

05-0792

AUDIT – CORPORATE FRANCHISE

TAX YEARS: 1998, 1999 & 2000

SIGNED 03-18-2009

COMMISSIONERS: P. HENDRICKSON, P. DEPAULIS, M. JOHNSON

ABSTAINED: R. JOHNSON

GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

AUDITING DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL DECISION**

Appeal No. 05-0792

Account No. #####

Tax Type: Corporate Franchise

Tax Years: 06/13/98 – 12/31/00

Judge: Chapman

Presiding:

Pam Hendrickson, Commission Chair

R. Bruce Johnson, Commissioner

Marc B. Johnson, Commissioner

D'Arcy Dixon Pignanelli, Commissioner

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP. 1, Attorney
PETITIONER REP. 2, from COMPANY D
PETITIONER REP. 3, from COMPANY D (ret.)

For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on November 17 and 18, 2008. 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 period at issue is June 13, 1998 through December 31, 2000.

3. On May 6, 2005, Auditing Division (“Division”) issued a Statutory Notice to PETITIONER. (“PETITIONER” or “taxpayer”), in which it imposed additional corporate franchise tax and interest for the period January 1, 1998 through December 31, 2000. In this notice, the Division asserted that the deficiency was \$\$\$\$ of tax and \$\$\$\$ of interest, for a total assessment of \$\$\$\$.

4. On June 3, 2005, the Division issued an amended Second Statutory Notice for the period January 1, 1998 through December 31, 2000. In this notice, the Division asserted that the deficiency for this period was \$\$\$\$ of tax and \$\$\$\$ of interest, for a total deficiency of \$\$\$\$.

5. On January 15, 2008, the Division issued a Third Statutory Notice for the audit period at issue in this appeal, June 13, 1998 through December 31, 2000.¹ In the Third Statutory Notice, the Division asserted that the deficiency for this period was \$\$\$\$ of tax and \$\$\$\$ of interest, for a total deficiency of \$\$\$\$\$. Exhibit 1.

6. In the Third Statutory Notice, the Division assessed additional tax pertaining to a termination fee that PETITIONER paid to COMPANY A (“COMPANY A”) and to capital losses and “swap contract losses” realized by PETITIONER on its sale of COMPANY A stock. Exhibit 1 at p. 4. The termination fee and the losses on the sales of COMPANY A stock are collectively referred to herein as the “COMPANY A losses.”

7. For the audit period at issue, PETITIONER filed Utah returns under the state’s UDITPA (Uniform Division of Income for Tax Purposes Act) provisions. Because PETITIONER claimed the COMPANY A losses as business losses on its 1999 and 2000 Utah returns, it allocated a portion of the losses

¹ On June 12, 1998, the “old” PETITIONER legally became two companies: 1) the “new” PETITIONER, which is the Petitioner or taxpayer in this appeal; and 2) COMPANY B. The beginning of the audit period in the Third Statutory Notice coincides with the date that the “new” PETITIONER began operations.

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to Utah, thus reducing its Utah tax liability for these years. The Division reclassified the COMPANY A losses as nonbusiness losses, which resulted in no portion of the losses being allocated to Utah. Whether the COMPANY A losses are business losses that decrease PETITIONER's tax liability under Utah's UDITPA apportionment formula or nonbusiness losses that do not reduce its tax liability is the only issue remaining in this appeal.

8. After the Third Statutory Notice was issued, the Internal Revenue Service ("IRS") made RAR (Revenue Agent Report) adjustments for the periods at issue. PETITIONER informed the Division of the RAR changes, which the Division incorporated in a letter and revised schedules dated October 15, 2008 ("October 15, 2008 letter"). In the October 15, 2008 letter, the Division asserted that the revised deficiency for the audit period consisted of \$\$\$\$ of additional tax and \$\$\$\$ of interest, for a total deficiency of \$\$\$\$\$. Exhibit 2.

9. In the October 15, 2008 letter, the Division shows the COMPANY A losses, after the RAR adjustments, to consist of: 1) approximately \$\$\$\$ in merger termination expenses for the 1999 tax year; 2) approximately \$\$\$\$ in losses from the sale of COMPANY A stock for the 1999 and 2000 tax years; and 3) approximately \$\$\$\$ in swap contract losses from the sale of COMPANY A stock for the 1999 and 2000 tax years. Exhibit 2, Schedule I1105, p.1.

