STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BRITISH LAND (MARYLAND), INC.	:	DECISION DTA No. 806894
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ending March 31, 1983 through March 31, 1985.	:	

Petitioner British Land (Maryland), Inc., 90 Broad Street, 12th Floor, New York, New York 10004 filed an exception to the determination of the Administrative Law Judge issued on October 3, 1991 with respect to its petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ending March 31, 1983 through March 31, 1985. Petitioner appeared by Schulte, Roth & Zabel (Alan S. Waldenberg and Tobin A. Sparling, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Petitioner filed a brief in support of its exception and a reply brief. The Division of Taxation filed a brief in opposition to the exception. Oral argument, at petitioner's request, was heard on March 12, 1992.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether a gain resulting from the sale of an office building located in Baltimore, Maryland may properly be included in petitioner's entire net income for purposes of calculating New York State corporation franchise tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "9," "14," "28," "36" and "42" which have been modified. We have deleted findings of fact "11" and "40." These findings were deleted because their substance was incorporated into findings of fact "9" and "36." We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

The parties have stipulated that the transcript of petitioner's City of New York Department of Finance hearing involving the same issue with respect to New York City General Corporation Tax and the exhibits submitted at such hearing are to be incorporated into the record in this case. References to said transcript and exhibits will be indicated by the notations "NYC Tr. __" and "NYC Ex. __". References to the transcripts of and exhibits received at the Division of Tax Appeals hearing held on June 20, 1990 will be indicated by the notations "Transcript __" and "Exhibit __".

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> Petitioner, British Land (Maryland), Inc., was incorporated in Delaware on May 3, 1973.[1] It is an indirect subsidiary of The British

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[1] On the New York State Corporation Franchise Tax Report for the fiscal year ending March 31, 1984 (Exhibit "G[1]") the space for state or country of incorporation was left blank. The application for extension of time for filing the report indicates petitioner to be a Maryland corporation. The New York City General Corporation Tax Return for the fiscal year ending March 31, 1983 (NYC Ex. "C[2]") indicates it to be a Maryland corporation. The New York City return for the fiscal year ending March 31, 1984 (NYC Ex. "C[3]") shows no state of incorporation. The New York City return for the fiscal year ending March 31, 1985 (NYC Ex. "C[4]") shows it to be a Delaware corporation. Virtually all of the other significant documents in evidence describe petitioner as a Delaware corporation (e.g., NYC Exs. "3," "4," "5," "6," "9," "10," "11," "12" and "15"). One document, the Management and Exclusive Agency Agreement for petitioner's New York City building (NYC Ex. "17"), refers to petitioner as a "New York general partnership."

Land Company Plc ("British Land"),[2] an international real estate investment firm based in London, England. British Land owned and operated real estate in various parts of the world through subsidiary corporations. The principal business of most of the subsidiary corporations was to own real property directly or to own stock in companies that owned real property. In its 1978 Annual Report, British Land described the nature of the corporate group's business as "fundamentally the creation and retention of first class properties (Exhibit "I-7," p. 7). During the 1970s and 1980s, the British Land corporate group owned in excess of five hundred properties. Principally, office buildings were the type of property owned. A primary goal of petitioner when acquiring property was to purchase property that would appreciate in value. At the time of its organization, petitioner was a direct subsidiary of British Land (Maryland) N.V., which itself was a fifth-tier subsidiary of British Land (Transcript 37; Exhibit "J"). British Land (Maryland) N.V. was based in Curacao, Netherlands Antilles (NYC Ex. "3", p. 41). Petitioner subsequently became a subsidiary of Union Property Holdings (Investments) Ltd. (NYC Ex. "12"), a second-tier subsidiary of British Land.[3]

THE BALTIMORE PROPERTY

By an Agreement of Sale and Purchase, dated as of May 4, 1973 (NYC Ex. "3"), petitioner agreed to purchase all of the capital stock of The First Charles Street Corporation ("First Charles"), a Maryland corporation which owned a 27-story office building known as the Arlington Federal Building at 201 North Charles Street, Baltimore, Maryland, together with the two ground leases for the land on which the building was situated. The consideration was stipulated to be $4,815,000.00. The agreement stated that the building was encumbered by a consolidated deed of trust securing an obligation of $6,646,974.77 (as of April 30, 1973).

The chronology of the closing and the financing arrangements is not entirely clear. All elements of the transaction, however, appear to have been completed between May 2, 1973 and September 1, 1973:

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[2] Prior to November 3, 1981, British Land was known as The British Land Company, Ltd. On that date, it re-registered as a public limited company and became known as The British Land Company Plc (Exhibit "I[11]," p. 9).

[3] We modified the Administrative Law Judge's findings of fact "2" by adding the third through eighth sentences. We added these sentences to reflect the record in greater detail.

(a) The Agreement of Sale and Purchase (supra) specified the closing date as May 2, 1973, which is two days before the date of the said agreement and the day before petitioner's date of incorporation.

(b) By a promissory note dated September 1, 1973 (NYC Ex. "4"), petitioner borrowed $4,700,000.00 from National Westminster Bank Limited ("NWB"). The note stated that it was guaranteed by "The British Land Company, Limited" pursuant to a guaranty agreement dated May 22, 1973 and was secured by a pledge agreement with petitioner and British Land (Maryland) N.V., as pledgors, dated as of August 1, 1973. The note also stated that it was secured by a deed of trust, similarly dated as of August 1, 1973, between petitioner and First Charles, jointly, and James P. Garland and David E. Belcher, Trustees.

(c) Under the terms of the pledge agreement of August 1, 1973 (NYC Ex. "27"), petitioner acknowledged being indebted to NWB for $4,700,000.00.[4] The agreement recited that the loan had been made to petitioner "to provide funds for the purchase by [petitioner] of all the issued and outstanding capital stock of First Charles". By the terms of the pledge agreement, petitioner and its then-parent corporation pledged and assigned to NWB all of First Charles' capital stock (which was owned by petitioner) and all of petitioner's capital stock (which was owned by its parent).

(d) The balance of the purchase price, i.e., $115,000.00, was obtained through an unsecured loan from Schroder Bank (NYC Tr. 40). The loan was secured in 1975 by a third lien on the premises (NYC Tr. 47).

Due to foreign exchange currency controls in the United Kingdom, it was necessary that British Land borrow 100% of any investment made outside the United Kingdom. It was for this reason that the Baltimore property was acquired by petitioner on a fully financed basis.

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[4]The pledge agreement refers to the note as being of "even date," i.e., August 1, 1973; however, as stated in finding of fact "4(b)," the date of the note is September 1, 1973. Part of the pledge agreement (at least the signature page) seems to be missing from NYC Ex. "27."

