05-0594 and 05-1764
TAX TYPE: CORPORATE FRANCHISE
TAX YEARS: 08-31-98 THROUGH 08-31-03
DATE SIGNED: 11-15-2011
COMMISSIONERS: B. JOHNSON, M. JOHNSON, D. DIXON, M. CRAGUN
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 05-0594 Account No. ##### Tax Type: Corporate Franchise Tax Years: Fiscal Years Ending 08/31/98 & 08/31/99 Judge: Chapman
TAXPAYER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	Appeal No. 05-1764 Account No. ##### Tax Type: Corporate Franchise Tax Years: Fiscal Years Ending 08/31/98, 08/31/99, 08/31/00, 08//31/01, 08/31/02 & 08/31/03 Judge: Chapman

Presiding:

Marc B. Johnson, Commissioner
D'Arcy Dixon Pignanelli, Commissioner
Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE-1 FOR TAXPAYER, Attorney
REPRESENTATIVE-2 FOR TAXPAYER, Attorney
REPRESENTATIVE-3 FOR TAXPAYER, from TAXPAYER.
REPRESENTATIVE-4 FOR TAXPAYER, from TAXPAYER.
REPRESENTATIVE-5 FOR TAXPAYER, from TAXPAYER.
REPRESENTATIVE-6 FOR TAXPAYER, from TAXPAYER.
REPRESENTATIVE-7 FOR TAXPAYER, from TAXPAYER.
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General

RESPONDENT-1, from Taxpayer Services Division
RESPONDENT-2, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on September 28, 29 and 30, 2009. In addition, both parties submitted post-hearing documents on November 2, 2009. Based upon the evidence and testimony presented, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax at issue is Utah corporate franchise and income tax.

2. The years at issue are each fiscal year from August 31, 1998 through August 31, 2003, inclusive (the "Audit Period). Specifically, the years are the fiscal year ended August 31, 1998 ("1998 tax year"), the fiscal year ended August 31, 1999 ("1999 tax year"), the fiscal year ended August 31, 2000 ("2000 tax year"), the fiscal year ended August 31, 2001 ("2001 tax year"), the fiscal year ended August 31, 2002 ("2002 tax year"), and the fiscal year ended August 31, 2003 ("2003 tax year").

3. The taxpayer is TAXPAYER ("TAXPAYER"), a (X) marketing company that develops, manufactures, distributes and sells proprietary products, PRODUCTS (collectively herein "Products").

4. TAXPAYER was incorporated in Utah and has its headquarters in CITY-1, Utah.

5. For all tax years during the Audit Period, TAXPAYER elected to file its income tax returns on a "water's edge" basis, as provided for in Utah Code Ann. §59-7-402. TAXPAYER' water's edge combined group returns report income earned by its domestic corporations (i.e.., those organized and incorporated in the United States), but not income earned by its foreign corporations (i.e., those organized and incorporated outside of the United States). For each tax year at issue, TAXPAYER' water's edge combined group included the following domestic corporations (Exhibit R-3):

a) 1998 and 1999 Tax Years: 1) COMPANY-1("COMPANY-1") (F.K.A. TAXPAYER); 2) TAXPAYER, and 3) COMPANY-2("COMPANY-2). For 1998 and 1999, COMPANY-1 was in existence, but had no activity;

b) 2000 Tax Year: 1) COMPANY-1; 2) TAXPAYER.; 3) COMPANY-2; and 4) COMPANY-4. For 2000, COMPANY-1 and COMPANY-4 were in existence, but had no activity;

c) 2001 Tax Year: 1) COMPANY-1; 2) TAXPAYER; 3) COMPANY-2; 4) COMPANY-4 and 5) COMPANY-5. For 2001, COMPANY-2 and COMPANY-5 were in existence, but had no activity;

d) 2002 Tax Year: 1) COMPANY-1; 2) TAXPAYER; 3) COMPANY-2; 4) COMPANY-4.; 5) COMPANY-6.; 6) COMPANY-7; and 7) COMPANY-5. For 2002, COMPANY-2, COMPANY-6. and COMPANY-7 and COMPANY-5 were in existence, but had no activity;

e) 2003 Tax Year: 1) COMPANY-1; 2) TAXPAYER; 3) COMPANY-2; 4) COMPANY-4.; 5) COMPANY-6; 6) COMPANY-7; 7) COMPANY-8; 8) COMPANY-9; 9) COMPANY-10; 10) COMPANY-5; and 11) COMPANY- 11. For 2003, COMPANY-2; COMPANY-9; COMPANY-10 COMPANY-5.; and COMPANY-11 were in existence, but had no activity. It is unknown whether COMPANY-8 had any activity during this year.

6. TAXPAYER filed its original Utah corporate franchise and income tax returns for the 1998, 1999, 2000, and 2001 tax years in May and/or June 2002. Late filing and/or underpayment penalties were assessed by the Tax Commission against TAXPAYER for these years.

7. TAXPAYER paid the assessed late filing and/or underpayment penalties associated with its Utah tax returns for the 1998, 1999, 2000, and 2001 tax years.

8. TAXPAYER sought abatement of all penalties assessed for the 1998, 1999, 2000, and 2001 tax years by filing an Abatement Request with the Tax Commission on October 18, 2002. Taxpayer Services Division responded to and denied TAXPAYERS' Abatement Request in a letter dated October 31, 2002.

9. After Taxpayer Services Division issued its October 31, 2002 letter denying TAXPAYERS' Abatement Request, TAXPAYER submitted a petition on December 6, 2002. The Appeals Division of the Tax Commission processed TAXPAYERS' December 6, 2002 petition as an appeal designated *Appeal No. 02-1832*.

10. Taxpayer Services Division submitted a Motion to Dismiss *Appeal No. 02-1832* on the basis that TAXPAYER did not timely file an appeal of its October 31, 2002 action denying TAXPAYERS' Abatement Request. On October 6, 2003, the Commission issued an Order Granting Motion to Dismiss, in which the Commission dismissed A*ppeal No. 02-1832* on the basis that TAXPAYERS' December 6, 2002 petition was untimely filed.

11. TAXPAYER appealed the Commission's dismissal of *Appeal No. 02-1832* to the Fourth District Court. The appeal was assigned case number 03-0404757 and was assigned to JUDGE. On June 2, 2008, the parties filed a stipulation for dismissal of the District Court appeal. JUDGE signed the order dismissing the appeal on June 5, 2008.

12. On May 17, 2004, TAXPAYER filed amended Utah corporate franchise and income tax returns for the 1998 and 1999 tax years. On November 15, 2005, TAXPAYER filed another set of amended Utah returns for the 1998 and 1999 tax years, as well as amended Utah returns for the 2000 and 2001 tax years. On June 1, 2006, TAXPAYER filed an amended Utah return for the 2002 tax year.

13. The aggregate tax deficiency (overpayment) claimed on the amended Utah corporate franchise and income tax returns specified in Finding of Fact #12 for the 1998 through 2002 tax years totaled ($$$$$), as follows for each year: 1) a ($$$$$) overpayment for the 1998 tax year; 2) a ($$$$$) overpayment for the 1999 tax year; 3) a ($$$$$) overpayment for the 2000 tax year; 4) a ($$$$$) overpayment for the 2001 tax year; and 5) a $$$$$ additional tax deficiency for the 2002 tax year.

14. On May 13, 2005, TAXPAYER filed a Petition for Redetermination, Request for Refund and Request for Agency Action with the Tax Commission, assigned *Appeal No. 05-0594*, with respect to its refund claims for the 1998 and 1999 tax years.

15. On June 21, 2005, Auditing Division filed a Motion to Dismiss TAXPAYERS' Petition for Redetermination, Request for Refund and Request for Agency Action in *Appeal No. 05-0594*, arguing that until a statutory audit deficiency was assessed against TAXPAYER or its refund claims were formally denied, there had been no agency action and therefore TAXPAYERS' request for redetermination was premature.

16. By Statutory Notice - Corporation Franchise Tax dated November 14, 2005, Auditing Division assessed additional corporate franchise and income taxes against TAXPAYER for each year of the Audit Period with an aggregate tax deficiency of $$$$$ plus applicable statutory interest, as follows: 1) a $$$$$ additional tax deficiency for the 1999 tax year; 2) a $$$$$ additional tax deficiency for the 2000 tax year; 3) a $$$$$ additional tax deficiency for the 2001 tax year; 4) a $$$$$ additional tax deficiency for the 2002 tax year; and 5) a $$$$$ additional tax deficiency for the 2003 tax year. The Division did not assess any additional deficiency for the 1998 tax year.

17. On December 13, 2005, TAXPAYER filed a second Petition for Redetermination, Request for Refund, and Request for Agency Action with the Tax Commission, assigned *Appeal No. 05-1764*. The Petition in *Appeal No. 05-1764* requested the Tax Commission reject Auditing Division's statutory audit deficiency for each tax year of the Audit Period and refund to TAXPAYER its claimed tax overpayments as shown on the amended Utah corporate franchise and income tax returns for each tax year of the Audit Period.

18. On April 19, 2006, the Commission issued an order denying the Motion to Dismiss *Appeal No. 05-0594* and granting a Motion to Consolidate *Appeals 05-0594 and 05-1764* into this combined appeal. In the April 19, 2006 order, the Commission also addressed whether it has jurisdiction in the combined appeal for *Appeals 05-0594 and 05-1764* to consider and rule upon the amount of penalties and interest associated with the

1998, 1999, 2000, and 2001 tax years, which had previously been at issue in the dismissed *Appeal No. 02-1832*. The April 19, 2006 order provided that "for the 1998, 1999, 2000, and 2001 tax years, the Commission finds that it may not consider a request to waive any penalties and interest associated with these years, but that it may recalculate the penalties and interest if the tax liability on which they have been calculated is adjusted."

19. Auditing Division submitted revised audit schedules stamped "tentative and preliminary draft" on January 2, 2008. The revised audit schedules changed the apportionment fraction in each year based on additional information provided by TAXPAYER and resulted in an aggregate tax deficiency of $$$$$ plus applicable statutory interest, as follows for each tax year: 1) a $$$$$ tax refund for the 1998 tax year; 2) a $$$$$ tax refund for the 1999 tax year; 3) a $$$$$ additional tax deficiency for the 2000 tax year; 4) a $$$$$ additional tax deficiency for the 2001 tax year; 5) a $$$$$ additional tax deficiency for the 2002 tax year; and 6) a $$$$$ additional tax deficiency for the 2003 tax year.

20. Auditing Division submitted another set of revised audit schedules stamped "tentative and preliminary draft" on or about May 21, 2009 (Auditing Division's "final schedules"). The revised final schedules changed the apportionment fraction in each year and resulted in an aggregate tax deficiency of $$$$$ plus applicable statutory interest, as follows for each tax year: 1) an ($$$$$) tax refund for the 1998 tax year; 2) a ($$$$$) tax refund for the 1999 tax year; 3) a ($$$$$) tax refund for the 2000 tax year; 4) a $$$$$ additional tax deficiency for the 2001 tax year; 5) a $$$$$ additional tax deficiency for the 2002 tax year; and 6) a $$$$$ additional tax deficiency for the 2003 tax year. Auditing Division states that these schedules are intended to replace the audit deficiency issued on November 14, 2005 and represent its calculation of TAXPAYERS' tax liability for the Audit Period at issue in this appeal.

21. Based on recalculated tax liabilities utilizing the concessions and items of agreement outlined in Auditing Division's May 21, 2009 schedules, TAXPAYER contends that it is entitled to a tax refund in the aggregate amount of ($$$$$) plus statutory interest, as follows for each tax year: 1) a ($$$$$$) tax refund for

the 1998 tax year; 2) a ($$$$$) tax refund for the 1999 tax year; 3) a ($$$$$) tax refund for the 2000 tax year; 4) a $$$$$ additional tax deficiency for the 2001 tax year; 5) a $$$$$ additional tax deficiency for the 2002 tax year; and 6) a $$$$$ additional tax deficiency for the 2003 tax year.

22. TAXPAYERS' tax liability for each tax period is determined with the Uniform Division of Income For Tax Purposes Act ("UDITPA") formula, which includes a property factor, a payroll factor, and a sales factor. The parties are in agreement on the property factor that should be used to determine TAXPAYERS' tax liability for each tax period. The parties are also in agreement on the payroll factor that should be used for the 2002 and 2003 tax years. However, the parties are in disagreement on both the numerator and the denominator of the payroll factor for the 1998, 1999, 2000, and 2001 tax years. In addition, the parties are in disagreement on the numerator of the sales factor for all tax years in the Audit Period.

Facts Concerning Sales Factor

23. During the Audit Period, TAXPAYER operated a (X) marketing network through which its Product was sold in the United States and in ##### or more foreign countries, usually through independent distributors.

24. Individuals became TAXPAYER Products distributors through a written application and approval process, and thereafter joining a distributor network organization, sometimes referred to as a (Z) organization of another distributor. Distributors are (Y) contractors who are operating their own businesses and are not employees of TAXPAYER.

25. Except for "stocklist countries," as discussed later in the decision, TAXPAYER distributed its Products directly from its Utah headquarters to purchasers both in the United States and in foreign countries.

26. TAXPAYER typically sold its Products to its (Y) distributors at wholesale, with the (Y) distributors in turn selling such Products to their customers. However, in a foreign country, TAXPAYER

would often sell its products to a foreign entity that it owned or an entity owned by a single distributor, which in turn would sell the Products to (Y) distributors in the country.

27. As soon as there were a sufficient number of TAXPAYER distributors in a country, TAXPAYER would generally create an entity in that country, usually a wholly-owned foreign subsidiary. The foreign subsidiary generally would set up an office and warehouse and hire employees. Often, the subsidiary would also set up a call center to which distributors in that country or nearby countries could call in and get assistance. No foreign subsidiary was included in TAXPAYERS' water's edge combined group for purposes of reporting taxes during the Audit Period.

28. In some countries, TAXPAYER would have an (Y) distributor function as a "stocklist center." TAXPAYER would sell its Products directly to the "stocklist distributor," and other (Y) distributors in that country would purchase Products from the stocklist distributor.

29. TAXPAYER has created call centers as the primary points of contact for distributors who require services or have questions, including questions about placement orders and distributor compensation. There is a call center in the United States. In addition, there are call centers in foreign countries that were generally established by TAXPAYERS' foreign subsidiaries. REPRESENTATIVE-4 FOR TAXPAYER testified that some foreign markets did not have call centers and were supported out of TAXPAYERS' Utah office.

30. One of the issues in this appeal is whether to include sales that TAXPAYER made into foreign countries in the numerator of TAXPAYERS' sales factor. TAXPAYERS' activities in FOREIGN COUNTRY-1 for the 1999 through 2003 tax years and in FOREIGN COUNTRY-2 for all years of the Audit Period are no longer in dispute. The parties agree that TAXPAYER had sufficient contacts with these two countries for these specified tax years to be subject to taxation. Auditing Division claims, however, that TAXPAYERS' contacts were insufficient to subject it to taxation in all other countries for all years of the Audit Period and for FOREIGN

COUNTRY-1 for the 1998 tax year. Accordingly, the Division claims that all sales made by TAXPAYER in foreign countries should be thrown back into the sales factor numerator, except for sales made in FOREIGN COUNTRY-2 for all years of the Audit Period and in FOREIGN COUNTRY-1 for tax years 1999 through 2003.

31. TAXPAYER asks for the following foreign sales not to be thrown back to Utah, as set forth below:

Throwback Amounts Contested by TAXPAYER							
Country Code	**Assumed Country**	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**
3	3	$$$$$	$$$$$	$$$$$	$$$$$	$$$$$	$$$$$
4	4	-	-	-	-	$$$$$	-
5	5	-	-	-	-	$$$$$	$$$$$
2	2	Resolved	Resolved	Resolved	Resolved	Resolved	Resolved
6	6	-	-	-	$$$$$	$$$$$	$$$$$
7	7	-	-	-	$$$$$	$$$$$	$$$$$
8	8	-	-	-	$$$$$	$$$$$	$$$$$
9	9	-	-	-	$$$$$	$$$$$	$$$$$
10	10	-	-	-	$$$$$	$$$$$	$$$$$
11	11	$$$$$	$$$$$	$$$$$	$$$$$	$$$$$	$$$$$
12	12	-	-	-	$$$$$	$$$$$	$$$$$
13	13	-	-	-	$$$$$	$$$$$	$$$$$
14	14	-	-	-	$$$$$	$$$$$	$$$$$
15	15	$$$$$	$$$$$	$$$$$	$$$$$	$$$$$	$$$$$
1	1	$$$$$	Resolved	Resolved	Resolved	Resolved	Resolved
16	16	-	-	-	$$$$$	$$$$$	$$$$$
17	17	-	-	-	$$$$$	$$$$$	$$$$$
18	18	-	-	-	$$$$$	$$$$$	$$$$$
19	19	$$$$$	$$$$$	$$$$$	$$$$$	$$$$$	$$$$$
20	20	$$$$$	$$$$$	$$$$$	$$$$$	$$$$$	$$$$$
21	21	$$$$$	$$$$$	$$$$$	$$$$$	$$$$$	$$$$$
22	22	-	-	-	$$$$$	$$$$$	-
23	23	-	-	-	$$$$$	-	-

24	24	$$$$$	-	-	$$$$$	$$$$$	
25	25	-	-	-	-	$$$$$	$$$$$
26	26	-	-	-	$$$$$	-	-
27	27	-	-	-	$$$$$	-	$$$$$
28	28	-	-	-	$$$$$	$$$$$	$$$$$

32. TAXPAYER employees traveled to foreign countries during the Audit Period. Evidence of foreign trips made by TAXPAYER employees for tax years 1998 through 2002 is found in Exhibit P-21. The exhibit does not include any evidence of foreign trips for the 2003 tax year. However, this evidence, by itself, does not show whether the trips were for activities that do not expose TAXPAYER to taxation (e.g., activities allowed under Public Law 86-272, 15 U.S.C.A. Sec. 381-385 concerning the solicitation of sales ("P.L. 86-272")). Nevertheless, TAXPAYER had several witnesses provide testimony about foreign trips they took for purposes other than the solicitation of sales, as described below.

33. REPRESENTATIVE-4 FOR TAXAPYER testified that he managed TAXPAYERS' Utah call center and was involved with distributor compensation. REPRESENTATIVE-4 FOR TAXPAYER testified that he went to FOREIGN COUNTRY-24 in 2000 to implement a change to the compensation plan at offices there. He also testified that he traveled to FOREIGN COUNTRY-19 in December 1997 and twice in 2000 and 2001 to document processes in FOREIGN COUNTRY-19 in anticipation of upgrading the computer system in FOREIGN COUNTRY-19 and in regards to the calculation of distributor compensation.

There is no evidence to show that REPRESENTATIVE-4 FOR TAXPAYER traveled to FOREIGN COUNTRY-19 in December 1997 or that he traveled there more than once in 2000 and 2001. There is no evidence to show that REPRESENTATIVE-4 FOR TAXPAYER traveled to any foreign country at issue during the 1998, 1999, 2000, 2002, and 2003 tax years. For countries and years still at issue, the evidence in Exhibit P-21 shows that REPRESENTATIVE-4 FOR TAXPAYER made two trips, specifically:

a) A trip to FOREIGN COUNTRY-24 between October 13 and October 18, 2000 (2001 tax year); and

b) One trip to FOREIGN COUNTRY-19 between the dates of June 4 and June 9, 2001 (2001 tax year).

34. REPRESENTATIVE-3 FOR TAXPAYER, who is in-house legal counsel for TAXPAYER, stated that during the Audit Period, the legal department from Utah began doing "legal audits" in foreign countries to determine whether subsidiaries were in legal compliance not only with the laws of the United States, but also with the laws of the country in which the subsidiary was located. REPRESENTATIVE-3 FOR TAXPAYER stated that he undertook legal audits in FOREIGN COUNTRY -21, FOREIGN COUNTRY -3, FOREIGN COUNTRY-2, the FOREIGN COUNTRY -11and FOREIGN COUNTRY-19. There is no evidence to show that REPRESENTATIVE-3 FOR TAXPAYER traveled to any foreign country at issue during the 1998, 1999, 2002 and 2003 tax years. For countries and years still at issue, the evidence in Exhibit P-21 shows that REPRESENTATIVE-3 FOR TAXPAYER made three trips, specifically:

a) A trip to FOREIGN COUNTRY-19 during the 2000 tax year. The evidence shows that a round-trip airline ticket between Utah and FOREIGN COUNTRY-19 CITY was purchased in REPRESENTATIVE-3 FOR TAXPAYER'S name in May 2000. Accordingly, it is assumed that he traveled to FOREIGN COUNTRY-19 sometime before the 2000 tax year ended on August 31, 2000. However, the evidence does not provide dates so exact timing of the trip or the length of the trip can be determined;

b) A trip to the FOREIGN COUNTRY -11 and to FOREIGN COUNTRY -9 between October 14 and October 21, 2000 (2001 tax year). The evidence shows that REPRESENTATIVE-3 FOR TAXPAYER was in the FOREIGN COUNTRY -11 on October 16, 2000 and October 21, 2000.

However, the information is insufficient to determine how many days REPRESENTATIVE-3 FOR TAXPAYER was in each country; and

c) A trip to FOREIGN COUNTRY -21 and FOREIGN COUNTRY -3 between May 14 and May 25, 2001 (2001 tax year). The evidence shows that REPRESENTATIVE-3 FOR TAXPAYER was in FOREIGN COUNTRY -3 on May 18, 2001 and May 21, 2001. However, the information is insufficient to show how many days REPRESENTATIVE-3 FOR TAXPAYER was in each of these countries. Furthermore, the exhibit contains contradictory information showing that REPRESENTATIVE-3 FOR TAXPAYER was in the FOREIGN COUNTRY -11 during the same dates that it shows him to be in FOREIGN COUNTRY -21 and FOREIGN COUNTRY -3.