10. PETITIONER REP. 2 testified on behalf of PETITIONER. She explained that the swap contract loss amounts of approximately \$\$\$\$\$, as shown in the Division's October 15, 2008 letter, are incorrect. She explained that PETITIONER had erroneously supplied financial reporting or "book" numbers to the Division instead of the "tax" numbers that should have been reported for the swap losses. She further testified that the correct amounts of the swap losses for tax purposes is \$\$\$\$ for the 1999 tax year and \$\$\$\$ for the 2000 tax year, which is approximately \$\$\$\$\$ less than reported to the Division and incorporated in the

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October 15, 2008 letter. Exhibits 5, 6 & 9. The Division explained that it had reviewed this matter and was satisfied that the swap loss “tax” numbers submitted by PETITIONER at the hearing, and not the “book” numbers previously given to the Division, should be used to determine PETITIONER’s Utah tax liability.

11. Should the Commission determine that the COMPANY A losses qualify as business income for Utah tax purposes, PETITIONER estimates that the amount of the deficiency (tax and interest) assessed by the Division would be reduced by approximately \$\$\$\$\$ for the 1999 tax year and \$\$\$\$\$ for the 2000 tax year, for a total reduction of approximately \$\$\$\$\$ for the audit period.

Information Concerning the COMPANY A Losses

12. PETITIONER REP. 3 testified on behalf of PETITIONER and explained the circumstances that led to the COMPANY A losses. (SENTENCE REMOVED). He further explained that PETITIONER initially sought to diversify, without success, into (X) and (X). Later, PETITIONER began to focus on businesses more closely associated with its “core” (X) business. Specifically, PETITIONER began acquiring companies that provided (SERVICES LISTED).

13. PARAGRAPH REMOVED

14. PARAGRAPH REMOVED

15. Because of these changes, PETITIONER decided that it was imperative for it to provide additional services in order for it to preserve its business. It began to consider joint ventures, strategic partnerships, acquisitions and mergers. In late 1998 or early 1999, PETITIONER met with consultants at COMPANY C to discuss potential partnerships and/or acquisitions.

16. In early 1999, PETITIONER’s board reviewed its strategic options and conducted exploratory discussion with various parties, which soon narrowed on two primary candidates - COMPANY A and COMPANY D Communications (“COMPANY D”).

17. Both COMPANY D and COMPANY A had fiber optic assets and international connections and were direct competitors. Although COMPANY D initially indicated an interest in a transaction with PETITIONER, discussions stalled while discussions with COMPANY A moved forward.

18. On May 16, 1999, COMPANY A and PETITIONER entered into a merger agreement. Exhibit 30. On May 18, 1999, PETITIONER filed a Form 8-K with the Securities and Exchange Commission (“SEC”), in which it advised the SEC that it was merging with COMPANY A “(STATEMENT REMOVED)s.” Exhibit 20.

19. On DATE, PETITIONER filed another Form 8-K with the SEC in which it disclosed that under the merger agreement with COMPANY A, PETITIONER was purchasing ##### shares of COMPANY A common stock for approximately \$\$\$\$\$. This document also discloses that PETITIONER would have to consider a superior offer and terminate the merger with COMPANY A if such an offer were made prior to the finalization of the merger with COMPANY A. It also discloses that in case PETITIONER terminated the merger with COMPANY A, it would be required to pay a termination fee to COMPANY A in the amount of \$\$\$\$\$. Exhibit 21.

20. Around DATE, COMPANY D approached PETITIONER with a merger offer. Exhibit 23. As required by law, the PETITIONER board considered the COMPANY D offer and, on DATE, determined that it was not superior to the COMPANY A merger deal. Exhibit 24.

21. On DATE, COMPANY D submitted a modified merger proposal that the PETITIONER board subsequently determined to be superior to the COMPANY A merger deal. Exhibit 25.

22. On DATE, PETITIONER terminated the merger agreement with COMPANY A and signed a merger agreement with COMPANY D. Exhibit 26. Under the termination agreement between PETITIONER and COMPANY A, PETITIONER agreed to pay COMPANY A a termination fee of \$\$\$\$\$, consisting of \$\$\$\$\$ in cash and approximately ##### shares of COMPANY A stock (worth \$\$\$\$\$) that

PETITIONER had previously purchased. Exhibit 27. PETITIONER REP. 3 testified that regulatory approval for the merger between PETITIONER and COMPANY A had not occurred when the merger was terminated.

