STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
AGMAN LOUISIANA INC.
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L0801590832

v. **No. 17-47**

TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on May 1, 2017 before Brian VanDenzen, Esq., Chief Hearing Officer, in Santa Fe. At the hearing, Nicholas Palmos, CPA, appeared representing Agman Louisiana, Inc. ("Taxpayer"). Dana Calmusa of Taxpayer also appeared as a Taxpayer witness in this matter. Staff Attorney Peter Breen appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Tom Dillon appeared as a witness for the Department. Taxpayers Exhibits #1-#5 were admitted into the record. Department Exhibits A-K were admitted into the record. Although there was some discussion at the conclusion of the hearing about reviewing complete corporate filings with the Securities and Exchange Commission in the interest of completeness, no review occurred in this matter as upon a more detailed review the record presented was adequate to decide the protest. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On August 1, 2016, under letter id. no. L0801590832, the Department assessed Taxpayer $156,440.00 in Corporate Income Tax, $31,288.00 in penalty, and $12,712.66 in interest

for a combined total assessment of $200,440.66 for the reporting period ending on September 30, 2013.

2. On September 22, 2016, Taxpayer timely protested the Department's assessment, a protest received by the Department on September 28, 2016.

3. On October 7, 2016, the Department acknowledged receipt of Taxpayer's protest.

4. On November 18, 2016, the Department requested a hearing in this matter with the Administrative Hearings Office, an agency independent of the Department under the Administrative Hearings Office Act, NMSA 1978, Section 7-1B-1 through 9 (2015).

5. On November 21, 2016, the Administrative Hearings Office issued a Notice of Telephonic Scheduling Conference, setting a scheduling hearing on December 2, 2016.

6. On December 2, 2016, a scheduling hearing occurred in this matter. The parties did not object that conducting the scheduling hearing within 90-days of the protest met the statutory 90-day hearing requirement while also allowing meaningful time to complete the statutory fair hearing requirements identified under the NMSA 1978, Section 7-1B-6 (D) (2015).

7. On December 2, 2016, the Administrative Hearings Office issued its Scheduling Order and Notice of Administrative Hearing, setting this matter for a merits hearing on March 1, 2017.

8. On January 24, 2017, Taxpayer moved, with concurrence of the Department, to continue the March 1, 2017 hearing until May 1, 2017.

9. On January 25, 2017, the Administrative Hearings Office issued a Continuance Order, Amended Scheduling Order, and Amended Notice of Administrative Hearing, rescheduling the hearing on May 1, 2017.

10. On April 14, 2017, the parties filed their joint prehearing statement, providing a narrative of joint stipulated facts incorporated into the evidentiary record in this matter.

11. Taxpayer, Agman Louisiana, Inc., is an indirect, wholly-owned subsidiary of ED&F Man and its group of subsidiary and affiliated entities[1], an agricultural commodities merchant headquarted in the United Kingdom. [Joint Stipulated Facts, Joint Prehearing Statement].

12. Taxpayer is headquarted in New Orleans, Louisiana. [Joint Stipulated Facts, Joint Prehearing Statement].

13. Taxpayer files a separate corporate income tax return in New Mexico. [Joint Stipulated Facts, Joint Prehearing Statement].

14. Taxpayer had two subsidiaries, Westway Terminal Company, Inc. ("Terminal") and Westway Feed Products, Inc. ("Feed Products"). [Joint Stipulated Facts, Joint Prehearing Statement].

15. Taxpayer sold off these two subsidiaries between 2006 and 2009, Terminal and Feed Products, to Westway Group Incorporated ("WGI"). [Joint Stipulated Facts, Joint Prehearing Statement; Department Ex. B-3 and Department Ex. E-006 (for time period of sale not otherwise specified or addressed by the parties)].

16. WGI was a publicly traded company, with Taxpayer owning between 48% and 49.5% of the publicly traded entity. [Joint Stipulated Facts, Joint Prehearing Statement].

17. Taxpayer had the authority to name three of the seven board members of WGI. [Joint Stipulated Facts, Joint Prehearing Statement].