35. REPRESENTATIVE-5 FOR TAXPAYER came to TAXPAYER in 2000 as International Controller, where he was responsible for TAXPAYERS' accounting outside of the United States. He explains that he hired people who would become employees not of TAXPAYER, but of the foreign subsidiaries. He stated that he held some interviews by telephone in Utah and some in person in foreign countries. He also trained new accounting employees in foreign countries. There is no evidence to show that REPRESENTATIVE-5 FOR TAXPAYER traveled to any foreign country at issue during the 1998, 1999, 2000, and 2003 tax years. For countries and years still at issue, the evidence in Exhibit P-21 shows that REPRESENTATIVE-5 FOR TAXPAYER made four trips, specifically:

a) A trip to FOREIGN COUNTRY-19 between June 4 and June 9, 2001 (2001 tax year);

b) A trip to FOREIGN COUNTRY-1 and FOREIGN COUNTRY-16 between June 19 and July 3, 2001 (2001 tax year). FOREIGN COUNTRY-1 is not at issue for the 2001 tax year, while FOREIGN COUNTRY-16 is still at issue. The evidence shows that REPRESENTATIVE-5 FOR TAXPAYER was present in FOREIGN COUNTRY-16 on July 3, 2001. However, the information is insufficient to

determine how many days REPRESENTATIVE-5 FOR TAXPAYER spent in each of the countries during the trip;

c) A trip to the FOREIGN COUNTRY -11 between July 14 and July 27, 2002 (2002 tax year); and

d) A trip to FOREIGN COUNTRY -3, FOREIGN COUNTRY-21, and FOREIGN COUNTRY-25between November 23 and December 12, 2001 (2002 tax year). The evidence indicates that REPRESENTATIVE-5 FOR TAXPAYER was in each of four countries for the following periods:

i) FOREIGN COUNTRY -21 – November 25 through November 29, 2001;

ii) FOREIGN COUNTRY -3 – November 29 through December 4, 2001;

iii) FOREIGN COUNTRY-20 – December 4 through December 7, 2001; and

iv) FOREIGN COUNTRY-25– December 7 through December 12, 2001.

36. REPRESENTATIVE-6 FOR TAXPAYER has been in-house corporate counsel for TAXPAYER since January 2001. REPRESENTATIVE-6 FOR TAXPAYER explained that from time to time, attorneys in Utah would travel to foreign markets, meet with office staff, and meet with local counsel retained in these markets. REPRESENTATIVE-6 FOR TAXPAYER stated that in March 2001, he and a colleague in the TAXPAYER legal department traveled to FOREIGN COUNTRY-16 to conduct a legal audit of the TAXPAYERS' operations in FOREIGN COUNTRY-16. There is no evidence to show that REPRESENTATIVE-6 FOR TAXPAYER traveled to any foreign country during the 1998, 1999, 2000, 2002 and 2003 tax years. For countries and years still at issue, the evidence in Exhibit P-21 shows that REPRESENTATIVE-6 FOR TAXPAYER made three trips, specifically:

a) A trip to the FOREIGN COUNTRY-22 and FOREIGN COUNTRY-27 between June 8 and June 24, 2001 (2001 tax year). The evidence shows that REPRESENTATIVE-6 FOR TAXPAYER was in FOREIGN COUNTRY-27 on June 24, 2006 and was in the FOREIGN COUNTRY-22 between June

10 and June 13, 2006. The evidence does not show what country REPRESENTATIVE-6 FOR TAXPAYER was in for the remaining days of the trip;

b) A trip to FOREIGN COUNTRY-16 between February 24, and March 3, 2001 (2001 tax year); and

c) A trip to FOREIGN COUNTRY-16 and FOREIGN COUNTRY-1 between March 24 and March 31, 2001 (2001 tax year). FOREIGN COUNTRY-1 is not at issue for the 2001 tax year, while FOREIGN COUNTRY-16 is still at issue. The evidence, however, does not show how many days REPRESENTATIVE-6 FOR TAXPAYER spent in each of these countries during this particular trip.

37. In addition to testimony from individual employees, TAXPAYER provided a resume of NAME-1. Exhibit P-10E. REPRESENTATIVE-3 FOR TAXPAYER testified that NAME-1 was the country manager of TAXPAYERS'FOREIGN COUNTRY-15 operations in 1997. NAME-1 resume indicates that he worked for TAXPAYER in FOREIGN COUNTRY-15 for the period "1997 – 1998" to help build out new facilities, including a will-call/customer service center and, in general, direct the official opening of the FOREIGN COUNTRY-15 market. COMPANY-12 is a foreign corporation that is not part of TAXPAYERS' water's edge combined group. Accordingly, the activities that NAME-1 performed in foreign countries, including FOREIGN COUNTRY-15, while an employee of COMPANY-12 are not ones that would expose TAXPAYER to nexus in these countries.

38. However, NAME-1 resume also shows that, sometime in 1998, he left the employment of COMPANY-12 and became an employee of TAXPAYER itself. For TAXPAYER, NAME-1 was an International Development Manager from 1999 to 2001 and an International Operations Co-Director from 2001 to 2003. In these positions, NAME-1 resume indicates that he supported TAXPAYERS' existing foreign markets and helped build new foreign markets for TAXPAYER. However, it is not known if NAME-1 activities in foreign countries exceeded those activities that are protected by P.L. 86-272 (in-state recruitment, training, and

evaluation of sales personnel, as well as use of local facilities for sales-related meetings are protected activities under P.L. 86-272. *See Wisconsin Department of Revenue v. William Wrigley , Jr., Co.*, 505 U.S. 214, 112 S.Ct. 2447 (1992)). Accordingly, there is insufficient information to know whether NAME-1 activities in foreign countries while an employee of TAXPAYER were ones that would expose TAXPAYER to income taxation in those foreign countries.

Facts Concerning Payroll Factor

39. For tax years 1998, 1999, 2000 and through June of 2001, TAXPAYER has a contractual arrangement with BUSINESS-1where TAXPAYER leased the employees who worked at TAXPAYERS' Utah facilities from BUSINESS-1. TAXPAYER referred to BUSINESS-1 as a "professional employer organization." During these periods, TAXPAYER and BUSINESS-1 had a contractual arrangement, the employees signed employment agreements with BUSINESS-1, not TAXPAYER, and BUSINESS-1 performed payroll functions for the employees. In June of 2001, the arrangement between TAXPAYER and BUSINESS-1was terminated, and TAXPAYER established an in-house payroll and employee benefits department to perform those functions.

40. The employees leased to TAXPAYER by BUSINESS-1 were either: 1) individuals in this State who performed their duties entirely at TAXPAYERS' Utah facilities; or 2) individuals who performed services both within and without Utah, but the service performed without the state was incidental to the individuals' service within the state.

41. The employees leased to TAXPAYER by BUSINESS-1 performed services for TAXPAYER at TAXPAYERS' direction, under TAXPAYERS' supervision and control, and pursuant to policies and procedures instituted by TAXPAYER.

42. TAXPAYERS' supervisors evaluated job performance and conducted compensation reviews of the employees leased by BUSINESS-1. TAXPAYERS' supervisors were also responsible for assigning work, recommending pay increases, transfers, and promotions, and maintaining discipline. They also had the authority

to dismiss employees for violations of the policies contained in the TAXPAYER, Employee Handbook dated May 3, 1999 ("TAXPAYER Employee Handbook"). Division's Exhibit R-1.

43. TAXPAYER provided training, tools, and, in some instances, uniforms for its employees. TAXPAYER determined work schedules, required the use of time clocks to track hours worked, approved overtime, and generally controlled the time and manner in which the employees performed the services.

44. TAXPAYER provided insurance and retirement benefits for its employees.

45. For all tax years during the Audit Period, TAXPAYER reported deductions for salaries and wages on its water's edge federal tax returns for TAXPAYER, including the years when TAXPAYER and BUSINESS-1 had their contractual arrangement. Exhibit R-3.

APPLICABLE LAW

1. Utah's Uniform Division of Income For Tax Purposes Act ("UDITPA") provisions are set forth in Title 59, Chapter 7, Part 3 of the Utah Code. For purposes of the UDITPA provisions, Utah Code Ann. §59-7-302(6)[1] defines "state" to mean "any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof."

2. UCA §59-7-303(1) provides that "[a]ny taxpayer having income from business activity which is taxable both within and without this state shall allocate and apportion its adjusted income as provided in this part."

3. UCA §59-7-305 provides guidance concerning whether a taxpayer is "taxable in another state," as follows:

> For purposes of allocation and apportionment of income under this part, a taxpayer is taxable in another state if:
>
> (1) in that state the taxpayer is subject to a net income tax, a franchise tax measured by net

1 The 2003 version of Utah law is cited in this decision, unless otherwise indicated.

> income, a franchise tax for the privilege of doing business, or a corporate stock tax; or
> (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

4. UCA §59-7-311 provides that "[a]ll business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three."

5. UCA §59-7-315 concerns the payroll factor and provides that "[t]he payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation, and the denominator of which is the total compensation paid everywhere during the tax period."

6. UCA §59-7-316 also concerns the payroll factor and provides, as follows:

> Compensation is paid in this state if:
> (1) the individual's service is performed entirely within the state; or
> (2) the individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or
> (3) some of the service is performed in the state and:
> (a) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state; or
> (ii) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

7. UCA §59-7-317 concerns the sales factor and provides that "[t]he sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period."

8. UCA §59-7-318 also concerns the sales factor and provides for the treatment of sales of tangible personal property, as follows:

> Sales of tangible personal property are in this state if:
> (1) the property is delivered or shipped to a purchaser, other than the United States Government, within this state regardless of the f.o.b. point or other conditions of the sale; or
> (2) the property is shipped from an office, store, warehouse, factory, or other place of storage in this state; and
> (a) the purchaser is the United States Government; or

(b) the taxpayer is not taxable in the state of the purchaser.

9. UCA §59-7-320 provides for the equitable adjustment of the standard allocation or apportionment method, as follows:

> If the allocation and apportionment provisions of this chapter do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the commission may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
> (1) separate accounting;
> (2) the exclusion of any one or more of the factors;
> (3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
> (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

10. Utah Admin. Rule R865-6F-6 ("Rule 6") provides guidance concerning the sales factor, Public Law 86-272, and the "throwback rule," as follows in pertinent part:

> A. Definitions.
> . . . .
> 2. "De minimis activities" means those activities that, when taken together, establish only a trivial connection with the taxing state. An activity conducted within Utah on a regular or systematic basis or pursuant to a company policy, whether or not in writing, shall not normally be considered trivial.
> . . . .
> 4. "Solicitation" means:
> a) speech or conduct that explicitly or implicitly invites an order; and
> b) activities that neither explicitly nor implicitly invite an order, but are entirely ancillary to requests for an order.
> . . . .
> C. Foreign corporations not qualified in Utah which ship goods to customers in this state from points outside this state, pursuant to orders solicited but not accepted by agents or employees in this state, and which are not doing business in Utah are not taxable under the Utah Corporation Franchise Tax Act if:
> 1. they maintain no office nor stocks of goods in Utah, and
> 2. they engage in no other activities in Utah.
> D. Foreign corporations not qualified in Utah that make deliveries from stocks of goods located in this state are doing business in this state and are taxable under the Corporation Franchise Tax Act, even though they have no office or regular place of business in this state.
> E. Foreign corporations not qualified in Utah are subject to the franchise tax if performing the necessary duties to fulfill contracts or subcontracts in Utah, whether through their own

employees or by furnishing of supervisory personnel.

. . . .

J. P.L. 86-272 restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the company within the state consists of the solicitation of orders for sales of tangible personal property, which orders are sent outside the state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state. The term "net income tax" includes a franchise tax measured by net income. If any sales of tangible personal property are made from Utah into a state which is precluded by P.L. 86-272 from taxing the income of the seller, such sales remain subject to throwback to Utah pursuant to Section 59-7-318(2). Similarly, a sale into Utah from another state would not subject a corporation to the Utah tax if the corporation's activities do not exceed those allowed under P.L. 86-272.

1. Only the solicitation to sell personal property is afforded immunity under P.L. 86-272; therefore, the leasing, renting, licensing or other disposition of tangible personal property, or transactions involving intangibles such as franchises, patents, copyrights, trade marks, service marks and the like, or any other type of property are not protected activities under P. L. 86-272. The sale or delivery and the solicitation for the sale or delivery of any type of service that is not either (1) ancillary to solicitation, or (2) otherwise set forth as a protected activity below is also not protected under P.L. 86-272 or this rule.

2. For the in-state activity to be a protected activity under P.L. 86-272, it must be limited solely to solicitation, except for de minimis activities and activities conducted by (Y) contractors as described below.

K. The following in-state activities, assuming they are not of a de minimis level, will constitute doing business in Utah under P.L. 86-272 and will subject the corporation to the Utah corporation franchise tax:

1. making repairs or providing maintenance or service to the property sold or to be sold;
2. collecting current or delinquent accounts, whether directly or by third parties, through assignment or otherwise;
3. investigating credit worthiness;
4. installation or supervision of installation at or after shipment or delivery;
5. conducting training courses, seminars, or lectures for personnel other than personnel involved only in solicitation;
6. providing any kind of technical assistance or service including engineering assistance or design service, when one of the purposes thereof is other than the facilitation of the solicitation of orders;
7. investigating, handling, or otherwise assisting in resolving customer complaints, other than mediating direct customer complaints when the sole purpose of such mediation is to ingratiate the sales personnel with the customer;
8. approving or accepting orders;
9. repossessing property;
10. securing deposits on sales;
11. picking up or replacing damaged or returned property;
12. hiring, training, or supervising personnel, other than personnel involved only in solicitation;

13. using agency stock checks or any other instrument or process by which sales are made within this state by sales personnel;

14. maintaining a sample or display room in excess of two weeks (14 days) at any one location within the state during the tax year;

15. carrying samples for sale, exchange or distribution in any manner for consideration or other value;

16. owning, leasing, using, or maintaining any of the following facilities or property in-state:

(a) repair shop;

(b) parts department;

(c) any kind of office other than an in-home office;

(d) warehouse;

(e) meeting place for directors, officers, or employees;

(f) stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation;

(g) telephone answering service that is publicly attributed to the company or to employees or agents of the company in their representative status;

(h) mobile stores, i.e., vehicles with drivers who are sales personnel making sales from the vehicles;

(i) real property or fixtures to real property of any kind.

17. consigning stocks of goods or other tangible personal property to any person, including an (Y) contractor, for sale;

18. maintaining, by either an in-state or an out-of-state resident employee, an office or place of business (in-home or otherwise) of any kind other than an in-home office;

(b) The maintenance of any office or other place of business in this state that does not strictly qualify as an in-home office under this subsection shall, by itself cause the loss of protection under this rule.

(c) For purposes of this subsection it is not relevant whether the company pays directly, indirectly, or not at all for the cost of maintaining the in-home office.

19. entering into franchising of licensing agreements; selling or otherwise disposing of franchises and licenses; or selling or otherwise transferring tangible personal property pursuant to such franchise or license by the franchisor or licensor to its franchisee or licensee within the state;

20. shipping or delivering of goods into this state by means of private vehicle, rail, water, air or other carrier, irrespective of whether a shipment of delivery fee or other charge is imposed, directly or indirectly, upon the purchaser;

21. conducting any activity not listed as a protected activity below which is not entirely ancillary to requests for orders, even if such activity helps to increase purchases.

L. The following in-state activities will not cause the loss of protection for otherwise protected sales;

1. soliciting orders for sales by any type of advertising;

2. soliciting of orders by an in-state resident employee or representative of the company, so long as such person does not maintain or use any office or other place of business in the state other than an in-home office;

3. carrying samples and promotional materials only for display or distribution without

charge or other consideration;

4. furnishing and setting up display racks and advising customers on the display of the company's products without charge or other consideration;
5. providing automobiles to sales personnel for their use in conducting protected activities;
6. passing orders, inquiries and complaints on to the home office;
7. missionary sales activities, i.e. the solicitation of indirect customers for the company's goods. For example, a manufacturer's solicitation of retailers to buy the manufacturer's goods from the manufacturer's wholesale customers would be protected if such solicitation activities are otherwise immune;
8. coordinating shipment or delivery without payment or other consideration and providing information relating thereto either prior or subsequent to the placement of an order;
9. checking of customer's inventories without a charge therefore if performed for reorder, but not for other purposes such as a quality control;
10. maintaining a sample or display room for two weeks (14 days) or less at any one location within the state during the tax year;
11. recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel;
12. mediating direct customer complaints when the purpose thereof is solely for ingratiating the sales personnel with the customer and facilitating requests for orders;
13. owning, leasing, using or maintaining personal property for use in the employee or representative's in-home office or automobile that is solely limited to the conducting of protected activities. Therefore, the use of personal property such as a cellular telephone, facsimile machine, duplicating equipment, personal computer and computer software that is limited to the carrying on of protected solicitation and activity entirely ancillary to such solicitation or permitted by the provisions of this rule shall not, by itself, remove the protection of P.L. 86-272.

M. P.L. 86-272 provides protection to certain in-state activities if conducted by an (Y) contractor that would not be afforded if performed by the company or its employees or other representatives.

1. (Y) contractors may engage in the following limited activities in the state without the company's loss of immunity;
   a) soliciting sales;
   b) making sales;
   c) maintaining an office.
2. Sales representatives who represent a single principal are not considered to be (Y) contractors and are subject to the same limitations as those provided under P.L. 86-272 and this rule.
3. Maintenance of stock of goods in the state by the (Y) contractor under consignment or any other type of arrangement with the company, except for purposes of display and solicitation, shall remove the protection.

N. The Tax Commission will apply the provisions of P.L. 86-272 and of this rule to business activities conducted in foreign commerce. Therefore, whether business activities are conducted by (i) a foreign or domestic company selling tangible personal property into a county outside of the United States from a point within this state or by (ii) either company selling such property

> into this state from a point outside of the United States, the principles under this rule apply equally to determine whether the sales transactions are protected and the company immune from taxation in either this state or in the foreign county, as the case might be, and whether, if applicable, the throwback provisions of Section 59-7-318(2) will apply.
> . . . .
> Q. The protection afforded under P.L. 86-272 and the provisions of this rule shall be determined on a year by year tax basis. Therefore, if at any time during a tax year the company conducts activities that are not protected under P.L. 86-272 or this rule, no sales in this state or income earned by the company attributed to this state during any part of said tax year shall be protected from taxation for purposes of the corporate franchise tax.

11. During the Audit Period, Utah Admin. Rule R865-6F-8 ("Rule 8") provided guidance concerning the allocation and apportionment of income under UDITPA, as follows in relevant part:

> . . . .
> E. Taxable in Another State.
> 1. In General. Under Section 59-7-303 the taxpayer is subject to the allocation and apportionment provisions of UDITPA if it has income from business activity that is taxable both within and without this state. A taxpayer's income from business activity is taxable without this state if the taxpayer, by reason of business activity (i.e., the transactions and activity occurring in the regular course of the trade or business), is taxable in another state within the meaning of Section 59-7-305. A taxpayer is taxable within another state if it meets either one of two tests:
> a) if by reason of business activity in another state the taxpayer is subject to one of the types of taxes specified in Section 59-7-305(1), namely: a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax; or
> b) if by reason of business activity another state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether the state imposes that tax on the taxpayer. A taxpayer is not taxable in another state with respect to the trade or business merely because the taxpayer conducts activities in that state pertaining to the production of nonbusiness income.
> 2. When a Taxpayer Is Subject to a Tax Under Section 59-7-305. A taxpayer is subject to one of the taxes specified in Section 59-7-305(1) if it carries on business activity in a state and that state imposes such a tax thereon. Any taxpayer that asserts that it is subject to one of the taxes specified in Section 59-7-305(1) in another state shall furnish to the Tax Commission, upon its request, evidence to support that assertion. The Tax Commission may request that the evidence include proof that the taxpayer has filed the requisite tax return in the other state and has paid any taxes imposed under the law of the other state. The taxpayer's failure to produce that proof may be taken into account in determining whether the taxpayer is subject to one of the taxes specified in Section 59-7-305(1) in the other state. If the taxpayer voluntarily files and pays one or more taxes when not required to do so by the laws of that state or pays a minimal fee for qualification, organization, or for the privilege of doing business in that state, but

a) does not actually engage in business activity in that state, or

b) does actually engage in some business activity, not sufficient for nexus, and the minimum tax bears no relation to the taxpayer's business activity within that state, the taxpayer is not subject to one of the taxes specified within the meaning of Section 59-7-305(1).

(3) When a State Has Jurisdiction to Subject a Taxpayer to a Net Income Tax. The second test, that of Section 59-7-305(2), applies if the taxpayer's business activity is sufficient to give the state jurisdiction to impose a net income tax by reason of business activity under the Constitution and statutes of the United States. Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provisions of Public Law 86-272, 15 U. S. C. A. Sec. 381-385 (P.L. 86-272). In the case of any state as defined in Section 59-7-302(6), other than a state of the United States or political subdivision of a state, the determination of whether a state has jurisdiction to subject the taxpayer to a net income tax shall be made as though the jurisdictional standards applicable to a state of the United States applied in that state. If jurisdiction is otherwise present, the state is not considered as without jurisdiction by reason of the provisions of a treaty between that state and the United States.

F. Apportionment Formula. All business income of the taxpayer shall be apportioned to this state by use of the apportionment formula set forth in Section 59-7-311. The elements of the apportionment formula are the property factor, see G. below, the payroll factor, see H. below, and the sales factor, see I. Below, of the trade or business of the taxpayer. For exceptions, see J. below.

. . . .

H. Payroll Factor.

1. The payroll factor of the apportionment formula shall include the total amount paid by the taxpayer in the regular course of its trade or business for compensation during the tax period.

2. The total amount paid to employees is determined upon the basis of the taxpayer's accounting method. If the taxpayer has adopted the accrual method of accounting, all compensation properly accrued shall be deemed to have been paid. Notwithstanding the taxpayer's method of accounting, at the election of the taxpayer, compensation paid to employees may be included in the payroll factor by use of the cash method if the taxpayer is required to report compensation under that method for unemployment compensation purposes. The compensation of any employee on account of activities that are connected with the production of nonbusiness income shall be excluded from the factor.

