



Historically, the Global Company focused on \*\*\*\*\*, but later expanded into \*\*\*\*  
\*\*\*\*\* to capitalize on \*\*\*\*\* growing role as a \*\*\*\*\*. The Global  
Company viewed its expansion into \*\*\*\*\* as a natural extension of its \*\*\*\*\*  
\*\*\*\*\* business because it took advantage of the Global Company's skills in \*\*\*\*\*  
\*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\*  
\*\*\*\*\* \*\*\*\*\* \*\*\*\*\*. The Global Company's business model for \*\*\*\*\* \*\*\*\*\* is no  
different than for \*\*\*\*\* \*\*\* – that is, to develop, build, own and operate \*\*\* \*  
\*\*\*\*\*.

In \*\*\*\*\*, responding to the global financial crisis, the Global Company announced its intent  
to begin strategically selling off \*\*\*\*\* \*\*\*\*\*. The Global Company  
believed that through this process it could generate value by selling \*\*\*\*\* for more  
than their implied value based on market capitalization. Also, this strategy would allow the  
Global Company to pay down debt and focus on the \*\*\*\*\* market. As a part of this  
strategy, the Global Company sold all of its \*\*\*\*\* \*\*\*\*\* in: \*\*\*\*\* \*\* \*  
\*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\*  
\*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\*

Following these divestitures and as of \*\*\*\*\*, the Global Company operated solely  
in \*\*\*\*\* and the United States.

### US Business and Entity Structure

The Global Company began operating in the US in \*\*\*\*\*, when it acquired a majority interest  
in \*\*\*\*\*g\*\*\*\*\*. The Global  
Company continued to acquire and operate \*\*\*\*\* in the US over the  
next several years.

In \*\*\*\*\*, the Global Company commenced a process to sell the entire US business as part of  
its previously announced plan to strategically sell off \*\*\*\*\* outside of \*\*\*\*\*, but,  
in \*\*\*\*\*, pulled the US business off the market after it was unable to obtain a satisfactory  
price.

In \*\*\*\*\* \*\*\*\*\*, after receiving an unsolicited but favorable offer, the Global Company  
sold \*\*\* of its \*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* to \*\*\*\*\* \*\*\*\*\* for \*\*\*  
\*\*\*\*\*.

At the time of the \*\*\*\*\* \*\* \*\*\*\*\* described below, the Global Company operated  
in the US through \*\*\* holding companies: (1) \*\*\*\*\* \*\* \* \*\*\*\*\* (“Holdings I”),  
an elected corporation for federal and California income tax purposes which invested in  
\*\*\*\*\* \*\*, and (2) \*\*\*\*\* \*\* \* \*\*\*\*\* \*\*\*\*\* \*\*\*\*\* (“Holdings II”), which invested in  
\*\*\*\*\* \*\*\*\*\* \*\*\*\*\*. Holdings I and Holdings II were brother-sister entities, wholly-owned  
indirectly by the Global Company. They do not have a common US parent corporation.

For the year ended \*\*\*\*\* \*\* \*\*\*\*\* , Holdings I and Holdings II file on a combined basis for  
California franchise tax purposes because of unitary ties and common ownership through  
the Global Company. They file their California return on a water's-edge basis. Together,  
Holdings I and Holdings II and their subsidiaries will be referred to as the “Taxpayer.”

### Taxpayer's Sale of their US Operations

During the TYE \*\*\*\* \*\* \*\*\*\*, the Global Company re-engaged in its efforts to dispose of its US \*\*\*\*\* businesses in order to monetize their value, pay down debt and focus future investments in \*\*\*\*\*, consistent with the strategic initiative that began in \*\*\*\*. They hired investment bankers and arranged a competitive bidding process. In \*\*\*\*\*, \*\*\*\*\*, the Taxpayer completed the sale of almost all of its \*\*\*\*\* \*\*\*\*\* business. The sale of the \*\*\*\*\* business closed in \*\*\*\*\*. In \*\*\*\*\*, the Taxpayer sold its remaining \*\*\*\*\*.

In summary, Taxpayer divested of its US renewable energy businesses during the TYE \*\*\*\*\* \*\*\*\*\* through three separate transactions as follows:

- In \*\*\*\*\*, Holdings II sold most of its \*\*\*\*\* to \*\*\*\*\* for \$\*\*\*\*\*.
- In \*\*\*\*\*, a wholly owned subsidiary of Holdings I sold all of its \*\*\*\*\* \*\*\*\*\* and the Taxpayer's US project management business and headquarters to \*\*\*\*\* for \$\*\*\*\*\*.
- In \*\*\*\*\*, Holdings II sold its remaining \*\*\*\*\* to \*\*\*\*\* for \$\*\*\*\*\*.