23. The PETITIONER shareholders approved the merger with COMPANY D around DATE, and the merger closed around MONTH YEAR. Exhibit 18.

24. Upon PETITIONER's shareholders approving the merger with COMPANY D, PETITIONER was in the position of having more than \$\$\$\$ invested in COMPANY A shares. PETITIONER REP. 3 testified that after the merger between PETITIONER and COMPANY A was terminated, the COMPANY A stock no longer served an operational function in PETITIONER's business.

25. In the fall of DTATE, PETITIONER's Treasury group put together a range of options to convert the company's COMPANY A shares into cash. These options were summarized in a DATE presentation described as the (X), which covered a number of different options for realizing cash or other economic benefits from the shares. Exhibit 13. In the end, the management and board of PETITIONER chose to sell part of the shares and to enter into swap contracts with the COMPANY E and COMPANY F to sell the remainder of the shares. Exhibits 14, 15 & 16. Because the price of COMPANY A shares had fluctuated significantly since the merger agreement was terminated, PETITIONER decided to enter into CONTRACTS to lessen any losses that might occur from further price drops.

26. PETITIONER began to sell its COMPANY A shares on DATE and concluded its sale of all COMPANY A shares on or around DATE. Exhibits 18 & 31.

Parties' Arguments

27. RESPONDENT REP. 2 testified on behalf of the Division. He agreed that the merger agreement between PETITIONER and COMPANY A was signed for a business purpose. However, he stated that once the merger between PETITIONER and COMPANY A was terminated in DATE, the COMPANY A stock owned by PETITIONER became an investment. As a result, the Division argues that the

losses from the sale of the stock occurred at a time when the stock served an investment, and not an operational, function. For these reasons, the Division contends that the COMPANY A losses are nonbusiness losses. The Division also argues that the termination fee that PETITIONER paid to COMPANY A is a nonbusiness loss because it is also associated with the termination of the proposed merger.

28. PETITIONER argues that all COMPANY A losses should be considered business losses. PETITIONER argues that the COMPANY A losses arose out of a strategic business merger. PETITIONER argues that it acquired the COMPANY A shares not as an investment, but as part of the comprehensive plan to increase the profitability and market position of the existing business of PETITIONER in response to changes in the marketplace. PETITIONER argues that the purpose for which the shares were purchased should determine whether losses on those shares constitute business or nonbusiness income. Because PETITIONER was required to purchase the COMPANY A stock in order to enter into a strategic merger agreement with COMPANY A, PETITIONER contends that the losses it realized on its disposition of the stock should be considered business losses.

29. PETITIONER also argues that the termination fee it paid to COMPANY A was a business expense necessary for it to conclude a strategic merger with COMPANY D. As a result, PETITIONER contends that the termination fee should also be considered a business loss.

APPLICABLE LAW

1. Utah's UDITPA provisions are set forth in Title 59, Chapter 7, Part 3 of the Utah Code. UCA §59-7-303(1) (2000)² 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 purposes of the UDITPA provisions, UCA §59-7-302 defines “business income” and “nonbusiness income,” as follows:

(1) “Business income” means income arising from transactions and activity in the regular course of the taxpayer’s trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitutes integral parts of the taxpayer’s regular trade or business operations.

....

(4) “Nonbusiness income” means all income other than business income.

3. Utah Administrative Rule R865-6F-8 (“Rule 8”) provides guidance concerning the classification of “business income,” as follows in relevant part:

A. Business and Nonbusiness Income Defined. Section 59-7-302 defines business income as income arising from transactions and activity in the regular course of the taxpayer’s trade or business operations. In essence, all income that arises from the conduct of trade or business operations of a taxpayer is business income. For purposes of administration of the Uniform Division of Income for Tax Purposes Act (UDITPA), the income of the taxpayer is business income unless clearly classifiable as nonbusiness income.