First Charles was merged into petitioner as of April 30, 1975 (NYC Ex. "5", note 1; also, NYC Ex. "C-1", Deed of Assignment, p. 2).

Schroder Bank, which had found the Arlington Federal Building as an investment for petitioner and had coordinated the purchase, retained the Baltimore real property management firm of W. C. Pinkard & Co., Inc. ("Pinkard") to assist in management of the building. After one or two years, petitioner decided to deal directly with Pinkard.

Pinkard became involved in the management of the building in the mid-1970's or shortly thereafter. The earliest building management agreement in the record reveals that Pinkard was petitioner's manager effective January 1, 1977 (NYC Ex. "13", p. 7).

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

> Petitioner entered into management agreements with Pinkard dated March 10, 1977, covering the period January 1, 1977 through December 31, 1979 (NYC Ex. "13"), and January 4, 1980, covering the period January 1, 1980 through December 31, 1982 (NYC Ex. "14"). Under the agreements, petitioner retained substantial control over the details of the management of the property. Petitioner retained the right to execute each lease and to approve: advertising; the commencement of collection suits against tenants; ordinary and necessary repairs and alterations; expenditures for alterations for new leases, renewals of leases, or to bring the property into compliance with applicable code requirements; the terms, rental and duration of each lease; and the cancellation or modification of any lease. Each agreement states that it represents the entire agreement between the parties and that it could not be changed orally. Petitioner's witness testified that the agreements introduced into evidence encompassed the entire agreement between the parties and that the agreements had not been modified in any way.
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> In addition, Pinkard was required to submit for petitioner's review and acceptance an annual budget. This budget set forth expenses anticipated by Pinkard in the operation and maintenance of the building. Once the budget was approved, Pinkard generally operated within it. Petitioner and Pinkard would also agree generally on a rental rate structure for the building. This structure would guide Pinkard's marketing of vacancies in the building, as well as the negotiation of leases.

> Petitioner's witnesses testified that in practice Pinkard often made decisions without seeking the approval of petitioner, notwithstanding the requirements of the agreement.[5]

All income from the building was to be deposited by Pinkard in a trustee or agency account. Pinkard was to disburse funds for expenses and also for the fees to be paid to itself as managing agent under the contract. If there was a deficit in the account, petitioner was to pay Pinkard the amount of the deficit. The March 10, 1977 agreement provided that surplus funds were to be remitted to petitioner within five days after petitioner's written request (NYC Ex. "13", p. 4). The January 4, 1980 agreement provided that the balance remaining at the end of each month was to be remitted to petitioner "for its general funds", or at anytime upon five days' notice (NYC Ex. "14", p. 4). All payments, notices, etc. were to be sent to petitioner at the following addresses:

Contract Period	Address
1/1/77 - 12/31/79	c/o Schroder Real Estate One State Street New York, New York 10004
1/1/80 - 12/31/81	10 Cornwall Terrace Regent's Park London, England NWI 4QP

Accounting for the Baltimore building was handled by the Baltimore office of Arthur Andersen & Co. Petitioner's financial statements (at least for the fiscal years ending March 31,

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[5] The Administrative Law Judge's finding of fact "9" read as follows:

> "Petitioner entered into management agreements with Pinkard dated March 10, 1977, covering the period January 1, 1977 through December 31, 1979 (NYC Ex. "13"), and January 4, 1980, covering the period January 1, 1980 through December 31, 1982 (NYC Ex. "14"). Under the agreements, Pinkard has broad powers to act for petitioner, which was virtually an absentee landlord. Pinkard was to advertise the space for rental and find tenants, maintain the building and see to repairs, hire employees, collect rents, make mortgage payments and do virtually everything necessary to operate the building. Under the agreement, petitioner's approval was necessary for certain acts, such as instituting lawsuits and for establishing leasing terms.

We modified this fact to more accurately reflect the record.

1976, 1981 and 1982) were certified by Arthur Anderson & Co.'s London office (NYC Exs. "5" and "6"). Pinkard suggested that petitioner retain another accountant to certify escalation expenses for the Baltimore property, as it would not be cost effective for a large accounting firm to handle such a task. Petitioner approved and a local accountant was retained for that purpose.

Monthly financial statements were sent to Mr. Colin Stubbs, Chief Accounting Officer of British Land, at its London offices.

We modify finding of fact "14" of the Administrative Law Judge's determination to read as follows:

> Petitioner had as an objective the acquisition of the fee interest in the Baltimore property at the time that the interest in the building was acquired. The acquisition of the fee interest was a major acquisition decision which was made by petitioner's officers. Mr. Weston Smith, petitioner's vice-president, arranged the financing for the acquisition. Pinkard developed a successful strategy for acquiring the fee interest in the land under the Arlington Federal Building. In addition to the fact that the building would be more valuable if the fee interest were acquired, refinancing the building without the fee interest would have been extremely difficult. Arlington Federal Savings and Loan, which controlled the fee, had merged with Central Savings Bank and the new entity, under the name Central Savings Bank, needed additional office space in the building. Pinkard recommended that petitioner not permit the bank to expand into additional space and also not permit the change of the name of the building from the Arlington Federal Building to the Central Savings Bank Building unless the owner sold the fee interest. This strategy was successful.[6]

The fee interest was acquired by another indirect subsidiary of British Land, British Land (B of C), Inc. ("B of C"). The precise date or cost of the acquisition is not specified in the record, however, petitioner's vice-president, John H. Weston Smith, testified that the transaction took place in approximately 1980 and the cost was "approximately 1.5 to 1.9 million dollars" (NYC Tr. 48). Pinkard's president, Walter D. Pinkard, Jr., recalled that the price was "about 2 million dollars" (NYC Tr. 218).

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[6] We modified the Administrative Law Judge's finding of fact by adding the first three sentences. These sentences were added to reflect the record in greater detail.

The value of the Baltimore property increased between 1973 and 1984 for a number of reasons, including:

(a) an improved economic climate in downtown Baltimore, due to the Inner Harbor redevelopment project;

(b) sound management by Pinkard, which resulted in improved occupancy rates;

(c) renovations to the building; and

(d) acquisition of the fee interest by an affiliate.

Sometime after the fee had been acquired by B of C and the building, renamed the Central Savings Bank Building, had been fully rented, petitioner (or British Land) determined that there was a weakening in the Baltimore office rental market and that the property should be sold.

Accordingly, by a contract of sale made as of March 30, 1984 (NYC Ex. "7"), petitioner and B of C agreed to sell their respective interests in the building and the land on which it was located to Lawrence Ruben Company ("Ruben"). Under the terms of the contract, petitioner agreed to transfer its interest to a newly-formed subsidiary, Lexchar, Inc., and B of C agreed to transfer its interest to a newly-formed subsidiary, Char Holding,Inc. The stock of the new subsidiaries was then to be purchased by Ruben. The purchase price of petitioner's assets was to be $22,000,000.00.[7] The purchase price of B of C's assets was to be $2,200,000.00.

