

**Letter of Findings: 02-20150653  
Corporate Income Tax  
For the Years 2009, 2010, and 2011**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

### HOLDING

Communication Company's relationship with its various limited partners constituted a unitary business with the partners' income and apportionment factors properly flowing through to the corporate partners; by offsetting previous payments of estimated taxes, the Department did not violate the three-year statute of limitations because the offset did not constitute a proposed assessment.

### ISSUES

#### **I. Administration - Statute of Limitations.**

**Authority:** IC § 6-8.1-5-2(a); also *Phoenix Coal Company, Inc. v. Commissioner of Internal Revenue*, 231 F.2d 420 (C.A.2 1956).

Taxpayer argues that the Department was not justified in denying a refund of estimated tax payments originally reported on the Taxpayer's 2009 corporate income tax return.

#### **II. Administration - Net Operating Loss Calculation Error.**

**Authority:** I.R.C. § 382; IC § 6-8.1-5-1(c).

Taxpayer states the Department incorrectly applied net operating loss ("NOL") deductions in excess of the applicable I.R.C. § 382 limitations and as provided for in a previous settlement agreement between itself and the Department of Revenue.

#### **III. Corporate Income Tax - Limited Partnership Income and Partnership Factors.**

**Authority:** IC § 6-3-2-2; IC § 6-8.1-5-1(c); *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983); *Phoenix Coal Company, Inc. v. Commissioner of Internal Revenue*, 231 F.2d 420 (C.A.2 1956); *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Hunt Corp v. Indiana Dep't of State Revenue*, 709 N.E.2d 766 (Ind. Tax Ct. 1999); *Sherwin-Williams Co. v. Indiana Dep't. of State Revenue*, 673 N.E.2d 849 (Ind. Tax Ct. 1996); [45 IAC 3.1-1-153](#); Memorandum of Decision 02-20100391R (March 7, 2011); Letter of Findings 02-20080545 (October 21, 2010).

Taxpayer claims that the Department was not entitled to reclassify income from limited partnerships and non-managing member LLC interests originally reported as non-unitary income to unitary income.

### STATEMENT OF FACTS

Taxpayer is a multi-state company in the business of providing communication services including phone, cell phone, cable television, Internet access, and other related services. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's income tax returns and business records.

The audit resulted in a partial denial of refund amounts and an assessment of additional tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which

Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

## **I. Administration - Statute of Limitations.**

### **DISCUSSION**

Taxpayer filed 2008, 2009, and 2010 corporate income tax returns. According to the Department's audit report, those returns reported a "large amount of partnership income as non-unitary, allocating it as apportioned at the partnership level, rather than including the partnership earnings and apportionment data in computing [Taxpayer's] Indiana taxable income."

As a result of the Department's review, it granted a 2008 tax refund. The audit approved the refund because "the [T]axpayer had a large net operating loss deduction - determined by a prior settlement agreement - that the Department determined would offset all the [T]axpayer's 2008 Indiana taxable income as re-determined by the Department."

Taxpayer sought an approximately \$6.7 million refund for 2009. The Department denied this refund because "[t]he amount of the tax adjustment for the determination of the [T]axpayer's 2009 Indiana taxable income made in the audit will completely offset the pending refund (even after the remainder of the net operating loss is utilized)." As a consequence the audit determined that "[n]o proposed assessment will be issued for 2009."

Taxpayer states what it regards as the issue:

[T]he issue is that [Taxpayer] made estimated tax payments for tax year 2009 and when it filed its 2009 tax return it did not need all of those credits (payments) to apply against its 2009 corporate income tax liability. Thus it requested that those overpayments of estimated tax be refunded to them. While the Department has the right to adjust a NOL carryforward from a closed year, [the law] does not allow the Department to keep an estimated tax payment from a closed year by claiming that a NOL carryforward utilized in a closed year was not allowable. (Emphasis in original).

Taxpayer disagrees with the Department arguing that the Department's treatment of the refund requested on its 2009 corporate income tax return violates the three-year statute of limitations under which the Department may issue an assessment of tax. As explained by Taxpayer:

It is generally accepted practice by the IRS and the Department to adjust NOL deductions available for utilization in a current tax year based upon changes of tax calculations of years in which the NOLs were generated and intervening years, even if the [statute of limitations] had expired in those years. [Taxpayer] does not contest the Department's ability to make such adjustments in this case.

Nonetheless, Taxpayer disagrees with the Department's decision to not refund the payment of estimated tax not required to credit against corporate income tax from an otherwise "closed tax year."

Taxpayers argue that the 2009 assessments are barred by the three-year statute of limitations set out at IC § 6-8.1-5-2(a) and that it is now entitled to a refund of the estimated tax overpayments. The statute provides in part as follows:

Except as otherwise provided in this section, the department may not issue a proposed assessment under section 1 of this chapter more than three (3) years after the latest of the date the return is filed, or either of the following: (1) The due date of the return. (Emphasis added).

The Department's audit acknowledged and granted a 2008 refund because any liabilities attributed to that year were extinguished by a "large net operating loss." Taxpayer's 2009 refund request was denied because the audit made an adjustment which "completely offset the pending refund (even after the remainder of the net operating loss [was] utilized)." However Taxpayer argues that it is entitled to the refund because the Department is precluded from making an assessment of 2009 taxes by the three-year statute of limitations.

The Department does not agree that Taxpayer is now entitled to a refund. The Department did not issue a proposed assessment of additional tax for a period outside the three-year limitations period. Instead, the Department reconciled what Taxpayer owed for that period and offset that amount by the amount of previously paid estimated taxes. The liability did not spring into being at the time the audit report was completed; there was no "proposed assessment" but simply an acknowledgment of the amount Taxpayer owed and a reconciliation of

those prior estimated payments. The Department did not issue a "bill" for additional tax but simply delayed acting on the refund request until the return could be reviewed to determine whether the refund request was accurate. (See *Phoenix Coal Company, Inc. v. Commissioner of Internal Revenue*, 231 F.2d 420 (C.A.2 1956) holding that Commissioner, in determining a deficiency for 1946, properly considered items on the 1945 return even though an adjustment of the 1945 return was otherwise barred by the three-year statute of limitations.)

### **FINDING**

Taxpayer's protest is respectfully denied.

## **II. Administration - Net Operating Loss Calculation Error.**

### **DISCUSSION**

Taxpayer argues that the Department erred in adjusting Taxpayer's net operating loss utilization and carryforward for tax years after 2007. Taxpayer points to a settlement agreement entered into between itself and the Department which addressed Taxpayer's 2004 through 2007 tax liabilities.

According to Taxpayer, that agreement allowed a NOL carryforward of approximately \$231 million for tax years after 2007. As explained by Taxpayer, that carryforward amount consisted of two "tranches" (segments). The first segment stemmed from a 2005 business acquisition; the second segment stemmed from a 2004 business acquisition.

Application of the I.R.C. § 382 limitations restricts the amount of carryforward that can be claimed in a taxable year from each of these two segments. Taxpayer was permitted to carry forward approximately \$56 million from the first 2005 segment and approximately \$58 million from the 2004 segment.

Taxpayer states that the Department erred in applying the I.R.C. § 382 limitation. As explained by Taxpayer:

IRC § 382 states that the amount of the taxable income of any new loss corporation for any post-change year which may be offset by pre-change losses shall not exceed an amount equal to the value of the old loss corporation multiplied by the long-term tax-exempt rate.

Taxpayer states that the Department has previously determined that the federal I.R.C. § 382 limit "must be apportioned as applied to Indiana NOLs." According to Taxpayer, the audit applied approximately \$220 million of the NOL carryforward to 2008 but that only approximately \$114 million was available due to the segment one and segment two I.R.C. § 382 limitations. According to Taxpayer, "This error seems to be pretty straightforward."

Taxpayer raises a reasonable concern. IC § 6-8.1-5-1(c) imposes on Taxpayer a burden of establishing that any portion of the pending assessment was wrong. Taxpayer has not proven that any portion of the over-arching assessment is wrong but has raised an issue which should be considered during a supplemental audit. The Audit Division is requested to review Taxpayer's explanation, the settlement agreement on which that explanation is based, the accompanying documentation, and to make whatever adjustments it deems are warranted.