3. The term "compensation" means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services. Payments made to an (Y) contractor or any other person not properly classifiable as an employee are excluded. Only amounts paid directly to employees are included in the payroll factor. Amounts considered paid directly include the value of board, rent, housing, lodging, and other benefits or services furnished to employees by the taxpayer in return for personal services.

a) The term "employee" means:

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee.

> Generally, a person will be considered to be an employee if he is included by the taxpayer as an employee for purposes of the payroll taxes imposed by the Federal Insurance Contributions Act. However, since certain individuals are included within the term employees in the Federal Insurance Contributions Act who would not be employees under the usual common law rules, it may be established that a person who is included as an employee for purposes of the Federal Insurance Contributions Act is not an employee for purposes of this rule.

. . . .

4. Denominator. The denominator of the payroll factor is the total compensation paid everywhere during the tax period. Accordingly, compensation paid to employees whose services are performed entirely in a state where the taxpayer is immune from taxation, for example, by P.L. 86-272, are included in the denominator of the payroll factor.

5. Numerator. The numerator of the payroll factor is the total amount paid in this state during the tax period by the taxpayer for compensation. The tests in Section 59-7-316 to be applied in determining whether compensation is paid in this state are derived from the Model Unemployment Compensation Act. Accordingly, if compensation paid to employees is included in the payroll factor by use of the cash method of accounting or if the taxpayer is required to report compensation under that method for unemployment compensation purposes, it shall be presumed that the total wages reported by the taxpayer to this state for unemployment compensation purposes constitute compensation paid in this state except for compensation excluded under H. The presumption may be overcome by satisfactory evidence that an employee's compensation is not properly reportable to this state for unemployment compensation purposes.

6. Compensation Paid in this State. Compensation is paid in this state if any one of the following tests applied consecutively are met:

a) The employee's service is performed entirely within the state.

b) The employee's service is performed entirely within and without the state, but the service performed without the state is incidental to the employee's service within the state. The word incidental means any service that is temporary or transitory in nature, or that is rendered in connection with an isolated transaction.

c) If the employee's services are performed both within and without this state, the employee's compensation will be attributed to this state:

(1) if the employee's base of operations is in this state; or

(2) if there is no base of operations in any state in which some part of the service is performed, but the place from which the service is directed or controlled is in this state; or

(3) if the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed but the employee's residence is in this state.

d) The term "base of operations" is the place of more or less permanent nature from which the employee starts his work and to which he customarily returns in order to receive instructions from the taxpayer or communications from his customers or other persons or to replenish stock or other materials, repair equipment, or perform any other functions necessary to the exercise of his trade or profession at some other point or

points. The term "place from which the service is directed or controlled" means the place from which the power to direct or control is exercised by the taxpayer.

I. Sales Factor. In General.

1. Section 59-7-302(5) defines the term "sales" to mean all gross receipts of the taxpayer not allocated under Section 59-7-306 through 59-7-310. Thus, for purposes of the sales factor of the apportionment formula for the trade or business of the taxpayer, the term sales means all gross receipts derived by the taxpayer from transactions and activity in the regular course of the trade or business. The following are rules determining sales in various situations.

. . . .

h) In filing returns with this state, if the taxpayer departs from or modifies the basis for excluding or including gross receipts in the sales factor used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

i) If the returns or reports filed by the taxpayer with all states to which the taxpayer reports under UDITPA are not uniform in the inclusion or exclusion of gross receipts, the taxpayer shall disclose in its return to this state the nature and extent of the variance.

2. Denominator. The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts excluded under J.3.

3. Numerator. The numerator of the sales factor shall include gross receipts attributable to this state and derived by the taxpayer from transactions and activity in the regular course of its trade or business. All interest income, service charges, carrying charges, or time-price differential charges incidental to gross receipts shall be included regardless of the place where the accounting records are maintained or the location of the contract or other evidence of indebtedness.

4. Sales of Tangible Personal Property in this State.

a) Gross receipts from the sales of tangible personal property (except sales to the United States government; see I.5.) are in this state:

(1) if the property is delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other conditions of sale; or

(2) if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the taxpayer is not taxable in the state of the purchaser.

. . . .

f) If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state.

g) If a taxpayer whose salesman operates from an office located in this state makes a sale to a purchaser in another state in which the taxpayer is not taxable and the property is shipped directly by a third party to the purchaser, the following rules apply:

(1) If the taxpayer is taxable in the state from which the third party ships the property, then the sale is in that state.

(2) If the taxpayer is not taxable in the state from which the property is shipped,

the sale is in this state.

. . . .

J. Special Rules:

1. Section 59-7-320 provides that if the allocation and apportionment provisions of UDITPA do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for, or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

a) separate accounting;

b) the exclusion of any one or more of the factors;

c) the inclusion of one or more additional factors that will fairly represent the taxpayer's business activity in this state; or

d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

. . . .

DISCUSSION

Utah uses UDITPA apportionment and allocation provisions to determine a taxpayer's Utah corporate franchise tax liability. Section 59-7-303(1) provides that "[a]ny taxpayer having income from business activity which is taxable both within and without this state shall allocate and apportion its adjusted income as provided in this part."[2] For the years at issue, Utah uses a "three-factor" apportionment formula found in Section 59-7-311 and Rule 8(F), whereby business income is apportioned to Utah by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three. Two of the three UDITPA factors are at issue in this appeal, specifically the sales factor and the payroll factor. Issues concerning the recalculation of penalties and interest and the tolling of interest for a specific period also need to be addressed.

I. Should TAXPAYER' Product sales in foreign countries during the Audit Period be "thrown back" to Utah and included in the numerator of the sales apportionment factor?

For purposes of UDITPA, the sales factor is defined in Section 59-7-317 and Rule 8(I), which provide that the sales factor is a fraction, "the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period." At

issue is the amount of "the total sales of the taxpayer in this state" (i.e., the numerator of the sales factor fraction).

Section 59-7-318 provides that "sales of tangible personal property are in this state" if: 1) the property is delivered or shipped to a purchaser in Utah;[3] or 2) "the property is shipped from an office, store, warehouse, factory, or other place of storage in this state; and . . . the taxpayer is not taxable in the state of the purchaser." The second criteria is commonly referred to as the "throwback rule" and is found in Section 59-7-318(2)(b) and Rule 8(I)(4). The throwback rule provides that a sale destined for another state or country is treated as a Utah sale for apportionment purposes if the taxpayer is not subject to income taxation in the other state or country. Auditing Division has determined that the sales TAXPAYER made into most foreign countries during the Audit Period should be thrown back into the numerator of its Utah sales factor, arguing that the evidence does not show that TAXPAYER was subject to taxation in these countries. TAXPAYER, on the other hand, asserts that the sales it made in foreign countries should not be considered Utah sales and should not be thrown back into the numerator of its Utah sales factor, arguing that the evidence shows that it was subject to taxation in these countries.

Section 59-7-305 and Rule 8(E) provide that a taxpayer is subject to taxation in another state or country: 1) if the taxpayer was subject to tax in that state or country, generally shown by producing the tax returns filed in that state or country; or 2) if the state or country had jurisdiction to tax the taxpayer, generally determined by whether or not the taxpayer's activities were limited to those protected from taxation under P.L. 86-272 and, if not, whether the "unprotected" activities were de minimis (see Rule 6(J)). In this case, TAXPAYER provided no

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2 For UDITPA purposes, "state" is defined in Section 59-7-302(6) to include a foreign country.

3 TAXPAYER also argued that the Commission needed to determine where title passed to see if the sale of a Product sold into a foreign country could be thrown back to Utah. TAXPAYERS' argument, however, improperly mixes the two criteria of Section 59-7-318. Although the passage of title may affect whether a sale is a Utah sale under Subsection 318(1), it does not appear to be relevant to the throwback rule under Subsection 318(2).

evidence to show that it filed income tax returns in or paid income tax to any of the foreign countries at issue. As a result, the Commission will need to determine whether TAXPAYERS' activities in the foreign countries at issue are protected under P.L. 86-272 and, if not, whether such activities were de minimis.[4] If TAXPAYERS' activities in these foreign countries do not exceed the activities protected under P.L. 86-272 or if TAXPAYER has unprotected activities that are de minimis, then it would not be subject to taxation in these countries. If TAXPAYER is not subject to taxation in these foreign countries, its sales into these countries would be thrown back to Utah and included in the numerator of the sales factor for apportionment purposes.

In its May 21, 2009 final schedules, Auditing Division included in the numerator of TAXPAYERS' sales factor all sales of Products that TAXPAYER sold and shipped from Utah into foreign countries, with two exceptions, specifically Auditing Division excluded: 1) all sales that TAXPAYER made into FOREIGN COUNTRY-2 for the entire Audit Period; and 2) all sales that TAXPAYER made into FOREIGN COUNTRY-1 for the last five years of the Audit Period (i.e., all years except for the 1998 tax year). Auditing Division determined that these sales should not be thrown back to Utah because TAXPAYERS' activities in these countries were sufficient to make it subject to taxation in these countries for these tax years. On the other hand, Auditing Division determined that TAXPAYERS' remaining sales to foreign countries should be thrown back to Utah because TAXPAYERS' activities in these countries were insufficient to subject it to taxation in these countries for these tax years.

TAXPAYER, however, contends that it had sufficient contacts with all foreign countries in which it sold Products to be subject to taxation in all countries for all years.[5] TAXPAYER explains that its business is unitary

4 Rule 6(N) clarifies that the "Tax Commission will apply the provisions of P.L. 86-272 and of this rule to business activities conducted in foreign commerce." It provides that where business activities are conducted by a domestic company selling tangible personal property into a country outside of the United States, the provisions of P.L. 86-272 are applied "to determine whether the sales transactions are protected and the company immune from taxation" in the foreign country and whether the throwback provisions of Section 59-7-318(2) will apply.

5 Nevertheless, TAXPAYER only asks the Commission to find that the sales for certain countries and for

and includes not only its domestic corporations, but also its foreign corporations. As such, TAXPAYER states that its total worldwide business is "functionally integrated" and "centrally managed" from Utah. Due to the unitary nature of its business, TAXPAYER argues that its activities, whether performed by its Utah entity or by its foreign subsidiaries, subject the entities that comprise its water's edge combined group to taxation in all foreign countries in which TAXPAYER does business.

TAXPAYER contends that its Utah entity and its water's edge combined group are conducting business in foreign countries as evidenced by the following systematic and regular activities in foreign countries, including: 1) In at least ##### foreign countries at issue, TAXPAYER has created foreign subsidiaries that own or lease real property and have employees; 2) TAXPAYER has systematically entered into contracts with many thousands of (Y) distributors in foreign countries, thereby making its Products available for sale in each foreign country at issue; 3) TAXPAYER ships its Products into the foreign countries at issue and would replace any damaged or returned property; 4) TAXPAYER has opened call centers to assist with problems in foreign countries and had some of the calls come into its Utah call center; and 5) TAXPAYER has systematically and regularly deployed employees from its Utah headquarters (i.e., employed by TAXPAYERS' water's edge combined group) into foreign countries to conduct various activities that are not protected by P.L. 86-272 and that are not de minimis. For these reasons, TAXPAYER asks the Commission to find that the foreign sales it has specifically identified in Exhibit P-17 (and which are compiled in Finding of Fact #31) are not Utah sales and should not be thrown back into the numerator of its sales factor. TAXPAYERS' argument that all these factors, when considered together,

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certain tax years should not be thrown back into the Utah sales factor numerator, as detailed in Exhibit P-17 and compiled in Finding of Fact #31. TAXPAYER explained at the hearing that its records were insufficient to determine the amounts of sales that it made into some foreign countries for some of the tax years in the Audit Period. For this reason, TAXPAYER is not contesting the total amount of foreign sales that Auditing Division "threw back" into the numerator of the sales factor. TAXPAYER is only contesting those specific amounts that it had sufficient records to attribute to a specific country for a specific year.

show that it is subject to taxation in every country in which its Products are sold is unpersuasive. TAXPAYERS' arguments will be addressed separately.

First, TAXPAYER has created foreign subsidiaries in many of the foreign countries at issue. Had TAXPAYER reported its income on a worldwide combined basis, the foreign subsidiaries would be considered as part of TAXPAYER for purposes of determining whether TAXPAYER was subject to taxation in these countries. But TAXPAYER did not report its income on this basis, even though it was permitted to do so under Utah law. Instead, TAXPAYER reported its income on water's edge combined basis, which excludes income earned outside of the United States. Accordingly, the existence and activities of TAXPAYERS' foreign subsidiaries do not subject TAXPAYERS' water's edge combined group to taxation in these foreign countries. TAXPAYER has separated its water's edge combined group from its foreign subsidiaries for tax purposes. Accordingly, their respective activities in a foreign country must also be separated to determine if the water's edge combined group is subject to taxation in that country.

Second, TAXPAYER argues that it is subject to taxation in all foreign countries at issue because it has made its Products available for sale in, has entered into contracts with many thousands of (Y) distributors in, and has shipped its Products into these countries. TAXPAYER points out that Rule 6(K)(19) provides that "entering into franchising of licensing agreements; [including] selling or otherwise transferring tangible personal property pursuant to such franchise or license by the franchisor or licensor to its franchisee or licensee. . . ." is an activity sufficient to make TAXPAYER subject to taxation. Because TAXPAYER enters into contracts with its (Y) distributors who are located in foreign countries and because tangible personal property is sold pursuant to these contracts, TAXPAYER argues that it is subject to taxation in the foreign countries.

However, these contracts are with distributors who are considered (Y) contractors. Rule 6(J)(2) clarifies that activities "conducted by (Y) contractors as described below" do not expose the company who entered into the contract with the (Y) contractor to taxation. Rule 6(M)(1) further explains that "(Y) contractors may engage in

the following limited activities in the state [or foreign country] without the company's loss of immunity; a) soliciting sales; b) making sales; c) maintaining an office." Accordingly, the fact that TAXPAYER has entered into contracts with (Y) contractors in the foreign countries at issue does not automatically expose TAXPAYER to taxation in these countries. With limited exceptions, as discussed later in the decision, TAXPAYER has not shown that its (Y) distributors engage in activities other than those listed in Rule 6(M)(1). As a result, TAXPAYER has not shown that its contracts with (Y) distributors in foreign countries necessarily expose it to taxation in the foreign countries at issue.

Third, TAXPAYER points out that a company is exposed to taxation in a foreign country if its activities include "shipping or delivering of goods into [a foreign country] by means of private vehicle, rail, water, air or other carrier" (emphasis added) (Rule 6(K)(20)) or "picking up or replacing damaged or returned property" (Rule 6(K)(11)). In regards to the shipping or delivery of goods, TAXPAYER has not shown that its deliveries are by "private" carrier. Auditing Division explained that TAXPAYER uses public carriers to transport its Products. TAXPAYER has the burden of proof and has not shown that it uses private carriers to deliver its goods. Nor has TAXPAYER provided any legal precedent to show that a company is exposed to taxation in a foreign country by shipping its goods into that country by public carrier. In regards to damaged goods, TAXPAYER argues that it would replace any goods that were damaged. If TAXPAYER sent its employees into a foreign country to replace goods, such an activity, if not de minimis, would expose TAXPAYER to taxation in that foreign country. TAXPAYER, however, did not explain the method by which it replaced damaged goods. If the replacement involved TAXPAYER shipping the replacement goods by public carrier to its (Y) distributor, such an action would not expose TAXPAYER to taxation in the foreign country. Accordingly, TAXPAYER has not met its burden to show that it is exposed to taxation in the foreign countries to which it ships goods and in which it replaces damaged goods.

Fourth, TAXPAYER has established call centers as the primary points of contact for distributors who require services or have questions, including questions about placement orders and distributor compensation. Call centers in foreign countries were typically established by TAXPAYERS' foreign subsidiaries and staffed by employees of the foreign subsidiary, which, as explained earlier, does not expose TAXPAYERS' water's edge combined group to taxation in the foreign countries. However, REPRESENTATIVE-4 FOR TAXPAYER testified that some foreign markets did not have their own call centers and were supported out of TAXPAYERS' call center in Utah. For example, REPRESENTATIVE-4 FOR TAXPAYER explained that the Utah call center supported FOREIGN COUNTRY-1 distributor questions until a call center was set up in FOREIGN COUNTRY-1 in 1999. TAXPAYER argues that such activities exposed TAXPAYER to taxation in foreign countries, in accordance with Rule 6(K)(7), which addresses "investigating, handling, or otherwise assisting in resolving customer complaints. . . ." However, distributors in foreign countries would contact the call center in Utah, and TAXPAYERS' employees in Utah would resolve the customer's questions. TAXPAYER presented no evidence to show that employees of TAXPAYERS' water's edge combined group resolved customer's questions in the foreign countries. Accordingly, TAXPAYER has not shown that it performed these activities in the foreign countries. The fact that TAXPAYERS' employees in Utah answered calls from foreign countries does not expose TAXPAYER to taxation in foreign countries.

Fifth, TAXPAYER presented evidence in the form of vouchers and credit card receipts (Exhibit P-21) to show that its employees made numerous trips to various foreign countries during each year of the Audit Period except for the 2003 tax year (no vouchers or credit card receipts were submitted for the 2003 tax year). TAXPAYER indicated that the vouchers and credit card receipts show that in the cumulative, travel by TAXPAYER personnel into foreign counties was regular and systematic and was not de minimis. The Commission received Exhibit P-21, but indicated at the hearing that the evidence in the exhibit would not, on its own, show that the travel was for a purpose other than the solicitation of sales, a protected activity under P.L. 86-

272. COMMISSIONER expressly pointed out that even though the Commission was accepting the Exhibit P-21 documents into evidence, the Commission, without additional evidence, has no idea of the purpose of any of trips.[6] *Wrigley* makes clear that the presence of employees of TAXPAYERS' water's edge combined group in a foreign country does not expose TAXPAYER to taxation in that country if the employees are only engaged in the solicitation of sales (the court in *Wrigley* determined that activities in a state must exceed activities concerning the solicitation of sales for a company to be subject to taxation in that state). The evidence in Exhibit P-21, by itself, does not show that TAXPAYER had activities in any foreign country that exceeded the protected activities of P.L. 86-272.

However, there is some additional evidence of activities that occurred in some foreign countries during some of the tax years. In accordance with Rule 6(Q), however, the evidence must be examined on a country by country basis and on a year by year basis to determine if TAXPAYERS' activities exceeded the protection afforded under P.L. 86-272 or if any unprotected activities were more than de minimis. When determining whether the yearly activities in a country expose TAXPAYER to taxation in that country for that year, the following will be considered.

Rule 6(J) provides that "P.L. 86-272 restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the company within the state consists of the solicitation of orders for sales of tangible personal property, which orders are sent outside the state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state." Rule

6 Furthermore, to ascertain the evidentiary value of the information in Exhibit P-21, the Commission spent numerous hours attempting to compile the trips taken by TAXPAYER employees to two countries, FOREIGN COUNTRY-1 and FOREIGN COUNTRY-24for the 1998 tax year. These trips are detailed later in the decision when it is discussed whether TAXPAYERS' activities expose it to income taxation in these countries for these years. The evidence in Exhibit P-21 is usually, if not always, too vague to show the purpose for which a trip is taken. It is also often too vague to even show when the trip was taken.

6(J)(2) further explains that "[f]or the in-state activity to be a protected activity under P.L. 86-272, it must be limited solely to solicitation, except for de minimis activities and activities conducted by (Y) contractors. . . ."

In addition, the United States Supreme Court addressed P.L. 86-272 in *Wrigley* and found that activities entirely ancillary to the solicitation of sales were also protected activities and would include "those that serve no (Y) business function apart from their connection to the soliciting of orders," but would not include "those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force." The Court also determined that there is a de minimis exception to the activities that forfeit immunity from taxation under P.L. 86-272. The Court found that "[w]hether in-state activity other than "solicitation of orders" is sufficiently de minimis to avoid loss of the tax immunity conferred by [P.L. 86-272] depends upon whether that activity establishes a nontrivial additional connection with the taxing State."

The countries and years at issue are:

A. FOREIGN COUNTRY-1.

Year at Issue: 1998

Foreign Subsidiary: TAXPAYER created two corporations that refer to FOREIGN COUNTRY-1: 1) a domestic corporation named COMPANY-4 that TAXPAYER first reported as part of its water's edge combined group on its federal return in the 2000 tax year; and 2) COMPANY-4-A ("COMPANY-4-A"), a FOREIGN COUNTRY-1 corporation that was wholly-owned by COMPANY-4 and that was incorporated on September 21, 2000 (during the 2001 tax year). It is not part of TAXPAYERS' water's edge combined group.

Contacts:

1) TAXPAYER argues that COMPANY-13(which is different from the COMPANY-4-A foreign subsidiary mentioned above) was a U.S. branch or division of TAXPAYER doing business in FOREIGN COUNTRY-1 in 1998 and that COMPANY-13 had an office and warehouse in FOREIGN COUNTRY-1 during the 1998 tax year at issue. To support this argument, TAXPAYER submitted a lease agreement (Exhibit P- 4A),

which shows a lease for a property in FOREIGN COUNTRY-1 beginning sometime in 1998. However, the lease does not show a specific date, so it is unknown if the lease was signed during the 1998 tax year at issue, which ended August 31, 1998. The lease also does not show who the lessee is.

It is noted that TAXPAYER provided Auditing Division with 1998 apportionment information that showed that its water's edge combined group had property in the 1998 tax year only in FOREIGN COUNTRY-2 and the United States, unlike the 1999 tax year apportionment information, on which TAXPAYER indicated a FOREIGN COUNTRY-1 Division of TAXPAYER that had inventory and supplies of $$$$$ on September 1, 1998 (the day after the 1998 tax year at issue) and in excess of $$$$$ as of August 31, 1999. The apportionment information for each year does not show any "rented property" in FOREIGN COUNTRY-1 until the 2000 tax year. Exhibit R-3.

2) The parties submitted a Notification of Foreign Corporation for TAXPAYER, to the Superintendent of CITY-1 OF FOREIGN COUNTRY-1 Tax Office showing that the name of the corporation as "TAXPAYER," that NAME-2 is the representative of TAXPAYER, and that the "Starting day of business in FOREIGN COUNTRY-1" was March 1, 1999 (during the 1999 tax year). Exhibit R-2 and P-5A. March 1, 1999 is after the 1998 tax year, which ended August 31, 1998. TAXPAYER indicated that NAME-2 was an (Y) contractor it had hired to help it with its business in FOREIGN COUNTRY-1.

3) TAXPAYER submitted a document identified as License No. ##### for Permission of Import and Sales of PRODUCTS approved by the Governor of CITY-1 OF FOREIGN COUNTRY in FOREIGN COUNTRY-1. Exhibit P-5B and P-5F. This document certifies that TAXPAYER, Inc. (the Utah company) is a licensed importer/seller of PRODUCTS beginning May 19, 1998 (during the 1998 tax year).

4) TAXPAYER also submitted a document identified as Certificate of Seal to show that NAME-2 obtained a certificate of seal for TAXPAYER, from a governmental entity in FOREIGN COUNTRY-1 on October 9, 1997 (during the 1998 tax year). Exhibit P-5C.

5) TAXPAYER submitted two Affidavits dated September 5, 1997 (during the 1998 tax year), both signed by NAME-2. Exhibits P-5D and P-5E. In the first affidavit, NAME-2 swore that he was the representative in FOREIGN COUNTRY-1 of "TAXPAYER, a U.S. Corporation organized and existing under the laws of Utah" and that TAXPAYER, was establishing a FOREIGN COUNTRY-1 Branch on September 5, 1997. In the second Affidavit, NAME-2 swore that he was the representative in FOREIGN COUNTRY-1 of TAXPAYER, and that "[t]he office in FOREIGN COUNTRY-1 shall be located at, ADDRESS-1 FOREIGN COUNTRY-1.

6) TAXPAYER provided a Power of Attorney dated August 7, 1998 (during the 1998 tax year), in which NAME-3, President of TAXPAYER, appointed NAME-4 of Utah County, Utah, to be his Attorney-in-Fact in FOREIGN COUNTRY-1 "[f]or the purpose of continuing TAXPAYER'S business operations in FOREIGN COUNTRY-1" and "to continue the business of a network marketing company in the FOREIGN COUNTRY-1 presently conducted by me under the trade name 'TAXPAYER' in FOREIGN COUNTRY-1." Exhibit P-10A.

7) TAXPAYER submitted evidence of significant payments that it made to NAME—4 and NAME-2 during the 1998 and 1999 tax years. Exhibits P-10B. The evidence shows that TAXPAYER paid or reimbursed NAME-4 for consulting fees for FOREIGN COUNTRY-1 and inventory (raw materials) during the 1998 tax year and reimbursed him for travel to FOREIGN COUNTRY-1. It also submitted evidence of payments made to NAME-2 during the 1998 tax year, for invoices describing: "travel," TAXPAYER video production," and "Productive Business Systems services."

Exhibit P-21 shows that NAME-4 made three trips to FOREIGN COUNTRY-1 during the 1998 tax year: 1) November 19 through November 25, 1997 (6 days); 2) May 11, 1998 through May 18, 1998 (7 days); and 3) June 17 through June 25, 1998 (8 days).

8) The 1998 summary sheets of Exhibit P-21 indicate that other TAXPAYER employees made trips to FOREIGN COUNTRY-1 in the 1998 tax year, as follows:

a) NAME--5, whose "Job Title / Description" is "FOREIGN COUNTRY-1 Specialist / FOREIGN COUNTRY-1 call center." A supporting voucher shows that he attended a "1998 Convention" in FOREIGN COUNTRY-1 from January 13 through January 18, 1998 (4 days).

b) NAME-6, whose "Job Title / Description" is "Executive Assistant / NAME-7 assistant." Information from NAME-3 CREDIT CARD ("credit card receipt") shows that a round-trip airline ticket from Utah to FOREIGN COUNTRY-1 was purchased for NAME-6 on September 2, 1998 (during the 1999 tax year). No information about the dates of the trip was shown on the receipt. However, if the ticket was purchased on September 2, 1998, it is assumed that the trip occurred on or after this date, which would be in the 1999 tax year.

c) NAME-8, whose "Job Title / Description" is "FOREIGN COUNTRY-1 Specialist / FOREIGN COUNTRY-1 call center." A credit card receipt shows that a round-trip airline ticket from Utah to FOREIGN COUNTRY-1 was purchased for NAME-8 on August 31, 1998 (last day of 1998 tax year). No information about the dates of the trip was shown on the receipt. However, if the ticket was purchased on August 31, 1998, the last date of the 1998 tax year, it is assumed that most, if not all, of the travel to FOREIGN COUNTRY-1 occurred in the 1999 tax year.

d) NAME-9, whose "Job Title / Description" is "Executive Assistant / Assistant to NAME-7." A credit card receipt shows that a round-trip airline ticket from Utah to FOREIGN COUNTRY-1 was purchased for NAME-9 on September 2, 1998 (during the 1999 tax year). No information about the dates of the trip was shown on the receipt. However, if the ticket was purchased on September 2, 1998, it is assumed that the trip occurred on or after this date, which would be in the 1999 tax year.

e) NAME-10, who has no "Job Title / Description." A credit card receipt shows that a round-trip airline ticket from Utah to FOREIGN COUNTRY-1 was purchased for NAME-10 on August 31, 1998 (last day of 1998 tax year). No information about the dates of the trip was shown on the receipt.

However, if the ticket was purchased on August 31, 1998, the last date of the 1998 tax year, it is assumed that most, if not all, of the travel to FOREIGN COUNTRY-1 occurred in the 1999 tax year.

f) NAME-3, whose "Job Title / Description" is "CoFounder/CoFounder." A supporting voucher shows that NAME-11 ticket to CITY-2 FOREIGN COUNTRY was paid on August 31, 1998 (last day of 1998 tax year), but does not show when he was in FOREIGN COUNTRY-1.

g) NAME-7, whose "Job Title / Description" is "CoFounder/CoFounder." A supporting voucher shows that NAME-12 ticket to CITY-2 FOREIGN COUNTY-1 was paid on August 31, 1998 (last day of 1998 tax year), but does not show when she was in FOREIGN COUNTRY-1.

h) NAME-13, who has no "Job Title / Description." A credit card receipt shows that a round-trip airline ticket from Utah to FOREIGN COUNTRY-1 was purchased for NAME-13 on August 31, 1998 (last day of 1998 tax year). No information about the dates of the trip was shown on the receipt. However, if the ticket was purchased on August 31, 1998, the last date of the 1998 tax year, it is assumed that most, if not all, of the travel to FOREIGN COUNTRY-1 occurred in the 1999 tax year.

i) NAME-14, whose "Job Title / Description" is "Executive Assistant / Assistant to NAME-7." A credit card receipt shows that a round-trip airline ticket from Utah to FOREIGN COUNTRY-1 was purchased for NAME-14 on September 2, 1998 (during the 1999 tax year). No information about the dates of the trip was shown on the receipt. However, if the ticket was purchased on September 2, 1998, it is assumed that the trip occurred on or after this date, which would be in the 1999 tax year.

j) NAME-15, whose "Job Title / Description" is "FOREIGN COUNTRY-1 Specialist / FOREIGN COUNTRY-1 call center." A credit card receipt shows that a round-trip airline ticket from Utah to FOREIGN COUNTRY-1 was purchased for NAME-15 on August 31, 1998 (last day of 1998 tax year). No information about the dates of the trip was shown on the receipt. However, if the ticket

was purchased on August 31, 1998, the last date of the 1998 tax year, it is assumed that most, if not all, of the travel to FOREIGN COUNTRY-1 occurred in the 1999 tax year.

k) NAME-16, whose Job Title / Description" is "FOREIGN COUNTRY-1 Specialist /int ops liaison." A credit card receipt shows that a round-trip airline ticket from Utah to FOREIGN COUNTRY-1 was purchased for NAME-16 on August 31, 1998 (last day of 1998 tax year). No information about the dates of the trip was shown on the receipt. However, if the ticket was purchased on August 31, 1998, the last date of the 1998 tax year, it is assumed that most, if not all, of the travel to FOREIGN COUNTRY-1 occurred in the 1999 tax year.

Conclusion. TAXPAYER asks that $$$$$ in sales it made in FOREIGN COUNTRY-1 during the 1998 tax year not be thrown back to Utah. In order to solicit sales in FOREIGN COUNTRY-1, it is reasonable to assume that TAXPAYER would need to notify the appropriate tax offices and obtain the required government licenses. These activities do not exceed the safe harbor of P.L. 86-272. The evidence presented regarding the travel of various employees does not establish the activities of those employees, nor does it establish that the travel occurred during the 1998 tax year. For these reasons, TAXPAYER has failed to carry the burden of showing that its activities in FOREIGN COUNTRY-1 for the 1998 tax year exceeded the limits of P.L. 86-272. Accordingly, the Commission sustains Auditing Division's determination that TAXPAYER was not subject to income taxation in FOREIGN COUNTRY-1 for the 1998 tax year and finds that Auditing Division appropriately threw back to Utah TAXPAYERS' sales in FOREIGN COUNTRY-1 for the 1998 tax year.

B. FOREIGN COUNTRY-24.

Years at Issue: 1998, 2001, 2002 and 2003.

Foreign Subsidiary: TAXPAYER created two corporations concerning FOREIGN COUNTRY-24: 1) a domestic corporation named COMPANY-7. that TAXPAYER first reported as part of its water's edge combined group on its federal return for the 2002 tax year; and 2) COMPANY-14 (COMPANY-14), a

FOREIGN COUNTRY-24 entity wholly-owned by TAXPAYER that was incorporated on December 12, 2002 (during the 2003 tax year). It is not part of TAXPAYERS' water's edge combined group.

Contacts:

1) By 1998, TAXPAYER indicated that it had established a FOREIGN COUNTRY-24 "branch." However, it only reported a FOREIGN COUNTRY-2 "branch" or "division" on its 1998 apportionment information documents. In addition, it only reported FOREIGN COUNTRY-2 and FOREIGN COUNTRY-1branches or divisions on its 1999, 2000, and 2001 apportionment documents. It did not report any branches or divisions on its 2002 and 2003 apportionment documents. Exhibit R-3.

2) TAXPAYER reported the existence of COMPANY-7, a domestic corporation it created and owned, on its 2002 and 2003 tax returns. On the 2002 tax return, TAXPAYER reported an $$$$$ "other deduction" for COMPANY-7 on its "Schedule of Combined Income and Deductions." This is the only activity reported by TAXPAYER for COMPANY-7 for the 2002 tax year on this schedule. TAXPAYER did not report for COMPANY-7 any "net sales," "inventory at beginning of year," or "inventory at end of year." It also did not report any expenses for COMPANY-7 for "salaries and wages" or "rents." Exhibit R-3.

Also on the 2002 tax return, TAXPAYER reported negative $$$$$ in "other current assets" as the only entry for COMPANY-7 on its "Schedule of Combined Ending Balance Sheet." TAXPAYER did not report any "cash," "inventories" or other assets or liabilities for COMPANY-7 on this schedule. Exhibit R-3.

3) On the 2003 tax return, TAXPAYER did not report any entries for COMPANY-7 on its "Schedule of Combined Income and Deductions" or on its "Schedule of Combined Ending Balance Sheet." Exhibit R-3.

4) Activities of NAME-17. TAXPAYER provided testimony and documents concerning NAME-17, who was associated with activities performed in FOREIGN COUNTRY-24, including activities in association with COMPANY-7, an entity owned by a distributor in FOREIGN COUNTRY-24 (and which appears to be

unrelated to the domestic and foreign corporations created by TAXPAYER for the FOREIGN COUNTRY-24 market around 2002). The evidence concerning NAME-17 includes:

a) A Letter of Agreement from TAXPAYER, to NAME-17 and is dated June 28, 1996. Exhibit P-9A. The Letter of Agreement is "to" NAME-17 "from" TAXPAYER, and is signed by NAME-17. This document provides that "[t]his Letter of Agreement is to memorialize the covenants between the parties regarding your continued employment as a director in FOREIGN COUNTRY-24, on an at will basis, and the additional benefits that TAXPAYER is willing to provide." The Letter of Agreement informed NAME-17 that as additional compensation for employment in FOREIGN COUNTRY-24, he would, unlike most other employees, be able to "build a (Z)" in his wife's name, subject to policies and procedures required of all distributors. It also informed him that he agreed to devote all energies to TAXPAYERS' business and that he would not engage in any other business activity.

b) A memorandum to NAME-17 "of COMPANY-14" from NAME-3, president of TAXPAYER, dated September 5, 1997 (during the 1998 tax year) and written on TAXPAYER letterhead showing a Utah address. Exhibit P-9B. In this letter, NAME-3 is informing NAME-17 of his concerns with NAME-17's performance in the FOREIGN COUNTRY-24 market and suggests that NAME-17 is a "country manager." The memorandum appears to show that NAME-17's expected duties included resolving issues with a distributor concerning pricing and where to purchase Products. It also indicates that NAME-3 is concerned that NAME-17 has submitted unsupported office expenses in excess of $$$$$. This document suggests that NAME-17's activities may have exceeded those allowed under P.L. 86-272. However, this memorandum could be construed to suggest that NAME-17 was an employee of COMPANY-14, an entity not in the TAXPAYER water's edge combined group.

c) REPRESENTATIVE-3 FOR TAXPAYER stated that NAME-17 was an employee of TAXPAYER, but also stated that he did not know whether NAME-17 was on the payroll of TAXPAYER, or of

COMPANY-14. REPRESENTATIVE-5 FOR TAXPAYER stated that he knows NAME-17 and that it is his understanding that NAME-17 was a TAXPAYER employee because he saw an employment agreement dated November 1994 that NAME-17 signed with TAXPAYER, and because NAME-17 completed a W-4 form in the same timeframe. REPRESENTATIVE-5 FOR TAXPAYER stated that he did not believe that a non-employee would complete a W-4. However, no information was presented to show whether the 1994 contract and W-4 were prior to NAME-17 taking on duties in FOREIGN COUNTRY-24.

d) Travel of NAME-17. The 1998 summary sheet in Exhibit P-21 indicates that NAME-17 made one trip to FOREIGN COUNTRY-24 and identifies him as "FOREIGN COUNTRY-24 Specialist / International liaison." A credit card receipt shows that a round-trip airline ticket from Utah to FOREIGN COUNTRY-24 was purchased for NAME-17 on September 4, 1998 (during the 1999 tax year). No information about the dates of the trip was shown on the receipt. However, if the ticket was purchased on September 4, 1998, it is assumed that the trip occurred on or after this date, which would be in the 1999 tax year, not during the 1998 tax year. The summary sheets for 1999, 2000, 2001 and 2002 tax years do not indicate that NAME-17 made any foreign trips during these tax years.

5) Activities of NAME-18. Evidence concerning the activities of NAME-18 includes:

a) A Consultant Agreement dated June 6, 2001 (during the 2001 tax year), between TAXPAYER, Inc., the Utah corporation, and NAME-18 ("Consultant"), a FOREIGN COUNTRY-24n who was a distributor for TAXPAYER in FOREIGN COUNTRY-24. Exhibit P-13B. In the agreement, TAXPAYER indicated that it distributes its Products in various Eastern European countries, including FOREIGN COUNTRY-24n and FOREIGN COUNTRY-28, and that "[i]n its efforts to service and administer these contracts, TAXPAYER desires to retain the services of Consultant to assist TAXPAYER in fulfilling its obligations under these contracts in Eastern Europe[.]" The Consultant agreed "to assist TAXPAYER in fulfilling its agreements with its various contract distributors located in Eastern Europe, including FOREIGN COUNTRY-24 and the FOREIGN

COUNTRY-28, in a manner to be directed by TAXPAYER through TAXPAYER' various managers and employees." The agreement provided that NAME-18duties would include:

> . . . management and supervision of TAXPAYER contract distributor agreements that service TAXPAYER distributors located throughout Eastern Europe, including FOREIGN COUNTRY-24 and the FOREIGN COUNTRY-28. Consultant shall be required to assist TAXPAYER in fulfilling its obligations to these contract distributors pursuant to the various agreements between TAXPAYER and the contract distributors. Such assistance shall include, but is not limited to, assistance in shipping and receiving product, clearing customs and registering product, distributor relations, bonus calculations and payments, information technology, quality control, and all other business functions necessary to the fulfillment of TAXPAYER agreements with its contract distributors as Consultant is directed by TAXPAYER.

It appears that NAME-18expected duties exceed those allowed of an (Y) contractor under Rule 6(M) and those allowed under P.L. 86-272. The agreement was dated June 6, 2001, which is during the 2001 tax year. The agreement provides that it would be in effect for a year (which would have been during both the 2001 and 2002 tax years) and would renew automatically unless terminated by either party. TAXPAYER did not indicate how long the agreement was in effect (i.e., whether it was still in effect during the 2003 tax year). b)

REPRESENTATIVE-6 FOR TAXPAYER explained that he would have drafted the Consultant Agreement between TAXPAYER and NAME-18 on behalf of TAXPAYER International Department in Utah. He stated that the contract was entered into for the purpose of TAXPAYER expanding its business in eastern Europe and FOREIGN COUNTRY-24 and FOREIGN COUNTRY-28.

6) REPRESENTATIVE-4 FOR TAXPAYER testified that he went to FOREIGN COUNTRY-24 sometime in 2000 to implement a compensation plan change at offices there. The evidence in Exhibit P-21 shows that REPRESENTATIVE-4 FOR TAXPAYER was present in FOREIGN COUNTRY-24 between October 13 and October 18, 2000 (5 days), which would have occurred during the 2001 tax year.

7) Travel to FOREIGN COUNTRY-24 in 1998 Tax Year. The 1998 summary sheets of Exhibit P-21 indicate that TAXPAYER employees made trips to FOREIGN COUNTRY-24 in the 1998 tax year, as follows:

a) NAME-19, whose "Job Title / Description" is "International Specialist / International market liaison." A supporting voucher shows that she was in CITY IN FOREIGN COUNTRY -24 for 18 days between July 21 and August 8, 1998 (during the 1998 tax year).

Information from NAME-3 CREDIT CARD shows that a round-trip airline ticket from Utah to FOREIGN COUNTRY-24 was purchased for NAME-19 on September 23, 1998 (during the 1999 tax year). No information about the dates of the trip was shown on the receipt. However, if the ticket was purchased on September 23, 1998, it is assumed that the trip occurred on or after this date, which would be in the 1999 tax year.

b) NAME-17, whose "Job Title / Description" is "FOREIGN COUNTRY-24 Specialist / International liaison." As discussed earlier, a credit card receipt shows that a round-trip airline ticket from Utah to FOREIGN COUNTRY-24 was purchased for NAME-17 on September 4, 1998 (during the 1999 tax year). No information about the dates of the trip was shown on the receipt. However, if the ticket was purchased on September 4, 1998, it is assumed that the trip occurred on or after this date, which would be in the 1999 tax year.

c) NAME-20, who has no "Job Title / Description." A credit card receipt shows that an airline ticket from FOREIGN COUNTRY-29 to FOREIGN COUNTRY-24 and another ticket from FOREIGN COUNTRY-24 to the FOREIGN COUNTRY-30 were purchased for NAME-20 on June 26, 1998 (during the 1998 tax year). No information about the dates of the trip was shown on the receipts.

d) NAME-21, who has no "Job Title / Description." However, there does not appear to be a voucher or credit card receipt in the supporting evidence to show that NAME-21 was in FOREIGN COUNTRY-24.

e) NAME-22 whose "Job Title / Description" is "FOREIGN COUNTRY-24 Specialist / International Operations liaison." A supporting voucher dated July 14, 1998 (during the 1998 tax year) shows that NAME-22 was in CITY IN FOREIGN COUNTRY-24 for 8 days, but does not show the days of the trip.

A credit card receipt shows that a round-trip airline ticket from Utah to FOREIGN COUNTRY-24 was purchased for NAME-22 on September 23, 1998 (during the 1999 tax year). No information about the dates of the trip was shown on the receipt. However, if the ticket was purchased on September 23, 1998, it is assumed that the trip occurred on or after this date, which would be in the 1999 tax year.

f) NAME-3, whose "Job Title / Description" is "CoFounder/CoFounder." A supporting voucher in the 1998 folder shows that NAME-11 was reimbursed for travel expenses to FOREIGN COUNTRY-22/FOREIGN COUNTRY-20 and FOREIGN COUNTRY-24/FOREIGN COUNTRY-28, but does not show the dates of the trips or the amount of time spent in each country.

g) NAME-23, whose "Job Title / Description" is "Finance/accounting." A credit card receipt shows that two round-trip airline tickets from Utah to FOREIGN COUNTRY-24 were purchased for NAME-23, one on October 10, 1998 and another on November 6, 1998 (both during the 1999 tax year). No information about the dates of the trip or trips was shown on the receipts. However, if the tickets were purchased on October 10, 1998 and November 6, 1998, it is assumed that the trip or trips occurred on or after these dates, which would be in the 1999 tax year.

8) 2001, 2002, and 2003 Tax Years. For these three years, any travel to FOREIGN COUNTRY-24 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER,

REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified, or by NAME-24, whose resume was submitted, has been documented before.

Conclusion. TAXPAYER asks that sales it made in FOREIGN COUNTRY-24 during the 1998, 2001, 2002, and 2003 tax years not be thrown back to Utah, which includes: 1) $$$$$ in sales for 1998; 2) $$$$$ in sales for 2001; 3) $$$$$ in sales for 2002; and 4) $$$$$ in sales for 2003. It is noted that the amount of sales TAXPAYER is contesting for FOREIGN COUNTRY-24 for 1998 ($$$$$) is significantly higher than amounts of sales contested for 2001, 2002, and 2003 (less than $$$$$ for each of these years). However, Auditing Division did not contest the *amount* of sales that TAXPAYER determined it made into FOREIGN COUNTRY-24 for any year at issue.