[1]Referred to repeatedly on the record, in exhibits, and in this decision and order as "ED&F Man group"

18. When WGI went public, a number of ED&F Man management employees took some positions of leadership at WGI. A majority of WGI's directors came from ED&F Man group and some of WGI's officers. A former manager at ED&F Man group became CEO of WGI in 2009 for a year. [Dept. Ex D-6; 05-01-17 CD 1:02:00-19:50].

19. WGI had two subsidiaries, Westway Feed Products LLC and Westway Terminal Company LLC, that were operated separately, with separate presidents, operations, and accounting departments. [05-01-17 CD 19:50-20:17].

20. WGI, through its subsidiary Westway Terminal Company, LLC, provided bulk liquid storage and related services in North America and across the globe with bulk storage capacity at 25 different terminals. [Taxpayer Ex. #1 & #2.5].

21. WGI, through its subsidiary Westway Feed Products, LLC, also was a leading manufacturer and distributor of liquid animal feed supplements, producing 1.8 million tons of liquid feed supplements annually in 35 facilities located in North America and eastern Australia. [Taxpayer Ex. #1 & #2.5].

22. WGI had two liquid feed supplement facilities in New Mexico. [Taxpayer Ex. #2.6].

23. WGI had a broad customer base, including a diverse group of multi-national, national, and regional corporations, for its liquid storage business, storing a wide range of products. [Taxpayer Ex. #2.8-11].

24. According to WGI's Form 10-K for fiscal year endings on December 31, 2011, "[i]n 2011, ED&F Man group, a related party, accounted for 17% of the revenues of our liquid storage business." ED&F was WGI's principal supplier of storage requirements. [Taxpayer Ex. #2.10].

25. WGI had a long-term contractual relationship, in form of a document titled "Storage Strategic Alliance," as a supplier of bulk liquid storage with ED&F Man group, an agreement running through 2029. [Taxpayer Ex. #2.10, #2.17, #3.1].

26. ED&F Man and WGI and its subsidiaries entered into a Storage Strategic Alliance agreement for the storage of ED&F Man's bulk liquid products at WGI's terminals. [Taxpayer Ex. #3.1].

27. Under the Storage Strategic Alliance agreement, WGI granted ED&F Man right of first offer/reservation on its storage capacity. [Taxpayer Ex. #3.5].

28. Under the storage strategic alliance agreement, ED&F Man paid WGI a market rate for the storage, provided that rate equaled the lowest rate provided to any third party customer. Additionally, WGI was required to provide ED&F Man with notice and an amended pricing agreement matching the lowest price if WGI entered into an underpriced agreement with any other customer. [Taxpayer Ex. #3.5-6].

29. WGI developed other strong relationships with numerous other well-established global customers, including companies that it or its predecessor had been doing business with for more than 10 years. [Taxpayer Ex. #2.11].

30. In the production of liquid feed supplements, one of WGI's primary inputs is molasses. Under a long-term agreement, called the Molasses Supply Agreement, ED&F Man group provided WGI with a majority of molasses needs based on a formula pricing determined in part by prices charged by the ED&F Man group to third parties. [Taxpayer Ex. #2.14, #2.17, #4].

31. ED&F Man Liquid Products Corporation entered into the Molasses Supply Agreement with WGI's subsidiary Westway Feed Products, LLC, to provide molasses. [Taxpayer Ex. #4].

32. Under the Molasses Supply Agreement, ED&F Man was the exclusive provider of molasses to Westway Feed Products, LLC. [Taxpayer Ex. #4.4].

33. Under the Molasses Supply Agreement, Westway Feed Products, LLC purchased molasses under a market-based formula pricing, but was also granted "most favored nation" pricing where it had the option to amend the agreement to match a lower price offered to a third party competitor. [Taxpayer Ex. #4.9].

34. As WGI reported in its 2009 Form 10-K, WGI's relationship with ED&F Man group provided "a degree of certainty regarding the ongoing operational characteristic of our business and our ability to service our customers in the future. In tandem with further investment opportunities made possible by business combination, the relationship with ED&F Man group can provide us with a material platform from which growth can be generated in the future." [Department Ex. B-6].

