as well as the results achieved under the federal tax system and other state tax systems generally. The Commission's reallocation of royalty income and deductions created by this related-company arrangement, so as to eliminate their tax effects entirely, conforms to this standard.

The court below acknowledged this Court's instruction in *Continental*, but it sidestepped the task of determining the clear reflection of income standard. Instead, the court looked to IRS regulations to determine how the federal agency typically applies the similarly-worded federal statute, 26 U.S.C. § 482 (IRC Sec. 482). Dist. Ct. Op. at 28. Concluding that the IRS's "tome" of regulations reflected a use of IRC Sec. 482 to determine arm's-length prices of related company deductions, but not to eliminate them entirely, *id.*, the court held that the Commission's use of Sec. 113 must be similarly constrained. Dist. Ct. Op. at 34. In addition to avoiding the question of the standard to be attained under Sec. 113, this reasoning assumes, incorrectly, that to eliminate the related-company income and deductions, it would be *necessary* for the IRS to use IRC Sec. 482. Not only is this assumption wrong, but in circumstances analogous to those here, the federal tax system would eliminate the tax effect of the deductions, just as the Commission has done here. Ironically, by purporting to tie the Commission to IRS regulations, the lower court imposed a different result under Sec. 113 than would actually be achieved under the federal system.

This Court has held that state agencies and courts are not bound to follow federal regulations. *Hughes Gen. Contractors, Inc. v. Utah Labor Comm'n*, 2014 UT 3, ¶ 8, 322 P.3d 712, 715. This agrees with the holdings of other states' courts, even when the provisions of law being applied are the same. *See, e.g., Wien Air Alaska, Inc. v. Alaska Dep't of Revenue*, 647 P.2d 1087 (Alaska 1982). While states may conform to federal tax law, and would therefore generally apply specific provisions in the same way as the IRS, there are critical differences between the state and federal tax systems which sometimes require states to apply even similarly-worded provisions differently in certain circumstances. *See, e.g., Mlady v. Director of Revenue,* 108 S.W.3d 12 (Mo. Ct. App. 2003). Further, like IRC Sec. 482, Sec. 113 is remedial in nature. *See Rubin v. Comm'r of Internal Revenue*, 56 T.C. 1155, 1158 (1971). Remedial provisions, in particular, may serve different purposes and, therefore, should be expected to have different applications in the state and federal contexts. Finally, Congress has over the years codified its treatment of certain transactions between related entities in the federal context, taking them out of the realm of IRC Sec. 482. So the divergent history of the federal and state tax systems also counsels against using current IRS regulations to deduce a limit on the Commission's Sec. 113 authority

The issue here is simple—if reallocating royalty income and deductions in this case, so as to eliminate the effect of the arrangement, achieves the result of clearly reflecting See's income, as that standard can best be determined, then the Commission's assessment must be upheld. In the course of this litigation, however, See's has suggested an additional argument we would be remiss not to address. See's suggests that because the Utah legislature had two alternatives available to reach the result the Commission seeks here, the failure of the legislature to adopt those alternatives somehow bears on the interpretation of Sec. 113. First, the legislature could have opted to impose a specific add-back requirement, denying deductions for related-party licenses of intangible property, as some states have done (to combat the income-shifting effects of the arrangement at issue here). Alternatively, the legislature could have chosen to tax the income of insurance companies, so that the deductions taken by See's would be effectively offset by the taxable income of Columbia. Of course, these alternatives would require trade-offs, which lawmakers would presumably have to weigh. For example, taxing the income of insurance companies would sweep much more broadly than the circumstances of this case. And one clear advantage of relying on Sec. 113's remedial authority is that it allows the Commission to respond to unusual situations that it may not be possible to specifically anticipate. Suffice it to say, determining legislative intent from the mere existence of alternatives not adopted is, at best, an entirely hypothetical, and therefore highly suspect, endeavor—prone to speculation and assumption. *See Utah Chapter of the*

Sierra Club v. Bd. of Oil, Gas, & Min., 2012 UT 73, 289 P.3d 558; and *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989).

ARGUMENT

I. Section 113's "clear reflection of income" standard has an agreed-upon meaning in the context of a tax-free transfer, license-back arrangement involving intangibles which can be derived from results achieved in the vast majority of cases under the federal tax system, Utah's own tax system, and other state tax systems.

This Court need not determine what the "clear reflection of income" standard of Sec. 113 means generally—but only what it means in the context of particular facts. This is the easier question, but more importantly, it is the proper one. Remedial provisions, like Sec. 113, are to be interpreted liberally so as to achieve their purpose. *See Forsberg v. Bovis Lend Lease, Inc.*, 2008 UT App 146, 184 P.3d 610. But it is also true that they are best understood in the context of the particular facts and circumstances. *Springer v. S. Pac. Co.*, 248 P. 819, 825 (Utah 1926). Here, the particular facts can be stated simply: A corporation (transferor) makes a tax-free transfer (under IRC Sec. 351) of its trademarks, service marks, goodwill, etc. (trademark intangibles) to a related company (transferee), which then charges the transferor a royalty for the continued use of those intangibles, creating tax deductions for the transferor. We refer to this as the tax-free transfer, license-back arrangement.

Income tax experts will recognize this same arrangement as constituting a common tax-planning device—since it serves to lower the overall tax burden of the related companies. The authors of the leading treatise on state taxation have called these arrangements "transparent attempts to 'game' the system." Walter Hellerstein & John

Swain, *State Taxation*, Para. 9.20[7][j] (WG& L, 3rd. Ed.). The value inherent in a business's own trademarks, trade names, and related goodwill is created over time by incurring regular business costs which are generally deductible as ordinary and necessary business expenses.[5] Because those costs have been deducted, rather than capitalized, the trademark intangibles often have little or no tax basis in the hands of their creator. If they were sold to an unrelated party, they would generate substantial taxable gain for the seller. But they can be transferred to a related company tax-free under IRC Sec. 351. If the transferee (Columbia) then charges a royalty or fee to the transferor (See's) for the continued use of the trademark intangibles, this gives rise to additional deductions for the transferor.

In a number of cases, this arrangement has been found to lack substance or business purpose.[6] Tax administrators are, therefore, justifiably suspicious of it. See's asserts that the arrangement in this case, unlike many others, does have a business purpose. But whatever substance the transactions at issue in this case might have is simply irrelevant to the Commission's assessment, relying as it does on Sec. 113. First, Sec. 113 makes no reference to whether or not related company transactions have substance. Second, the Commission does not need Sec. 113 to disallow deductions that lack proper substance or support for the tax benefit claimed. *See, e.g., Matrix Funding Corp. v. Utah State Tax Comm'n*, 2002 UT 85, 52 P.3d 1282. Sec. 113 would have no

[5] This is in contrast with similar property that might be acquired from an unrelated third party where gain is recognized and the related costs may be capitalized and amortized. *See* 26 U.S.C. 263(a).

[6] For an extensive analysis of the litigation over the years, see Walter Hellerstein & John Swain, *State Taxation*, ¶ 7.17. (WG& L, 3rd. Ed.).

meaning if it applied only to deductions that lack substance, or where the amount deducted lacks sufficient support. Such a construction is, therefore, patently unreasonable. *See Conder v. Univ. of Utah*, 257 P.2d 367, 374-75 (Utah 1953). With respect to the arrangement at issue in this case, however, not only is there a consensus as to the standard for clear reflection of income, that standard is not based on the purported substance of the related-company transactions, or lack thereof.

There is a critical point to which we must draw this Court's attention, lest there be any confusion. In this section, we look to a number of sources, including the results attained under similar or analogous circumstances applying other substantive tax rules and principles, and to particular cases with similar facts, some of which were discussed during the trial below. Our purpose is to demonstrate there is an agreed upon standard for "clear reflection of income," *not* to contend that the rules described, or the cases cited, are specifically applicable to See's. So for this purpose, we accept the premise that See's particular facts represent, in effect, an unusual exception. But it is merely "the exception that proves the rule." There is a rule for achieving the clear reflection of income in the context of the arrangement at issue here. And Sec. 113 was enacted to address such exceptional circumstances.

While we understand that this Court must look to the Utah tax system to give meaning to Sec. 113, we begin by examining the result that would be achieved under the federal tax system. We do so because of the error made by the court below in assuming that, in analogous circumstances, it would be necessary for the IRS to apply IRC Sec. 482 to eliminate related-company deductions. Next, we turn to the critical policy choices that represent what clear reflection of income is under Utah's own tax system. Finally, we examine the result reached in other states applying similar kinds of remedial provisions to the arrangement at issue here.

A. Section 113's clear reflection of income standard cannot be inferred from the absence of IRS regulations using IRC Sec. 482 to eliminate related-company deductions under analogous circumstances because, in those circumstances, the effect of those deductions would already be eliminated.

First, it must be noted that, as all would agree, the arrangement between See's and Columbia does not reduce See's federal taxes in the same way it reduces its state taxes. See's and Columbia file as part of a consolidated group for federal purposes. R. 1079, ln. 7-11. The related-company transactions between them, giving rise to income and deductions, are therefore cancelled out, or eliminated. But even had See's and Columbia filed separately, there would be no collective federal tax reduction flowing from this arrangement. The federal government, unlike Utah, has jurisdiction to tax 100% of the income of both companies. So, the royalty income of Columbia would also be subject to federal tax, thus offsetting the related deductions that reduce the taxable income of See's. No one expects, therefore, that the IRS would ever need to use IRC Sec. 482 to reallocate income and deductions between See's and Columbia. But See's apparently does not contend that because the IRS has not, and would never, apply Sec. 482 to the royalty payments between See's and Columbia, this bars the Commission from applying Sec. 113 to reallocate the income and deductions arising from those payments. See's accepts that the state may use Sec. 113 in situations where the IRS would not use IRC Sec. 482, because federal tax is not affected. Rather, See's contends that the IRS regulations reflect only the use of IRC Sec. 482 to determine an arm's length rate for related-company deductions, and it is this which limits the Commission's use of Sec. 113. But inherent in See's argument is the assumption that the IRS would need to apply Sec. 482 to eliminate related-company deductions in analogous circumstances where federal taxes *would* be affected. This assumption is wrong.

In the most analogous circumstance, the arrangement would be the same except Columbia would be a foreign affiliate, rather than a U.S. corporation, so that it could not be allowed to file as part of a consolidated return with See's,[7] and so that 100% of its income would not be automatically subject to U.S. tax. In this situation, the federal tax system achieves the same result as if the transferor's related company deductions were eliminated. Rather than relying on special authority granted under IRC Sec. 482, however, the federal system simply applies a per se rule under 26 U.S.C. § 367(d) (IRC Sec. 367(d)).

IRC Sec. 367(d)(1) creates an exception to the rules that would otherwise allow the transferor to make a tax-free transfer of property to a related foreign affiliate. Under the terms of that statute, which references 26 U.S.C. § 936(h)(3)(B), the intangible property subject to this exception includes, among other things, patents, inventions, formulas, processes, trademarks, trade names, brand names, methods, systems, procedures, customer lists, or any similar item. Under IRC Sec. 367(d)(2), the U.S. corporation-transferor must annually recognize deemed periodic income commensurate

[7] While the federal tax code does not require commonly-owned U.S. corporations to file on a consolidated basis, almost all choose to do so in order to allow current year income and losses to offset one another.

with the use or royalty value of the property transferred. (Under IRC Sec. 367(d)(2)(B), the foreign affiliate's royalty income charged to the transferor would also be reduced by the deemed amount required to be included in the income of the transferor.) Under IRC Sec. 367(d)(2)(C), the transferor's deemed income is treated as ordinary royalty income.[8] This periodic income effectively cancels out any tax deduction the transferor could take for royalties or usage fees charged by the foreign affiliate (at presumably the same rate). It is as if the related company royalty income and deductions were eliminated. So, while the IRS might use IRC Sec. 482 to determine proper related-company charges in a transaction not subject to IRC Sec. 367(d), use of IRC Sec. 482 to price the charges by a foreign affiliate for property transferred tax-free (and therefore subject to IRC Sec. 367(d)) is unnecessary. See IRS regulation 26 C.F.R. § 1.367(d)-1T, subparagraph (g)(4)(i).[9]

Again, what is important for the purpose of this section is *not* whether IRC Sec. 367(d) somehow applies to See's transfer of intangible trade property to Columbia (a U.S., rather than foreign, corporation). Clearly, it does not. What is important is that there is simply nothing to be inferred from the absence in IRS regulations of the use of IRC Sec. 482 to eliminate deductions in analogous circumstances. But we would also argue

[8] Rather than recognizing annual periodic income equal to the royalty value of the intangible property transferred, the transferor may instead elect to recognize taxable gain in the year of the transfer equal to the value of the property transferred, less any tax basis, assuming the transfer qualifies under IRC Sec. 367(g).

[9] If, rather than recognizing annual periodic income equal to the royalty value of the intangible property transferred, the transferor elects to recognize taxable gain under IRC Sec. 367(g), then IRC Sec. 482 principles would govern the determination of the sale value of the intangible property. See 26 C.F.R. § 1.367(d)-1T, subparagraph (g)(5).

that the result under IRC Sec. 367(d), which applies unconditionally, demonstrates the general conclusion of federal tax policymakers that, when faced with the same kind of arrangement at issue here, the transferor should not benefit from the effects of related-company royalty deductions. So that even in the federal system, which relies primarily on arm's-length pricing of related-company transactions, this type of arrangement would not be given any tax effect. In Section II of this argument, we provide further information on how the federal system came to adopt this treatment and discuss why, in light of this and related differences in the state and federal systems, IRC Sec. 482 regulations are inapplicable.

B. Section 113's standard for clear reflection of income can be derived from the critical policy choices made by the Utah legislature and conforming to this standard requires elimination of See's royalty deductions.

Although treatment of analogous circumstances under the federal system is relevant to this case, given the incorrect assumption made by the lower court, we recognize that this Court must primarily concern itself with the policy choices made by Utah lawmakers that give meaning to the standard for clear reflection of income. As a remedial statute intended for exceptional circumstances, Sec. 113's purpose is to alter how specific tax provisions might otherwise apply. It will therefore give rise to apparent conflicts between particular legislative choices. Such conflicts might be impossible to resolve if all policy choices were created equal. But they are not. Here, we are concerned with the fundamental choices that give meaning to Sec. 113's clear reflection of income standard.

This Court can be assured that the elimination of the related-company royalty deductions taken by See's is entirely consistent with two controlling policy choices made by the Utah legislature—the use of UDITPA's formulary apportionment and combined filing. Why are these two policy choices controlling? The answer is because both involve a fundamental choice to reject the use of transactional accounting as the means for accomplishing two essential functions—accurately determining income of a multistate business earned within the state, and determining the income of related companies participating in a single enterprise. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 165 (1983).

The first controlling policy choice, formulary apportionment, involves the need to determine the income of a multistate business earned within the state. *See Mobil Oil v. Commissioner of Taxes of Vermont,* 445 U.S. 425 (1980). One way to determine the income earned within a state is through a kind of transactional accounting, sometimes called separate geographic accounting or territorial accounting. This approach requires that in-state and out-of-state operations be treated as doing business with each other so that transactions between those operations must be recognized, or imputed, and properly valued or priced. Under this system, the separate profit or loss of in-state and out-of-state operations of a multistate business are determined as though those operations were dealing with each other on an arm's-length basis.

So, for example, if a business manufactures goods in one state and sells them in a neighboring state, a tax system that uses transactional accounting would have to recognize purchase and sale transactions between the manufacturing and sales operations each time goods are shipped into the neighboring state. If no such purchase and sale transactions actually occur between the related operations (as they likely would not), it would be necessary to impute them. In either case, it would also be necessary to determine the proper arm's length price of the transactions. This kind of transactional accounting is generally used under the federal tax system, when determining domestic versus foreign source income, and by other countries. *See Container Corp.*, 463 U.S. at 196. The income of a multinational business earned in the U.S. must be determined by treating the domestic operations and the foreign operations as engaging in transactions with each other on an arm's-length basis. This need accounts for the "tome" of IRS regulations that address how transactions between related companies will be recognized and valued. *Id*. at 191.

The alternative to transactional accounting is formulary apportionment. This is the method used by every state which imposes income-based taxes on multistate corporations. Formulary apportionment determines the income of a multistate business that is subject to tax in a particular state using "factors" (indicia of business activity) to divide up the business income without the need for recognizing, imputing, and pricing transactions between operations in differing jurisdictions. The basic premise of formulary apportionment is that the amount of income a multistate taxpayer earns in the state is closely related to the relative percentage of that taxpayer's overall business activity taking place in the state, as represented by the factors used in the apportionment formula. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978). The Uniform Division of Income for Tax Purposes Act (UDITPA), which Utah followed during the years at issue, uses an evenly-weighted average of three separate “factors”: (a) real and tangible personal property; (b) employees (payroll); and (c) gross receipts (also called “sales”). *See* the predecessor to Utah Code § 59-7-319.

A notable feature of UDITPA, and one most relevant here, is how it generally apportions the income of a seller of goods, where the seller also profits from valuable goodwill, embodied in things like tradenames and trademarks. To illustrate this feature, assume that the seller of a particular product is able to charge customers three times what it costs to manufacture and sell that product. This circumstance is certainly not unknown, and one could reasonably argue that most of the seller’s income is due to intangible value—trademarks, goodwill, etc. Nevertheless, under UDITPA, the intangible components of the product are disregarded when apportioning the income of such a seller. The property factor, for example, excludes intangible property. Utah Code § 59-7-312. So if the seller was able to charge more because it held valuable trademarks or used valuable patents, these intangibles would not be included in the property factor. Also, while UDITPA sources (that is, attributes to a particular state) receipts from the sale of tangibles differently than receipts from the sale of intangibles, the intangible value that may be embedded in tangible products sold is generally disregarded in applying UDITPA’s sales factor sourcing-rules. (Utah Code § 59-7-318, for example, sources sales of tangibles to the location of the purchaser, whereas the version of Utah Code § 59-7-319 applicable during the period at issue sourced sales of intangibles to the location where the seller had the predominant costs of performance.)

In short, UDTIPA assumes that the profits from tangible products and the profits from the intangible goodwill associated with those products will be apportioned together, and that the rules for sales of property will apply, even if most of the profits are actually derived from the intangibles. Indeed, prior to the transfer by See's of its trademark intangibles to Columbia, See's would have apportioned all of its income using the UDITPA factors—including in its property factor its own plant and equipment, but not the considerable value of its trademark intangibles, and including in its sales factor for Utah the receipts from candy sold in the state, without separately sourcing some portion of those sales receipts which could be said to result from customers' willingness to pay more for candy bearing the See's brand name (the intangible property). This approach to formulary apportionment recognizes that such intangible goodwill is inherent in and subordinate to the products that produce a profit for the seller.

The second controlling policy choice, combined filing, is similar to the first in that it also represents the rejection of transactional accounting, in this case, for the purpose of determining the income and loss of different entities that are part of a commonly controlled group. The minority of states that do not require combined filing, instead, allow related companies to file on a separate entity basis using transactional accounting to determine the income or loss of each separate entity. States like Utah that require combined filing in some form can avoid the need to determine whether related-company transactions have been properly recognized and valued.

The unitary business principle has been adopted by the U.S. Supreme Court as the basis for allowing states to impose combined filing, along with formulary apportionment, to determine income earned within the state, even when some members of the combined group are entirely outside the state. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 439 (1980). The Supreme Court has long recognized the impossibility of determining where a multijurisdictional business generates profits. *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120 (1920). While the standard for a unitary business can be stated in different ways, the components or operations treated as unitary must have a close relationship to one another and to the state seeking to tax that unitary business. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 166 (1983).[10]

The seminal case discussing the states' rejection of transactional accounting in favor of formulary apportionment and combined filing under the unitary business principle is *Container*. The taxpayer in that case, a multinational company, contended that its transactional accounting records were more accurate at reflecting its income earned in California, arguing that its foreign operations were more profitable than its operations in the state. The Supreme Court, however, noted:

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[10] The MTC has developed a model definition of what constitutes a unitary business, providing in part that:
"A unitary business is a single economic enterprise that is made up either of separate parts of a single business entity or of a commonly controlled group of business entities that are sufficiently interdependent, integrated and interrelated through their activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value to the separate parts." Reg. IV.1.(b). *Principles for Determining the Existence of a Unitary Business*, Model General Allocation & Apportionment Regulations at 19, *available at* http://www.mtc.gov/getattachment/Events-Training/2017/Special-Meeting/FINAL-APPROVED-2017-Proposed-Amendments-to-General-Allocation-and-Apportionment-Regulat.pdf.aspx

> One way of deriving locally taxable income is on the basis of formal geographical or transactional accounting. The problem with this method is that formal accounting is subject to manipulation and imprecision, and often ignores or captures inadequately the many subtle and largely unquantifiable transfers of value that take place among the components of a single enterprise. . . . The unitary business/formula apportionment method is a very different approach to the problem of taxing businesses operating in more than one jurisdiction. It rejects geographical or transactional accounting, and instead calculates the local tax base by first defining the scope of the "unitary business" of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that "unitary business" between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction.
> 463 U.S. at 164-165.

The unitary business principle may be applied at the level of the legal entity to determine which entities are part of the group, but the Supreme Court has also recognized that the principle can be applied to parts of legal entities. *See Allied-Signal, Inc. v. Director*, *Division of Taxation*, 504 U.S. 768 (1992)(gains from sale of unrelated stock investment could not be apportioned as part of taxpayer's unitary business operations); and *MeadWestvaco Corp. v. Illinois Dep't of Revenue*, 553 U.S. 16 (2008)(single entity operated two distinct businesses, precluding application of single apportionment formula to income arising from business segments). By statute, when it comes to determining who may be combined on a single return, Utah applies the unitary business principle at the entity level. See Utah Code § 59-7-101(30)(a) referring to a "unitary group" as a "group of corporations." Applying the principle at the entity level for purposes of combination no doubt lessens the administrative burden of requiring a separate unitary division or operation within an entity, which itself may not be unitary, to be combined with other entities. But the determination of "who can be combined" does not answer the question of what is the scope of the unitary business operating in Utah. In rare occasions, limiting the application of the unitary business to particular entities may omit significant portions of the unitary business that are isolated in a related entity which is not considered to be unitary or, as in Columbia, is not subject to combination because of unrelated policy considerations.

Because See's was determined not to be unitary with its parent, Berkshire Hathaway, and See's directly owns only a minority interest in Columbia, See's and Columbia cannot be part of a unitary group, even if Columbia were subject to Utah's income tax. Utah Code § 59-7-101(30)(a). But there can be no doubt that See's trademark intangibles are, otherwise, an essential part of its unitary business under any standard. In fact, it is hard to imagine any two components of a business being more interconnected and interdependent when it comes to the generation of profits than an operational entity and its own trademarks, tradenames, trade secrets, and similar intangible property. *Home Depot, USA, Inc. v. Arizona*, 314 P.3d 576 (Ariz. Ct. App. 2013). *See also Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 n. 14 (1982) (trademark represents the owner's "goodwill, which he spent energy, time, and money to obtain"); *Marshak v. Green*, 746 F.2d 927, 929 (2d Cir. 1984) (trademarks and trade names embody goodwill of ongoing business); *Visa U.S.A., Inc. v. Birmingham Trust Nat'l Bank*, 696 F.2d 1371, 1375 (Fed. Cir. 1982) (trademarks are "integral and inseparable elements of the goodwill of the business or services to which they pertain").

This idea that a unitary asset might be isolated from the rest of the unitary business is not new. One of the leading scholars in this area has said this about the Supreme Court's treatment of unitary assets:

> The Court's unitary business cases generally raised the question of whether the taxpayer was engaged in single unitary *enterprise* with other *enterprises* over which it exercised varying degrees of control. The Court also recognized, however, that income from an *asset* (or the disposition of the asset) could give rise to apportionable income under the unitary business principle if the *asset* was used in the taxpayer's unitary business, even though the taxpayer was not engaged in a unitary business with the enterprise that owned the asset or with the asset itself.

Walter Hellerstein, MeadWestvaco *and the Scope of the Unitary Business Principle*, 108 J. Tax'n 261 (2008), *available at* http://www.cost.org/uploadedFiles/Content/COST_Calendar/39th_Annual_Meeting_-_Materials/Walter%20Hellerstein%20Final%20JTax%20Article(2).PDF.

Finally, the idea that Utah's adoption of combined filing indicates the standard for clear reflection of income under Sec. 113 is also confirmed by two other state cases, *Joslin Dry Goods* and *Pioneer Container Corp.* There, the state courts supported their decisions to require combined reporting by reliance on statutes essentially identical to Sec. 113. *Joslin Dry Goods v. Dolan*, 615 P.2d 16 (Colo. 1980); and *Pioneer Container Corp. v. Beshears*, 684 P.2d 396 (Kan. 1984). In *Joslin*, the court also rejected the claim that the delegation of authority to the tax agency was unconstitutionally broad for lack of any applicable standard. *Joslin*, 615 P.2d at 19-20.

Utah's long-standing policy choices favoring formulary apportionment and combined filing over the sole alternative—transactional accounting—bear directly on the question of what it means to "clearly reflect income" under Utah Code Sec. 113. Transactional accounting generally assumes that related-company transactions can be valued with a high degree of accuracy. Transactional accounting requires that the states have a well-developed set of rules for recognizing or imputing and valuing related-company transactions, similar to the extensive regulations used in the federal tax system and the systems of other countries. Formulary apportionment and combined filing reject transactional accounting as the means to accurately reflect income and deductions among related multistate companies whose operations form a unitary business. The standard for clear reflection of income under Utah's tax system requires that all the profits from the sale of See's candies, including the intangible goodwill represented by the royalties, be attributed to See's and apportioned by its factors. By eliminating the related-company royalty deductions, the Commission has achieved this result.

C. Section 113's clear reflection of income standard can also be derived from the treatment of the arrangement at issue here by a number of other states.

State tax agencies may have authority under state law to remedy potential distortions in income caused by related company transactions, similar to the arrangement in this case, by eliminating the effects of those transactions entirely, using one of three general approaches: (1) combined filing, (2) add-back statutes, and (3) taxing the income of the transferee apportioned by reference to the related transferor. Again, we should emphasize, these approaches are described here not because we contend that they specifically apply to See's, but because all three approaches come to the same result—

and therefore demonstrate the accepted standard for clear reflection of income under Sec. 113.

As discussed in section I.B., combined filing eliminates the effects of the related company income and deductions entirely. Combined filing is now required in 25 states as well as in Utah. Institute on Taxation and Economic Policy, *Combined Reporting of State Corporate Income Taxes: A Primer*, February 24, 2017, http://www.itep.org/pdf/Combined_Reporting_Brief_2017.pdf. What is particularly relevant for our purpose here is that some states may require combined filing to remedy the distortion caused by related company transactions, even where combined filing is not otherwise required. Examples of cases where states have imposed combined filing for this purpose include *Coca Cola Co. v. Oregon Dep't of Revenue*, 533 P.2d 788 (Or. 1975); *Montana Dep't of Revenue v. Am.. Smelting & Refining Co.*, 567 P.2d 901 (Mont. 1977); *Am.. Smelting & Refining Co. v. Idaho State Tax Comm.*, 592 P.2d 39 (Id. 1979); *Caterpillar Tractor Co. v. Lenckos*, 417 N.E.2d 1343 (Ill. 1981); *PMD Investment Co. v. State Dep't of Revenue*, 345 N.W.2d 815 (Neb. 1984); *Pioneer Container Corp. v. Beshears*, 684 P.2d 396 (Kan. 1984); *Delhaize America, Inc. v. Lay*, 731 S.E.2d 486 (N.C. Ct. App. 2012); *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 694 S.E.2d 525 (S.C. 2010); *GTE & Subsidiaries v. Kentucky*, 889 S.W.2d 788 (Ky. 1994); and *Joslin Dry Goods v. Dolan*, 615 P.2d 16 (Colo. 1980). These cases confirm that even without specific statutory requirement for combined filing, a tax administrator authorized to remedy distortion caused by related-company deductions may do so by using combined filing to eliminate those deductions.

The second approach states have used to arrive at a similar result is adoption of statutory “add-back provisions,” requiring certain related-company deductions to be added back to income. These statutes, originally enacted by Ohio in 1999 and now adopted by 24 states (most recently Louisiana in 2016), generally provide that taxpayers must add-back any expenses claimed for royalties paid to related parties for the lease, license or other use of intangible property.[11] The MTC adopted a model add-back statute in 2006.[12]

Examples of cases describing the use of add-back statutes include: *Surtees v. VFJ Ventures, Inc*., 8 So.3d 950 (Ala. Ct. App. 2008); *Kimberly-Clark Corp. v. Commissioner of Revenue*, 2011 WL 383865 (Mass. App. Tax. Bd. 2011); *Morgan Stanley & Co. v. Director, Div. of Taxation*, 28 NJ Tax 197 (2014)(dictum). In a notable case, *VFJ Ventures,* a taxpayer (manufacturer) paid royalties to two related corporations in exchange for the use of trademarks. The Alabama Court of Civil Appeals stated that “[a] state, subject to constitutional limitations, may fashion its own taxing scheme. In doing so, a state is not required to use the same deductions the federal-taxation scheme allows.” *VFJ Ventures*, 8 So.3d at 970.

The third approach states have used to cure distortion and achieve a clear reflection of income in circumstances similar to those here differs from the first two in that, rather than eliminating the deductions taken by the transferor of the intangible

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[11] *See* CCH Corporate Income Tax Guide,¶10-600, *Additions to Taxable Income Base*
[12] *Model Statute Requiring the Add-back of Certain Intangible and Interest Expenses,* http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/Add-Back%20-%20FINAL%20version.pdf

property, the royalty income of the transferee is separately subjected to tax, off-setting the deductions taken by the transferor. Importantly, states that have taken this approach modify the normal apportionment method, using UDITPA Sec. 18, or similar authority, to look to the location of the transferor's operations, or retail sales of its tangible personal property, thus recognizing that it is the continued use of the intangible property in the market or destination state by the transferor that gives rise to the transferee's royalty income. Under this approach, the income reported by the transferee and transferor to the jurisdiction in which the transferor operates will be substantially the same as if the intercompany transactions were simply eliminated.

One of the first cases involving a state response to the tax-free transfer, license-back arrangement to receive national attention was *Geoffrey v. South Carolina*, 437 S.E.2d. 13 (S.C. 1993), *cert. den*., 114 S.Ct. 550 (1993). The retailer Toys R Us created a subsidiary, named after its well-known mascot, Geoffrey the Giraffe, and then transferred the legal ownership of its tradenames and trademarks to that entity in a tax-free exchange. Geoffrey simultaneously licensed the trademark intangibles back to Toys R Us for a royalty which it then claimed as a tax deduction. The South Carolina Supreme Court upheld the state's assessment of income tax against Geoffrey using an apportionment formula that looked to the location of the sales activity of Toys R Us, in recognition of the fact that it was this activity that generated Geoffrey's royalty income. Examples of cases using this same approach include: *Kmart Props., Inc. v. N.M. Taxation & Revenue Dep't*, 131 P.3d 27, 31 (N.M. Ct. App. 2001); *Lanco, Inc. v. Dir., Div. of Taxation*, 908

A.2d 176 (N.J. 2006); *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308 (Iowa 2010); and *A& F Trademark v. Tolson*, 605 S.E.2d 187 (N.C. Ct. App. 2004).

See's will no doubt argue that in addition to the cases cited above, there are also cases where courts have held that the state tax agency lacks the authority to cure distortion caused by related-company transactions, or where state law imposes specific constraints on such authority. The presence or absence of necessary authority, however, is not the point. Rather, what the cases cited above demonstrate is that, where states have been found to possess this authority to cure the distortion caused by certain types of related-company transactions, the result under combined filing, which effectively eliminates related company transactions, represents the agreed upon standard for clear reflection of income.

II. IRS regulations under IRC Sec. 482 should not serve as the standard for Sec. 113 authority because the federal tax system diverges from the state's, not only in its use of transactional accounting, but in its history and in the purposes served by Sec. 482.

The predecessor to Sec. 113 was adopted in 1931. Chapter 39, Laws of Utah, 1931, enacting Utah Code § 59-13-17. While a version of IRC Sec. 482 existed prior to this, and was undoubtedly the model for Sec. 113's language, regulations adopting an arm's-length standard were not adopted until 1935. *Transfer Pricing: the Code, the Regulations, and Selected Case Law*, BNA Portfolio: 886-2nd (I)(C)(2012). These regulations received little attention in the 1930's due to the fact that the primary potential for so-called "income shifting" was between domestic corporations and their foreign affiliates, a problem that was still in its nascent stage. *Id.* at (I)(D). Congress also adopted the predecessor to IRC Sec. 367, limiting tax-free transfers to foreign affiliates, in 1932. Boris I. Bittker & James S. Eustice, *Federal Income Taxation of Corporations and Shareholders* (7th Ed., 2005 Cum. Supp.), ¶ 15.80[2]. This provision was originally structured as a tax-avoidance (principal-purpose) test. In effect, a transfer to a foreign subsidiary of a domestic corporation would not receive tax-free treatment under IRC Sec. 351 unless the taxpayer, by way of an advanced ruling, demonstrated that the transaction was not "in pursuance of a plan having as one of its principal purposes the avoidance of Federal income taxes." *Id*. Over the years, however, Congress and the IRS struggled with this approach and finally, in 1984, Congress substantially revised IRC Sec. 367 and established a per-se "toll charge" on the "expatriation" of certain assets, in particular, intangible property. *Id*. at ¶ 15.80[5]. Congress took this step out of concern that the then-existing statute and regulations were insufficient to police the kinds of transfers used to shift income off-shore. *Id*. and n. 830. As discussed in Section I.A., IRC Sec. 367(d) now prevents the tax-free transfer of intangible assets, like those at issue in this case, to a foreign subsidiary.

Yet, it is true that the federal tax system retains arm's-length pricing for most transactions between related domestic and foreign companies, thus necessitating the IRS to maintain its tome of regulations. The reason it does so is this:

> The arm's length standard is embodied in all U.S. tax treaties; it is in each major model treaty, including the U.S. Model Convention; it is incorporated into most tax treaties to which the United States is not a party; it has been explicitly adopted by international organizations that have addressed themselves to transfer pricing issues; and virtually every major industrial nation takes the arm's length standard as its frame of reference in transfer pricing cases …

Reuven S. Avi-Yonah, *The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation*, 15 Va. Tax Rev. 89 (1995)(citing I.R.S. Notice 88-123, 1988-2 C.B. 458, 475).

But Utah need not concern itself with conforming to international tax treaties which are not applicable to the states in determining how to administer their own tax systems or in calculating Utah income subject to tax. *Container* at 196-97. In fact, the U.S. Senate, when pressed to impose the arm's-length pricing rules on the states under a proposed tax treaty with the United Kingdom, refused to do so. *See* 123 Cong. Rec. 59,565 (June 23, 1978). And, as previously noted, all states that apply a general income tax to corporate income do so by means of formulary apportionment, rather than arm's-length transactional accounting, regardless of whether U.S treaties would allow it.

While the states are therefore free to use combined filing and formulary apportionment, even with respect to determining the income of foreign corporations doing business in the U.S., *see Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298 (1994), there will still be instances when transactions between related companies will create distortion in the income and deductions of those companies, necessitating remedial provisions such as Sec. 113. In using Sec. 113 authority, it is unreasonable to ask the Commission to determine how federal arm's-length pricing rules would apply to the royalty deductions at issue here, given that in analogous circumstances, under current IRC Sec. 367(d), Congress has determined that such deductions should be effectively disallowed. Instead, if Utah wished to hew closely to federal policy, then Congress's choice to apply Sec. 367(d)'s per se rule to analogous arrangements that affect federal taxes would counsel Utah to do likewise, and eliminate the royalty deductions entirely.

Moreover, no principle of law compels Utah to employ transfer pricing to address misallocation of income and expenses merely because IRC Sec. 482 is usually applied to transfer pricing cases. Since Sec. 113 is modeled on IRC Sec. 482, the district court ruled that it would be inappropriate to deny the deductions taken by See's because its transfer pricing analysis showed that Columbia paid "arm's length" rates for the marks. The transfer pricing analysis is irrelevant in this case, and the district court's ruling is incorrect. In a very similar case, the Oregon Tax Court ruled that the state was not required to use a transfer pricing analysis to address misallocation of income as a result of royalties paid by health maintenance organizations for use of intellectual property licensed by insurance affiliates. *Pacificare Health Systems, Inc. v. Department of Revenue*, 2008 WL 2596371 (Or. Tax Regular Div. 2008). The court held that Oregon's equivalent of I.R.S. § 482—a statute virtually identical to Sec. 113—authorized the state to disallow the deductions taken for the royalties, as both federal and state 482 statutes are designed to address issues of ownership of property, assignment of income and substance over form. The Oregon Tax Court rejected the argument that a 482 adjustment was not authorized as long as "arm's length" royalty rates were paid.

> [The Oregon 482 statute] permits the department the authority to distribute, apportion, and allocate items of income and deductions between or among commonly controlled organizations. That is precisely what the department did here, and the question is whether its actions were appropriate to prevent evasion of tax or to clearly reflect the income of any of the members of taxpayer's corporate family.

Pacificare at *4.[13]

A survey of applicable state tax conformity cases shows that there is no rigid rule that governs when a state must conform its tax practices to federal tax practices. Rather, the cases demonstrate that courts approach this issue pragmatically, on a case by case basis. Unless a state has formally committed itself by statute or rule to apply a particular federal tax rule—in which case the issue is not so much conformity with federal law but rather state compliance with its own rules—the cases analyze whether conformity is appropriate in view of a number of factors. Among those factors are (1) the extent to which the state has committed itself to follow the federal rule, (2) the purpose of the state tax policy at issue, (3) the purpose of the corresponding federal tax policy, and (4) whether the federal purpose is sufficiently consistent with the state purpose to support applying the federal rule in the state case. *Compare Marx v. Bragalini,* 6 N.Y.2d 322 (CANY 1959) (federal regulation followed when state statute specifically modeled definitions of gross income and dividends after preexisting federal definitions) *with Astoria Fin. Corp. v. Tax Appeals Tribunal of State*, 880 N.Y.S.2d 389 (N.Y. Sup. Ct. 3d Div. 2009) (federal definition of security for purposes of mark to market rules rejected in state tax case involving investment tax credits, as the purposes of the two provisions were different).

[13] In *Pacificare,* the Tax Court held that the HMOs in fact still owned the intellectual property. That is not an issue in this case. Nevertheless, the Tax Court's holding rejecting an "arm's length" defense is directly relevant to this case and supports Utah's use of Sec. 113 to disallow the deductions for the royalty payments.

As applied to state statutes modeled on IRC Sec. 482, "[f]ederal statutes and regulations offer limited guidance in interpreting the language of a State statute." *Commissioner of Revenue v. Amiwoodbroke, Inc.*, 634 N.E.2d 114, 116 (Mass. 1994). For this reason, Louisiana was not required to follow federal accounting rules on deferring recognition of DISC income in a 482 case. *Bunge Corp. v. Sec'y of Dep't of Revenue & Taxation*, 419 So. 2d 1288 (La. Ct. App. 1982). The court ruled that nothing in the IRC or in the Louisiana distortion statute supported requiring the state to follow the federal rules. The court noted that the IRC contains many deductions and exclusions from income that states do not recognize. The state is not obligated to allow any of them merely because its distortion statute is based on Sec. 482.

Finally, it would be problematic and unprecedented to use federal tax regulations, passed over decades and subject to change as federal law and the federal tax system change, into a kind of binding state tax authority. The idea raises potentially serious concerns for state sovereignty and regulatory authority. While the Utah legislature may conform to federal law when it sees fit, and even look to federal regulations as providing elements of state law, see *State v. Green*, 793 P.2d 912 (Utah Ct. App. 1990), it is another thing to assume that the state legislature has, in effect, delegated the interpretation and application of critical remedial authority to the IRS without explicitly saying so, whether through specific reference to federal regulations, or otherwise. Nor would it be reasonable to ask the Commission to monitor and review all federal regulations applying Sec. 482 to determine when and if it should vary from those regulations. This would require the

Commission to anticipate possible situations in which the federal regulations might not effectuate a clear reflection of income for state purposes.

III. No canon of statutory construction supports the argument that Sec. 113 should be interpreted in light of the supposed alternatives available to the Utah legislature, as suggested by See's.

See's suggests that Sec. 113 cannot be interpreted as allowing the Commission to disallow its intercompany deductions so long as there are other methods for achieving the same essential result. To state the premise is to reveal its lack of logic. According to See's, had the Utah legislature wished to ensure that the deductions at issue here would be eliminated, it could have adopted an add-back statute. Presumably, the legislature could also have adopted something like IRC Sec. 367(d), which would require See's to recognize periodic income after the transfer of its property to Columbia. In short, there is more than one way to skin a cat. But courts must be wary of substituting unenacted statutory language for legislative intent. *See State v.Toth*, 804 A.2d 565, 569 (N.J. Super. Ct. App. Div. 2002) ("We may not disregard plain statutory language to replace it with an unenacted legislative intent, because such action would constitute the undemocratic process of judicial lawmaking."); and *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 469 (Tex. 2009) ("Precedent from both the United States Supreme Court and from this Court counsel against supplanting unequivocal enacted text with equivocal unenacted inferences drawn from failed legislation.") If proposed, but unenacted, legislation is no guide to the construction of a statute, it can hardly be claimed that legislation which was never proposed, but could have been, is. In short, there is no principle of statutory construction that would counsel this Court to construe the broader remedial authority granted by Utah's legislature to its Tax Commission to exclude any remedy that could achieved through some narrower means.

See's also appears to suggest that by excluding insurance companies from the state income tax, the legislature had a different idea in mind for what would be a clear reflection of income under these particular circumstances. But this case is not about what tax Columbia pays. This case is about what tax See's pays. See's is the one that transferred its trademark intangibles to a related company, agreeing to pay for their continued use. See's is the one that got the benefit of increased tax deductions, due to the related-company royalties paid. This is not about the legislative prerogative to exclude or exempt Columbia. This is about what is a clear reflection of See's income.

CONCLUSION

Where a company which has developed valuable trademark intangibles through its business operations, then makes a tax-free transfer of those intangibles to a related company, paying that related company a royalty for the continued use of those intangibles, Utah's tax system would generally eliminate any royalty income and deductions through combined filing. The profits of the combined business group, generated from the intangibles as well as from operations of the business, would then be apportioned using Utah's apportionment formula, which looks to the property, payroll and sales of the related operations. This is the rule. See's contends that it is the exception to this rule. It argues that because its trademark intangibles are held by an entity which cannot be combined, its royalty deductions must be allowed, provided that they meet a federal arm's-length pricing standard. Sec. 113, however, gives the Commission the authority to address such exceptional circumstances. This Commission's use of its authority in this case conforms to Sec. 113's clear reflection of income standard and therefore is entirely reasonable and should be upheld.

Respectfully submitted this 8th day of May, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(f)(l) AND 27(b)

1. This brief complies with the type-volume limitations of Utah R. App. P. 24(f)(l) because this brief contains 9,584 words, excluding the parts of the brief exempted by Rule 24(f)(l)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May 2017, a true and correct copy of the Brief of *Amicus Curiae* Multistate Tax Commission in Support of Appellants Utah State Tax Commission was filed with the Court and served via electronic mail and/or United States mail, postage prepaid, to the following:

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