### **FINDING**

Subject to review by the Department's Audit Division, Taxpayer's protest is sustained.

## **III. Corporate Income Tax - Limited Partnership Income and Partnership Factors.**

### **DISCUSSION**

Taxpayer filed 2009, 2010, and 2011 corporate income tax returns. In those returns, Taxpayer treated its interest in various limited partnerships (LP's) and limited liability companies (LLC's) as non-unitary. Consequently, the income received from the LP's and LLC's was computed at the LLC and LP level and then the Indiana portion of that income was allocated to Taxpayer.

### **A. Audit Results.**

The Department's audit reviewed Taxpayer's 2008 through 2011 corporate income tax returns. The audit disagreed with the Taxpayer's treatment of income reported on the returns. The audit reclassified the LPs' and

LLCs' interest as unitary income. As a result, Taxpayer's share of the LPs' and LLCs' income was directly added to the Taxpayer's adjusted gross income from other sources; the LLCs' and LPs' factors were also added to Taxpayer's factors thus apportioning at the Taxpayer's level. The Department's audit report explains its rationale:

This audit and previous Letters of Findings issued by the [D]epartment conclude the [T]axpayer's characterization of the partnership distributive share income is incorrect, and leads to an unreasonable representation of the unitary business enterprise reporting in Indiana. The adjustments in the previous and current audits are to correctly report business income that the [T]axpayer incorrectly treated/reported as non-unitary income on its returns.

The audit noted that Taxpayer reports its Indiana adjusted gross income on a combined Indiana return "reporting the income and expenses of many affiliated corporations, partnerships, and limited liability companies as a unitary business enterprise." According to the report, "this method was elected by the [T]axpayer several years ago, and has been approved by the Indiana Department of Revenue."

As originally reported, Taxpayer designated "a large amount of partnership income as non-unitary, allocating it as apportioned at the partnership level rather than including the partnership earnings and apportionment data in computing Indiana taxable income." The audit concluded that "the [T]axpayer's characterization of the partnership distributive share income is incorrect, and leads to an unreasonable representation of the unitary business reporting in Indiana" and that the "partnership earnings are business income and should be treated as business income of the corporate partners."

As such, the audit concluded that Taxpayer and its LLC's and LP's comprised a "unitary business."

The activities and operations of each entity within the group, including the partnerships and limited liability companies created for various business purposes, all contribute to the overall business operations and purpose - the provision of telecommunications services.

The Department's audit found all of the LLC's and LP's were owned directly or indirectly - wholly or partially - by Taxpayer's parent company and its various affiliates.

It should be noted that in many of the specific relationships at issue, [T]axpayer purports that a partner owning 99[percent] of a partnership interest is the limited partner, ostensibly having no control or operational unity with the partnership in question. In all the partnership structures analyzed, while a specific partner may be claimed to be "limited," such partner is under the same umbrella of ownership as the general partner(s), in essence having no distinct difference in terms of control or operation. Additionally, besides all the entities sharing the same parent companies, in many instances, the particular partnership's "limited" partner is directly owned or indirectly owned--through one intervening entity--by that partnership's "general" partner.

In general, the audit concluded that the parties were functionally integrated, shared a centralized management structure, and that it was reasonable to conclude that the parties benefited from "economies of scale."

The audit cited to [45 IAC 3.1-1-153](#) as authority for its decision that the Taxpayer's partnership income should not be apportioned at the individual partnership level but that their income and apportionment factors should "flow up" to the corporate partners otherwise included in the combined return.

## **B. Taxpayer's Response.**

Taxpayer maintains that the Department may not change its stance on the underlying apportionment issue and that the Department cannot change "its longstanding interpretation of the regulation [which] requires that the limited partnership and LLC membership interests must be apportioned at the partnership level." (Emphasis added).

Taxpayer points to the Department's regulation, [45 IAC 3.1-1-153](#), as the benchmark standard under which corporate partners' income is apportioned. According to Taxpayer, proper application of this regulation inexorably leads to the conclusion that "a limited partner cannot be unitary with a partnership because, as a matter of law, a limited partner does not have the ability to control a partnership."