Under the agreement, Lexchar, Inc. and Char Holding, Inc. were to be incorporated under Maryland law not earlier than two days prior to settlement, to engage in no

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[7]The $22,000,000.00 apparently included the sum of $4,242,215.00 then remaining due on the consolidated deed of trust. The contract of sale provides that the purchase price of petitioner's assets was $22,000,000.00 "of which the debt secured by the [deed of trust] shall be a part. The balance of the purchase price shall be paid in federal funds immediately available in New York City" (NYC Ex. "7", p. 4). The deed of trust (referred to as the "mortgage note") appears to have been assumed by the buyer (NYC Ex. "26", note 5 to financial statement). The difference of $22,664.00 between the balance due, as stated in the contract of sale, and the total secured indebtedness, as stated in the deed of assignment, is unexplained.

business activity prior to the transfer, and to have no assets or liabilities except as provided for in the contract (NYC Ex. "7", p. 2).

Lexchar, Inc. was incorporated on March 29, 1984 and petitioner's interest in the Central Savings Bank building was transferred to it by a Deed of Assignment dated March 30, 1984, in exchange for the issuance of the stock of said subsidiary. The transfer was subject to total secured indebtedness (principal and interest on the consolidated deed of trust) of $4,264,879.00 (NYC Ex. "C-1", attachment "Deed of Assignment").

On March 30, 1984 Ruben assigned its rights under the contract of sale for the purchase of Lexchar, Inc. stock to Chipaole, Inc., a Maryland corporation (NYC Ex. "C-1", attachment "Assignment and Assumption"). Lexchar, Inc. was to be merged into Chipaole, Inc., whereupon Chipaole, Inc. was to be dissolved and liquidated, and its assets were to be distributed to Lexington Charles Limited Partnership ("Lexington"), a Maryland limited partnership. It appears that Ruben also assigned its rights under the contract to the purchase of Char Holding, Inc. stock to Esile, Inc., a Maryland corporation, and that a similar process was to take place, with Char Holding, Inc. to be merged into Esile, Inc., whereupon Esile, Inc. was to be dissolved and liquidated, and its assets were to be distributed to Baysic Land Limited Partnership ("Baysic").

The transaction was structured as a sale of stock in order to minimize real property transfer taxes. Under a cross-indemnification agreement dated March 30, 1984 (NYC Ex. "C-1", attachment "Cross- Indemnification Agreement"), Baysic and Lexington, as buyers, and petitioner and B of C, as sellers, agreed to pay and indemnify each other for closing taxes as follows:

(a) sellers were to pay all conveyancing taxes and buyers were to pay all documentary stamp taxes;

(b) the conveyancing and stamp taxes were agreed to be .025 times the remaining principal balance on the existing mortgage;

(c) buyers agreed to indemnify sellers for 40% of conveyancing taxes on the series of transactions in excess of $85,300.00 and stamp taxes in excess of $21,325.00; and

(d) sellers agreed to indemnify buyers for 60% of conveyancing taxes found to be due on the series of transactions in excess of $85,300.00.

Petitioner made an inducement payment to B of C of $1,250,000.00 "for it to enter into the sale agreement" of March 30, 1984 (NYC Ex. "26", p. 6).

The NWB note (Finding of Fact "4[c]") was paid off from the proceeds of the sale of the Baltimore property (NYC Tr. 96).

The Baltimore property operated at a substantial net loss until at least 1982. The financial statements in the record (NYC Exs. "5" and "6") show the following:

	1975	1976	1981	1982
Rental Income	$1,906,701	$2,009,556	$1,969,460	$2,542,325
Interest, Exchange & Other Income	-	-	222,576	37,711
Cost and Expenses (Including Interest & Depreciation)	2,731,337	2,695,215	3,527,717	4,250,422
Net Loss	(824,636)	(685,659)	(1,335,681)	(1,670,386)
Accumulated Deficit (at End of Year)	(1,370,997)	(2,056,656)	(7,567,895)	(9,238,281)

The financial statements also indicate payments on the "mortgage note" (apparently referring to the debt secured by the consolidated deed of trust) and additional investment in the building, as well as substantial amounts due to or from petitioner's parent or fellow subsidiaries, and long-term bank loans. No attempt will be made to tabulate said items herein, as the statements of changes in financial position included in the financial statements appear to make inconsistent use of parentheses to signal decreases and/or increases and, consequently, any portrayal of said amounts would be nothing but guesswork.

The deficits incurred for each year necessitated substantial borrowing by petitioner. Petitioner borrowed $590,000.00 from Schroder Bank and also received loans from its own

affiliates (NYC Tr. 108). Petitioner's vice-president, John H. Weston Smith, testified that funds to cover the shortfalls would have come from a Bermuda subsidiary of British Land which would have obtained the funds from Australia (NYC Tr. 141). The interest on the intercompany loans was accumulated, rather than paid on a current basis (NYC Tr. 147).

THE NEW YORK PROPERTY

By an agreement made as of February 5, 1982 (NYC Ex. "8"), Carton Realty, Inc. ("Carton"), a New York corporation, as purchaser, contracted to purchase all of the issued and outstanding capital stock of Ninety Broad Street Building Corporation ("Broad Street"), a Delaware corporation, from Stone & Webster, Incorporated ("Stone & Webster"), also a Delaware corporation.

We modify finding of fact "28" of the Administrative Law Judge's determination to read as follows:

> Broad Street was the fee owner of the land and office building known as 90 Broad Street, New York, New York, and the adjacent parking lot known by the address 8-12 Stone Street and 27-29 Bridge Street, New York City. The purchase price was $27,600,000.00.[8]

By an assignment dated as of October 1, 1982 (NYC Ex. "9"), Carton, as assignor, assigned to petitioner, as assignee, its rights under the agreement of February 5, 1982. The assignment stated that Carton was "acting in all respects and at all times as the nominee of [petitioner] and its affiliate, The British Land Company Plc."

Under a Loan Agreement dated October 29, 1982 (NYC Ex. "10"), British Land, as borrower, and petitioner, as guarantor, and Standard Chartered Merchant Bank Limited, on behalf of itself and as agent for three other banks, British Land obtained a loan facility of up to $40,000,000.00. The loan facility was to be used solely to finance petitioner's acquisition of the freehold of the premises at 90 Broad Street and the adjacent 8-12 Stone Street

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[8] We modified the Administrative Law Judge's finding of fact "28" to indicate that the building was an office building.

and 27-29 Bridge Street in New York City. The agreement stated that petitioner was to purchase the capital stock of Broad Street which was to be dissolved and the property distributed to petitioner.