The information regarding NAME-17 is ambiguous. No evidence was presented to prove that the W-4 or the employment agreement was executed prior to NAME-17 taking on FOREIGN COUNTRY-24 duties. It appears that he had some responsibilities for resolving customer disputes. However, Rule 6(L)(12) provides that such activities may not cause the loss of P.L. 86-272 protection. It is not clear what duties any of the employees performed who made trips to FOREIGN COUNTRY-24 during the 1998 tax year.

The duties of NAME-18, however, do appear to exceed the P.L. 86-272 protections. The agreement with NAME-18 was in effect during both the 2001 and 2002 tax years. Although the agreement could renew automatically, no evidence was presented that it was in fact renewed. For these reasons, TAXPAYER has carried its burden of showing that its FOREIGN COUNTRY-24 sales should not be thrown back to Utah for the 2001 and 2002 tax years. With regards to the other years at issue, 1999 and 2003, TAXPAYER has not carried its burden of proof. Accordingly, the numerator of TAXPAYER sales apportionment factor should be reduced by $$$$$ for the 2001 sales and $$$$$ for the 2002 sales.

C. Four Stocklist Countries (FOREIGN COUNTRY-13, FOREIGN COUNTRY-28, FOREIGN COUNTRY-18, and FOREIGN COUNTRY-14).

REPRESENTATIVE-3 FOR TAXPAYER testified that TAXPAYER had agreements with entities in several countries where TAXPAYER would send its Products to one entity in a country and then that entity would disperse TAXPAYER Products to distributors in those countries. TAXPAYER characterized these agreements as "stocklist" agreements and provided copies of agreements it had with entities in FOREIGN COUNTRY-13, FOREIGN COUNTRY-28, FOREIGN COUNTRY-18, and FOREIGN COUNTRY-14. In the case of FOREIGN COUNTRY-13, FOREIGN COUNTRY-28, and FOREIGN COUNTRY-18, TAXPAYER itself entered into the stocklist agreements with a TAXPAYER distributor located in that country. The stocklist agreements for FOREIGN COUNTRY-13 and FOREIGN COUNTRY-28 characterized the distributors as "wholesale suppliers" of TAXPAYER Products in the respective countries. The stocklist agreement for FOREIGN COUNTRY-18 characterized the relationship between the FOREIGN COUNTRY-18 distributor and TAXPAYER as a "distributor – distributee" relationship. Although TAXPAYER was a party to the agreements for FOREIGN COUNTRY-13, FOREIGN COUNTRY-28 and FOREIGN COUNTRY-18, it was not in the case of FOREIGN COUNTRY-14. The FOREIGN COUNTRY-14 stocklist agreement was between a distributor and COMPANY-15, a FOREIGN COUNTRY-14 corporation that was a foreign subsidiary of TAXPAYER and not part of TAXPAYER water's edge combined group.

C1. FOREIGN COUNTRY-13.

Years at Issue: 2001, 2002 and 2003

Foreign Subsidiary: No

Contacts:

1) Stocklist Agreement. TAXPAYER submitted a "stocklist" Agreement between TAXPAYER, the Utah corporation, and COMPANY-16. ("COMPANY-16"), an unrelated FOREIGN COUNTRY-24 company. Exhibit P-6A. The Agreement is dated June 14, 2001 (which is in the 2001 tax year). REPRESENTATIVE-3 FOR TAXPAYER testified that although COMPANY-16 is not an entity related to

TAXPAYER, it was a TAXPAYER distributor that also oversaw the selling of TAXPAYER Products in FOREIGN COUNTRY-13.

The Agreement provides that COMPANY-16 is entering into the Agreement to "act as a wholesale supplier of TAXPAYER products in FOREIGN COUNTRY-13[.]" It also provides that TAXPAYER is entering into the Agreement to "further develop and enlarge its (Y) distributor network in FOREIGN COUNTRY-13 with the assistance of COMPANY-16, for their mutual benefit[.]" In the Agreement, COMPANY-16 agreed to act as TAXPAYER exclusive bulk supplier in FOREIGN COUNTRY-13, whereby COMPANY-16 "shall direct all TAXPAYER business functions in FOREIGN COUNTRY-13." COMPANY-16 also agreed to pay all shipping costs for Products to be delivered to FOREIGN COUNTRY-13 and all costs to distribute Products in FOREIGN COUNTRY-13. COMPANY-16 also agreed that "it will provide suitable warehousing facilities and storage of TAXPAYER Products that have been shipped by TAXPAYER to COMPANY-16 in order to maintain marketable quantity of the Products."

Although the term of the Agreement was for one year (comprising parts of both the 2001 and 2002 tax years), it contained a provision providing that the Agreement would be renewed automatically for successive one year periods unless either party terminated it.

In the Agreement, the parties describe their "Nature of Relationship" in Paragraph 8.1, as follows:

> 8.1 **Wholesale Supplier Relationship**. At all times, COMPANY-16 shall be the wholesale supplier of TAXPAYER Products in FOREIGN COUNTRY-13. Nothing contained or implied in this Agreement will be construed to constitute either party as the legal representative or agent of the other or to constitute or construe the Parties as partners, joint venturers, co-owners or otherwise as participants in a joint or common undertaking. . . .

COMPANY-16 is an (Y) contractor under Rule 6(M). Rule 6(M)(1) provides that an (Y) contractor may engage in the following activities without the company losing its immunity from taxation: soliciting sales, making sales, and maintaining an office. Furthermore, Rule 6(M)(3) provides that "[m]aintenance of stock of

goods in the state by the (Y) contractor under consignment or any other type of arrangement with the company, except for purposes of display and solicitation, shall remove the protection."

2) Visits by TAXPAYER Employees. For years at issue, there was no travel to FOREIGN COUNTRY-13 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified, or by NAME-24, whose resume was submitted.

Conclusion. TAXPAYER asks that sales made in FOREIGN COUNTRY-13 during the 2001, 2002, and 2003 tax years not be thrown back to Utah, which includes: 1) $$$$$ in sales for 2001; 2) $$$$$ in sales for 2002; and 3) $$$$$ in sales for 2003.

TAXPAYER contract with COMPANY-16 is sufficient to show that TAXPAYER had income tax nexus with FOREIGN COUNTRY-13 for the 2001 and 2002 tax years. The most logical reading of the contract is that COMPANY-16 was storing inventory on TAXPAYER behalf in FOREIGN COUNTRY-13 during these two years. Rule 6(K)(17) provides that such an activity is not protected by P.L. 86-272. The agreement was in effect during both the 2001 and 2002 tax years. Although the agreement could renew automatically, no evidence was presented that it was in fact renewed and in effect for the 2003 tax year. For these reasons, TAXPAYER has carried its burden of showing that its sales in FOREIGN COUNTRY-13 should not be thrown back to Utah for the 2001 and 2002 tax years. With regards to the 2003 tax year, TAXPAYER has not carried its burden of proof. Accordingly, the numerator of TAXPAYER sales apportionment factor should be reduced by $$$$$ for the 2001 sales and $$$$$ for the 2002 sales.

C2. FOREIGN COUNTRY-28.

Years at Issue: 2001, 2002, and 2003

Foreign Subsidiary: No

Contacts:

1) Stocklist Agreement. Effective May 15, 2001 (during the 2001 tax year), TAXPAYER, entered into an Agreement with COMPANY-16 ("COMPANY-16"), a FOREIGN COUNTRY-28 corporation that was owned by a party unrelated to TAXPAYER. Exhibit P-6C. The Agreement with COMPANY16 is most similar to the stocklist agreement for FOREIGN COUNTRY-13, as the parties also describe their "Nature of Relationship" in Paragraph 8.1, as follows:

> 8.1 **Wholesale Supplier Relationship**. At all times, COMPANY-16 shall be the wholesale supplier of TAXPAYER Products in the FOREIGN COUNTRY-28. Nothing contained or implied in this Agreement will be construed to constitute either party as the legal representative or agent of the other or to constitute or construe the Parties as partners, joint venturers, co-owners or otherwise as participants in a joint or common undertaking. . . .

In the Agreement, COMPANY-16 agreed that "it will provide suitable warehousing facilities and storage of TAXPAYER Products that have been shipped by TAXPAYER to COMPANY-16 in order to maintain marketable quantity of the Products." Although the term of the Agreement was for one year (comprising parts of both the 2001 and 2002 tax years), it contained a provision providing that the Agreement would be renewed automatically for successive one year periods unless either party terminated it.

2) Activities of NAME-18. TAXPAYER provided a Consultant Agreement dated June 6, 2001 (during the 2001 tax year), between TAXPAYER, the Utah corporation, and NAME-18 ("Consultant"), a FOREIGN COUNTRY-24 who was a distributor for TAXPAYER in FOREIGN COUNTRY-24. Exhibit P-13B. In the Agreement, TAXPAYER indicated that it distributes its Products in various Eastern European countries, including FOREIGN COUNTRY-24 and the FOREIGN COUNTRY-28, and that "[i]n its efforts to service and administer these contracts, TAXPAYER desires to retain the services of Consultant to assist TAXPAYER in fulfilling its obligations under these contracts in Eastern Europe[.]" The Consultant agreed "to assist TAXPAYER in fulfilling its agreements with its various contract distributors located in Eastern Europe, including FOREIGN COUNTRY-24 and the FOREIGN COUNTRY-28, in a manner to be directed by

TAXPAYER through TAXPAYERS' various managers and employees." The Agreement provided that NAME-18 duties would include:

> . . . management and supervision of TAXPAYER contract distributor agreements that service TAXPAYER distributors located throughout Eastern Europe, including FOREIGN COUNTRY-24 and the FOREIGN COUNTRY-28. Consultant shall be required to assist TAXPAYER in fulfilling its obligations to these contract distributors pursuant to the various agreements between TAXPAYER and the contract distributors. Such assistance shall include, but is not limited to, assistance in shipping and receiving product, clearing customs and registering product, distributor relations, bonus calculations and payments, information technology, quality control, and all other business functions necessary to the fulfillment of TAXPAYERS' agreements with its contract distributors as Consultant is directed by TAXPAYER.

REPRESENTATIVE-6 FOR TAXPAYER explained that he would have drafted the Agreement between TAXPAYER and NAME-18 on behalf of TAXPAYER International Department in Utah. He stated that the contract was entered into for the purpose of TAXPAYER expanding its business in eastern Europe, including FOREIGN COUNTRY-24 and the FOREIGN COUNTRY-28. It appears that NAME-18expected duties exceeded those allowed of an (Y) contractor under Rule 6(M). It also appears that the duties also exceed those activities allowed under P.L. 86-272.

The agreement was dated June 6, 2001, which is during the 2001 tax year. The agreement provides that it would be in effect for a year (during both the 2001 and 2002 tax years) and would renew automatically unless terminated by either party. Although the agreement could renew automatically, no evidence was presented that it was in fact renewed and in effect for the 2003 tax year.

3) Visits by NAME-24. From 2001 to 2003, NAME-1 worked for TAXPAYER, the Utah corporation, as an International Operations Co-Director. See Exhibit P-10E (NAME-1Resume). NAME-1resume indicates that in this position, he provided supervision over TAXPAYERS' International Department functions. He also provided direction for Managing Directors in foreign markets and was responsible for ensuring successful business operations in a number of foreign countries.

Exhibit P-21 contains information that suggests that NAME-1visited the FOREIGN COUNTRY-28 several times in 2001 and 2002, as explained below:

a) A credit card receipt shows that an airline ticket to the FOREIGN COUNTRY-28 and FOREIGN COUNTRY-24 was purchased in NAME-1 name on August 8, 2000 (during the 2000 tax year which is not at issue for the FOREIGN COUNTRY-28). However, there is no information to know whether the trip occurred prior to August 31, 2000 (during the 2000 tax year where the FOREIGN COUNTRY-28 is not at issue) or on or after September 1, 2000 (during the 2001 tax year where the FOREIGN COUNTRY-28 is at issue). In addition, there is no information on the number of days spent in either country.

b) A credit card receipt shows that an airline ticket to the FOREIGN COUNTRY-28 and FOREIGN COUNTRY-24 was purchased in NAME-1 name on November 1, 2000 (during the 2001 tax year). However, there is no information showing the dates of travel or the number of days spent in either country.

c) A credit card receipt shows that an airline ticket to the FOREIGN COUNTRY-28, FOREIGN COUNTRY-24, and FOREIGN COUNTRY-11 was purchased in NAME-1name on May 14, 2002 (purchased during the 2002 tax year). However, there is no information showing the dates of travel or the number of days spent in any of the countries.

d) A credit card receipt shows that an airline ticket to the FOREIGN COUNTRY-28 and FOREIGN COUNTRY-11 was purchased in NAME-1name on May 1, 2002 (purchased during the 2002 tax year). However, there is no information showing the dates of travel or the number of days spent in any of the countries.

4) Visits by TAXPAYERS' Employees. For years at issue, there was no travel to the FOREIGN COUNTRY-28 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified.

Conclusion. TAXPAYER asks that sales made in the FOREIGN COUNTRY-28 during the 2001, 2002, and 2003 tax years not be thrown back to Utah, which includes: 1) $$$$$ in sales for 2001; 2) $$$$$ in sales for 2002; and 3) $$$$$ in sales for 2003.

TAXPAYERS' contract with COMPANY-16 is sufficient to show that TAXPAYER had income tax nexus with the FOREIGN COUNTRY-28 for the 2001 and 2002 tax years. The most logical reading of the contract is that COMPANY-16 was storing inventory on TAXPAYERS' behalf in the FOREIGN COUNTRY-28 during these two years. As previously noted, Rule 6(K)(17) provides that this activity is not protected by P.L. 86-272. The agreement was in effect during both the 2001 and 2002 tax years. Although the agreement could renew automatically, no evidence was presented that it was in fact renewed and in effect for the 2003 tax year.

The duties of NAME-18 also appear to exceed the P.L. 86-272 protections. The agreement with NAME-18 was in effect during both the 2001 and 2002 tax years. Although the agreement could renew automatically, no evidence was presented that it was in fact renewed and in effect for the 2003 tax year. For these reasons, TAXPAYER has carried its burden of showing that its sales in the FOREIGN COUNTRY-28 should not be thrown back to Utah for the 2001 and 2002 tax years. With regards to the 2003 tax year, TAXPAYER has not carried its burden of proof. Accordingly, the numerator of TAXPAYERS' sales apportionment factor should be reduced by $$$$$ for the 2001 sales and $$$$$ for the 2002 sales.

C3. FOREIGN COUNTRY-18

Years at Issue: 2001, 2002, and 2003

Foreign Subsidiary: No

Contacts:

1) Stocklist Agreement. Effective January 1, 2001 (during the 2001 tax year), TAXPAYER, entered into an Agreement with COMPANY-17 a FOREIGN COUNTRY-18 corporation unrelated to TAXPAYER. Exhibit P-6B. The Agreement with COMPANY-17 in FOREIGN COUNTRY-18 had slight differences from the stocklist agreements discussed earlier for FOREIGN COUNTRY-13 and FOREIGN COUNTRY-28. In the agreements for FOREIGN COUNTRY-13 and the FOREIGN COUNTRY-28, the parties' relationship was described as a "wholesale supplier relationship." In the Agreement with COMPANY-17 in FOREIGN COUNTRY-18, the "Nature of the Relationship" was described in Paragraph 8.1, as follows:

> 8.1 **Distributor – Distributee Relationship**. The relationship between TAXPAYER and COMPANY-17 will be and at all times remain, respectively, that of Distributee and Distributor. Nothing contained or implied in this Agreement will be construed to constitute either party as the legal representative or agent of the other or to constitute or construe the Parties as partners, joint venturers, co-owners or otherwise as participants in a joint or common undertaking. . . .

In addition, in the Agreement for FOREIGN COUNTRY-18, COMPANY-17 agreed that "it will provide suitable warehousing facilities and storage of TAXPAYER Products that have been shipped by TAXPAYER to COMPANY-17." Unlike the agreements for FOREIGN COUNTRY-13 and FOREIGN COUNTRY-28, however, this provision of the Agreement for FOREIGN COUNTRY-18 did not require COMPANY-17 to provide facilities in order to "maintain marketable quantity of the Products." REPRESENTATIVE-3 FOR TAXPAYER also explained that prior to this Agreement being signed, TAXPAYER had had an agreement with COMPANY-17 since 1997 or before as its distributor in FOREIGN COUNTRY-18 and that COMPANY-17 had previously been performing the functions memorialized in the Agreement. It appears that these activities exceed those protected by P.L. 86-272.

The Agreement for FOREIGN COUNTRY-18 had a term of two years, unlike the ones in place in FOREIGN COUNTRY-13 and the FOREIGN COUNTRY-28, which had terms of one year each. Accordingly, the Agreement in FOREIGN COUNTRY-18 was in place during the 2001, 2002, and 2003 tax years at issue.

2) Visits by TAXPAYERS' Employees. For years at issue, there was no travel to FOREIGN COUNTRY-18 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified, or by NAME-24, whose resume was submitted.

Conclusion. TAXPAYER asks that sales made in FOREIGN COUNTRY-18 during the 2001, 2002, and 2003 tax years not be thrown back to Utah, which includes: 1) $$$$$ in sales for 2001; 2) $$$$$ in sales for 2002; and 3) $$$$$ in sales for 2003.

TAXPAYERS' contract with COMPANY-17 is sufficient to show that TAXPAYER had income tax nexus with the FOREIGN COUNTRY-28 for the 2001, 2002, and 2003 tax years. The most logical reading of the contract is that COMPANY-17 was storing inventory on TAXPAYERS' behalf in FOREIGN COUNTRY-18 during these three years. As previously noted, Rule 6(K)(17) provides that this activity is not protected by P.L. 86-272. For these reasons, TAXPAYER has carried its burden of showing that its sales in FOREIGN COUNTRY-18 should not be thrown back to Utah for the 2001, 2002, and 2003 tax years. Accordingly, the numerator of TAXPAYERS' sales apportionment factor should be reduced by $$$$$ for the 2001 sales, $$$$$ for the 2002 sales, and $$$$$ for the 2003 sales.

C4. FOREIGN COUNTRY-14.

Years at Issue: 2001, 2002, and 2003

Foreign Subsidiary: In January 1996, TAXPAYER created a FOREIGN COUNTRY-14 corporation named COMPANY-9 / COMPANY-15 This corporation is not part of TAXPAYERS' water's edge combined group.

Contacts**:**

1) Stocklist Agreement. Effective June 1, 2001 (during the 2001 tax year), COMPANY-9 /COMPANY-15, FOREIGN COUNTRY-14 corporation, entered into the TAXPAYER Stocklist Centre Sales

Office Operator Agreement with COMPANY-15(COMPANY-15) ("COMPANY-15"). Exhibit P-6D. In the contract, COMPANY-9 / COMPANY-15 appointed COMPANY-15 as the sole distributor of TAXPAYERS' Products in FOREIGN COUNTRY-14. REPRESENTATIVE-3 FOR TAXPAYER testified that this contract was another stocklist agreement. Unlike the other stocklist agreement discussed previously, this agreement was not entered into by TAXPAYER, but by COMPANY-9 / COMPANY-15, foreign subsidiary that was not part of TAXPAYERS' water's edge combined group. As a result, this contract has no impact on whether TAXPAYERS' activities are sufficient to expose it to income taxation in FOREIGN COUNTRY-14.

2) Visits by TAXPAYERS' Employees. For years at issue, there was no travel to FOREIGN COUNTRY-14 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified, or by NAME-24, whose resume was submitted.

Conclusion. TAXPAYER asks that sales made in FOREIGN COUNTRY-14 during the 2001, 2002, and 2003 tax years not be thrown back to Utah, which includes: 1) $$$$$ in sales for 2001; 2) $$$$$ in sales for 2002; and 3) $$$$$ in sales for 2003.

TAXPAYER has not met its burden of showing that it or a member of its water's edge combined group had sufficient contacts with FOREIGN COUNTRY-14 to be subject to taxation in FOREIGN COUNTRY-14 for the three years at issue. Accordingly, no FOREIGN COUNTRY-14 sales should be removed from the numerator of TAXPAYERS' sales apportionment factor.

D. FOREIGN COUNTRY-9.

Year at Issue: 2003

Foreign Subsidiary: TAXPAYER created two corporations concerning FOREIGN COUNTRY-9: 1) a domestic corporation named COMPANY-8 that TAXPAYER first reported as part of its water's edge combined group on its federal return for the 2003 tax year; and 2) a foreign subsidiary named COMPANY-19

that TAXPAYER created in FOREIGN COUNTRY-9 on December 23, 2002. It is not part of TAXPAYERS' water's edge combined group.

Contacts:

1) NAME-25. TAXPAYER provided an International Long-Term Assignment Letter dated April 30, 2003 ("Assignment Letter") in regards to NAME-25, who received an assignment from TAXPAYER to work in FOREIGN COUNTRY-9. Exhibit P-10F. The Assignment Letter provides that "[TAXPAYER anticipates] that your assignment will begin 1 June 2003 and will last a minimum of two years." June 1, 2003 falls within the 2003 tax year at issue for FOREIGN COUNTRY-9. REPRESENTATIVE-3 FOR TAXPAYER explained that TAXPAYER assigned NAME-25 to move to FOREIGN COUNTRY-9 and run the office there. In the Assignment Letter, TAXPAYER described NAME-25's assignment, as follows:

> As an employee of TAXPAYER, you will be seconded to COMPANY-19. Your position will be that of Managing Director, FOREIGN COUNTRY-9, reporting to European Managing Director. For the duration of the assignment, you will exclusively support COMPANY-9. For the duration of this assignment, you will not act on behalf of TAXPAYER, in FOREIGN COUNTRY -9 and you will not conclude contracts in the name of TAXPAYER, in FOREIGN COUNTRY -9.