Taxpayer states that the Department has repeatedly held that "a limited partner that did not have the legal right to exercise control over the underlying limited partnership could not be unitary with a limited partnership and therefore could not flow up partnership income or factors per [45 IAC 3.1-1-153](#)." Taxpayer states the issue is

"one of statutory and administrative interpretation" and that the Department has "consistently held in numerous [Letters of Finding] that a limited partner cannot be unitary with a partnership because a limited partner cannot legally exert control over a limited partnership since it cannot participate in management of the limited partnership."

### C. Hearing Analysis.

The issue is whether the Department erred when it concluded that income earned by Taxpayer's limited partners - and their apportionment factors - should "flow up" to the corporate partners because - as the Department found - the limited partners and Taxpayer constituted a "unitary business."

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, interpretations of Indiana tax law contained within this decision, as well as the original audit, are entitled to the decision maker's deference.

"Indiana imposes a tax on every corporation's adjusted gross income derived from sources within Indiana. [IC § 6-3-2-1(b).] In cases where a corporation derives business income from sources both within and without Indiana, the 'adjusted gross income derived from sources within the state of Indiana' is determined by an apportionment formula." *Sherwin-Williams Co. v. Indiana Dep't. of State Revenue*, 673 N.E.2d 849, 851 (Ind. Tax Ct. 1996).

[45 IAC 3.1-1-153](#) provides:

- (a) A corporate partner's share of profit or loss from a partnership will be included in its federal taxable income and therefore generally subject to the same rules as any other adjusted gross income.
- (b) If the corporate partner's activities and the partnership's activities constitute a unitary business under established standards, disregarding ownership requirements, the business income of the unitary business attributable to Indiana shall be determined by a three (3) factor formula consisting of property, payroll, and sales of the corporate partner and its share of the partnership's factors for any partnership year ending within or with the corporate partner's income year, with the following modifications:
  - (1) The value of property which is rented or leased by the corporate partner to the partnership or vice versa shall, with respect to the corporate partner, be excluded from the property factor of the partnership or eliminated to the extent of the corporate partner's interest in the partnership, whichever the case may be, in order to avoid duplication.
  - (2) Intercompany sales between the corporate partner and the partnership shall be eliminated from the corporate partner's sales factor as follows:
    - (A) Sales by the corporate partner to the partnership to the extent of the corporate partner's interest in the partnership.
    - (B) Sales by the partnership to the corporate partner not to exceed the corporate partner's interest in all partnership sales.
- (c) If the corporate partner's activities and the partnership's activities do not constitute a unitary business under established standards, disregarding ownership requirements, the corporate partner's share of the partnership income attributable to Indiana shall be determined as follows:
  - (1) If the partnership derives business income from sources within and without Indiana, the business income derived from sources within Indiana shall be determined by a three (3) factor formula consisting of property, payroll, and sales of the partnership.
  - (2) If the partnership derives business income from sources entirely within Indiana, or entirely without Indiana, such income shall not be subject to formula apportionment.
- (d) A partner's distributive share of income will be adjusted by the partner's proportionate share of the

partnership's income that is exempt from taxation under the Constitution and statutes of the United States and by the partner's proportionate share of the partnership's deductions allowed or allowable under Section 63 of the Internal Revenue Code for taxes based on or measured by income and levied at the state level by any state of the United States or for taxes on property levied by any subdivision of any state of the United States.

(e) After determining the amount of business income attributable to Indiana under subsection (c), the corporate partner's distributive share of such income shall be added to the corporate partner's other business income apportioned to Indiana and its nonbusiness income, if any, allocable to Indiana, in determining the corporate partner's total taxable income.

The Indiana Tax Court, in *Hunt Corp v. Indiana Dep't of State Revenue*, 709 N.E.2d 766 (Ind. Tax Ct. 1999), provided guidance in computing a corporate taxpayer's tax liabilities when a taxpayer and its subsidiaries/affiliates file consolidated returns as a group where some income was from its subsidiaries/affiliates' distributive shares in partnerships. Even though that case dealt with a consolidated, not combined, filing, the court provided general rules on computing corporate taxpayer's tax liabilities. The court explained that IC § 6-3-2-2 "is a general provision that deals with how of all of a corporate taxpayer's adjusted gross income is attributed by way of allocation and apportionment rules. . . . [T]he fact that section 6-3-2-2 deals with the attribution of all of a corporate taxpayer's adjusted gross income means that income derived from a corporate partnership . . . is subject to section 6-3-2-2." *Id.* at 776. The court further illustrated that:

Under section 6-3-2-2, in order to determine where the income from the corporate partnership is to be attributed, it must first be determined whether that income constitutes business or nonbusiness income for the affiliated group. That determination is made by ascertaining whether the affiliated group and the partnerships are engaged in a unitary business or not. If the income from the partnerships constitutes business income (i.e., if the affiliated group and the partnerships are engaged in a unitary business), under section 6-3-2-2, all of that income would be subject to apportionment based on an application of the affiliated group's property, payroll, and sales factors. If the income from the partnerships constitutes nonbusiness income for the affiliated group (i.e., if the affiliated group and the partnerships are not engaged in a unitary business), that income will be allocated to a particular jurisdiction. Section 6-3-2-2 does not specifically address the question of whether a partnership's property, payroll, and sales factors may be considered in apportioning a corporation's business income derived from a corporate partnership. The regulation [\[45 IAC 3.1-1-153\]](#) addresses this technical problem and provides a comprehensive description of the treatment of income derived from corporate partnerships. Mirroring the analysis required by section 6-3-2-2, the regulation makes the crucial distinction between the situation where the corporate partner's activities and the partnership's activities constitute a unitary business and when they do not. *Id.* (Emphasis in original).

The United States Supreme Court's decisions on this issue established what is properly classified as a "unitary business" which allows a state to apply formula apportionment taxing some income (which a taxpayer's subsidiaries/affiliates received), which does not have its source in the taxing state. When in dispute, the Court examines whether "contributions to income of the subsidiaries resulted from functional integration, centralization of management, and economies of scale." *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 179 (1983).

In this instance, Taxpayer (and its affiliates) elected and was permitted to file combined returns as an organization conducting a unitary business and, since 1985, Taxpayer has been filing the combined returns as conducting a unitary business in Indiana. Taxpayer, thus, was presumed to be in the unitary business for those years and it presumptively carries the burden to demonstrate otherwise.

The audit explained the interrelationship between the individual partners and the corporate partners based on the available documentation. The audit found that the entities at issue were the same entities addressed in a prior audit. The audit found that the entities were functionally integrated sharing attributes of common ownership, common function, and interdependence.

The Department previously addressed this identical issue and identical parties in two earlier written decisions. In Memorandum of Decision 02-20100391R.MOD (March 7, 2011), the Department - after a meticulous review of documentation detailing the relationship between the parties - found that:

This business structure and disproportionate ownership interest of partnerships and LLCs are controlled and managed by the same group of individuals. Regardless of Taxpayers' inability to provide the two missing partnership agreements, Taxpayers' documentation exhibits a common theme concerning the establishment of the corporate structure in relation to both the LPs and the LLCs. Taxpayers' documentation demonstrates that the partners (both general and limited partners) or LLC members (both managing and non-managing

members) were, wholly and/or partially, separately and/or jointly, as well as directly and/or indirectly, owned by Taxpayers and/or Parent. Among those LPs and LLCs, was one general partner designated for each of the LPs and one managing member designated for each of the LLCs. The designated general partners or the designated managing members typically owned negligibly small percentage of ownership (usually one percent or less) of the LPs or the LLCs. Meanwhile, the designated limited partners and the designated non-managing members would, equally or proportionately, share the remaining ownership of the LPs and the LLCs. In fact, in most of the partnerships at issue, the general partner owns the limited partners. As a result, in reality, the general partner owns all the interest of the LPs at issue even though the limited partners share the ownership of the LPs with the general partner. Likewise, for some of the LLCs at issue, the designated managing member owns the non-managing members. As a result, the managing member owns all the interest of the LLCs at issue even though the non-managing members share the ownership of the LLCs with the managing member.

Upon executing the agreements, most of the partnership agreements and operating agreements were signed and executed by the same group of individuals, who served as executives (Executives) for both the general partners and the limited partners of the partnerships at the same time or managing and non-managing LLC members simultaneously. Meanwhile, the same Executives also held major senior management level positions (such as, Chief Executive Officer, Chief Financial Officer, president, vice president, or director) in the management within and throughout Taxpayers and Parent. Moreover, some agreements further stated that the LPs or the LLCs "shall not have any employees" since the date they were formed.

As summarized in Memorandum of Decision 02-20100391R:

Taxpayer's documentation demonstrates that the general partner and the limited partners of the partnerships or managing and non-managing members of the LLCs were controlled and managed by the same Executives, who also participated in vital business decision-making and were responsible for executing the business plans throughout Taxpayers' telecommunication enterprise. The substance of their arrangements belies the formal designations. Thus, given the totality of the circumstances, Taxpayers have not met their burden of showing they were non-unitary[.]

In Letter of Findings 02-20080545 (October 21, 2010), 20110126 Ind. Reg. 045110010NRA, the Department - after reviewing these same parties' various partnership and operating agreements - found that:

Notably, Taxpayers' documentation exhibited a common theme concerning the establishment of the corporate structure, both the LPs and the LLCs. Taxpayers' documentation demonstrated that the partners (both general and limited partners) or LLC members (both managing and non-managing members) were, wholly and/or partially, separately and/or jointly, as well as directly and/or indirectly, owned by Taxpayers and/or Parent. Among those LPs and LLCs, there was one general partner designated for each of the LPs and one managing member designated for each of the LLCs. The designated general partners or the designated managing members usually owned negligibly small percentage of ownership (usually one percent or less) of the LPs or the LLCs. Meanwhile, the designated limited partners and the designated non-managing members would, equally or proportionately, share the remaining ownership of the LPs and the LLCs.

Specifically, upon executing the agreements, most of the partnership agreements and operating agreements were signed and executed by the same group of individuals, who served as executives (Executives) for both the general partners and the limited partners of the partnerships at the same time or managing and non-managing LLC members simultaneously. Meanwhile, the same Executives also held major executive level positions (such as, Chief Executive Officer, Chief Financial Officer, president, vice president, or director) in the management within and throughout Taxpayers and Parent. Moreover, some agreements further scrupulously stated that the LPs or the LLCs "shall not have any employees" since the date they were formed.

....

Thus, the same Executives, who made any business decisions regarding the LPs, represented the general partners and, at the same time, also represented the limited partners. Similarly, the same Executives, who engaged in the LLCs' day-to-day operations, represented the managing members and, at the same time, also represented the non-managing members.

....



Taxpayers' documentation demonstrated that the general partner and the limited partners of the partnerships or managing and non-managing members of the LLCs were controlled and managed by the same Executives, who also participated in vital business decision-making and were responsible for executing the business plans throughout Taxpayers' telecommunications enterprise. The substance of their arrangements belies the formal designations. Thus, given the totality of the circumstances, in the absence of other documentation, Taxpayers have not met their burden of showing they were non-unitary[.]

In its protest of these most recent audit findings, Taxpayer invites the Department to revisit the same facts, circumstances, and conclusions detailed in both Memorandum of Decision 02-20100391R and Letter of Findings 02-20080545. Taxpayer asks the Department to accept the proposition that every limited partner cannot - by its very nature - ever share a unitary relationship with its corporate partners. The Department does not accept this proposition except to note - as set out in other decisions issued by the Department - that certain LLC's and LP's are so far removed from the operation and functional operation of the partners that their income and apportionment factors should remain at the individual entity level.

Whatever may be the outward governance of the LLC's and LP's, they plainly share a unitary relationship with the corporate partners. As set out in the prior audits, the current audit, and the previous administrative decisions, the limited partners share common attributes of management, ownership, and business function entitling the Department to require the limited partners' income and apportionment factors be "flowed up" to the corporate partner in calculating Taxpayer's adjusted gross income.

### **FINDING**

Taxpayer's protest is respectfully denied.

### **SUMMARY**

The Department did not issue a proposed assessment outside the statute of limitations by offsetting previous overpayments of estimated taxes. The Audit Division is requested to review the calculation of Taxpayer's NOLs. Taxpayer's relationship with its various limited partnerships and limited liabilities constituted a unitary business with the partners' income and apportionment factors properly flowing through to the corporate partner.

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