Drawings under the agreement were not to exceed $30,000,000.00 with respect to the acquisition. The remaining $10,000,000.00 was to be available for any income deficit and for costs of enhancing the value of the property.

Petitioner made a mortgage dated as of November 5, 1982 (NYC Ex. "11") to Standard Chartered Merchant Bank Limited, acting on behalf of itself and as agent for the other banks, covering the real property at 90 Broad Street, 8-12 Stone Street and 27-29 Bridge Street in New York City. The mortgage secured the $30,000,000.00 loan for the acquisition of the property.

By a guarantee, the date of which is illegible on the copy thereof in the record (NYC Ex. "12") but which appears to be contemporaneous with the loan agreement, petitioner guaranteed the obligations of British Land under said agreement. The guarantee, however, was to be enforced only against the property securing the mortgage and certain rents, issues and profits thereof, as well as certain security deposits and insurance proceeds. It was agreed that no deficiency judgement would be sought or enforced against petitioner "except in respect to funds representing surplus funds relating to the Premises" (NYC Ex. "12", p. 4).

Petitioner's vice-president, John H. Weston Smith, testified that British Land had considered forming a separate corporation to acquire the New York property, but decided against it, as petitioner was considering the sale of the Baltimore property. Mr. Weston Smith stated that this was consistent with British Land's practice in other cases and that, in fact, B of C had owned and sold a California building before acquiring the land on which the Baltimore building was situated.

By an instrument dated as of November 5, 1982 (NYC Ex. "16"), petitioner appointed the real estate management firm of Jones Lang Wootton ("JLW") to act as its special agent for the purpose of executing all leases and other documents related to the leasing of the building known as 90 Broad Street.

We modify finding of fact "36" of the Administrative Law Judge's determination to read as follows:

> By an agreement made as of February 1, 1985 (NYC Ex. "17"), petitioner appointed JLW as exclusive managing agent and leasing agent for the building. Although this agreement was not executed until February 1, 1985, the property was managed in accordance with the provisions of this agreement from November 2, 1982 through the end of 1984. Under the terms of the agreement, petitioner retained substantial control over the details of the management of the building. Pursuant to the agreement, JLW was required to submit an annual budget to petitioner, for petitioner's approval, for the operation and maintenance of the building. Generally, JLW was prohibited from incurring, without petitioner's prior approval, an expense in any month which would result in any major category of the budget being exceeded by more than 10%. The agreement also precluded JLW from incurring any cost in excess of $5,000.00 (or a lesser amount if established by petitioner), without petitioner's prior approval, unless incurred with respect to any emergency or provided for in the approved budget. Under the management agreement, petitioner had the right to approve the terms and conditions of each lease, marketing plan, service and maintenance contract, contract with a professional or contractor, and the settlement of any dispute with a tenant for more than $1,000.00.
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> A witness of petitioner's testified that JLW often made decisions without obtaining the approval of petitioner, even though required by the contract.[9]

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[9] The Administrative Law Judge's finding of fact "36" read as follows:

> "By an agreement made as of February 1, 1985 (NYC Ex. "17"), petitioner appointed JLW as exclusive managing agent and leasing agent for the building. Under the terms of the agreement, JLW was to act for petitioner in almost every respect with regard to the operation of the building, including leasing, maintenance, cleaning, repairs, supervision of tenants and obtaining insurance. Many of JLW's actions on petitioner's behalf, such as entering into maintenance contracts or hiring advertising agencies, required petitioner's prior approval, but some, such as emergency repairs, did not."

We modified this fact to more accurately reflect the record.

JLW was to prepare annual budgets and to establish and maintain books of account and other records. It was to deliver to petitioner a monthly report setting forth detailed statements of collections, disbursements, etc. JLW also was to deliver to petitioner a quarterly list of recommended adjustments to the approved budget, and submit an annual report.

JLW was to maintain "operating accounts" at a New York bank and deposit into said accounts all funds collected by JLW, except for JLW's compensation and also except for security deposits, which were to be held in a separate account.

Within 20 days after the end of each month, JLW was to remit to petitioner all unexpended funds in the operating accounts to the extent that the balance in said accounts exceeded the amount reasonably estimated by JLW as necessary to provide working capital. The funds were to be sent to a bank account designated by petitioner (NYC Tr. 158, 163). For the fiscal year ending March 31, 1984, there was a surplus cash flow (before debt service) of $506,020.00. (NYC Tr. 177; NYC Ex. "19").

JLW implemented and carried out a capital improvement program for the building, including renovation of the windows and modification of the lobby, and also coordinated tenant construction. JLW would obtain estimates for the work and would then seek approval from petitioner.

We modify finding of fact "42" of the Administrative Law Judge's determination to read as follows:

> Starting in or about 1984, petitioner maintained office space at 90 Broad Street. It was used by petitioner's vice-president, John H. Weston Smith, with respect to management of petitioner's affairs and also to the management of properties of petitioner's affiliates in the United States (NYC Tr. 182). While Mr. Weston Smith frequently travelled to the United Kingdom and throughout the United States, he was available for the majority of the time during 1984 at 90 Broad Street.[10]

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[10] We modified this fact to insert the words "during 1984" in the last sentence.

Accounting for the building was handled by the New York office of Arthur Andersen & Co.

HOME OFFICE INCOME AND EXPENSES

Certain "Home Office" or "London" income and expenses were not segregated on the records kept for each of the two buildings by the Baltimore and New York offices of Arthur Andersen & Co. Exhibit "1" and NYC Exs. "29" and "31" each include an analysis which attempts to allocate such items retroactively (NYC Tr. 262).

THE FEDERAL INCOME TAX RETURNS

On its Federal income tax returns for the fiscal years ending March 31, 1983 and March 31, 1984, petitioner combined its income and deductions for the Baltimore and New York properties. On the fiscal 1983 return, depreciation for the two buildings was shown separately on Section C of Form 4562, as follows:

Building Baltimore	$445,362.00
Building New York (5 months)	259,525.00
	$704,887.00

The Federal return for fiscal 1984 shows depreciation on "Buildings" of $1,091,353.00. This figure is broken down on Statement 7 attached to the return, as follows:

90 Broad St.	$ 618,090.00
90 Broad St. - 1982 Add.	4,767.00
90 Broad St. - 1983 Add.	23,134.00
Baltimore Bldg.	445,362.00
	$1,091,353.00

The fiscal 1984 return reported a long term capital gain of $13,023,844.00 on 100 shares of Lexchar, Inc. stock.