The Assignment Letter specifically provides in the "Compensation" section that "[NAME-25] will be an employee of the TAXPAYER company, paid on the TAXPAYER, payroll." The "Benefits" section of the letter provides that "[l]ife insurance, business travel accident insurance, retirement plans, disability and healthcare coverage will continue to be provided by TAXPAYER, while on assignment." The letter also provides that "TAXPAYER, will look to COMPANY-19 for reimbursement of costs associated with this agreement." The presence of a TAXPAYER employee assigned to "run the office" of the FOREIGN COUNTRY-9 subsidiary would not be a protected activity under P.L. 86-272.

2) Agreement for Services and Guarantee. On June 10, 2003 (during the 2003 tax year at issue for FOREIGN COUNTRY-9), TAXPAYER, entered into an Agreement for Services and Guarantee with four

TAXPAYER or TAXPAYER related distributors ("Service Agreement"). Exhibit P-13C. Two of the four distributors were FOREIGN COUNTRY-9 citizens located in FOREIGN COUNTRY-9, while the remaining two distributors were located in the United States. In the Service Agreement, TAXPAYER indicated that "[o]ver the months of June through October 2003, TAXPAYER is assisting its sister company, COMPANY-19 in opening the FOREIGN COUNTRY-9 market to sell TAXPAYER products in FOREIGN COUNTRY -9[.]" The Service Agreement also provided that the distributors "shall be acting as (Y) contractors in performing the Duties and shall not be considered to deemed to be an agent, employee, joint venture, or partner of TAXPAYER."

3) REPRESENTATIVE-4 FOR TAXPAYER explained that he helped train call center management and distributor compensation specialists in FOREIGN COUNTRY -9 when that office opened. However, REPRESENTATIVE-4 FOR TAXPAYER stated that this occurred after the Audit Period, which would not affect a nexus determination for FOREIGN COUNTRY -9 for the 2003 tax year at issue.

4) From 2001 to 2003, NAME-1 worked for TAXPAYER, the Utah corporation, as an International Operations Co-Director. NAME-1 resume indicates that in this position, he provided supervision over TAXPAYERS' International Department functions. He also provided direction for Managing Directors in foreign markets and was responsible for ensuring successful business operations in a number of foreign countries. Exhibit P-21 shows that NAME-1 traveled to FOREIGN COUNTRY-9 on behalf of TAXPAYER one time in either 2002 or 2003. A credit card receipt shows that an airline ticket to FOREIGN COUNTRY-9 and FOREIGN COUNTRY-15 was purchased in NAME-1 name on July 23, 2002 (purchased during the 2002 tax year). It is not known whether NAME-1 traveled to these countries on or before August 31, 2002 (during the 2002 tax year when FOREIGN COUNTRY-9 is not at issue) or after August 31, 2002 (during the 2003 tax year when FOREIGN COUNTRY-9 is at issue). In any case, there was no information showing the number of days spent in either country.

5) Exhibit P-21 does not include travel information to any foreign country for the 2003 tax year.

Conclusion. TAXPAYER asks the Commission not to throw back $$$$$ of sales made in FOREIGN COUNTRY-9 for the 2003 tax year. The other tax years are not at issue for FOREIGN COUNTRY-9.

The activities that NAME-25 performed on behalf of TAXPAYER in FOREIGN COUNTRY-9 in 2003 are not ones that are protected by P.L. 86-272. TAXPAYER has met its burden to show that it was subject to income taxation in FOREIGN COUNTRY-9 for the 2003 tax year. Accordingly, the numerator of TAXPAYERS' sales apportionment factor should be reduced by $$$$$ for the 2003 sales.

E. FOREIGN COUNTRY-15.

Years at Issue: 1998, 1999, 2000, 2001, 2002 and 2003

Foreign Subsidiary: TAXPAYER created a foreign subsidiary in FOREIGN COUNTRY-15 in 1994, identified as COMPANY-12 which is not part of TAXPAYERS' water's edge combined group.

Contacts:

1) NAME-24. TAXPAYER provided a resume of NAME-24. Exhibit P-10E. REPRESENTATIVE-3 FOR TAXPAYER testified that NAME-1 was the country manager of TAXPAYERS' FOREIGN COUNTRY-15 operations in 1997. NAME-1 resume indicates that he worked for COMPANY-12 (the foreign corporation) in FOREIGN COUNTRY-15 for the period "1997 – 1998" to help build out new facilities, including a will-call/customer service center and, in general, to direct the official opening of the FOREIGN COUNTRY-15market. The resume suggests that NAME-1 was an employee of the foreign corporation, not TAXPAYER, during the "1997 – 1998" period. TAXPAYER provided no Assignment Letter or other documentation to show otherwise. Accordingly, the activities that NAME-1 performed in 1997 – 1998, including those in FOREIGN COUNTRY-15, may be assumed to be one performed while an employee of COMPANY-12 and are not activities that would expose TAXPAYER to nexus in FOREIGN COUNTRY-15 for the "1997 – 1998" period.

2) However, sometime in 1998, NAME-1 resume suggests that he left the employment of COMPANY-12 and became an employee of TAXPAYER itself. For TAXPAYER, NAME-1 was an International Development Manager from 1999 to 2001 and an International Operations Co-Director from 2001 to 2003. In these positions, NAME-1 supported TAXPAYERS' existing foreign markets and helped build new foreign markets for TAXPAYER. The evidence in Exhibit P-21 shows that NAME-1 traveled to FOREIGN COUNTRY-15 on behalf of TAXPAYER three times between 1999 and 2002 or 2003, specifically:

a) An expense report in Exhibit P-21 shows that NAME-1 traveled to FOREIGN COUNTRY-15 and FOREIGN COUNTRY-31. The expense report has a date of June 9, 1999 (which would be the 1999 tax year, even though the report was found in the binder for the 2000 tax year). The expense report shows expenses for dates of "21 through 29" without indicating a month or year. As a result, it is not known whether this trip occurred in 1999 (as suggested by the report date) or 2000 (as the expense report is located in the binder for the 2000 tax year). In any case, the expense report does not show how many days NAME-1spent in FOREIGN COUNTRY-15 and how many days were spent in FOREIGN COUNTRY-31.

b) Expense information shows that NAME-1 was in FOREIGN COUNTRY-15 on June 19 and 20, 2000 (during the 2000 tax year).

c) A credit card receipt shows that an airline ticket to FOREIGN COUNTRY-9 and FOREIGN COUNTRY-15 was purchased in NAME-1 name on July 23, 2002 (purchased during the 2002 tax year). It is not known whether NAME-1 traveled to these countries on or before August 31, 2002 (during the 2002 tax year) or after August 31, 2002 (during the 2003 tax year). In any case, there is no information showing the number of days spent in either country.

3) Visits by TAXPAYERS' Employees. For years at issue, there was no travel to FOREIGN COUNTRY-15 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified.

Conclusion. TAXPAYER asks that sales made in FOREIGN COUNTRY-15 not be thrown back to Utah for all years of the Audit Period, as follows: 1) $$$$$ in sales for 1998; 2) $$$$$ in sales for 1999; 3) $$$$$ in sales for 2000, 4) $$$$$ in sales for 2001; 5) $$$$$ in sales for 2002; and 6) $$$$$ in sales for 2003.

It appears that NAME-1 worked not for TAXPAYER, but for a foreign subsidiary that was not part of TAXPAYERS' water's edge combined group, in 1997 and 1998. TAXPAYER has not met its burden of showing otherwise. Accordingly, NAME-1 activities in FOREIGN COUNTRY-15 in 1997 and 1998 do not expose TAXPAYER to taxation in FOREIGN COUNTRY-15 for the "1997 – 1998" period.

In addition, once NAME-1 began working for TAXPAYER in 1998, he appears to have visited FOREIGN COUNTRY-15 three times, once in either 1999 or 2000, once in 2002, and again in either 2002 or 2003. The information is not specific enough to know which years other than 2000 that NAME-1 was in FOREIGN COUNTRY-15. In addition, there is no evidence to show what NAME-1 did while in FOREIGN COUNTRY-15. In-state recruitment, training, and evaluation of sale personnel and use of local facilities for sales-related meetings were allowed in *Wrigley*, and Rule 6(L)(11) provides that they do not exceed the protection of P.L. 86-272. For these reasons, TAXPAYER has not met its burden of showing that it had sufficient contacts with FOREIGN COUNTRY-15 to be subject to taxation in FOREIGN COUNTRY-15 for any tax year in the Audit Period. Accordingly, no FOREIGN COUNTRY-15 sales should be removed from the numerator of TAXPAYERS' sales apportionment factor.

F. FOREIGN COUNTRY-11.

Years at Issue: 1998, 1999, 2000, 2001, 2002 and 2003

Foreign Subsidiary: TAXPAYER created a foreign subsidiary in the FOREIGN COUNTRY-11 in 1995 that is named COMPANY-20 It is not part of TAXPAYERS' water's edge combined group.

Contacts: Travel to the FOREIGN COUNTRY-11 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified, and by NAME-24, whose resume was submitted, was considered. There is evidence to show that several of these employees traveled to the FOREIGN COUNTRY-11 during the Audit Period, as follows:

1) REPRESENTATIVE-3 FOR TAXPAYER, who is in-house legal counsel for TAXPAYER, stated that during the Audit Period, the legal department from Utah began doing "legal audits" in foreign countries to determine whether subsidiaries were in legal compliance with the laws not only of the United States, but also the laws of the country in which the subsidiary was located. REPRESENTATIVE-3 FOR TAXPAYER stated that he undertook legal audits in FOREIGN COUNTRY-21, FOREIGN COUNTRY-3, FOREIGN COUNTRY-2, the FOREIGN COUNTRY-11and FOREIGN COUNTRY-19.

a) The evidence in Exhibit P-21 shows that REPRESENTATIVE-3 FOR TAXPAYER made a trip to the FOREIGN COUNTRY-11 and to FOREIGN COUNTRY-9 between October 14 and October 21, 2000 (during the 2001 tax year). The evidence, however, does not show how many days REPRESENTATIVE-3 FOR TAXPAYER was in each country.

b) The evidence in Exhibit P-21 shows that REPRESENTATIVE-3 FOR TAXPAYER made a trip to FOREIGN COUNTRY-21 and FOREIGN COUNTRY-3 between May 14 and May 25, 2001. However, other evidence shows that he was in the FOREIGN COUNTRY-11 between these dates. These dates are also in the 2001 tax year.

2) REPRESENTATIVE-5 FOR TAXPAYER, who came to TAXPAYER in 2000 as International Controller, was responsible for TAXPAYERS' accounting outside of the United States. He explains that he hired

people who would become employees not of TAXPAYER, but of the foreign subsidiaries. He stated that he held some interviews by telephone in Utah and some in person in foreign countries. The evidence in Exhibit P-21 shows that REPRESENTATIVE-5 FOR TAXPAYER made one trip to the FOREIGN COUNTRY-11 between July 14 and July 27, 2002 (during the 2002 tax year).

3) For TAXPAYER, NAME-1 was an International Development Manager from 1999 to 2001 and an International Operations Co-Director from 2001 to 2003. In these positions, NAME-1 supported TAXPAYERS' existing foreign markets and helped build new foreign markets for TAXPAYER. Exhibit P-21 shows that NAME-1 traveled to the FOREIGN COUNTRY-11on behalf of TAXPAYER several times between 1999 and 2002, specifically:

a) NAME-1 traveled to the FOREIGN COUNTRY-11and was at the London office between August 21 and 29, 1999 (during the 1999 tax year).

b) Information shows that NAME-1 was in the FOREIGN COUNTRY-11between May 16 and 19, 2000 (during the 2000 tax year). Another document in the same Exhibit P-21 binder shows that NAME-1 was present in the FOREIGN COUNTRY-11 for three nights. However, it is unclear if these three nights corresponded to the May 16 through 19, 2000 dates.

c) A credit card receipt shows that an airline ticket to the FOREIGN COUNTRY-28 and the FOREIGN COUNTRY-11 was purchased in NAME-1 name on May 1, 2002 (purchased during the 2002 tax year). However, there is no information showing the dates of travel or the number of days spent in either of the countries.

d) A credit card receipt shows that an airline ticket to the FOREIGN COUNTRY-28, FOREIGN COUNTRY-24, and the FOREIGN COUNTRY-11 was purchased in NAME-1 name on May 14, 2002 (purchased during the 2002 tax year). However, there is no information showing the dates of travel or the number of days spent in any of the countries.

Conclusion. TAXPAYER asks that sales made in the FOREIGN COUNTRY-11 not be throw back to Utah for all years of the Audit Period, as follows: 1) $$$$$ in sales for 1998; 2) $$$$$ in sales for 1999; 3) $$$$$ in sales for 2000, 4) $$$$$ in sales for 2001; 5) $$$$$ in sales for 2002; and 6) $$$$$ in sales for 2003.

Again, there is no evidence to show what NAME-1 did while in the FOREIGN COUNTRY-11. In-state recruitment, training, and evaluation of sales personnel and use of local facilities for sales-related meetings were allowed in *Wrigley* (i.e., did not exceed the protection of P.L. 86-272). TAXPAYER has not shown that NAME-1 activities are ones that are not protected by P.L. 86-272.

On the other hand, the activities that REPRESENTATIVE-3 FOR TAXPAYER and REPRESENTATIVE-5 FOR TAXPAYER performed in the FOREIGN COUNTRY-11in 2001 and 2002 are not ones that are protected by P.L. 86-272. These activities could expose TAXPAYER to income taxation for the years in which they occurred, if the unprotected activities are not de minimis.

2001 Tax Year. REPRESENTATIVE-3 FOR TAXPAYER made a 7-day trip to the FOREIGN COUNTRY-11 and FOREIGN COUNTRY-9 in the 2001 tax year to conduct a legal audit. The information is ambiguous on whether he made another trip to the FOREIGN COUNTRY-11in this tax year. In *Wrigley*, the United States Supreme Court found that whether an unprotected, in-state activity "is sufficiently de minimis to avoid loss of the tax immunity conferred by [P.L. 86-272] depends upon whether that activity establishes a nontrivial additional connection with the taxing State." One trip to the FOREIGN COUNTRY-11 of 7 days or less to conduct a legal audit appears to be a trivial connection with the FOREIGN COUNTRY-11 and to be sufficiently de minimis to avoid loss of the tax immunity conferred by P.L. 86-272. TAXPAYER has not provided any legal precedent to suggest otherwise. Accordingly, TAXPAYER has not met its burden of showing that it would be exposed to income taxation in the FOREIGN COUNTRY-11 for the 2001 tax year.

2002 Tax Year. REPRESENTATIVE-5 FOR TAXPAYER made a 12-day trip to the FOREIGN COUNTRY-11 in the 2002 tax year in regards to accounting personnel. Although this activity is not one

protected by P.L. 86-272, one trip for 12 days appears, again, to be a trivial connection with the FOREIGN COUNTRY-11 and to be sufficiently de minimis to avoid loss of the tax immunity conferred by P.L. 86-272. No legal precedent was submitted that shows otherwise. Accordingly, TAXPAYER has not met its burden of showing that it would be exposed to income taxation in the FOREIGN COUNTRY-11 for the 2002 tax year.

TAXPAYER has not met its burden of showing that it had sufficient contacts with the FOREIGN COUNTRY-11 to be subject to income taxation in the FOREIGN COUNTRY-11 for any tax year in the Audit Period. Accordingly, no sales in the FOREIGN COUNTRY-11 should be removed from the numerator of TAXPAYERS' sales apportionment factor.

G. FOREIGN COUNTRY-3.

Years at Issue: 1998, 1999, 2000, 2001, 2002 and 2003

Foreign Subsidiary: TAXPAYER created a foreign subsidiary named COMPANY-21 in August 1994. It is not part of TAXPAYERS' water's edge combined group.

Contacts:

Travel to FOREIGN COUNTRY-3 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified, and by NAME-24, whose resume was submitted, was considered. There is evidence to show that two of these employees traveled to FOREIGN COUNTRY-3 during the Audit Period, as follows:

1) REPRESENTATIVE-3 FOR TAXPAYER, who is in-house legal counsel for TAXPAYER, stated that during the Audit Period, the legal department from Utah began doing "legal audits" in foreign countries. REPRESENTATIVE-3 FOR TAXPAYER stated that he undertook legal audits in FOREIGN

COUNTRY-21, FOREIGN COUNTRY-3, FOREIGN COUNTRY-2, the FOREIGN COUNTRY-11 and FOREIGN COUNTRY-19. The evidence in Exhibit P-21 shows that REPRESENTATIVE-3 FOR TAXPAYER made one trip to FOREIGN COUNTRY-21 and FOREIGN COUNTRY-3 between May 14 and May 25, 2001 (during the 2001 tax year). However, the evidence does not indicate the number of days he was in each of these countries.

2) REPRESENTATIVE-5 FOR TAXPAYER, who came to TAXPAYER in 2000 as International Controller, was responsible for TAXPAYERS' accounting outside of the United States and sometimes held interviews in foreign countries to hire employees who would work in the foreign countries. The evidence in Exhibit P-21 shows that REPRESENTATIVE-5 FOR TAXPAYER made a trip to FOREIGN COUNTRY-3 between November 29 and December 4, 2002 (during the 2003 tax year).

Conclusion. TAXPAYER asks that the sales it made into FOREIGN COUNTRY-3 not be throw back to Utah for all years of the Audit Period, as follows: 1) $$$$$ in sales for 1998; 2) $$$$$ in sales for 1999; 3) $$$$$ in sales for 2000, 4) $$$$$ in sales for 2001; 5) $$$$$ in sales for 2002; and 6) $$$$$ in sales for 2003.

The activities that REPRESENTATIVE-3 FOR TAXPAYER and REPRESENTATIVE-5 FOR TAXPAYER performed in FOREIGN COUNTRY-3 during the 2001 and 2003 tax years are not ones that are protected by P.L. 86-272. These activities could expose TAXPAYER to income taxation for the years in which they occurred, if the unprotected activities are not de minimis.

2001 Tax Year. REPRESENTATIVE-3 FOR TAXPAYER made an 11-day trip to FOREIGN COUNTRY-3 and FOREIGN COUNTRY-21 in the 2001 tax year to conduct a legal audit. It is unknown how many of these days were spent in FOREIGN COUNTRY-3 and how many in FOREIGN COUNTRY-21. Even if REPRESENTATIVE-3 FOR TAXPAYER spent all but one of these days in FOREIGN COUNTRY -3, one 10-day trip to FOREIGN COUNTRY-3 to conduct a legal audit appears to be a trivial connection with FOREIGN COUNTRY-3 and to be sufficiently de minimis to avoid loss of the tax immunity conferred by P.L. 86-272.

TAXPAYER has not provided any legal precedent to suggest otherwise. Furthermore, TAXPAYER provided no information to show the actual number of days spent in FOREIGN COUNTRY-3. Accordingly, TAXPAYER has not met its burden of showing that it would be exposed to income taxation in FOREIGN COUNTRY-3 for the 2001 tax year.

2003 Tax Year. REPRESENTATIVE-5 FOR TAXPAYER made a 5-day trip to FOREIGN COUNTRY-3 in the 2003 tax year in regards to accounting personnel. Although this activity is not one protected by P.L. 86-272, one trip for 5 days appears, again, to be a trivial connection with FOREIGN COUNTRY-3 and to be sufficiently de minimis to avoid loss of the tax immunity conferred by P.L. 86-272. No legal precedent was submitted that shows otherwise. Accordingly, TAXPAYER has not met its burden of showing that it would be exposed to income taxation in FOREIGN COUNTRY-3 for the 2003 tax year.

TAXPAYER has not met its burden of showing that it had sufficient contacts with FOREIGN COUNTRY-3 to be subject to income taxation in FOREIGN COUNTRY-3 for any tax year in the Audit Period. Accordingly, no sales in FOREIGN COUNTRY-3 should be removed from the numerator of TAXPAYERS' sales apportionment factor.

H. FOREIGN COUNTRY-21.

Years at Issue: 1998, 1999, 2000, 2001, 2002 and 2003

Foreign Subsidiary: TAXPAYER had three foreign subsidiaries in FOREIGN COUNTRY-21 during the Audit Period. The first one is identified as COMPANY-22("COMPANY-22") and was created in November 1995. The other two were created in 1994 and are identified as COMPANY-23 and COMPANY-24 They are not part of TAXPAYERS' water's edge combined group.

Contacts:

Travel to FOREIGN COUNTRY-21 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and

REPRESENTATIVE-6 FOR TAXPAYER, who testified, and by NAME-24, whose resume was submitted, was considered. There is evidence to show that two of these employees traveled to FOREIGN COUNTRY-21 during the Audit Period, as follows:

1) REPRESENTATIVE-3 FOR TAXPAYER, who is in-house legal counsel for TAXPAYER, stated that during the Audit Period, the legal department from Utah began doing "legal audits" in foreign countries. REPRESENTATIVE-3 FOR TAXPAYER stated that he undertook legal audits in FOREIGN COUNTRY-21, FOREIGN COUNTRY-3, FOREIGN COUNTRY-2, the FOREIGN COUNTRY-11and FOREIGN COUNTRY-19. The evidence in Exhibit P-21 shows that REPRESENTATIVE-3 FOR TAXPAYER made one trip to FOREIGN COUNTRY-21 and FOREIGN COUNTRY-3 between May 14 and May 25, 2001 (during the 2001 tax year). However, the evidence does not indicate the number of days he was in each of these countries.

2) REPRESENTATIVE-5 FOR TAXPAYER, who came to TAXPAYER in 2000 as International Controller, was responsible for TAXPAYERS' accounting outside of the United States and sometimes held interviews in foreign countries to hire employees who would work in the foreign countries. The evidence in Exhibit P-21 shows that REPRESENTATIVE-5 FOR TAXPAYER made one trip to FOREIGN COUNTRY-21 between November 25 and November 29, 2002 (during the 2003 tax year).

Conclusion. TAXPAYER asks that the sales it made in FOREIGN COUNTRY-21 not be thrown back to Utah for all years of the Audit Period, as follows: 1) $$$$$ in sales for 1998; 2) $$$$$ in sales for 1999; 3) $$$$$ in sales for 2000, 4) $$$$$ in sales for 2001; 5) $$$$$ in sales for 2002; and 6) $$$$$ in sales for 2003.

The activities that REPRESENTATIVE-3 FOR TAXPAYER and REPRESENTATIVE-5 FOR TAXPAYER performed in FOREIGN COUNTRY-21 during the 2001 and 2003 tax years are not ones that are protected by P.L. 86-272. These activities could expose TAXPAYER to income taxation for the years in which they occurred, if the unprotected activities are not de minimis.

2001 Tax Year. REPRESENTATIVE-3 FOR TAXPAYER made an 11-day trip to FOREIGN COUNTRY-3 and FOREIGN COUNTRY-21 in the 2001 tax year to conduct a legal audit. It is unknown how many of these days were spent in FOREIGN COUNTRY-3 and how many in FOREIGN COUNTRY-21. Even if REPRESENTATIVE-3 FOR TAXPAYER spent all but one of these days in FOREIGN COUNTRY-21, one 10-day trip to FOREIGN COUNTRY-21 to conduct a legal audit appears to be a trivial connection with FOREIGN COUNTRY-21 and to be sufficiently de minimis to avoid loss of the tax immunity conferred by P.L. 86-272. TAXPAYER has not provided any legal precedent to suggest otherwise. Furthermore, TAXPAYER provided no information to show the actual number of days spent in FOREIGN COUNTRY-21. Accordingly, TAXPAYER has not met its burden of showing that it would be exposed to income taxation in FOREIGN COUNTRY-21 for the 2001 tax year.

2003 Tax Year. REPRESENTATIVE-5 FOR TAXPAYER made a 4-day trip to FOREIGN COUNTRY-21 in the 2003 tax year in regards to accounting personnel. Although this activity is not one protected by P.L. 86-272, one trip for 4 days appears, again, to be a trivial connection with FOREIGN COUNTRY-21 and to be sufficiently de minimis to avoid loss of the tax immunity conferred by P.L. 86-272. No legal precedent was submitted that shows otherwise. Accordingly, TAXPAYER has not met its burden of showing that it would be exposed to income taxation in FOREIGN COUNTRY-21 for the 2003 tax year.

TAXPAYER has not met its burden of showing that it had sufficient contacts with FOREIGN COUNTRY-21 to be subject to income taxation in FOREIGN COUNTRY-21 for any tax year in the Audit Period. Accordingly, no sales in FOREIGN COUNTRY-21 should be removed from the numerator of TAXPAYERS' sales apportionment factor.

I. FOREIGN COUNTRY-16.

Years at Issue: 2001, 2002 and 2003

Foreign Subsidiary: TAXPAYER created a foreign subsidiary in FOREIGN COUNTRY-16 on November 15, 1998, named COMPANY-25. It is not part of TAXPAYERS' water's edge combined group.

Contacts:

Travel to FOREIGN COUNTRY-16 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified, and by NAME-24, whose resume was submitted, was considered. Evidence shows that these employees traveled to FOREIGN COUNTRY-21 during the Audit Period, as follows:

1) REPRESENTATIVE-5 FOR TAXPAYER, who came to TAXPAYER in 2000 as International Controller, was responsible for TAXPAYERS' accounting outside of the United States. He explained that he hired people who would become employees not of TAXPAYER, but of the foreign subsidiaries. He stated that he held some interviews in foreign countries. Evidence in Exhibit P-21 shows that REPRESENTATIVE-5 FOR TAXPAYER traveled to FOREIGN COUNTRY-1 and FOREIGN COUNTRY-16 between June 19 and July 3, 2001 (during the 2001 tax year). The evidence, however, does not show how many days he spent in each of the countries.

2) REPRESENTATIVE-6 FOR TAXPAYER, who has been in-house corporate counsel for TAXPAYER since January 2001, explained that attorneys from TAXPAYER would occasionally travel to foreign markets to meet with office staff and with local counsel retained in these markets. REPRESENTATIVE-6 FOR TAXPAYER stated that in March 2001, he and a colleague in the TAXPAYER legal department traveled to FOREIGN COUNTRY-16 to conduct a legal audit of the TAXPAYER FOREIGN COUNTRY-16 operation. The evidence in Exhibit P-21 shows that REPRESENTATIVE-6 FOR TAXPAYER made two trips to FOREIGN COUNTRY-16 during the 2001 tax year, as follows:

a) REPRESENTATIVE-6 FOR TAXPAYER traveled to FOREIGN COUNTRY-16 between February 24 and March 3, 2001 (during the 2001 tax year).

b) REPRESENTATIVE-6 FOR TAXPAYER also traveled to FOREIGN COUNTRY-16 and FOREIGN COUNTRY-1 between March 24 and March 31, 2001 (during the 2001 tax year). The evidence, however, does not show how many days REPRESENTATIVE-6 FOR TAXPAYER spent in each of the countries during this trip.

3) NAME-1 resume shows that between 1999 and 2001, he worked for TAXPAYER as an International Development Manager. In this position, NAME-1 "facilitated market penetration into FOREIGN COUNTRY-16" and "hired and trained the Managing Director for FOREIGN COUNTRY-16." However, there is no evidence in Exhibit P-21 of any travel for NAME-1 to FOREIGN COUNTRY-16.

Conclusion. TAXPAYER asks that sales made in FOREIGN COUNTRY-16 not be thrown back to Utah for the 2001, 2002, and 2003 tax years, as follows: 1) $$$$$ in sales for 2001; 2) $$$$$ in sales for 2002; and 3) $$$$$ in sales for 2003.

There is no evidence to show that NAME-1 traveled to FOREIGN COUNTRY-16 during the 2001, 2002, and 2003 tax years at issue. Although he may have been responsible for certain activities of TAXPAYER in FOREIGN COUNTRY-16 during the 2001 tax year, the evidence does not show that he performed these activities in FOREIGN COUNTRY-16 or that his activities would not have been protected by P.L. 86-272. Accordingly, TAXPAYER has not shown that NAME-1 activities expose it to income taxation in FOREIGN COUNTRY-16.

On the other hand, the activities that REPRESENTATIVE-5 FOR TAXPAYER, REPRESENTATIVE-6 FOR TAXPAYER, and a colleague of REPRESENTATIVE-6 FOR TAXPAYER performed in FOREIGN COUNTRY-16 during the 2001 tax year are not ones that are protected by P.L. 86-272. These activities could expose TAXPAYER to income taxation for the years in which they occurred, if the unprotected activities are not

de minimis. The evidence shows that three employees made four trips to FOREIGN COUNTRY-16 in the 2001 tax year for activities not protected by P.L. 86-272, as follows: 1) REPRESENTATIVE-5 FOR TAXPAYER, who hired accounting personnel in foreign countries, spent 13 days in FOREIGN COUNTRY-16 and FOREIGN COUNTRY-1 during the 2001 tax year; 2) REPRESENTATIVE-6 FOR TAXPAYER, who conducted a legal audit in FOREIGN COUNTRY-16, spent 7 days in FOREIGN COUNTRY-16 between February 24 and March 3, 2001; 3) REPRESENTATIVE-6 FOR TAXPAYER also spent another 7 days in FOREIGN COUNTRY-16 and FOREIGN COUNTRY-1 between March 24 and March 31, 2001; and 4) REPRESENTATIVE-6 FOR TAXPAYER testified that a colleague from the TAXPAYER legal department accompanied him on one of trips to FOREIGN COUNTRY-16 in March 2001.

The exact number of days of each trip in FOREIGN COUNTRY-16 is not known. Nevertheless, the fact that three different TAXPAYER employees made four trips to FOREIGN COUNTRY-16 in 2001 for purposes outside the protection of P.L. 86-272 shows that TAXPAYER established more than a trivial connection with FOREIGN COUNTRY-16 in 2001. Accordingly, these contacts are not sufficiently de minimis for TAXPAYER to avoid the loss of the immunity conferred by P.L. 86-272 for the 2001 tax year.

As a result, TAXPAYER has met its burden of showing that it was subject to income taxation in FOREIGN COUNTRY-16 for the 2001 tax year. However, TAXPAYER has not met its burden of showing that it was subject to taxation in FOREIGN COUNTRY-16 for 2002 and 2003, the other two years at issue. Accordingly, the numerator of TAXPAYERS' sales apportionment factor should be reduced by $$$$$ for the 2001 sales only.

J. FOREIGN COUNTRY-19.

Years at Issue: 1998, 1999, 2000, 2001, 2002 and 2003

Foreign Subsidiary: TAXPAYER has created three foreign subsidiaries in FOREIGN COUNTRY-19. The first one is identified as COMPANY-26 and was created on November 15, 1993. The other two were

both created on April 26, 2001 and are identified as TD Importaciones, COMPANY-27 and COMPANY-28. They are not part of TAXPAYERS' water's edge combined group.

Contacts:

Travel to FOREIGN COUNTRY-19 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified, and by NAME-24, whose resume was submitted, was considered. Evidence shows that these employees traveled to FOREIGN COUNTRY-19 during the Audit Period, as follows:

1) REPRESENTATIVE-3 FOR TAXPAYER, who is in-house legal counsel for TAXPAYER, stated that he undertook a legal audit in FOREIGN COUNTRY-19. A credit card receipt in Exhibit P-21 shows that two airline tickets to FOREIGN COUNTRY-19 were purchased in the name of REPRESENTATIVE-3 FOR TAXPAYER, one on May 24, 2000 and the other on the following day, May 25, 2000 (purchases made during the 2000 tax year). However, the information does not show whether the travel occurred on or before August 31, 2000 (during the 2000 tax year) or later in 2000 (during the 2001 tax year). Also, the information does not provide the length of the trip or trips.

2) REPRESENTATIVE-4 FOR TAXPAYER testified that he traveled to FOREIGN COUNTRY-19 in December 1997 (during the 1998 tax year) and twice in 2000 and 2001 (which could be the 2000, 2001, and/or the 2002 tax years) to document processes in FOREIGN COUNTRY-19 in anticipation of upgrading the computer system in FOREIGN COUNTRY-19 and in regards to the calculation of distributor compensation. There is no evidence in Exhibit P-21 to show that REPRESENTATIVE-4 FOR TAXPAYER traveled to FOREIGN COUNTRY-19 in December 2007 or that he traveled to FOREIGN COUNTRY-19 more than once in 2000 and 2001. The evidence in Exhibit P-21 shows that REPRESENTATIVE-4 FOR TAXPAYER traveled to

FOREIGN COUNTRY-19 once, specifically between the dates of June 4 and June 9, 2001 (during the 2001 tax year).

3) REPRESENTATIVE-5 FOR TAXPAYER, who came to TAXPAYER in 2000 as International Controller, was responsible for TAXPAYERS' accounting outside of the United States and would travel to foreign countries to hire accounting employees for the foreign subsidiaries. The evidence in Exhibit P-21 shows that REPRESENTATIVE-5 FOR TAXPAYER also made one trip to FOREIGN COUNTRY-19 between June 4 and June 9, 2001 (during the 2001 tax year).

Conclusion. TAXPAYER asks that sales made in FOREIGN COUNTRY-19 not be thrown back to Utah for all years of the Audit Period, as follows: 1) $$$$$ in sales for 1998; 2) $$$$$ in sales for 1999; 3) $$$$$ in sales for 2000, 4) $$$$$ in sales for 2001; 5) $$$$$ in sales for 2002; and 6) $$$$$ in sales for 2003.

The activities that REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-4 FOR TAXPAYER, and REPRESENTATIVE-5 FOR TAXPAYER performed in FOREIGN COUNTRY-19 are not ones that are protected by P.L. 86-272. These activities, as discussed below, could expose TAXPAYER to income taxation for the years in which they occurred, if the unprotected activities are not de minimis.

1998 Tax Year. REPRESENTATIVE-4 FOR TAXPAYER testified that he went to FOREIGN COUNTRY-19 during the 1998 tax year in regards to computer systems and/or distributor compensation. However, there is no information in Exhibit P-21 to support his recollection of the trip or to show that number of days he spent in FOREIGN COUNTRY-19 on this trip. However, even if there were supporting evidence of this trip, one trip of unknown duration by an employee for a purpose not protected by P.L. 86-272 appears to be a trivial and de minimis connection with FOREIGN COUNTRY-19 for the 1998 tax year. Accordingly, TAXPAYER has not met its burden of showing that it was subject to taxation in FOREIGN COUNTRY-19 for the 1998 tax year.

2000 Tax Year. First, REPRESENTATIVE-4 FOR TAXPAYER testified that he made two trips to FOREIGN COUNTRY-19 in 2000 and 2001. It is unknown whether either of these trips occurred in 2000. If the two trips occurred in October 2000 and July 2001, for example, both of the trips would have occurred during the 2001 tax year and neither in the 2000 tax year. For these reasons, the evidence does not show that REPRESENTATIVE-4 FOR TAXPAYER traveled to FOREIGN COUNTRY-19 in the 2000 tax year.

Second, it appears that REPRESENTATIVE-3 FOR TAXPAYER may have traveled to FOREIGN COUNTRY-19 for legal purposes in the 2000 tax year, as two airline tickets to FOREIGN COUNTRY-19 were purchased in his name on May 24, 2000 and May 25, 2000. Based on the credit card receipts for the ticket purchases, it is not known whether he made one or two trips to FOREIGN COUNTRY-19, the duration of the trip or trips, and whether the trip or trips occurred on or before August 31, 2000 (during the 2000 tax year) or later in 2000 (during the 2001 tax year). Even if he made one trip to FOREIGN COUNTRY-19 in 2000, such contact would probably be de minimis in nature and would not expose TAXPAYER to income taxation for the 2000 tax year. In any case, TAXPAYER has not met its burden of showing that it was subject to taxation in FOREIGN COUNTRY-19 for the 2000 tax year.

2001 Tax Year. REPRESENTATIVE-4 FOR TAXPAYER traveled to FOREIGN COUNTRY-19 during the 2001 tax year for 5 days in regards to computer systems and distributor compensation. REPRESENTATIVE-5 FOR TAXPAYER traveled to FOREIGN COUNTRY-19 during the 2001 tax year for 5 days in regards to accounting issues. Two trips for different activities, neither of which are protected by P.L. 86-272, appear to create a nontrivial connection with FOREIGN COUNTRY-19 for this tax year (i.e., short trips for different activities may indicate more of a presence than a single trip of longer duration). For these reasons, the connections in FOREIGN COUNTRY-19 for the 2001 tax year that are not protected by P.L. 86-272 are not de minimis. TAXPAYER has met it burden of showing that it is subject to income taxation in FOREIGN COUNTRY-19 for the 2001 tax year.

TAXPAYER has not met its burden of showing that it had sufficient contacts with FOREIGN COUNTRY-19 to be subject to income taxation in FOREIGN COUNTRY-19 for any tax year in the Audit Period except for the 2001 tax year. Accordingly, the numerator of TAXPAYERS' sales apportionment factor should be reduced by $$$$$ for the 2001 sales only.

K. FOREIGN COUNTRY-6.

Year at Issue: 2001

Foreign Subsidiary: TAXPAYER created two corporations concerning FOREIGN COUNTRY-6: 1) a domestic corporation named COMPANY-11 that TAXPAYER first reported as part of its water's edge combined group on its 2003 federal return; and 2) COMPANY-29, a FOREIGN COUNTRY-6 entity that TAXPAYER created on September 11, 1998. It is not part of TAXPAYERS' water's edge combined group.

Contacts:

Travel to FOREIGN COUNTRY-6 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified, and by NAME-24, whose resume was submitted, was considered. There is no evidence in Exhibit P-21 showing that any of these employees traveled to FOREIGN COUNTRY-6 during the 2001 tax year. REPRESENTATIVE-4 FOR TAXPAYER testified that he traveled to FOREIGN COUNTRY-6 in December 1997 to meet with distributors and to help with compensation recalculations. REPRESENTATIVE-4 FOR TAXPAYER later testified that he went to FOREIGN COUNTRY-6 in either 1998 or 1999. These contacts would have occurred prior to the 2001 tax year at issue (which began on September 1, 2000).

Conclusion. TAXPAYER asks that the $$$$$ in sales it made in FOREIGN COUNTRY-6 during the 2001 tax year not be thrown back to Utah. TAXPAYER has not met its burden of showing that it had sufficient

contacts with FOREIGN COUNTRY-6 during the 2001 tax year to be subject to taxation in FOREIGN COUNTRY-6 for this tax year. Accordingly, no sales in FOREIGN COUNTRY-6 should be removed from the numerator of TAXPAYERS' sales apportionment factor.

L. FOREIGN COUNTRY-20.

Years at Issue: 1998, 1999, 2000, 2001, 2002 and 2003

Foreign Subsidiary: TAXPAYER created a FOREIGN COUNTRY-20 corporation named COMPANY-30 on February 17, 1992. It is not part of TAXPAYERS' water's edge combined group.

Contacts:

Travel to FOREIGN COUNTRY-20 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified, and by NAME-24, whose resume was submitted, was considered. There is no evidence in Exhibit P-21 showing that any of these employees traveled to FOREIGN COUNTRY-20 during the Audit Period, with one exception. REPRESENTATIVE-5 FOR TAXPAYER, who traveled to foreign countries to hire accounting personnel for foreign subsidiaries, was present in FOREIGN COUNTRY-20 for 3 days between December 4 and December 7, 2002 (during the 2003 tax year).

Conclusion. TAXPAYER asks that sales it made in FOREIGN COUNTRY-20 not be thrown back to Utah for all years of the Audit Period, as follows: 1) $$$$$ in sales for 1998; 2) $$$$$ in sales for 1999; 3) $$$$$ in sales for 2000, 4) $$$$$ in sales for 2001; 5) $$$$$ in sales for 2002; and 6) $$$$$ in sales for 2003.

REPRESENTATIVE-5 FOR TAXPAYER made a 3-day trip to FOREIGN COUNTRY-20 in the 2003 tax year in regards to accounting personnel. Although this activity is not one protected by P.L. 86-272, one trip for 3 days appears to be a trivial connection with FOREIGN COUNTRY-20 and to be sufficiently de minimis to avoid loss of the tax immunity conferred by P.L. 86-272. No legal precedent was submitted that shows otherwise.

TAXPAYER has not met its burden of showing that it would be exposed to income taxation in FOREIGN COUNTRY-20 for any year in the Audit Period. Accordingly, no sales in FOREIGN COUNTRY-20 should be removed from the numerator of TAXPAYERS' sales apportionment factor.

M. FOREIGN COUNTRY-25.

Years at Issue: 2002 and 2003

Foreign Subsidiary: TAXPAYER created a FOREIGN COUNTRY-25 corporation named COMPANY-31 on May 28, 1998. It is not part of TAXPAYERS' water's edge combined group.

Contacts:

Travel to FOREIGN COUNTRY-25 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified, and by NAME-24, whose resume was submitted, was considered. There is no evidence in Exhibit P-21 showing that any of these employees traveled to FOREIGN COUNTRY-25 during the Audit Period, with one exception. REPRESENTATIVE-5 FOR TAXPAYER, who traveled to foreign countries to hire accounting personnel for foreign subsidiaries, was present in FOREIGN COUNTRY-25 for 5 days between December 7 and December 12, 2002 (during the 2003 tax year).

Conclusion. TAXPAYER asks that the sales it made in FOREIGN COUNTRY-25 not be thrown back to Utah for the 2002 and 2003 tax years, as follows: 1) $$$$$ in sales for 2002; and 2) $$$$$ in sales for 2003.

REPRESENTATIVE-5 FOR TAXPAYER made a 5-day trip to FOREIGN COUNTRY-25 in the 2003 tax year in regards to accounting personnel. Although this activity is not one protected by P.L. 86-272, one trip for 5 days appears to be a trivial connection with FOREIGN COUNTRY-25 and to be sufficiently de minimis to avoid loss of the tax immunity conferred by P.L. 86-272. No legal precedent was submitted that shows otherwise. TAXPAYER has not met its burden of showing that it would be exposed to income taxation in FOREIGN

COUNTRY-25 for any year in the Audit Period. Accordingly, no sales in FOREIGN COUNTRY-25 should be removed from the numerator of TAXPAYERS' sales apportionment factor.

N. FOREIGN COUNTRY-22.

Years at Issue: 2001 and 2002

Foreign Subsidiary: TAXPAYER created a FOREIGN COUNTRY-22 corporation named COMPANY-32 on July 11, 1997. It is not part of TAXPAYERS' water's edge combined group.

Contacts:

Travel to the FOREIGN COUNTRY-22 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified, and by NAME-24, whose resume was submitted, was considered. There is no evidence in Exhibit P-21 showing that any of these employees traveled to the FOREIGN COUNTRY-22 during the years at issue, with one exception. This evidence shows that REPRESENTATIVE-6 FOR TAXPAYER, who traveled to foreign countries to meet with local office staff and local outside legal counsel, made a trip to the FOREIGN COUNTRY-22 and FOREIGN COUNTRY-27 between June 8 and June 24, 2001 (during the 2001 tax year). The evidence also shows that REPRESENTATIVE-6 FOR TAXPAYER was specifically in the FOREIGN COUNTRY-22 between June 10 and June 13, 2001, and in FOREIGN COUNTRY-27 on June 24, 2001. The evidence does not show whether REPRESENTATIVE-6 FOR TAXPAYER was in the FOREIGN COUNTRY-22 or FOREIGN COUNTRY-27 for the remaining days of the trip.

Conclusion. TAXPAYER asks that sales it made in the FOREIGN COUNTRY-22 not be thrown back to Utah for the 2001 and 2002 tax years, as follows: 1) $$$$$ in sales for 2001; and 2) $$$$$ in sales for 2002.

REPRESENTATIVE-6 FOR TAXPAYER made a trip of at least 3 days to the FOREIGN COUNTRY-22 during the 2001 tax year in regards to legal matters. If REPRESENTATIVE-6 FOR TAXPAYER divided his time equally between the FOREIGN COUNTRY-22 and FOREIGN COUNTRY-27 on this trip, his stay in the FOREIGN COUNTRY-22 would have been for no more than 8 days. Although this activity is not one protected by P.L. 86-272, one 3-to-8 day trip by one employee appears to be a trivial connection with the FOREIGN COUNTRY-22 and sufficiently de minimis to avoid loss of the tax immunity conferred by P.L. 86-272. No legal precedent was submitted that shows otherwise. TAXPAYER has not met its burden of showing that it would be exposed to income taxation in the FOREIGN COUNTRY-22 for either the 2001 or 2002 tax year at issue. Accordingly, no sales in the FOREIGN COUNTRY-22 should be removed from the numerator of TAXPAYERS' sales apportionment factor.

O. FOREIGN COUNTRY-27.

Years at Issue: 2001 and 2003

Foreign Subsidiary: TAXPAYER created a FOREIGN COUNTRY-27 corporation named COMPANY-33 on November 12, 1997. It is not part of TAXPAYERS' water's edge combined group.

Contacts:

Travel to FOREIGN COUNTRY-27 by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified, and by NAME-24, whose resume was submitted, was considered. There is no evidence in Exhibit P-21 showing that any of these employees traveled to FOREIGN COUNTRY-27 during the years at issue, with one exception. This evidence shows that REPRESENTATIVE-6 FOR TAXPAYER, who traveled to foreign countries to meet with local office staff and local outside legal counsel, made a trip to the FOREIGN COUNTRY-22 and FOREIGN COUNTRY-27 between June 8 and June 24, 2001 (during the 2001 tax year). The evidence also shows that REPRESENTATIVE-6 FOR TAXPAYER

was specifically in the FOREIGN COUNTRY-22 between June 10 and June 13, 2001, and in FOREIGN COUNTRY-27 on June 24, 2001. The evidence does not show whether REPRESENTATIVE-6 FOR TAXPAYER was in the FOREIGN COUNTRY-22 or FOREIGN COUNTRY-27 for the remaining days of the trip.

Conclusion. TAXPAYER asks that the sales it made in FOREIGN COUNTRY-27 not be thrown back to Utah for the 2001 and 2003 tax years, as follows: 1) $$$$$ in sales for 2001; and 2) $$$$$ in sales for 2003.

REPRESENTATIVE-6 FOR TAXPAYER made a trip of at least 1 day to FOREIGN COUNTRY-27 during the 2001 tax year in regards to legal matters. If REPRESENTATIVE-6 FOR TAXPAYER divided his time equally between FOREIGN COUNTRY-27 and the FOREIGN COUNTRY-22 on this trip, his stay in FOREIGN COUNTRY-27 would have been for no more than 8 days. Although this activity is not one protected by P.L. 86-272, one 1-to-8 day trip by one employee appears to be a trivial connection with FOREIGN COUNTRY-27 and sufficiently de minimis to avoid loss of the tax immunity conferred by P.L. 86-272. No legal precedent was submitted that shows otherwise. TAXPAYER has not met its burden of showing that it would be exposed to income taxation in FOREIGN COUNTRY-27 for either the 2001 or 2002 tax year at issue. Accordingly, no sales in FOREIGN COUNTRY-27 should be removed from the numerator of TAXPAYERS' sales apportionment factor.

P. FOREIGN COUNTRY-4, FOREIGN COUNTRY-5, FOREIGN COUNTRY-7, FOREIGN COUNTRY-8, FOREIGN COUNTRY-10, FOREIGN COUNTRY-12, FOREIGN COUNTRY-17, FOREIGN COUNTRY-23, and FOREIGN COUNTRY-26.

The tax years at issue for these nine countries are 2001, 2002, and/or 2003. The 1998, 1999, and 2000 tax years are not at issue for any of these countries. Travel to these countries by REPRESENTATIVE-4 FOR TAXPAYER, REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-5 FOR TAXPAYER, and REPRESENTATIVE-6 FOR TAXPAYER, who testified, and by NAME-24, whose resume was submitted, was

considered. There is no evidence in Exhibit P-21 showing that any of these employees traveled to any of these countries during the 2001, 2002, or 2003 tax years. TAXPAYER has not met its burden of showing that it would be exposed to income taxation in any of these countries for any year at issue. Accordingly, no sales in these countries should be removed from the numerator of TAXPAYERS' sales apportionment factor.

Q. Summary.

TAXPAYER has contested Auditing Division's decision to throw back to Utah the sales that it made into a number of foreign counties for various years of the Audit Period. For the countries and years still at issue, as compiled in the chart in Finding of Fact #31, TAXPAYER has not provided sufficient evidence to show that any of the contested sales that it made in the 1998, 1999, or 2000 tax years should not have been thrown back to Utah. Accordingly, none of the contested sales amounts for the 1998, 1999, and 2000 tax years should be removed from the numerators of TAXPAYERS' sales apportionment factors.

On the other hand, TAXPAYER has provided sufficient evidence to show that some of the contested sales it made in the 2001, 2002, and 2003 tax years should not have been thrown back to Utah, specifically as follows:

Country	2001 Tax Year	2002 Tax Year	2003 Tax Year
FOREIGN COUNTRY-9			$$$$$
FOREIGN COUNTRY-13	$$$$$	$$$$$	
FOREIGN COUNTRY-16	$$$$$		
FOREIGN COUNTRY-18	$$$$$	$$$$$	$$$$$
FOREIGN COUNTRY-19	$$$$$		
FOREIGN COUNTRY-24	$$$$$	$$$$$	
FOREIGN COUNTRY-28	$$$$$	$$$$$	
Yearly Total	$$$$$	$$$$$	$$$$$

Auditing Division has already removed from the sales factor numerators all FOREIGN COUNTRY-2 sales made during the Audit Period and all FOREIGN COUNTRY-1 sales made in the 1999, 2000, 2001, 2002,

and 2003 tax years. Based on the foregoing, Auditing Division should also remove the following amounts of sales from the numerators of TAXPAYERS' 2001, 2002, and 2003 sales apportionment factors: 1) $$$$$ for the 2001 tax year; 2) $$$$$ for the 2002 tax year; and 3) $$$$$ for the 2003 tax year.

II. Should the wages of employees who worked at TAXPAYERS' facilities in Utah during 1998, 1999, 2000 and part of 2001 be included in the numerator and denominator of the Utah payroll apportionment factor for these four years of the Audit Period?

The payroll factor for UDITPA apportionment purposes is defined in Section 59-7-315(1), which provides, "the payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation, and the denominator of which is the total compensation paid everywhere during the tax period."

For 1998, 1999, 2000, and part of 2001, TAXPAYER had an arrangement with BUSINESS-1 concerning the employees who worked at its Utah facilities. All employees who worked at TAXPAYERS' Utah facilities, including officers and supervisors, were leased to TAXPAYER by BUSINESS-1. All employees signed employment contracts with BUSINESS-1, not TAXPAYER. Auditing Division determined that the wages of all of these employees should be included in both the numerator and denominator of TAXPAYERS' payroll factor for the periods BUSINESS-1 leased the employees to TAXPAYER. TAXPAYER, on the other hand, claims that its payroll factor (both the numerator and denominator) for these periods should reflect that TAXPAYER had no employees in Utah.

Auditing Division contends that TAXPAYERS' relationship with BUSINESS-1 should not result in wages for all employees working at TAXPAYERS' Utah facilities being excluded from the payroll factor when measuring TAXPAYERS' activities in Utah for purposes of apportioning its income to Utah. Auditing Division states that TAXPAYER had hundreds of people working in Utah at all times during the Audit Period and that this fact should be considered when fairly determining how much of TAXPAYERS' income is subject to tax in Utah.

Auditing Division states that there are two separate ways for the Commission to find that the wages of the employees at issue should be included in the payroll factor. First, the Division states that the Commission should find that the employees at issue are TAXPAYERS' common law employees because TAXPAYER reserved the right to hire and fire the employees and to control the manner in which they performed their activities. Second, even if the Commission finds that the employees at issue are not TAXPAYERS' common law employees, the Division argues that the Commission should make an equitable adjustment under Section 59-7-320 and Rule 8(J)(1) by adding the employee's wages to TAXPAYERS' payroll factor.

TAXPAYER contends that Rule 8(H)(3)(a)(2) is explicit in a situation where BUSINESS-1, and not TAXPAYER, included the employees for purposes of the payroll taxes imposed by the Federal Insurance Contribution Act ("FICA"). TAXPAYER argues that the rule clearly dictates that the employees at issue are employees of BUSINESS-1Sand are not employees of TAXPAYER for purposes of UDITPA. Furthermore, TAXPAYER argues that the employees should not be considered TAXPAYERS' employees because BUSINESS-1 legally withheld and paid their payroll taxes, directly paid their wages, and handled all necessary employment forms.

However, Rule 8(H)(3)(a)(2) is not as explicit as TAXPAYER contends. The rule provides that a person is **generally** considered to be an employee if he or she is included for purposes of the payroll taxes imposed by FICA. It also defines an "employee" to be "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee." As a result, the Commission needs to determine if the employees at issue in this case are common-law employees of TAXPAYER.

REPRESENTATIVE-3 FOR TAXPAYER explained that BUSINESS-1 did not supervise the employees' work at TAXPAYER, did not have any direct control over their performance, did not perform performance valuations, and did not set levels of compensation. These functions were handled by other persons working at TAXPAYER, persons who themselves had employee agreements with BUSINESS-1. In addition,

during the period TAXPAYER leased the employees from BUSINESS-1, TAXPAYER prepared a TAXPAYER Employee Handbook. Division's Exhibit R-1. On the first page of the TAXPAYER Employee Handbook, employees were welcomed to TAXPAYER and informed that "we will strive to make employment at TAXPAYER a rewarding and pleasant experience for you" and that "TAXPAYER employment policies are designed to provide you with a pleasant working environment, fair wages and benefits, recognition for your accomplishments, and an opportunity for advancement." TAXPAYER also disclosed in the handbook that it "hires each of its employees by and through BUSINESS-1 [and that] TAXPAYER retains the right to supervise its employees and all other rights of an employer."

REPRESENTATIVE-3 FOR TAXPAYER explained that TAXPAYER determine the hours of employment, the conditions under which the employees would work, provided new hire orientation and on-the-job training, and disciplined employees. REPRESENTATIVE-3 FOR TAXPAYER stated that both TAXPAYER and BUSINESS-1 kept a personnel file for each employee. In the handbook, it is explained that employment and compensation with TAXPAYER is "at will" and can be terminated either by the employee or TAXPAYER. However, it does not indicate whether BUSINESS-1 can terminate an employee. Furthermore, REPRESENTATIVE-6 FOR TAXPAYER stated that hiring and firing decisions would have been made by personnel and management at TAXPAYER, not at BUSINESS-1.

Even though BUSINESS-1 included the employees at issue for purposes of the payroll taxes imposed by FICA, they appear to be common law employees of TAXPAYER whose wages should be included in TAXPAYERS' payroll factor. The United States Supreme Court defined relevant factors in determining whether or not a worker was an "employee" for purposes of ERISA (the Employee Retirement Income Security Act of 1974) in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), stating:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source

> of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. . . .

Based on the Court's criteria and the relationship between TAXPAYER and the employees at issue, it appears that the employees are common law employees of TAXPAYER whose wages should be included in TAXPAYERS' payroll factor. BUSINESS-1 had no actual or constructive control over the work performed by TAXPAYERS' employees. TAXPAYERS' employee handbook provided that TAXPAYER retained the right to supervise its employees and all other rights of an employer. TAXPAYERS' supervisors evaluated employee job performance, conducted compensation reviews, were responsible for assigning work, recommended pay increases, transfers, and promotions, maintained discipline, and had the authority to dismiss employees for violations of the policies contained in the handbook. TAXPAYER provided training, tools, and controlled the manner in which the work was performed. TAXPAYER determined work schedules, required time clocks to track hours worked, and approved overtime. TAXPAYER provided insurance and retirement benefits for its employees. For these reasons, the relationship between TAXPAYER and BUSINESS-1 does not alter the nature of the employer-employee relationship that existed between TAXPAYER and its employees.

Even had it been found that the employees at issue were not common law employees of TAXPAYER, their wages should, nevertheless, be included in TAXPAYERS' payroll factor pursuant to the equitable adjustment provisions of Section 59-7-320 and Rule 8(J)(1). These provisions provide for an equitable adjustment if the "allocation and apportionment provisions of [UDITPA] do not fairly represent the extent of the taxpayer's business activity in this state[.]" Excluding the wages of the employees at issue from TAXPAYERS' payroll factor would not fairly represent TAXPAYERS' business activity in Utah. TAXPAYERS' employees lived in Utah. They drove to work at TAXPAYERS' Utah facilities on public streets and roads. They and/or

their children attended Utah schools. Utah provided utilities and police and fire protection to the homes of the employees. TAXPAYERS' employees would be eligible to participate in Utah's unemployment system and Utah's Workers' Compensation Insurance plan. To exclude the wages of these employees from the payroll factor on the basis of TAXPAYERS' arrangement with BUSINESS-1would fail to capture TAXPAYER' activities within the state.

Furthermore, between the 1992 through 1996 tax years, TAXPAYER filed between 199 and 420 W-2's in Utah. For the 2001 through 2004 tax years, TAXPAYER filed between 490 and 616 W-2's in Utah. However, it filed zero W-2's for the 1997 through 2000 years during which it had the contractual relationship with BUSINESS-1. In addition, for all tax years during the Audit Period, TAXPAYER reported deductions for salaries and wages on its water's edge federal tax returns for TAXPAYER, including the years when TAXPAYER and BUSINESS-1 had their contractual arrangement. It is evident that the wages of the employees at issue should be included in the TAXPAYERS' payroll factor.

TAXPAYER has not shown that any of the wages paid to its employees are not "compensation paid in Utah" pursuant to Section 59-7-316 and Rule 8(H)(6). TAXPAYER has the burden of proof in this matter. Although TAXPAYER has shown that some of its employees occasionally traveled to foreign countries, they have not provided sufficient evidence to show that any service performed outside of Utah is other than incidental to the employees' service in Utah. Accordingly, all wages of employees leased to TAXPAYER by BUSINESS-1 should be included in both the numerator and the denominator of TAXPAYERS' payroll factor for the 1998, 1999, 2000, and 2001 tax years.

At the hearing, TAXPAYER also asserted that for the 1998 tax year, there were wages specific to FOREIGN COUNTRY-1 employees in the amount of $$$$$ that should be deducted from the numerator of the payroll factor. TAXPAYER, however, presented no evidence or testimony to demonstrate who had earned this

amount of wages and where the employee or employees who earned these wages performed their services.[7] In addition, it is noted that TAXPAYER did not report any wages for a "FOREIGN COUNTRY-1 branch" on its 1998 or 1999 apportionment information documents, even though it reported wages for its FOREIGN COUNTRY-2 branch on its apportionment documents for these years. Exhibit R-3. For these reasons, TAXPAYER did not meet its burden to show why these wages should not be considered "compensation paid in Utah" in accordance with Section 59-7-316 and Rule 8(H)(6). Accordingly, for each year of the Audit Period, Auditing Division's payroll factor for TAXPAYER is sustained.

III. Should penalties and interest be recalculated on the basis of TAXPAYERS' revised corporate franchise and income tax liability as herein determined for each year of the Audit Period?

TAXPAYER filed its initial 1998, 1999, 2000, and 2001 Utah franchise and income tax returns late. As a result, TAXPAYER was assessed late filing and/or underpayment penalties based on the amounts of tax shown due on these initial returns, which TAXPAYER paid. TAXPAYER subsequently sought abatement of these penalties, which was denied in *Appeal No. 02-1832*.

Auditing Division states that the penalties should be based on the tax shown due on the original return, not the amounts shown due on later amended returns or amounts determined through the appeals process because Utah Code Ann. §59-7-509 states that "there shall be added to the amount required to be shown as tax on the return a penalty as provided in Section 59-1-401." The Division claims that this refers to the first or initial return filed. Furthermore, Auditing Division notes that until recently, it had been the Tax Commission's policy not to

7 In Exhibit P-10B, TAXPAYER provided evidence to show that for the 1998 tax year, it paid NAME—4 approximately $$$$$ for travel expenses and for inventory and consulting fees. It also shows that for the 1998 tax year, it paid NAME-2 (FORIEGN COUNTRY-1 Direct) approximately $$$$$ for travel expenses and for services. These amounts are significantly less than the $$$$$ of wages that TAXPAYER claims should be attributed to FORIEGN COUNTRY-1. In addition, information in Exhibit P-21 shows that NAME-4 was only in FORIEGN COUNTRY-1 for 21 days during the 1998 tax year. There is insufficient information to know whether the services NAME-4performed in FORIEGN COUNTRY-1 were not incidental to the services he performed in Utah so that all or a portion of his wages could be attributed to FORIEGN COUNTRY-1. Furthermore, TAXPAYER characterized NAME-2 as an independent contractor. TAXPAYER has not shown

adjust the penalties assessed on an initial return, even if a subsequent return or audit showed that the tax reported on the initial return was incorrect. RESPONDENT-1, Assistant Director of Taxpayer Services Division, testified that this had been the Tax Commission's policy until 2009. RESPONDENT-1 explained that the current policy in place since 2009 is to adjust penalties if the underlying tax liability changes from the amount shown due on an initial return.

TAXPAYER notes that the tax liability for the 1998, 1999, 2000, and 2001 tax years has decreased significantly since the initial returns were filed. As a result, TAXPAYER asks the Commission to adjust the penalties and associated interest for all years of the Audit Period to reflect the amounts of tax actually due instead of the incorrect amounts shown on the initial returns.

The Commission has already addressed this issue in regards to these two appeals. The Tax Commission rejected Auditing Division's position in its April 19, 2006 order in these matters, where it explained that:

> . . . should the Commission decide, in a decision relating to *Appeal No. 05-0594* and *Appeal No. 05-1764*, to increase or decrease TAXPAYERS' tax liability for any of the years at issue, the Commission finds that it has the authority to order the recalculation of the penalties and interest imposed on these amounts. . . .

Auditing Division's arguments at the Formal Hearing do not show that the Commission's prior ruling is incorrect. If anything, the testimony of RESPONDENT-1 concerning current policy supports the Commission's prior ruling. For these reasons, penalties and associated interest should be recalculated on the basis of TAXPAYERS' revised corporate franchise and income tax liability as herein determined for each year of the Audit Period.

IV. Tolling of Interest from November 2, 2009 Until 30 Days After the Date of the Final Decision.

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that it included amounts it paid independent contractors as a salary and wage expense.

The parties submitted their post-hearing briefs in this matter on November 2, 2009, and the Commission has not issued this Final Decision until late 2011. The parties are partially responsible for the delay because they had not marshaled their evidence in a manner that would have expedited the Commission's determination of all issues. Nevertheless, the Commission has, on occasion, tolled interest when there is a significant period between the hearing date and the date of the issuance of a decision, pursuant to the authority given in Utah Code Ann. §59-1-401(13) and Utah Admin. Rule R861-1A-42(2). Accordingly, the Commission finds that reasonable cause exists to toll, or waive, any interest that would have otherwise accrued for the period beginning November 2, 2009 and ending 30 days after the date of this Final Decision.

CONCLUSIONS OF LAW

1. Auditing Division has already removed from the numerators of TAXPAYERS' sales apportionment factors all FOREIGN COUNTRY-2 sales that TAXPAYER made during the Audit Period and all FOREIGN COUNTRY-1sales that it made in the 1999, 2000, 2001, 2002, and 2003 tax years. For the remaining sales at issue, as shown on the chart in Finding of Fact #31, TAXPAYER did not meet its burden of showing that it was subject to income taxation in any of the contested countries for the 1998, 1999, and 2000 tax year. Accordingly, no additional adjustments should be made to the numerators of TAXPAYERS' 1998, 1999, and 2000 sales apportionment factors.

2. For the 2001, 2002, and 2003 tax years, however, TAXPAYER did meet its burden of showing that it was subject to income taxation in some of the contested countries for some of these years, as listed on the chart on page 76 of this decision. TAXPAYER has shown that additional amounts of sales should be removed from the numerators of its 2001, 2002, and 2003 sales apportionment factors, as follows: 1) $$$$$,for the 2001 tax year; 2) $$$$$ for the 2002 tax year; and 3) $$$$$ for the 2003 tax year.

3. All wages of employees leased to TAXPAYER by BUSINESS-1 should be included in both the numerator and the denominator of TAXPAYERS' payroll factor for the 1998, 1999, 2000, and 2001 tax years.

In addition, TAXPAYER has not shown that any of the wages at issue are specific to FOREIGN COUNTRY-1, not Utah, employees. Accordingly, for each year of the Audit Period, Auditing Division's payroll factor for TAXPAYER should be sustained.

4. Any penalties and interest imposed for a tax year at issue in this appeal should be recalculated on the basis of TAXPAYERS' revised corporate franchise and income tax liability as herein determined for each year of the Audit Period.

5. Reasonable cause also exists to toll, or waive, any interest that would have otherwise accrued for the period beginning November 2, 2009 and ending 30 days after the date of this Final Decision.

_____

Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Commission orders Auditing Division to reduce the numerators of TAXPAYER' 2001, 2002, and 2003 sales apportionment factors by the following amounts: 1) $$$$$ for the 2001 tax year; 2) $$$$$ for the 2002 tax year; and 3) $$$$$ for the 2003 tax year. These reductions are in addition to the reductions that result from the parties' agreement to remove all FOREIGN COUNTRY-2 sales for all years of the Audit Period and all FOREIGN COUNTRY-1 sales made for the 1999, 2000, 2001, 2002, and 2003 tax years.

In addition, the Commission sustains Auditing Division's payroll factor for TAXPAYER for all years in the Audit Period. The Commission also orders that any penalties and interest imposed for a tax year at issue in this appeal are to be recalculated on the basis of TAXPAYERS' revised corporate franchise and income tax liability as herein determined for each year of the Audit Period. Lastly, the Commission also tolls, or waives, any interest that would have otherwise accrued for the period beginning November 2, 2009 and ending 30 days after the date of this Final Decision. It is so ordered.

DATED this _____ day of _____, 2011.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

NOTICE OF APPEAL RIGHTS: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-