35. As WGI reported in its 2010 Form 10-K, WGI maintained an ongoing commercial relationship with, and dependence on, ED&F Man that provided a degree of certainty in the operation of WGI's business. [Dept. Ex. F].

36. As WGI reported in its 2011 Form 10-K, ED&F Man group had significant voting power to influence WGI's policies, business and affairs. [Dept. Ex. D-7].

37. As WGI reported in its 2011 Form 10-K, WGI reported that "[p]rior to the business combination in May 2009, as consequence of being owned by ED&F Man, the acquired business maintained a commercial relationship with the ED&F Man group. After the business combination, this relationship has continued…". [Dept. Ex. D-8].

38. As WGI reported in its 2011 Form 10-K, WGI's relationship with ED&F Man group provided numerous "benefits to both our bulk liquid storage and liquid feed supplements

business. In particular, the benefits of being a supplier of bulk liquid storage to the ED&F Man group, combined with quality and quantity of molasses supplied to our liquid feed supplements business by the ED&F Man group, provides us with a degree of certainty in the operation of our business and our ability to service our many customers in the future." [Taxpayer Ex. #2.16].

39. WGI also had an insurance agreement with a captive insurance company owned by ED&F Man group in 2011. [Taxpayer Ex. #2.17].

40. After the initial spin-off of the terminal and liquid feed businesses, WGI and ED&F Man group had a shared services agreement in place for the provisioning of administrative support services, human resources, information technology services, and accounting services. Taxpayer reimbursed the cost of these services to WGI with no markup. This agreement was terminated in 2010. [Dept. Ex. B.7; 05-01-17 CD 25:04-56].

41. ED&F man owned preferred, convertible stock rights in WGI, but could not execute that preferred stock if it would result in Taxpayer owning more than 49.5% of WGI's outstanding common stock. [Taxpayer Ex. #2.76].

42. On January 7, 2013, WGI sold its interest in Feed Products back to Taxpayer. [Joint Stipulated Facts, Joint Prehearing Statement].

43. On January 30, 2013, Taxpayer sold its stock interest in WGI to an unrelated third party private equity company. [Joint Stipulated Facts, Joint Prehearing Statement].

44. Taxpayer recognized and reported the gain of $170 million on the sale of its interest in WGI on Taxpayer's 2013 tax return as allocable non-business income, reported back to its commercial domicile.

45. Upon audit, the Department determined that the income was business income and apportioned part of the gain on this sale of WGI stock to New Mexico. [Joint Stipulated Facts, Joint Prehearing Statement].

46. As a result of that audit determination, the Department issued its assessment of 2013 corporate income identified in Finding of Fact #1.

47. As of the date of the hearing, Taxpayer owed $156,440.00 in tax, $31,288.00 in penalty, and $17,385.88 in interest for a total outstanding liability of $205,113.88. [Dept. Ex. A].

DISCUSSION

At issue in this protest is whether Taxpayer's $140 million gain on the 2013 sale of its interest in WGI is business income apportionable and subject to New Mexico Corporate Income Tax or whether it is allocable nonbusiness income, not subject to New Mexico tax under Uniform Division of Income for Tax Purposes Act ("UDITPA") and applicable Commerce Clause and Due Process Clause requirements.

Burden of Proof and Standard of Review.

Pursuant to NMSA 1978, Section 7-1-17 (C), the assessment issued in this case is presumed correct. The Taxpayer has the burden to overcome the presumption of correctness that attached to the assessment. *See Archuleta v. O'Cheskey,* 1972-NMCA-165, ¶11, 84 N.M. 428. Unless otherwise specified, for the purpose of the Tax Administration Act, "tax" is defined to include interest and civil penalty. *See* NMSA 1978, § 7-1-3 (X). Under Regulation 3.1.6.13 NMAC, the presumption of correctness under Section 7-1-17 (C) extends to the Department's assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given substantial weight). Moreover, "[w]here an exemption or

deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447.