THE MARYLAND CORPORATION INCOME TAX RETURNS

Petitioner filed a Maryland corporation income tax return for the fiscal year ending March 31, 1983 (NYC Ex. "D") on which no tax was shown to be due because of negative Federal

income. The Maryland apportionment factor, however, was shown as .3559 based on a three-factor formula showing the following:

	Within and Without Maryland	Maryland	Decimal Factor
Total Receipts	4,853,865	2,887,040	.5948
Value of Property	22,963,288	10,856,965	.4728
Wages, Salaries	110,798	-	-0-
Total of Factors			1.0676
Average of Factors		$\frac{1.0676}{3} = .3559$	

Petitioner's Maryland corporation income tax return for the fiscal year ending March 31, 1984 (NYC Ex. "E") shows petitioner's Federal taxable income of $4,341,444.00 (which includes the gain on the sale of the Lexchar, Inc. stock) and Maryland taxable income of $4,499,105.00. After a deduction of $1,442,750.00 for net rental and other income from real estate or tangible personal property, adjusted business income was $3,056,355.00. This income was apportioned by a Maryland apportionment factor of .540511 computed on the Maryland three factor formula as follows:

	Within and Without Maryland	Maryland	Decimal Factor
Total Receipts	21,007,693	16,313,479	.7765479
Value of Property	42,362,931	12,898,430	.3044744
Wages, Salaries	-	-	-0-
Total of Factors			1.081022
Average of Factors		$\frac{1.081022}{2} = .540511$	

Adjusted business income apportioned to Maryland was $1,651,993.00. Rental and other income from real estate or tangible personal property located in Maryland totalling $556,563.00 was added back, resulting in adjusted income allocated to Maryland of $2,208,556.00. Maryland tax was $154,599.00.

THE NEW YORK AUDIT

Petitioner filed a New York State Corporation Franchise Tax Report for the fiscal year ending March 31, 1984[11] on which it reported Federal taxable income (before net operating loss and special deductions) of $12,951,592.00, an addition of $21,076.00 for New York State franchise tax deducted on the Federal return and $2,241.00 for ACRS deductions, resulting in a total of $12,974,909.00. It then subtracted the gain of $13,023,844.00 on the sale of subsidiary capital (the Lexchar, Inc. stock), as well as $112,282.00 for a New York net operating loss and $1,121.00 for allowable New York depreciation, resulting in entire net income of ($162,338.00).

The business allocation percentage reported was 39.95903%, resulting in allocated taxable net income of ($64,869.00). Tax of $6,665.00 was calculated based on allocated capital. A Metropolitan Transportation Business Tax Surcharge Report was also filed for the same year showing a surcharge of $1,133.00.

The New York District Office performed a limited scope audit of petitioner for the fiscal years ending March 31, 1983 through March 31, 1985. The scope was limited to subsidiary capital, business allocation, entire net income and computation of capital. The only audit adjustments at issue herein concern the fiscal year ending March 31, 1984, i.e., the auditor's disallowance of the subtraction of the $13,023,844.00 gain on the sale of petitioner's subsidiary, Lexchar, Inc., which had been subtracted as a gain on the sale of subsidiary capital. It appeared to the auditor that the subsidiary had been formed for the purpose of circumventing New York State tax liability on the sale of the Baltimore property. The field audit report states:

> "Properly, the basis for transfer of the building from the taxpayer to subsidiary should have been fair market value instead of net book value."

Petitioner's tax for the fiscal year ending March 31, 1984 was recomputed as follows:

"Entire Net Income as Reported Per CT-3	(162338)
Add: Interest to Stockholders*	182587
Add: Profit on Sale of Building	

[11]The New York report for fiscal 1983 is not in the record.

Erroneously Deducted from ENI	13023844
Adjusted Entire Net Income	13044093
Adjusted Business Allocation Percentage	64.1395%
Allocated Business Income	8366416
Tax Rate	10%
Audited Tax Due	836642
MTA Tax Surcharge	
Audited Tax Due	836642
MCTD Alloc %	100%
Allocated Tax	836642
Tax Rate	17%
Surcharge Due Per Audit	142229
* Interest paid to stockholders	202874
Less: 10% exclusion	20287
Amount to be added back	182587"

The auditor also noted that, on its report, petitioner had reduced total capital by the $22,000,000.00 selling price of Lexchar, Inc. for the fiscal year ending March 31, 1984, but that no adjustment was being made prorating subsidiary capital to reflect only two days of existence in said year, since petitioner was being placed on the entire net income method.

Petitioner executed two consents extending the period of limitation of the assessment of tax for the fiscal years ending March 31, 1983 and March 31, 1984 to May 31, 1988.

On January 19, 1988, notices of deficiency and statements of audit changes were issued to petitioner as follows:

Period Ended	Tax	Interest	Additional Charge	Total
3/31/84	$829,977.00	$356,652.68	$82,997.70	$1,269,627.38
3/31/84 (Surcharge)	141,096.00	60,630.91	14,109.60	215,836.51

Petitioner has conceded that if the tax is to be calculated on allocated capital, the correct tax (including surcharge) is $73,765.00 (Transcript 18; Exhibit "1").

In addition to the facts found by the Administrative Law Judge, we find the following:

> Petitioner's officers all had expertise in the area of real property investment. All of them were also either senior executives or directors of British Land and were officers of other subsidiary corporations within the group. John H. Weston Smith was vice president of petitioner and managing director of British Land. Mr. Weston Smith was also an officer of approximately 100 other subsidiaries in the

corporate group. Mr. Weston Smith had extensive experience in real estate valuation, financing and management.

The decisions to buy, finance and sell the properties were made by petitioner's officers, primarily by Mr. Weston Smith in consultation with the other members of the board. Mr. Weston Smith was also petitioner's primary contact with the managing agents of the properties.

OPINION

The Administrative Law Judge determined that the relief sought by petitioner, i.e., to exclude the gain on the Maryland property from the entire net income reported to New York, was essentially equitable in nature. The Administrative Law Judge further concluded that petitioner was not entitled to this equitable relief because petitioner did not enter into these proceedings with clean hands. The act committed by petitioner that precluded the application of an equitable remedy, according to the Administrative Law Judge, was the inconsistent position taken by petitioner on its Maryland return. On the Maryland return, petitioner reduced the amount of tax on the gain in issue by including its New York assets and revenues in its Maryland apportionment formula.