1. Nonbusiness income means all income other than business income and shall be narrowly construed.

2. The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, and nonoperating income, is of no aid in determining whether income is business or nonbusiness income. Income of any type or class and from any source is business income if it arises from transactions and activity occurring in the regular course of a trade or business. Accordingly, the critical element in determining whether income is business income or nonbusiness income is the identification of the transactions and activity that are the elements of a particular trade or business. In general, all transactions and activities of the taxpayer that are dependent upon or contribute to the operation of the taxpayer’s economic enterprise as a whole constitute the taxpayer’s trade or business and will be transactions and activity arising in the regular course of business, and will constitute integral parts of a trade or business.

3. Business and Nonbusiness Income. Application of Definitions. The following are rules for determining whether particular income is business or nonbusiness income:

....

b) Gains or Losses from Sales of Assets. Gain or loss from the sale,

2 The 2000 version of Utah law is cited in this decision.

exchange or other disposition of real or tangible or intangible personal property constitutes business income if the property while owned by the taxpayer was used in the taxpayer's trade or business. However, if the property was utilized for the production of nonbusiness income the gain or loss will constitute nonbusiness income. . . .

DISCUSSION

At issue is whether the COMPANY A losses are business income or nonbusiness income for Utah corporate franchise tax purposes. Utah has adopted the UDITPA provisions to determine the portion of income from a multi-state business that is subject to Utah tax. These provisions are contained at Utah Code Ann. §59-7-302 through §59-3-321 and provide the formula for allocating and apportioning multi-state income. The formula divides income into two separate categories, i.e., business income and nonbusiness income. Business income is apportioned to each state through the use of a three-factor formula that is based on the taxpayer's property, sales and payroll in a particular state in comparison to its total property, sales and payroll. Nonbusiness income is generally allocated to the state in which the taxpayer is domiciled.

The Division contends that Utah may not apportion the COMPANY A losses because they are not "business income" or losses, as defined in Utah law. The Commission notes that there is a strong inference that income is "business income." Rule 8(A) provides that "the income of the taxpayer is business income unless clearly classifiable as nonbusiness income." Furthermore, Rule 8(A)(1) specifies that "nonbusiness income . . . shall be narrowly construed."³

The Commission has consistently found that Utah's definition of "business income" in Section 59-7-302(1) includes two separate tests that are commonly referred to as the "transactional test" and the "functional test." The transactional test includes "income arising from transactions and activity in the regular

³ The rule is supported by United States Supreme Court rulings, which clarify that the taxpayer has the "distinct burden of showing by clear and cogent evidence that [the state tax] results in extraterritorial values being taxed." See *Container Corp. v Franchise Tax Bd.*, 463 U.S. 159 (1983); *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207 (1980).

course of the taxpayer's trade or business." The functional test includes "income from tangible and intangible property if the acquisition, management, and disposition of the property constitutes integral parts of the taxpayer's regular trade or business operations." The Commission has determined that the definition of "business income" requires that only one or the other of the two tests be met, an interpretation supported by cases in other jurisdictions with a similar definition.⁴

The Commission has recognized and applied the functional test in its prior decisions.⁵ The Commission has typically found that the functional test applies when the asset that generated that income "served a useful purpose in furthering one of the business lines of the taxpayer, or provided some synergism for one of the business lines of the taxpayer, or the subsidiary generated business income" (*USTC Appeal No. 01-0172* at p. 4).

PETITIONER entered in to a merger agreement with COMPANY A for a strategic business purpose, specifically to protect its (X) business by acquiring new assets that would allow it to better compete in a changing market. The Commission believes that it is clear that PETITIONER and COMPANY A entered into a merger agreement for a business purpose. Furthermore, PETITIONER was subsequently required to terminate the COMPANY A merger deal after COMPANY D submitted a superior proposal. PETITIONER subsequently entered a merger with COMPANY D for a similar strategic business purpose to protect its (X) business.

Given these circumstances, the Commission considers the payment of the termination fee to COMPANY A to be a necessary expense of PETITIONER to merge with COMPANY D. As a result, the Commission finds that the termination fee "served a useful purpose in furthering" the taxpayer's line of

4 See *Polaroid v. Offerman*, 507 S.E.2d 284 (N.C. 1998); *Hoechst Celanese Corp. v. Franchise Tax Board*, 22 P.3d 324 (Cal. 2001).

5 See *USTC Appeal Nos. 90-1607, 90-1521, 93-0481, 97-1416, 93-0004, 01-0005 and 01-0172*.

business and qualifies as a business loss under the functional test.

Concerning the COMPANY A stock losses, the Division argues that an operational relationship between PETITIONER and COMPANY A never occurred once PETITIONER terminated their merger agreement. For this reason, the Division argues that the COMPANY A stock never served an operational purpose in PETITIONER's business. The Division contends, as a result, that the COMPANY A stock only served an investment purpose in PETITIONER's business and that the losses realized from the sale of the stock are nonbusiness losses that do not qualify as business losses under the functional test. PETITIONER, however, argues that a unitary relationship between PETITIONER and COMPANY A was not necessary for the COMPANY A losses to be deemed business income. PETITIONER argues that the United States Supreme Court has determined that income or losses associated with an *asset* can also qualify as business income or losses under the functional test, regardless of whether a unitary relationship exists between the relevant companies.

The United States Supreme Court has determined that an *asset* may serve an operational function instead of an investment function in several cases. In *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768 (1992), the Court explained that “the existence of a unitary relation . . . is one justification for apportionment, but not the only one.”⁶ The Court further stated in *Allied-Signal* that situations could occur in which UDITPA apportionment might be constitutional even though “the payee and that payor [were] not . . . engaged in the same unitary business.” The Court recently reconfirmed its *Allied-Signal* position in *MeadWestvaco v. Illinois Dep't of Revenue*, 2008 U.S. LEXIS 3473 (2008) (“*Mead*”), explaining that:

our references to “operational function” in *Container Corp.* and *Allied-Signal* were not intended to modify the unitary business principle by adding a new ground for apportionment. The concept of operational function simply recognizes that an asset

6 See also *Container Corp.*

can be a part of a taxpayer's unitary business even if what we may term a "unitary relationship" does not exist between the "payor and payee."

The Court further explained in *Mead* that:

[i]n each case, the "payor" was not a unitary part of the taxpayer's business, but the relevant asset was. The conclusion that the asset served an operational function was merely instrumental to the constitutionally relevant conclusion that the asset was a unitary part of the business being conducted in the taxing State rather than a discrete asset to which the State had no claim.

In the present case, the Commission finds that PETITIONER acquired the COMPANY A shares solely to accomplish the operational purpose of enabling PETITIONER to protect its communications business. In 1999, PETITIONER was a local (X) company providing services in ##### states. PETITIONER's business was being challenged due to changes in both the regulatory framework governing PETITIONER and its competitors and to changes in the technology related to communication services. In order to protect its customer base and provide the additional services now required by its customers, PETITIONER's directors and management considered various options and elected to merge with another company with a complementary operating structure. PETITIONER pursued discussions with both COMPANY A and COMPANY D. When discussions with COMPANY D initially failed to produce a concrete merger offer, PETITIONER elected to conclude a merger agreement with COMPANY A. Although the Commission considers the proposed merger to be an extraordinary event, the Commission believes that the "acquisition, management, and disposition of the [COMPANY A stock] constitutes integral parts of the taxpayer's regular trade or business operations." For these reasons, the Commission finds that once PETITIONER entered into a merger agreement with COMPANY A, the COMPANY A stock served an operational purpose and any income or losses associated with it qualifies as business income or losses under the functional test.

The Commission believes its conclusion is supported by the ruling of the North Carolina Supreme Court in *Polaroid* and the California Supreme Court in *Hoechst*. In *Polaroid*, the North Carolina Court found that an award of lost profits that Polaroid received from a patent infringement suit constituted business income under the functional test even though the income was obtained as a result of court proceedings rather than marketplace sales. The North Carolina Court stated that “[w]hen determining whether a source of income constitutes business income under the functional test, the extraordinary nature or infrequency of the event is irrelevant.”

In *Hoechst*, the California Supreme Court considered whether the income received from the reversion of surplus pension plan assets constituted business income. The Court found that it did not qualify as business income under the transactional test because the reversion was an extraordinary event that did not occur in the regular course of Hoechst’s trade or business. The Court stated that “unprecedented, once-in-a-lifetime occurrences do not meet the transactional test because they do not occur in the regular course of any business.” Nevertheless, the Court found that the income realized from this extraordinary event qualified as business income under the functional test because “Hoechst’s control and use of the pension plan assets still contributed materially to its production of business income by improving the efficiency and quality of its workforce which, in turn, generated Hoechst’s business income.” As a result, the COMPANY A losses at issue in this case may qualify as business losses even though they were associated with an extraordinary event.

Furthermore, once the merger with COMPANY A was terminated in July 1999, the Commission does not agree with the Division that the COMPANY A stock automatically changed from an operational function to an investment function. The Commission finds that PETITIONER began an orderly liquidation of its COMPANY A stock, as evidenced by its development of a monetization strategy in DATE and its subsequent sale of the stock. Although the monetization strategy was developed several months after the merger was terminated, the Commission believes that PETITIONER’s actions were reasonably quick to

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dispose of such a large amount of stock. The Commission finds that the passage of time between the COMPANY A merger termination and the sale of the COMPANY A stock was not so significant to result in the stock changing from an operational function to an investment function. For these reasons, the Commission finds that the losses incurred by PETITIONER from the sale of and swaps involving its COMPANY A stock qualify as “business losses” under the functional test.

The Commission believes that the facts of this case are distinguishable from those found in *Appeal No. 99-0652* (Utah State Tax Comm’n Dec. 19, 2000)⁷. In *Appeal No. 99-0652*, COMPANY 1, an office retail company, entered into a Stock Purchase Agreement to purchase a minority interest in COMPANY 2, another office retail company, with an option to acquire a majority interest. Additionally, the agreement set forth that the two companies would exchange information on management systems, vendor pricing and stocking, and that they would assist each other with obtaining discounted goods from vendors and selling to each other at cost. COMPANY 1 would also be allowed to visit and inspect COMPANY 2’s facilities, books and records. After two years, however, COMPANY 1 decided not to pursue a merger with COMPANY 2 and sold its shares of COMPANY 2 stock. The Commission determined that the gains realized by COMPANY 1 on the sale of COMPANY 2 stock was nonbusiness income.

However, the Commission’s decision in *Appeal No. 99-0652* was based on facts different from those presented in the present case. While there were some operational discussions between COMPANY 1 and 2 in *Appeal No. 99-0652*, COMPANY 1 took a stock position with an option to acquire a majority position and did nothing with that position for a two-year period of time. The decision of Company A to sell that stock was brought about by a change of its internal financial assets. What that case presents is a “maybe

⁷ The Commission issued an Initial Hearing Decision in *Appeal No. 99-0652* on December 19, 2000, after which Auditing Division timely requested a Formal Hearing. However, the parties subsequently entered into a Stipulation, which the Commission approved in an Order dated August 16, 2001.

we'll move forward with a majority business ownership interest," but without any commitment as to combining business operations. Although there was an option to purchase a majority interest, that option was abandoned.

In the present case, PETITIONER signed a merger agreement with COMPANY A. PETITIONER did not purchase the COMPANY A stock without committing to a merger of the two companies. Although the merger was eventually terminated, the Commission finds that the merger agreement was undertaken for a business purpose and that the COMPANY A stock purchased under that agreement became an asset that served an operational function in PETITIONER's business. Accordingly, the Commission believes that its conclusion that the COMPANY A stock losses qualify as business losses is distinguishable from, and not inconsistent with, its decision in *Appeal No. 99-0652*.

CONCLUSIONS OF LAW

1. In its October 15, 2008 letter, the Division used financial reporting or "book" numbers to determine the amounts of the COMPANY A stock swap contract losses for the audit period. The Commission finds that the "tax" numbers submitted by PETITIONER at the hearing should be used instead for Utah tax purposes.

2. The Commission finds that the termination fee paid by PETITIONER to COMPANY A qualifies as business income or loss for Utah tax purposes.

3. The Commission finds that the losses incurred by PETITIONER on its sale of COMPANY A stock and its swap contracts involving COMPANY A stock qualify as business income or losses for Utah tax purposes.

DECISION AND ORDER

Based upon the foregoing, the Commission finds that the termination fee and stock losses arising out of the merger agreement between COMPANY A and PETITIONER are apportionable business income or losses under UDITPA for Utah tax purposes. Accordingly, the Commission reverses that portion of

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the Division's audit assessment that classifies the COMPANY A losses as nonbusiness income or losses. It is so ordered.

DATED this _____ day of _____, 2009.

Kerry R. Chapman
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION.

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
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. §§59-1-601 and 63G-4-401 et. seq. Failure to pay any remaining balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.

KRC/05-0792.fof