These transactions, collectively referred to as the "\*\*\*\*\* US divestments," generated almost all of the Taxpayer's gross receipts for the TYE \*\*\*\*\* as follows:

<u>Description</u>	<u>Contribution to Gross Receipts</u>
***** Transaction	\$ *****
***** Transaction	\$ *****
***** Transaction	\$ *****
***** Fees <sup>1</sup>	\$ *****
***** Sales	\$ *****
Total Gross Receipts	\$ *****

Following these sales, the Global Company ceased to operate in the US and California and operated solely in \*\*\*\*\*. As of \*\*\*\*\*, the Global Company operated \*\* \*\*\*\*\* and a \*\*\*\*\* in \*\*\*\*\*, and had a \*\*\*\*\* to build additional \*\*\* and \*\*\*\*\* in \*\*\*\*\*.

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<sup>1</sup>This represents \*\*\*\*\* fees charged by the Taxpayer to its various flow-through project entities that are not eliminated under CCR section 25137-1(f)(3)(A) due to less than 100% ownership of the \*\*\*\*\* entities.

## **ISSUE**

Whether the gross receipts arising from the \*\*\*\* US divestments described above constitute substantial and occasional sales within the meaning of CCR section 25137(c)(1)(A) such that they should be excluded from the sales factor?

## **HOLDING**

Based on the accuracy and completeness of the facts and representations provided by the Taxpayer, and subject to examination by the Internal Revenue Service and/or FTB of the facts, the \*\*\*\* US divestments are substantial and occasional under CCR section 25137(c)(1)(A).

## **DISCUSSION**

For California apportionment purposes, the sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year.<sup>2</sup> For taxable years beginning on or after January 1, 2011, "sales" means all gross receipts of the taxpayer not allocated under CRTC sections 25123 to 25127.<sup>3</sup> Gross receipts means the gross amounts realized on the sale or exchange of property, the performance of services, or the use of property or capital in a transaction that produces business income.<sup>4</sup>

However, CCR section 25137(c)(1)(A) provides a special rule excluding receipts from the sales factor when those receipts are substantial and arise from an occasional sale of assets used in the taxpayer's trade or business. CCR section 25137(c)(1)(A) states in pertinent part:

Where substantial amounts of gross receipts arise from an occasional sale of fixed assets or other property held or used in the regular course of the taxpayer's trade or business, such gross receipts shall be excluded from the sales factor. For example, gross receipts from the sale of a factory, patent, or affiliate's stock will be excluded if substantial. For purposes of this subsection, sales of assets to the same purchaser in a single year will be aggregated to determine if the combined gross receipts are substantial.

1. For purposes of this subsection, a sale is substantial if its exclusion results in a five percent or greater decrease in the sales factor denominator of the taxpayer or, if the taxpayer is part of a combined reporting group, a five percent or greater decrease in the sales factor denominator of the group as a whole.
2. For purposes of this subsection, a sale is occasional if the transaction is outside of the taxpayer's normal course of business and occurs infrequently.

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<sup>2</sup> California Revenue and Taxation Code ("RTC") section 25134.

<sup>3</sup> RTC section 25120(f)(1).

<sup>4</sup> RTC section 25120(f)(2).

This regulation requires that two elements be met before the gross receipt exclusion applies: the sale must be (1) "substantial" and (2) "occasional." In situations where both of these elements are met, the gross receipts from the transaction will be excluded from both the sales factor numerator and denominator. These elements must be evaluated separately for each of the Taxpayer's \*\*\*\* US divestments during \*\*\*\*\*, as each sale was made to a different purchaser.

**1. The \*\*\*\*\* US Divestments are Substantial**

A sale is substantial if its exclusion results in a five percent or greater decrease in the sales factor denominator of the taxpayer's combined reporting group.<sup>5</sup> As outlined below, excluding the gross receipts from each of the \*\*\*\* US divestments (evaluated separately) reduced Taxpayer's sales factor denominator by \*\*\*, \*\*\*, and \*\*\* percent, respectively:

	Sales Factor Denominator Including the Sale	Sales Factor Denominator Excluding the Sale	Difference	Percentage Decrease in Denominator
***** Sale of *****	\$ *****	\$ *****	\$ *****	*****%
***** Sale of *****	\$ *****	\$ *****	\$ *****	*****%
***** Sale of *****	\$ *****	\$ *****	\$ *****	*****%

As each of the above percentage decreases are greater than the five percent threshold set forth in the regulation, the \*\*\*\* US divestments are substantial.

**2. The \*\*\*\* US Divestments are Occasional**

In considering whether a transaction occurred outside the taxpayer's normal course of business, the Court's analysis in *Hoechst Celanese Corp. v. Franchise Tax Bd.*<sup>6</sup> ("*Hoechst Celanese*") may be helpful. In considering whether certain receipts constituted business income under the transaction test – a test which requires an analysis similar to that required by the regulation – the Court in *Hoechst Celanese* held that the "controlling factor" for determining whether a transaction occurred outside the regular course of a taxpayer's business activity is the "nature of the particular transaction" generating the income.<sup>7</sup> Here, the disposition of its entire US \*\*\*\*\* businesses is an extraordinary corporate occurrence. The Taxpayer's normal course of business was to develop and operate (not sell) \*\*\*\*\* and sell the resulting \*\*\*\*\*. Almost all of Taxpayer's recurring revenues come from such sales of \*\*\*\*\*. While Taxpayer had a plan in place to strategically sell off \*\*\*\*\* outside of \*\*\*\*\*, Taxpayer's ongoing and normal business model did not contemplate regular, reoccurring, and ongoing divestitures of its \*\*\*\*\*. The Global Company

<sup>5</sup> CCR section 25137(c)(1)(A)1.

<sup>6</sup>*Hoechst Celanese Corp. v. Franchise Tax Bd.*, (2001) 25 Cal 4th 508, 526.

<sup>7</sup> *Ibid.*

continues to own and operate \*\*\*\*\* in \*\*\*\*\* with aim of operating these facilities in the future. Stated another way, the Taxpayer's day-to-day business did not involve building and developing \*\*\*\*\* for sale at a profit, and Taxpayer did not normally or regularly sell \*\*\*\*\* . Rather, as previously stated, Taxpayer's normal course of business involved the development, owning and operating of \*\*\*\*\* with its regular and recurring revenues coming from the sale of \*\*\*\*\* . Thus, the \*\*\*\*\* US divestments during TYE \*\*\*\*\* are outside of the normal course of Taxpayer's business.

In addition, in order for a transaction to be occasional within the meaning of CCR section 25137(c)(1)(A) it must also be infrequent. Here, case law considering whether income is "business income" under the transactional test (codified in RTC section 25120(a)) can be useful, although it does not control whether a sale is occasional under CCR section 25137(c)(1)(A). In *Appeal of New York Football Giants, Inc.*,<sup>8</sup> the State Board of Equalization (the "Board") held that a professional sports team playing one game in California in a taxable year was occasional. Also, in *Appeal of Learner Company*,<sup>9</sup> the Board held that trips made by the taxpayer's officers once or twice a year were infrequent and occasional. The Board also provided context to the meaning of "occasional" under CCR section 25137(c)(1)(A) in *Appeal of Triangle Publications, Inc.*<sup>10</sup> There the Board recognized that the sale of two corporate divisions and a building during a four-year period were "occasional" under CCR section 25137(c)(1)(A). Here, the Global Company has made four prior divestitures over an eight year period, and the Taxpayer had a single prior divestiture in a prior year.<sup>11</sup> Thus, the \*\*\*\*\* US divestments during the TYE \*\*\*\*\* are also infrequent.

## HOLDING

Based on the accuracy and completeness of the facts and representations provided by the Taxpayer, the \*\*\*\*\* US divestments are both substantial and occasional under CCR section 25137(c)(1)(A) and the gross receipts from these divestments should be excluded from the Taxpayer's sales factor for the TYE \*\*\*\*\*.

Please be advised that the tax consequences expressed in this Chief Counsel Ruling are applicable only to the named taxpayer and are based upon and limited to the facts you have submitted. In the event of a change in relevant legislation, or judicial or administrative case law, a change in federal interpretation of federal law in cases where our opinion is based upon such an interpretation, or a change in the material facts or circumstances relating to your request upon which this opinion is based, this opinion may no longer be applicable. It is your responsibility to be aware of these changes, should they occur.

This letter is a legal ruling by the Franchise Tax Board's Chief Counsel within the meaning of paragraph (1) of subdivision (a) of section 21012 of the CRTC. Please attach a copy of this

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<sup>8</sup> *Appeal of New York Football Giants, Inc.*, 77-SBE-014, February 3, 1979 and 77-SBE-015, June 28, 1979.

<sup>9</sup> *Appeal of the Learner Company, et. al.*, 80 SBE-103, September 30, 1980.

<sup>10</sup> *Appeal of Triangle Publications, Inc.*, 84-SBE-096, June 27, 1984.

<sup>11</sup> The \*\*\*\*\* sale of the two \*\*\*\*\* to \*\*\*\*\* for \$\*\*\*\*\*.

letter and your request to the appropriate return(s) (if any) when filed or in response to any notices or inquiries which might be issued.

Very Truly Yours,

Cheryl L. Akin  
Tax Counsel