On exception, petitioner asserts that the unclean hands doctrine is not applicable in this case because: its actions in filing the Maryland return did not injure New York State; the relief that petitioner seeks is legal in nature; and equity powers may not be used to deprive a person of constitutionally protected rights. Further, petitioner argues that the Administrative Law Judge erred in deciding the case on a ground that petitioner did not have an opportunity to argue. The doctrines of equitable estoppel, quasi-estoppel or the duty of consistency are also inapplicable, urges petitioner, because New York cannot demonstrate that it relied on petitioner's treatment of the gain in question on the Maryland tax return. With respect to the merits of the issue, petitioner argues that both State law and the Federal Constitution prohibit taxing the gain on the Baltimore property because petitioner's Maryland and New York operations were in no sense a unitary business. Petitioner argues that the operations in Maryland and in New York are entirely unconnected and that the intercorporate transactions noted by the Administrative Law Judge did not occur between the Baltimore and New York operations. Petitioner also argues

that it is irrelevant to deciding this issue that it did not pay tax to another state on the full amount of the gain. Finally, petitioner argues that even if its business was unitary, the instant imposition violates the Federal Constitution because it is out of all appropriate proportion to petitioner's activities in New York.

In response, the Division of Taxation (hereinafter the "Division") argues that the Administrative Law Judge did not raise a new issue when he decided the case under the doctrine of unclean hands because the question of how petitioner treated the gain on its Maryland return was considered a relevant factor by the parties. However, the Division offers that the Administrative Law Judge's holding is more aptly characterized as an application of the estoppel rule, which precludes a party from adopting inconsistent positions as to an issue. The Division also argues that petitioner's Maryland tax reporting may be a basis for denying the relief sought under State law because the court in Matter of Sheraton Bldgs. v. Tax Commn. (15 AD2d 142, 222 NYS2d 192, affd 13 NY2d 802, 242 NYS2d 226) focused on the fairness and/or equity of the method used to allocate income. The Division also suggests that the question of whether a unitary business was conducted by petitioner is not applicable because all of the income at issue was internally generated by a single corporation and advises that "[i]t is important to avoid false tests as to whether the income of a single corporation must be allocated by separate accounting" (Division's brief on exception, p. 15). Assuming that the unitary business principle is applicable, the Division argues that petitioner's business was unitary because there was a sharing of value between the two commercial properties. Next, the Division argues that petitioner has not established that the income apportioned to New York is out of all proportion to the business transacted in the State. The Division also argues that the determination, under section 210(8) of the Tax Law, as to whether a taxpayer's entire net income or business allocation percentage should be adjusted is ultimately a sui generis inquiry, and that there are at least three factors in the present matter which distinguish it from Matter of Sheraton, i.e., the imposition of a Maryland tax on only a portion of the gain, the common

nature of the business activities conducted in each state, and the shared values between the two operations. Lastly, the Division argues that if we find that the statutory business allocation percentage does not yield a fair result in this case, the notices should not be cancelled, but instead we should modify the formula to achieve an equitable result.

We begin by agreeing with petitioner that the doctrine of unclean hands is not applicable to the issue raised in this case. In our view, the issue here is based upon a constitutional question, the source and nature of which was recently described by the Supreme Court:

> "[a]mong the limitations the Constitution sets on the power of a single State to tax the multi-state income of a nondomiciliary corporation are these: there must be 'a "minimal connection" between the interstate activities and the taxing State' Mobil Oil Corp. v. Commissioner of Taxes of Vt., 445 U.S. 425, 436-437 (quoting Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273) and there must be a rational relation between the income attributed to the taxing State and the intrastate value of the corporate business. 445 U.S., at 437. Under our precedents, a State need not attempt to isolate the intrastate income-producing activities from the rest of the business; it may tax an apportioned sum of the corporation's multistate business if the business is unitary. E.g. Asarco Inc. v. Idaho State Tax Commn., 458 U.S. 307, 317. A State may not tax a nondomiciliary corporation's income, however, if it is 'derive[d] from "unrelated business activity" which constitutes a "discrete business enterprise"' (Exxon Corp. v. Wisconsin Dept. of Revenue, 447 US 207, 224, quoting Mobil Oil, supra, at 442, 439)" (Allied-Signal, Inc. v. Director, Div. of Taxation, ___ US ___ [June 15, 1992], 112 S Ct 2251, 2255).

To establish that the State cannot subject income to a statutory apportionment formula, the taxpayer has the "distinct burden of showing by 'clear and cogent evidence' that [the imposition] results in extraterritorial values being taxed" (Exxon Corp. v. Wisconsin Dept. of Revenue, supra, at 221, quoting Butler Bros. v. McColgan, 315 US 501, 507, quoting Norfolk & W. Ry. Co. v. State of North Carolina, 297 US 682, 688). If petitioner established that subjecting the Baltimore gain to the business allocation percentage resulted in the taxation of extraterritorial values, the Division was empowered pursuant to section 210(8)[12] to revise the

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[12]Section 210(8) of the Tax Law provides as follows:

> "If it shall appear to the tax commission that any business or investment

tax calculation to avoid the unconstitutional application of tax (see, Matter of Bonner Props., State Tax Commn., May 15, 1984). The question before us then is whether petitioner proved the unconstitutional application so that the Division's refusal to exercise its power under section 210(8) was erroneous.

We conclude that petitioner has not sustained its burden of proving that the Baltimore property constituted a discrete business enterprise and that it was not conducting a unitary business.

The constitutional prerequisite to an acceptable finding of unitary business is a flow of value (Container Corp. of Am. v. Franchise Tax Bd., 463 US 159, 178).[13] The constitutional test focuses on functional integration, centralization of management and economies of scale (Allied-Signal, Inc. v. Director, Div. of Taxation, supra, 112 S Ct 2251, 2252, 2261). In Allied-Signal, the Supreme Court recently clarified the meaning and application of these factors by stating that these essentials could respectively be shown by: transactions not undertaken at arm's length, a management role by the parent which is grounded in its own operational expertise and operational strategy, and the fact that the corporations are engaged in the same line of business (Allied-Signal, Inc. v. Director, Div. of Taxation, supra, 112 S Ct 2251, 2264).

> allocation percentage or alternative business allocation percentage determined as hereinabove provided does not properly reflect the activity, business, income or capital of a taxpayer within the state, the tax commission shall be authorized in its discretion, in the case of a business allocation percentage or alternative business allocation percentage, to adjust it by (a) excluding one or more of the factors therein, (b) including one or more other factors, such as expenses, purchases, contract values (minus subcontract values), (c) excluding one or more assets in computing such allocation percentage, provided the income therefrom is also excluded in determining entire net income or minimum taxable income, or (d) any other similar or different method calculated to effect a fair and proper allocation of the income and capital reasonably attributable to the state, and in the case of an investment allocation percentage, to adjust it by excluding one or more assets in computing such percentage provided the income therefrom is also excluded in determining entire net income or minimum taxable income."