UDITPA, and Apportionment and Allocation of Income

For context, under NMSA 1978, Section 7-2A-3, New Mexico levies an income tax on the "the net income of every domestic corporation and upon the net income of every foreign corporation employed or engaged in the transaction of business in, into or from this state or deriving any income from any property or employment within this state." As used under the Corporate Income and Franchise Tax Act, the term "corporations" includes corporations, joint stock corporations, certain real estate trusts, financial corporations, banks, other business associations, limited liability companies and partnerships taxed as corporations under the Internal Revenue Code. *See* NMSA 1978, § 7-2A-2 (D).

There is no dispute in this matter that Taxpayer is subject to New Mexico Corporate Income Tax. Instead, the question in this case turns on the allocation or apportionment of Taxpayer's gain on the 2013 sale of WGI. Taxpayer claims that it was non-business income, allocable to its state of domicile. Upon audit, the Department determined that it was business income that needed to be apportioned to New Mexico. In essence, the issue in this case turns on statutory apportionment under UDITPA and related constitutional concerns.

Like many states, New Mexico has adopted the UDITPA to address apportionment and allocation of income earned by multistate or multinational entities. *See* NMSA 1978, §§7-4-1 through 7-4-21; *see also ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 311 fn.3 (1982) (short

discussion of history of UDITPA) ; *see also J. Hellerstein & W. Hellerstein*, State Taxation, ¶9.01 (3rd ed. 2001-2015) (discussion of history of adoption of UDITPA, or similar statutory regimes, by numerous states). UDITPA distinguishes between business income and nonbusiness income with only business income being subject to apportionment. *See* NMSA 1978, §7-4-10 (A) (2013) ("…all business income shall be apportioned...").

"Business income" is defined under NMSA 1978, Section 7-4-2 (A) (1999), as

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

Conceptually, New Mexico's statutory scheme under Section 7-4-2 (A) adopts three tests to determine whether the income is business or non-business income. First, under Section 7-4-2 (A), is a "transactional test," where income is considered business income when the income arose from "transactions and activity" occurring in the "regular course of the taxpayer's trade or business." Second, under the "disposition test," income is considered business income when the income arose from the disposition of a business or segment of a business. *See* § 7-4-2 (A). And finally, Section 7-4-2 (A)'s last sentence creates a "functional test," where income is considered business income when the income arose from "tangible and intangible property if the acquisition, management or disposition of the property constitute an integral part of the taxpayer's regular trade or business operations." In contrast, "nonbusiness income" is defined under UDITPA as "all income other than business income." NMSA, §7-4-2 (E).

Numerous Department regulations provide further guidance on the UDITPA distinction between business and nonbusiness income. In addition to essentially reiterating the statutory definition of business income, Department Regulation 3.5.1.9 (A) NMAC adds that "[i]n essence, all

income which arises from the conduct or the disposition or liquidation of trade or business operations of a taxpayer is business income." Regardless of the name, label, or classification used to describe the income, Department Regulation 3.5.1.9 (A) NMAC indicates that

> [i]ncome 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 which are the elements of particular trade or business. In general, all transactions and activities of the taxpayer which are dependent upon or contribute to the operations 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, and constitute integral parts of, a trade or business.

In concept, the broad principals of business income as defined under UDITPA and the accompanying Department regulations are not inconsistent or incompatible with the touchstone constitutional Due Process and Commerce Clause standard for apportionment, the unitary business principal. *See Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 786 (U.S. June 15, 1992) (generally noting that UDITPA, while never expressly adopted by the Supreme Court as the constitutional standard, is not incompatible with that standard). An overview of those constitutional standards, as articulated by the United States Supreme Court, provides guidance on the application of UDITPA to this matter.

Generally, a state may not impose an income tax on the value earned outside of its border under the Due Process and Commerce Clauses of the United States Constitution. *See ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 314 (1982). Specifically, the Commerce and Due Process Clauses of the United States Constitution impose distinct but parallel limitations on New Mexico's power to tax value earned from out-of-state business activities. *See Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 454 (1980); *Norfolk & Western R. Co. v. Missouri Tax Comm'n.*, 390 U.S. 317, 325, n.5 (1969). However, a state may tax an apportioned share of a multistate

entity's income earned outside of its territory if the activity that generated that income was part of a "unitary business." *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 19 (U.S. Apr. 15, 2008); *Allied-Signal*, 504 U.S. at 772; *Hunt Wesson v. Franchise Tax Bd.*, 528 U.S. at 460; *Exxon Corp. v. Wisconsin*, 447 U.S. 207, 224 (1980); *Mobil Oil Corp.*, 454 U.S. at 442. "[T]he linchpin of apportionability in the field of state income taxation is the unitary-business principle." *Mobil Oil Corp.*, 445 U.S. 425, 439. Taxpayer bears the burden of establishing by clear and cogent evidence that the state seeks to tax extraterritorial values. *Allied-Signal*, 504 U.S. 768, 782, citing *Exxon Corp*. 447 U.S. 207, 224.

The United States Supreme Court has held over the years in a wide range of factual contexts that the constitutional test for establishing whether two or more companies are unitary is dependent on whether there is functional integration, centralization of management, and economies of scale between the companies. *See F.W. Woolworth Co. v. Taxation and Revenue Dep't*, 458 U.S. 354 (1982); *See also ASARCO*, 458 U.S. 307 (1982); *See also Exxon*, 447 U.S. 207 (1980). Additionally, the Court, in *Allied-Signal*, stated that a non-domiciliary state can tax income from intangible property even if the income payer and payee are not engaged in the same unitary business, so long as the capital transaction serves an operational function, and not an investment function. *See Allied-Signal*, 504 U.S. at 787. Hence, for example, a state may include in the apportionable income of a non-domiciliary corporation interest earned on short-term deposits in a bank located in another state if the deposits form part of the working capital of the corporation's unitary business. *Id*. And, in *Container Corp. v. Franchise Tax Bd*., the Court noted that capital transactions can serve an investment function or an operational function, finding that corn futures contracts in the hands of a corn refiner seeking to hedge against increases in corn prices are operational rather than capital assets. *Container Corp. v. Franchise Tax Bd.*, 463 U.S.

159, n.19 (1983); *citing Corn Products Refining Co. v. Commissioner*, 350 U.S. 46, 50-53 (1955).

In 2008, the United States Supreme Court clarified its statement in *Allied-Signal* in the *Mead* case. *See MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16 (2008). In *Mead*, the Court noted that its 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 Court explained that the concept of operational function simply recognized that an asset can be part of a taxpayer's unitary business even if the unitary business relationship doesn't exist between the payee and the payor. In the example given by the Court in *Allied-Signal*, the taxpayer was not unitary with its banker, but the taxpayer's short-term deposits (which represented working capital and thus operational assets) were clearly unitary with the taxpayer's business. In *Corn Products*, the taxpayer was not unitary with the counterparty to its hedge, but the taxpayer's futures contracts (which served to hedge against the risk of an increase in the price of a key cost input) were likewise clearly unitary with the taxpayer's business. In the examples in *Allied Signal* and *Corn Products*, the payor was not a part of the taxpayer's unitary business but the asset clearly was. The conclusion that the asset served an operational function was merely instrumental to the constitutionally relevant conclusion that the asset was a part of the unitary business being conducted in the taxing state rather than a discrete asset to which the state had no claim.

Distilling the Supreme Court's constitutional jurisprudence in this area into a brief summary, pursuant to the holdings in *Allied Signal* and *Mead*, an item of income is subject to apportionment either if (1) the taxpayer/payee and the income payor are engaged in a unitary business, or (2) the asset that generated the income was itself used as part of the taxpayer's unitary business operations in the taxing state.

Under these general statutory and constitutional principles, Taxpayer's $140 million gain on the 2013 sale of WGI is business income subject to apportionment under UDITPA. Under both the dispositional and functional tests articulated in Section 7-4-2 (A), Taxpayer's income in this case arose from disposition of a line of business and a functional asset integral to Taxpayer's regular trade or business operations. After creating the separate WGI entity in 2009, but having that separate entity remain a critical component of Taxpayer's business functions, it reacquired WGI in 2013 as part of the eventual sale of the stock to the third party buyer. Thus, when Taxpayer sold its interest in WGI, including its stock and the reacquired Feed Products entity in 2013, the income from that sale met the dispositional test under Section 7-4-2 (A), making the proceeds of the sale business income that needed to be apportioned to New Mexico. Moreover, as will be discussed in more detail, because Taxpayer's stock in WGI continued to be integral to Taxpayer's business operations between 2009 and 2013, Taxpayer's interests in WGI also met the functional test under Section 7-4-2 (A), making the income gained on the sale business income that needed to be apportioned to New Mexico.

The dispositional test portion of the statue was added by the Legislature in response to the New Mexico Court of Appeals' decision in *McVean & Barlow, Inc. v. Bureau of Revenue*, 1975-NMCA-128, 88 NM 521. In *McVean & Barlow, Inc.*, the Court of Appeals had found that income from the liquidation of a line of business was non-apportionable, non-business income under UDITPA because it arose from a one-time transaction not part of that taxpayer's line of business. This statutory overruling of *McVean & Barlow, Inc.* made clear that the Legislature intended the proceeds from the disposition of a line of business to be considered business income under UDITPA subject to apportionment. Here, as the parties stipulated in the joint prehearing statement but barely addressed during the hearing, Taxpayer had to reacquire Feed Products from WGI in 2013 and then sold its interests in WGI some two weeks later to an unrelated third-party. Even for a brief period,

Taxpayer again owned Feed Products, an asset that had been furthering Taxpayer's operational needs in the entire intervening period from 2009 through 2013. When Taxpayer sold its interest in WGI later that month, it was subject to tax as business income under the post-*McVean & Barlow, Inc.* amendment to Section 7-4-2 (A) adding the dispositional test.

While Taxpayer's argument focused almost exclusively on the fact that Taxpayer held no more than a 49% ownership interest in WGI once it sold the terminal and liquid food products entities in 2009, and thus could not be considered unitary with WGI, the evidence established that the stock Taxpayer owned in WGI remained a part of Taxpayer's core operational functions between 2009 and 2013. While Taxpayer only had a 49% ownership interest in WGI, it appointed three members of the board, WGI's initial CEO came from ED&F Man group, ED&F Man group provided core administrative support services to WGI for the first year, and ED&F Man group insured WGI. All of WGI's 10-K forms in 2009, 2010, and 2011 presented into the record as evidence clearly demonstrate the important role ED&F Man group played with WGI: ED&F Man group had right of first refusal on WGI's terminal space with a price matching guarantee ensuring that ED&F Man group would be able to store its goods while receiving the lowest rate offered to any third-party competitor; ED&F Man group was the exclusive provider of molasses to WGI, providing ED&F Man group with a sure market for one its core business products. The functional integration of ED&F Man group and WGI had a direct operational benefit to ED&F Man group's business operations. Therefore, even if not amounting to a unitary business between ED&F Man group and WGI, it cannot be said that Taxpayer's ownership of 49% stock in WGI was merely a passive investment because Taxpayer's interest in WGI remained a functional component of, and business benefit to, Taxpayer's operations even after the sale of the Feed Products and Terminal entities in 2009.

Similarly, under the constitutional analysis espoused in the Supreme Court jurisprudence,

the income in question is business income apportionable to New Mexico. Again, even if there is no unitary-business relationship between the entities, it is still possible to apportion the tax on the income consistent with the constitutional requirements if the asset resulting in the income serves an "operational rather than investment function." *Allied-Signal, Inc.*, 504 U.S. 768, 787; *See also Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159. *Mead* provided further clarity on this point, indicating that the concept of operational function means that an asset can be part of a taxpayer's unitary business even if the unitary business relationship doesn't exist between the payee and the payor.

There is significant evidence that even if Taxpayer only owned a 49% interest in WGI, as discussed above, that interest provided Taxpayer with operation benefit and function. Taxpayer and WGI maintained functional integration with some elements of centralized management after the 2009 transfer of Feed Products and Terminal from ED&F Man group to WGI. ED&F Man group provided 3 of the 7 members of WGI's corporate board. WGI's first CEO came from ED&F Man group. ED&F Man group and WGI had an administrative services agreement where Taxpayer provided core administrative support services to WGI, and WGI stated in its 10-K form that ED&F Man group had the ability to exert substantial influence and control over WGI. While Taxpayer described the pricing agreements in place between ED&F Man group and WGI as based on fair market pricing reached as at arm's length, some of the components of those agreements show that the ED&F Man group received significant business operational benefit in that ED&F Man group had the right of first refusal on terminal storage space at essentially what amounted to equal to the lowest price offered at the facility. Perhaps this is why the agreement between the parties was titled a "Storage Strategic Alliance Agreement." All of these continuing connections between ED&F Man group and WGI in 2009 through 2013 provided Taxpayer with operational

benefit to its line of business. And to that extent, it cannot be said that Taxpayer's stock in WGI was held purely for passive investment reasons.

Like in *Corn Products Refining Co.* case, spun-off WGI provided Taxpayer with a business operational benefit to Taxpayer related to Taxpayer's business, and the rights of first refusal, price matching guarantee, and exclusive molasses purchase requirements provided a similar hedge for Taxpayer's business against variations in supply and demand for storage capacity. By having a right of first refusal for storage in conjunction with what amounted to a lowest price guarantee for storage of its products, Taxpayer avoided possible shortages in storage or increases in prices for storage in times of short supply or high demand that would negatively impact it business operations. Similarly, by being the exclusive supplier of molasses to WGI, ED&F Man group ensured ability to get some of its products to market with reduced fear of market competition.

In summary, Taxpayer failed its burden of establishing by clear and cogent evidence that the state seeks to tax extraterritorial values. *Allied-Signal*, 504 U.S. 768, 782, citing *Exxon Corp*. 447 U.S. 207, 224. Taxpayer's stock interests in WGI in 2009-2013, and short-term reacquisition of Feed Products in 2013, provided Taxpayer with operational benefit integral to Taxpayer's business. Thus, the income from the sale of that interest in WGI met the dispositional and functional tests under Section 7-4-2(A) for business income, as well as the guidance provided by Regulation 3.5.1.9 (A) NMAC ("In general, all transactions and activities of the taxpayer which are dependent upon or contribute to the operations 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, and constitute integral parts of, a trade or business."). Moreover, since the stock and interests in WGI provided Taxpayer with an operational benefit and function part of Taxpayer's unitary operation in New Mexico, apportionment of the gain on the sale does not offend the

Commerce or Due Process Clauses of the Constitution. *See Allied-Signal, Inc.*, 504 U.S. 768, 787; *See also Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159; *See also Exxon Corp*. 447 U.S. 207, 224. For these reasons, Taxpayer's $140-million in gain is business income, apportionable to New Mexico and Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest of the Department's assessment and jurisdiction lies over the parties and the subject matter of this protest.

B. Timely conducting the scheduling hearing in this matter within 90-days met the statutory 90-day hearing requirement under NMSA 1978, Section 7-1B-8 (2015) while also allowing meaningful time for the parties to engage in discovery, motions practice, and fair presentation of their cases, as required by the statutory fair hearing requirements articulated under NMSA 1978, Section 7-1B-6 (D) (2015).

C. Taxpayer's gain on the sale of WGI in 2013 amounted to business income under UDITPA, NMSA 1978, Section §7-4-2 (A) & (E) because the income met the dispositional test and the functional test articulated under the definition of business income. *See also* Regulation 3.5.1.9 (A) NMAC.

D. After Taxpayer 2009, when Taxpayer sold off the Feed Products and Terminal entities to WGI, Taxpayer's interests in WGI provided Taxpayer with significant business operational function and the resulting income earned on the 2013 sale was apportionable to New Mexico consistent with the Due Process Clause and Commerce Clause. *See Allied-Signal, Inc.*, 504 U.S. 768, 787; *See also Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159; *See also Exxon Corp*. 447 U.S. 207, 224.

For the foregoing reasons, Taxpayer's protest **IS DENIED**. As of the date of hearing,

Taxpayer owed $156,440.00 in tax, $31,288.00 in penalty, and $17,385.88 in interest for a total outstanding liability of $205,113.88.

DATED: December 5, 2017

Brian VanDenzen, Esq.
Chief Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record proper with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Decision and Order to the parties listed below this 5th day of December 2017 in the following manner: