IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 08-0026

GANNETT SATELLITE INFORMATION NETWORK, INC.,

Petitioner and Appellant,

vs.

STATE OF MONTANA, DEPARTMENT OF REVENUE,

Respondent and Appellee.

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF RESPONDENT AND APPELLEE STATE OF MONTANA, DEAPRTMENT OF REVENUE

On Appeal from the First Judicial District Court
Lewis and Clark County, Judge Jeffrey M. Sherlock

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I. INTERESTS OF *AMICUS CURIAE*

This brief is submitted by *amicus curiae* Multistate Tax Commission ("the Commission") in support of Respondent and Appellee State of Montana, Department of Revenue ("the State"). The Commission files this brief to express its members' critical interest in ensuring the uniform application and interpretation of the provisions of the Uniform Division of Income for Tax Purposes Act ("UDITPA"). See 7A *Uniform Laws Annotated* 147-198 (West Publishing 1985). The sole question before the Court is whether the definition of "business income" in Section 1(a) of UDITPA, codified as Section 15-31-302(1), MCA, includes both a "functional" test and a "transactional" test to determine whether income is subject to apportionment. The Commission submits that the lower court correctly held that UDITPA's definition of business income includes all income arising from property used in a taxpayer's "unitary" business operations, not simply income arising from "regularly occurring" transactions.

Although the question presented sounds exceedingly narrow, the proper interpretation of the statutory language at issue lies at the heart of UDITPA's system of formulary apportionment. Interpreting the definition of business income as having a single "transactional" test, as Petitioner and Appellant Gannett Satellite Information Network, Inc. ("the Taxpayer") urges, would impair UDITPA's

essential purposes of bringing uniformity and fairness to interstate taxation.

The Commission is the administrative agency for the Multistate Tax Compact ("Compact"), which became effective in 1967. (See RIA State & Local Taxes: All States Tax Guide ¶ 701 *et seq.* (2005).) Forty-seven states and the District of Columbia are now members of the Commission.[1] Article IV of the Compact incorporates UDITPA almost word for word. Article VII of the Compact charges the Commission with interpretation of UDITPA through promulgation of model regulations. (Compact, Art.VII.1; MCA §15-1-601.) Acting through its member states, the Commission also submits briefs as a friend of the court in cases where the Commission believes that the proper interpretation and application of key provisions of UDITPA are of vital public importance. Arguably, no provision of UDITPA's statutory framework is of more importance than the definition of business income, for that definition determines whether income is subject to formulary apportionment.

The Multistate Tax Compact was proposed to the states in 1966 by the National Association of Attorneys General and the National Legislative Council as a means to reform state taxation of interstate commerce, in direct response to threatened Congressional preemption of the field. Tax Management Multistate Tax

[1] In addition to Montana, the full Compact member states are Alabama, Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Washington, and the District of Columbia.

Portfolio, Income Taxes, *The Distinction Between Business and Non-Business Income,* ¶ 1140.02.D (1996). The stated purposes of the Compact 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 other phases of tax administration;
4. Avoid duplicative taxation.

Compact, Article 1; §15-1-601, MCA.

The promise of increased uniformity established by the states' adoption of the Compact was critical to preserving the existing sovereignty of the states in the face of threatened federal preemption. See, e.g., H.R. Rep. No. 89-952, Pt. VI, at 1143 (1966). By adopting the Compact in 1969, Montana expressed its commitment to achieving the Compact's goals. Laws of Montana 1969, Ch. 17.[2]

The need for uniformity in state taxation has not diminished since 1969, as the scope and volume of multi-jurisdictional business has expanded considerably with advancements in communications and transportation. Meanwhile, Congress continues to consider preemption of state taxing authority based on claims that interstate commerce is excessively burdened by non-uniform taxation. See, e.g., H.R. 5267, the Business Activities Tax Simplification Act of 2008.

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[2] The substantive provisions of Article IV of the Compact have been incorporated in Sections 15-31-301 through 313, MCA.

The Commission respectfully urges that furtherance of the Compact's goals of uniformity and fairness should be a paramount consideration in the interpretation of UDITPA, and compel recognition of the "functional" test of business income.

ARGUMENT

A. THE EXISTENCE OF A SEPARATE FUNCTIONAL TEST FOR BUSINESS INCOME IS CONSISTENT WITH THE LANGUAGE AND STRUCTURE OF UDITPA

The subject of this appeal is the proper meaning and application of UDITPA's definition of business income, codified in Montana as MCA §15-31-302(a):

> "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

The proper interpretation of the statute has been the source of considerable litigation. The great majority of state courts to have considered the point have concluded that the definition of business income encompasses two independent tests, either one of which, if satisfied, results in the apportionment of that income among the states in which the taxpayer does business. *See, e.g., Polaroid v. Offerman* (N.C. 1998), 507 N.E. 2d 284; *Hoechst Celanese Corp. v. Franchise Tax Board* (Ca. 2001), 22 P.3d 324; and *District of Columbia v. Pierce Associates, Inc.* (D.C. 1983), 462 A.2d 1129. The so-called "transactional" test focuses on the regularity and frequency of income-generating activities, while the "functional" test focuses on the

relationship between the transaction and property to the taxpayer's unitary business operations. The Commission respectfully submits that the two tests can be read as complementary: the first test addresses income from the sales of goods and services occurring in the regular and ordinary course of business; the second test addresses the treatment of gains and other income arising from property *used* in the business. Both tests, like UDITPA itself, are grounded in the "unitary business principle" which is discussed in greater detail below.

The Taxpayer argues that UDITPA's definition of business income has a single transactional test, established by the first 19 words of the statute, which determines apportionability by the regularity and frequency of all types of transactions. Under this theory, which has been adopted by a handful of courts, the remainder of the definition, beginning "...and includes income from tangible and intangible property..." imposes further criteria for the apportionment of income arising from transactions involving property. See *Ex Parte Uniroyal Tire Company v. Department of Revenue* (Alabama 2000), 779 So.2d 227. The majority of courts read the second clause as a completely independent test. Under the "functional" test, the frequency or regularity of a particular transaction is irrelevant to determining whether the resulting income should be apportioned; rather the question is how the transaction and the underlying property relates to the taxpayer's unitary business. See *Hoechst Celanese, supra,* and cases cited therein.

Your amicus respectfully submits that the courts which have recognized the "functional" analysis as a separate test for income from property have the better of the argument and should be followed by this Court.

First, as discussed below (Section B), UDITPA's definition of business income was added to the model Act in 1957 to ensure conformity with constitutional restrictions on apportionment of income. See *Hoechst Celanese*, 22 P.3d at 334-5. Assets used in the unitary business create apportionable income; there is no constitutional reason why income from the *disposition* of those assets would not also be considered part of the unitary income of the taxpayer. See *ASARCO, Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 330 (1982)(capital gains arising from assets unrelated to the unitary business conducted in Idaho not subject to apportionment). It makes little sense to construe the definition of business income to impose an unnecessary and arbitrary restriction on apportionment.

Second, recognition of the functional test has been embodied in the Commission's model uniform regulations since 1973. MTC Model Regulation IV.1.(c)(2) is directly applicable to this dispute. During the tax years at issue it provided in part:

> Gain or loss from the sale, exchange, or other dispositions of real or tangible personal property constitutes business income if the property while owned by the taxpayer was used in the taxpayer's trade or business. However, if such property was utilized for the production of nonbusiness income or otherwise was removed from the property

> factor before its sale, exchange, or other disposition, the gain or loss will constitute nonbusiness income.

This regulation has been adopted by 15 Compact states, including Montana. 1 All States Tax Guide (RIA), ¶ 226-B (1999); ARM 42.26.207(2). See also, ARM 42.2.304(5); ARM 42.26.206. These regulations are important to this case for two reasons: they reflect the expertise of the agencies charged with administering the states' tax laws, and they further the goal of uniformity because of their wide adoption by Compact member states. The regulations are fully in accord with this Court's seminal decision in *Montana Department of Revenue v. American Smelting & Refining Co.* (Montana 1977), 567 P.2d 901, which applied the functional test (albeit without labeling it as such) to uphold the apportionment of dividends, interest and gains arising out of the taxpayer's unitary business.

Third, the existence of a separate functional test is evident from the plain meaning of the words used. The statute is a compound sentence with two independent clauses. The common subject to these two independent clauses is "business income", the term actually being defined, and not "transactions." The phrase "and includes" does not mean: "including", which is how the statute would have to be read for the second clause to merely limit the first. It is thus entirely appropriate to read the second clause as: "[Business income] includes income from tangible and intangible property..." Reading the definition as a single transactional test would improperly conflate "activities in the *regular course* of ...business" with

activities which are "integral" (i.e., necessary) to the business itself.

In addition to the plain language analysis, the regulations and judicial decisions recognizing the functional test have the benefit of consistency with the drafter's comments to UDITPA, which provide in two separate places that "[i]ncome from the disposition of property used in a trade or business of a taxpayer is includable within the meaning of business income." 7A *Uniform Laws Annotated*, Comments to §§1(a) &1(g), Cumulative Annual Pocket Part, pp. 85-86 (West 2007). The Taxpayer's efforts to cast these comments as ambiguous (Brief in Chief, pp. 17-19) are simply unavailing.

Further, UDITPA's language was drawn from California precedents which had recognized a functional test for business income as it relates to gain from the disposition of assets used in the taxpayer's unitary business. See, e.g., *Appeal of Voit Rubber Corp.*, CCH State Tax Cases Rep. ¶ 202-435 (Cal. St. Bd. of Equal. 5/12/64).

The most cogent criticism of the "single test" theory, however, remains that the critical choice of apportionment or allocation would turn on essentially arbitrary considerations of the form or frequency in which some income is received, rather than the relationship of the income to the activities being conducted in the taxing states.

B. BECAUSE UDITPA'S FORMULARY APPORTIONMENT SYSTEM IS BASED ON THE UNITARY BUSINESS PRINCIPLE, THE BUSINESS INCOME DEFINITION SHOULD REFLECT THE FUNCTIONAL CONNECTION BETWEEN AN ASSET AND THE TAXPAYER'S UNITARY BUSINESS

Any interpretation of UDITPA's business income definition should be informed by an understanding of the unitary business principle and its relationship to formulary apportionment.

UDITPA is designed to fairly approximate the amount of income generated in each state by a multistate taxpayer. The method used to accomplish this goal is formulary apportionment, which assumes that income is generated in equal measure by two economic factors of production and one economic factor of demand. The two factors of production used for this purpose under UDITPA are an entity's property and payroll, while gross receipts are used to measure the factor of demand, or market. By calculating the percentages of an entity's three factors situated in Montana, one can approximate the amount of an entity's overall income which is properly subject to tax here. Virtually all states which impose a corporate income tax now do so using systems of formulary apportionment which follow the UDITPA model to some degree. Healy & Schadewald, *Multistate Corporate Income Tax Guide,* I-495-499 (CCH, 2006). Not all of the income of a multistate business is necessarily subject to apportionment, however. The Due Process Clause and the Commerce Clause of the U.S. Constitution prohibit states from taxing income

generated outside their borders. *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 778 (1992). To be subject to formulary apportionment, income must arise from transactions or operations of a single business that is carried out, in part, in the taxing state.

The economic assumption underlying formulary apportionment, that factors reflect income equally regardless of location, *Container Corporation v. Franchise Tax Board*, 463 U.S. 159 (1983), applies only where the factors are those of a single, integrated business. This concept is known as the unitary business principle, and it has been rightly characterized as "the lynchpin of apportionability." *Mobil Oil v. Commissioner,* 445 U.S. 425, 436 (1980). Under the Constitution a state can tax a non-domiciliary's income arising from the sale of assets to the extent those assets are a part of the unitary business being conducted partially within the taxing state. *Meadwestvaco Corp. v. Illinois Department of Revenue*, __U.S.__, 128 S.Ct. 1498 (2008).

Under UDITPA's statutory framework, income which arises out of the "unitary business" is subject to apportionment in the states where the taxpayer conducts that business, while income unconnected to the unitary business is allocated to the state or states which have an independent connection to the source of that income. Thus, under UDITPA §§ 5 and 6, non-business rents and capital gains arising from real property are assigned to the state(s) where the property is located.

7A *Uniform Laws Annotated* 162-163 (West Publishing 2002). Royalties from patents and copyrights are assigned to the state(s) where the property is employed by the licensee under § 8. *Id.* at 167. Non-business interest and dividends are assigned to the Taxpayer's commercial domicile under § 7. *Id.* at 166. In each instance, allocation of non-business income is made to the jurisdiction which has the authority under the Constitution to tax that income.

The concept of apportionable business income under UDITPA and the concept of apportionability under the Constitution are closely related. *Allied-Signal,* 504 U.S. at 786 (describing UDITPA's business income definition as "quite compatible" with the unitary business principle). Early on, the relationship between UDITPA's definition of business income and constitutional standards was recognized by academics. In Kessling & Warren, *The Uniform Division of Income for Tax Purposes Act*, Part 1, 15 U.C.L.A. L. Rev, 156, 163-4 (1967), the authors write: "[T]he Uniform Act sharply distinguishes between business income which is to be apportioned by formula and non-business income which is to be allocated...This distinction is in line with existing California practice except that the terms which have been in use here are 'unitary income' and 'non-unitary income.'"

See also, Peters, *The Distinction Between Business Income & Non-Business Income,* 25 So. Cal. Tax Inst. 251, 272-3 (1973)(noting that the definition of business income was adopted to address constitutional apportionment concerns).

If "business income" is defined without reference to the unitary business concept, the possibility of double-taxation becomes acute. For example, if a lumber company operating a unitary business in Montana, California and Oregon disposed of its Montana timber holdings, double taxation would be a certainty if Montana, applying the constricted "transactional" test, determined that the gain recognized on the sale of the timberlands should be allocated here because the sale was "unusual", without regard to the function of the asset in the unitary business. California and Oregon would hold that the same gain is subject to apportionment because the assets were integral to the taxpayer's unitary business. *See Simpson Timber Co. v. Department of Revenue* (Or. 1998), 953 P.2d 366 (gain from condemnation of timberlands subject to apportionment).

From this example, it should be clear that the proper construction of the "business income" definition cannot turn on the rote application of maxims such as "ambiguities in tax statutes should be resolved in favor of the taxpayer." See *Uniroyal, supra,* at 231; Brief in Chief, pp. 11-16. Resolving the interpretation of §15-31-302(1) "in favor of the taxpayer" here does no favors to the company that sells its assets in Montana. Interpreting §15-31-302(1) as a single test would benefit Gannett in this instance, while inviting double-taxation for others. An apportionment statute cannot be construed based on the particular circumstances of the taxpayer who first comes before the court.

It is necessary to consider these principles in the construction of the statute, precisely because the UDITPA system must adhere to unitary business principles. Throughout the statute, business income is apportioned, and non-business income is allocated, to the particular states with the constitutional right to tax that income. In *Mobil Oil, supra*, the Court held that where "unitary" income could be subject to taxation both on an apportioned basis under the unitary business principle, and also taxed on an allocated basis based on commercial domicile, the state of commercial domicile should yield to the states apportioning the tax as a matter of constitutional preference. 445 U.S. at 444. Failure to recognize a functional test would bring the statute into conflict with that constitutional preference, increasing the likelihood of double taxation.

Failure to recognize a functional test would also result in a disconnect between apportioned income and apportioned expenses when property used in the unitary business is sold. Under the transactional test advocated here, a taxpayer could properly deduct expenses related to property used in the unitary business, reducing the amount of income subject to apportionment. If the property was sold in the "regular" course of business, those expenses would be "recaptured" when the gain is apportioned to the states where the expenses were previously deducted. But if the gain is allocated because the transaction was "unusual", a single state would capture all of the income while the states which had previously allowed expenses on

an apportioned basis would continue to shoulder the deductions. MTC Model Regulation IV.1.d. requires expenses related to non-business income to be separately allocated and deducted. Failure to align allocated expenses with allocated income ultimately results in an overstatement of net allocated income and an understatement of apportioned net income. *Amerada Hess Corporation v. Director, Div. of Taxation,* 490 U.S. 66, 67 (1979)(unitary expenses must be apportioned with unitary income). To the extent the gain is a product of expenses which were previously apportioned, allocating the gain to a single state results in obvious unfairness.[3]

C. Recognition of the Functional Test for Business Income Furthers the Goals of Uniformity

In 2001, the California Supreme Court held that the functional test was supported by UDITPA's legislative history and the background of California decisions which had relied upon the functional test to determine apportionment. *Hoechst Celanese*, 22 P.3d at 334-336; 340, *citing, inter alia, Holy Sugar Corp v. Johnson* (1941), 18 Cal. 2d 218, 225 (losses from the forced disposition of stock were apportionable because "the stockholdings in question were an integral part of [the taxpayer's] unitary sugar business".). But the court also based its decision on a desire to "promote uniformity with the states", citing numerous decisions which had applied the functional test as well as legislative responses to those decisions which

[3] The contribution of prior expenses to the creation of capital gains is also reflected in Internal Revenue Code § 1245(b)'s basis adjustment to recapture previous depreciation deductions.

had found only a transactional test. *Id.* at 336, 342-3. In its Order on Petition for Judicial Review, the district court noted that following the California court's decision, no court has ruled that UDITPA's business income definition is limited to a single transactional test. Order on Petition, P. 10.

The Taxpayer responds that *Hoechst Celanese* exaggerated the extent of uniformity because six cases had in fact recognized only a transactional test before 2001. Brief in Chief, pp. 15-16. The Taxpayer's interpretation of those cases bears scrutiny.

Three of the six cases cited by the Taxpayer involved gains from complete liquidations of businesses; in those cases, the question of "one test versus two", which is the only issue now before this Court, was subsumed into the question of whether a liquidating event could ever be "integral" if there was no remaining business to be integral with. *Western Natural Gas Company v. McDonald* (Kansas 1968), 446 P.2d 781; *General Care Corporation v. Olsen* (Tenn. 1986), 705 S.W. 2d 642; *Ex Parte Uniroyal Tire Co.* (Ala. 2000), 779 So.2d 227. Two of the cases applied the transactional test to find that income from "unusual" dispositions could not be apportioned, but the reasoning of those cases provides little comfort. *McVean & Barlow, Inc. v. New Mexico Bureau of Revenue* (New Mexico App. 1975), 543 P.2d 489; *Phillips Petroleum Company v. Iowa Dept. of Revenue,* 511 N.W. 2d. 608, 610 (Iowa 1993). The sixth case, *Sperry & Hutchinson Company v. Oregon*

Department of Revenue, 270 Or. 329, 527 P.2d 729 (1974), quite clearly applies what is now known as the functional test.

Without question, *Western Natural Gas, supra,* interpreted "business income" solely by reference to the unusualness of the transaction. The significance of the case, however, is that the sale constituted a complete liquidation of the entire business, leaving no unitary business to which the gain could be apportioned.[4]

The court in *McVean & Barlow, Inc. v. New Mexico Bureau of Revenue* (N. M. App. 1975), 543 P.2d 489, failed to see the significance of the complete liquidation which occurred in *Western Natural Gas, supra,* and held that any sale of assets should be judged by its regularity. Even *McVean,* however, recognized that the definition of business income:

> can be broken down into two parts, each with distinct meanings; (1) '* * * transactions and activity in the regular course of the taxpayer's trade or business * * *' and (2) situations in which '* * * the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations * * *" In his decision, the Commissioner relies on the second part of this section.

543 P.2d at 491. The court then held that the gains from the disposition of a business segment should be treated similarly to the liquidation in *Western Natural Gas.* The dissent in *McVean* strongly criticized the majority for failing to

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[4] Kansas has since amended its laws to provide taxpayers with an election to treat all income as apportionable. Kan. Stat. §79-3271(a) (1996).

understand that the test "is not how frequent the sales are, nor how substantial the income from them may be, but rather what the relationship of the property sold is to the business." 453 P.2d at 492. The dissent went on to argue that the language endorsed by the majority from *Western Natural*

Gas was:

> a critically inaccurate paraphrase of the statutory requirement that the transaction involving the property be 'an integral part of the taxpayer's regular trade or business.' By pulling income from tangible and intangible property into business income, the legislature has shown its intent to include more than income from inventory within the term. Once it is conceded that non-inventory items are to be included, the frequency and regularity with which a business produces income from these collateral sources is irrelevant.

Id.

Just four years later, the judge who dissented in *McVean* now wrote for a unanimous court in applying the functional test to uphold the apportionment of gains from the disposition of mineral leases. *Tipperary Corp. v. New Mexico Bureau of Revenue* (N.M. App. 1979), 595 P.2d 1212. *Accord, Kewanee Industries v. Reese* (N.M. 1993), 845 P.2d 1238 (recognizing transactional and functional test under UDITPA). New Mexico subsequently amended its definition of business income to eliminate any potential for reliance on the *McVean* court's partial liquidation exception. NMSA 1978, § 7-2-2A; Laws of New Mexico 1999, Ch. 47.

General Care Corporation v. Olsen (Tenn. 1986), 705 S.W. 2d 642 involved a complete liquidation of the taxpayer's business and distribution of its assets to its

shareholders. The court did not suggest that UDITPA's definition did not include a functional test, but held that "the disposition of assets as part of a corporate liquidation is not within the taxpayer's regular business activities, and therefore produces non-business income." 705 S.W. 2d at 646. Tennessee subsequently amended its definition of business income to clarify the existence of the functional test. Tenn. Code Ann., §67-4-2004.

Ex Parte Uniroyal Tire Co., supra, involved a complete business liquidation as well. 779 So.2d at 237. The court's decision was principally based on its understanding that a separate functional test "would essentially render nugatory the transactional test" as applied to *capital gains*. *Id.* at 235. The court did not consider that the transactional test is more clearly addressed to the sale of goods and services in the ordinary course of business, not capital gains; the functional test is limited to income from unitary business property, not sales of inventory or services. The two tests would rarely apply to the same income and certainly do not conflict. *Cf., Hoechst-Celanese*, 22 P.3d at 337 (gains from pension reversion met functional test but not transactional test). Alabama's legislature subsequently amended its definition of unitary income in 2001 to explicitly provide that disposition of property used in a taxpayer's unitary business constituted apportionable income. Acts 2001-113; Ala. Code §40-27-1.1.

The one case cited by the Taxpayer which can properly be included in the

"transactional test" only column is *Phillips Petroleum Company v. Iowa Dept. of Revenue,* 511 N.W. 2d. 608, 610 (Iowa 1993), where the court concluded that gain arising from the sale of assets arising from an attempt to thwart a hostile takeover would meet neither the functional nor transactional test. In considering the meaning of the second, independent clause of the business income definition the court announced:

> The concluding 26 words...are added to include transactions involving disposal of fixed assets by taxpayers who emphasize the trading of assets as an integral part of their regular trade or business.

The second clause would be unnecessary under the court's reading. If a taxpayer's regular business activity "emphasizes" the trading of fixed assets, then the income from those transactions would already meet the transactional test. No textual support is offered for the proposition that the second clause is intended for taxpayers who "emphasize" trading of "fixed" assets. It is simply surmise. The Iowa legislature has now amended its definition of business income to recognize the functional test. Iowa Code § 422.32; Laws 1995, Ch. 141.

The case of *Sperry & Hutchinson, supra,* does not involve a transactional analysis. The Oregon court held that interest income received from "securities held to satisfy the needs for liquid capital in the stamp business are apportionable", while interest received from both short-term and long-term "securities held pending favorable developments in the long-term money market or acquisition of other

businesses...are not a part of the stamp business and, therefore, not apportionable to Oregon". 527 P.2d at 731. The court's application of the unitary business principle to determine whether interest should be apportioned *is* the functional test, not the transactional test.

Subsequent decisions from the Oregon courts have recognized the existence of two separate tests. See *Pennzoil v. Department of Revenue* (Or. 2001), 33 P.3d 314, 318.

In contrast to the cases cited by the Taxpayer, cases applying the functional test attempt to integrate the definition into the remainder of the statute. In the context of partial dispositions, those courts suggest that the phrase "acquisition, disposition and management" is intended simply to "suggest elements typically associated with the keeping of corporate property or...the conditions of ownership of corporate property". *Texaco Cities Service Pipeline Co. v. McGaw* (Illinois 1998), 695 N.E. 2d 481, 485. As set forth in Southerland Statutory Construction, §21.14, pp. 141-144 (6th. Ed. 2000), the conjunctive "and" is often used to express both a conjunctive and a disjunctive sense in statutes. The interpretation of the business income test argued by the minority would generate many anomalous results. For instance, the minority's understanding of the phrase would prevent apportionment of income from property which has been created as an integral part of the taxpayer's business but is now licensed, rented or leased to others, since no

"disposition" has occurred. The arbitrariness extends to the uncomfortable result that income from transactions involving property would inexplicitly be subjected to a more rigorous apportionment test than income from transactions involving services.

Presumably, reading the phrase conjunctively would also result in the allocation of income derived from condemnations, damage payments or insurance payments for losses of business property. See *District of Columbia v. Pierce Associates, Inc.* (D.C. 1983), 462 A.2d 1129, 1131 (apportioning insurance proceeds). There is no plausible explanation for why the business income definition should be interpreted to reach these kinds of results, and indeed, all of the minority interpretations of the statute share the common characteristic of announcing a rule without a reason.

The minority decisions discussed above have now been superseded in every state by subsequent decisions or legislation. Construing Montana's laws to mirror those interpretations would be counterproductive to the goal of uniformity.

This Court has already applied the functional test in interpreting identical language in *American Smelting, supra*, and should use this opportunity to re-affirm the existence of a functional test for the apportionment of business income.

CONCLUSION

For the reasons set forth above, your amicus urges the Court to hold that §15-

31-302(1) encompasses both a transactional and functional test for determining business income.

DATED this 6th day of May 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of this *Brief of Amicus Curiae on Behalf of Respondent and Appellee State of Montana, Department of Revenue* on this 6th day of May 2008 by placing this document in first class mail, postage pre-paid, addressed to the parties as shown below:

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CERTIFICATE OF COMPLAINCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that the foregoing *Brief of Amicus Curiae on Behalf of Respondent and Appellee State of Montana, Department of Revenue* is printed with a proportionally spaced Times New Roman typeface of 14 point; is double spaced; and the word count calculated by Microsoft Word is 4,634, exclusive of the Certificate of Compliance and Certificate of Service.

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