[13]We see no basis for the Division's contention that the unitary business analysis is not applicable here because the income at issue was earned by a single corporation (see, Exxon Corp. v. Wisconsin Dept. of Revenue, supra, at 223).

The Allied-Signal decision credits the decision in Container as having identified these factors as evidence of a unitary business and cites to specific parts of the Container decision for each factor. The citations are instructive in understanding the factors and applying them to the instant facts.

First, with respect to the non-arm's length transaction, the Court in Allied-Signal identified this as an element to prove functional integration and referred to that part of its Container decision where it noted that there was a flow of capital resources from Container to its subsidiaries through loans and loan guarantees, which were not shown to be at arm's length and which obviously resulted in a flow of value (Allied-Signal, Inc. v. Director, Div. of Taxation, supra, 112 S Ct 2251, 2264, citing Container Corp. of Am. v. Franchise Tax Bd., supra, at 180, n. 19). The Container decision also stated that a capital transaction can serve either an investment function or an operational function and concluded that Container's capital transaction served an operational function -- to ensure the continued growth and profitability of the subsidiaries (Container Corp. of Am. v. Franchise Tax Bd., supra, at 180, n. 19).

Similarly, in the instant case, petitioner provided both properties with a flow of capital through loans and loan guarantees. Specifically, petitioner borrowed $4,700,000.00 to finance the acquisition of the Baltimore property, which note was guaranteed by British Land Company, Ltd. and secured by a pledge agreement by petitioner. Further, petitioner funded the substantial deficits of the Baltimore property through loans obtained from third parties as well as affiliates. The acquisition and improvement of the New York property was funded through a loan obtained by British Land, which was guaranteed by petitioner. Petitioner never asserted that it made any additional charge to the properties for the loan proceeds or for the loan guarantees, beyond that charged by the lender. Accordingly, we assume that these internal transactions by petitioner, between it and its properties, were not at arm's length. It is also clear that these loans and loan guarantees served an operational, rather than an investment function, because they allowed the acquisition and development of the properties, which was the business of petitioner.

Turning to the next factor identified by Allied-Signal, it is clear that petitioner played a significant management role with respect to both properties and that this role was grounded in petitioner's expertise, through its officers, in real estate investment. First, it was petitioner's officers who made the major decisions with respect to the properties: to purchase, finance and sell. Second, although separate agents of petitioner managed the day-to-day operations of the two properties, petitioner retained substantial control over the specifics of the agents' actions through the budget review and approval process and through the management agreements, e.g., petitioner retained the right to approve leases, advertising campaigns, service contracts, collection activity and tenant settlements. In our view, the control that petitioner had over each property was substantially more than that involved in Container, which the Court found sufficient to sustain a finding of a unitary business. In Container, the management oversight included advice and consultation to the subsidiaries, establishing general standards of professionalism, profitability and ethical practices, and dealing with major problems and long term decisions (Container Corp. of Am. v. Franchise Tax Bd., supra, at 172, 173). We also believe that the control involved here is in total contrast to the situation in F. W. Woolworth Co., where the Court found that no phase of any subsidiary's business was integrated with the parent's because each subsidiary autonomously and independently performed the functions of merchandising, site selection, advertising and accounting control (F. W. Woolworth Co. v. Taxation and Revenue Dept. of State of New Mexico, 458 US 354, 365). In the present case, we find no significant area within which the agents functioned autonomously or independently.

It is also clear that this centralized management drew on the real estate investment expertise of petitioner's officers. All of petitioner's officers had expertise in real estate investment. The focal point for decision making by petitioner was John H. Weston Smith. Mr. Weston Smith was the managing director of British Land and an officer of approximately 100 subsidiaries. The business of this group of corporations was investing in real property: they held over 500 properties during the period in question, which were principally, as here, office

buildings. With these facts, we find the conclusion inescapable that petitioner was relying on its own operational expertise and operational strategy in managing the two properties.

Petitioner has argued that the properties were not centrally managed because "the center of gravity for the management of the New York and Baltimore buildings was in the managing agents" (Petitioner's post-hearing brief, p. 20). Further, petitioner asserts that although certain of the agents' decisions were, as a legal matter, subject to petitioner's review, in practice, the managing agents often did not seek this approval. Petitioner asserts that petitioner's control over the agents amounted to only the potential for control and that the unitary business issue must be decided on actual control.

We do not agree that petitioner's control over the properties was only the potential for control. First, the decisions to buy, finance and sell the properties were the decisions of petitioner alone and the income in question was generated as the result of the sale of one of the properties. With respect to the managing of the properties, the agents' operation of the building took place within the context of the annual budget approved by petitioner. Through this budget, petitioner exercised control over the day-to-day operations of the agents. We also do not agree that the contract provisions requiring petitioner's approval of the agents' acts was equivalent to the "potential control" found insufficient in Woolworth and Asarco. Although petitioner's witnesses testified that the agents did not always obtain the required contractual approvals, the requirements of the contract were an actual manifestation of petitioner's right to control the agents' acts. This actual expression of control reduced to a contractual agreement is not equivalent to the unasserted potential to control involved in Woolworth and Asarco, which resulted simply because of the parents' ownership of the subsidiaries (F. W. Woolworth Co. v. Taxation and Revenue Dept. of State of New Mexico, 458 US 354, 362; Asarco, Inc. v. Idaho State Tax Commn., supra, at 322-323).

In any event, the Court in Allied-Signal indicates that the extent of control is not as critical to the question of a unitary business as is the nature of the control. When identifying a

management role grounded in operational expertise as an element of a unitary business, the Allied-Signal decision refers to that part of the Container decision where it stated that a management role that is operational, i.e, based on the parent's own operational expertise and overall operational strategy, will support a unitary business finding even where there is a decentralization of day-to-day management (Allied-Signal, Inc. v. Director, Div. of Taxation, supra, 112 S Ct 2251, 2264, citing Container Corp of Am. v. Franchise Tax Bd., supra, at 180, n. 19). The operational nature of petitioner's management role would, thus, outweigh the importance of any decentralization of management that, in fact, occurred because the agents made decisions outside of the scope of their contractual authority.

Turning to the last element identified by the Court in Allied-Signal, it is indisputable that petitioner was engaged in the same line of business in its ownership of the two properties -- the investment in commercial rental real estate. In identifying this element of a unitary business, the Allied-Signal decision refers to that portion of the Container opinion where it endorsed as reasonable a presumption that corporations engaged in the same line of business are unitary (Allied-Signal, Inc. v. Director, Div. of Taxation, supra, 112 S Ct 2251, 2264, citing Container Corp. of Am. v. Franchise Tax Bd., supra, at 178). In such a situation, the Court in Container found it "more likely that one function of the investment is to make better use -- either through economies of scale or through operational integration or sharing of expertise -- of the parent's existing business related resources" (Container Corp. of Am. v. Franchise Tax Bd., supra, at 178). In the instant case, this presumption, as one element of our analysis, is not only applicable, but the underlying facts witness its appropriateness.

Since we conclude that petitioner's ownership and operation of the two properties exhibit the three essentials that the Court in Allied-Signal identified as being sufficient to show a unitary business, we find that petitioner was conducting a unitary business.[14]

Next we consider petitioner's assertion that even if it conducted a unitary business, New York's taxation of the Baltimore gain is unconstitutional because it is out of all appropriate proportion to petitioner's activities in New York. Petitioner asserts that:

> "to determine whether an apportionment formula attributes excessive income to a particular jurisdiction, courts compare the results of the apportionment formula with the income attributed to that jurisdiction using a separate accounting. If there is a gross disparity between the results, the use of the apportionment formulas is unconstitutional" (Petitioner's brief on exception, p. 18).

Petitioner concludes by stating that the apportionment formula applied by the Division imputes taxable income that is over 2,200% as large as that resulting from petitioner's separate accounting of New York income and expenses and that this gross disparity proves that the use of the allocation formula violates the standards imposed by the Federal Constitution.

We begin by noting that "[o]ne who attacks a formula of apportionment carries a distinct burden of showing by clear and cogent evidence that it results in extraterritorial values being taxed" (Butler Bros. v. McColgan, 315 US 501, citing Norfolk & W. Ry. Co. v. State of North Carolina, supra). We conclude that petitioner has not sustained this burden because its proof, the separate accounting, is based on a faulty premise, i.e., that all of the gain from the Baltimore property is allocable to Maryland and none to New York. In Container, the Supreme Court in addressing this same question stated:

> "[t]he problem with this argument is obvious: the profit figures relied on by appellant are based on precisely the sort of formal geographical accounting whose basic theoretical weaknesses justify resort to formula apportionment in the first place. Indeed, we considered and rejected a very similar argument in Mobil, pointing out that whenever a unitary business exists, 'separate (geographical) accounting, while it

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[14]The facts of this case are similar to those in Tranel, Inc. v. Commonwealth of Pennsylvania (558 A2d 925, affd 593 A2d 402), where the Commonwealth Court of Pennsylvania found that a corporation which owned an office building in New York and one in Pennsylvania was conducting a unitary business.

> purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale. Because these factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable "source." Although separate geographical accounting may be useful for internal auditing, for purposes of state taxation it is not constitutionally required'" (Container Corp of Am. v. Franchise Tax Bd., supra, at 181, quoting Mobil Oil Corp. v. Commissioner of Taxes of Vermont, supra, at 438).

Since we conclude that petitioner did operate a unitary business and that the income in question did arise from the operation of the business as a whole, we conclude that to characterize all of the income as having a Maryland source is a mischaracterization that cannot sustain petitioner's heavy burden of proof on this issue.

In response to petitioner's suggestion that the decision in Container establishes the 250% discrepancy in Hans Rees' Sons v. State of North Carolina (283 US 123) as a benchmark to judge discrepancies between formula apportioned income and separate accounting income,[15] we note simply that the Supreme Court has sustained formulas of apportionment that resulted in much greater disparities than petitioner asserts exist here. In Exxon, the Supreme Court sustained the application of an apportionment formula that resulted in taxable income of $4,532,555.00 for the taxpayer during the period 1965 through 1968, while the taxpayer's returns, based on separate state accounting methods reflecting only the State operation, showed

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[15]In contrast to the authority with which petitioner would credit the Hans Rees' Sons decision, one commentator has stated:

> "Hans Rees' Sons obtained a reversal of the assessment, not because it had borne the burden of proving that the apportionment violated the Due Process or Commerce Clause, but because the State court had not afforded the taxpayer an opportunity to try to satisfy that burden. The case holds only that taxpayers have a constitutional right to seek to prove that an apportionment formula 'albeit fair on its face,' operates in the particular case in a manner that taxes income that is 'in no just sense attributable to transactions within its jurisdiction'" (State Taxation, Corporate Income & Franchise Taxes, Hellerstein, Jerome, 1983, p. 343, quoting Hans Rees' Sons v. State of North Carolina, supra, at 124).

Since petitioner has not been deprived of any opportunity to sustain its burden, under this interpretation of Hans Rees' Sons, the case is of little value to petitioner.

losses for each year of the period (Exxon Corp. v. Wisconsin Dept. of Revenue, supra, at 213-214). Similarly, in Butler Bros., the Supreme Court concluded that a taxpayer had not sustained its burden of proving that the apportionment formula resulted in extraterritorial values being taxed, where the taxpayer's main line of attack, relying on Hans Rees' Sons, was that the formula converted a loss, calculated under a separate accounting system, of $82,851.00 into a profit of over $93,500.00 (Butler Bros. v. McColgan, supra, at 505, 508).

Although we do not agree that the Container decision establishes the 250% discrepancy of Hans Rees' Sons as a standard against which to evaluate apportionment formulas, Container does state that a three factor apportionment formula, based in equal parts on the proportion of a unitary business' total payroll, property and sales which are located in the taxing state has received the Court's approval and has become something of a benchmark against which other apportionment formulas are judged (Container Corp. of Am. v. Franchise Tax Bd., supra, at 170). The apportionment formula involved here, the business allocation percentage under section 210(3)(a) of the Tax Law, is also a three-factor formula based on the taxpayer's property, receipts and payroll. Although the New York formula differs from that described in Container in that the New York formula double counts the receipts factor, petitioner has advanced no argument, and none is apparent to us, to indicate that this feature of the New York formula makes it significantly different than that described in Container, or results in an unfair application to petitioner's facts.[16]

Given our conclusions that petitioner was conducting a unitary business and that petitioner has not established that the tax is out of all appropriate proportion to the amount of business done in this State, we find the Appellate Division's decision in Matter of Sheraton Bldgs. v. Tax Commn. (supra) not controlling, since it was based on the court's conclusion that

[16]Since the Court in Container noted that the one-third each weight given to the three factors is essentially arbitrary (Container Corp. of Am. v. Franchise Tax Bd., supra, at 183, n. 20), it does not appear that this feature of the tax was important to the Court's decision.

the taxpayer's business was not unitary and that the tax did not bear a reasonable relationship to the privilege granted to the corporation by the State.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of British Land (Maryland), Inc. is denied;

2. The determination of the Administrative Law Judge is sustained, but solely for the reasons stated in this decision;

3. The petition of British Land (Maryland), Inc. is denied; and

4. The notices of deficiency dated June 19, 1988 are sustained.

DATED: Troy, New York
September 3, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner