IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

CRYSTAL COMMUNICATIONS, INC., an Oregon corporation; LLOYD E. DAWSON, ANN N. DAWSON, PLINY A. PRICE, STEPHEN J. PRICE, JILL LEVY, C. G. McKEEVER, MYRA McKEEVER, JAMES E. BRYANT, CAMELLA L. RYAN, TERRY PINNA and ERICA PINNA,	)	
Plaintiffs,	)	TC-MD 040026D
v.	)	
DEPARTMENT OF REVENUE, State of Oregon,	)	
Defendant.	)	**DECISION**

Plaintiffs appeal Defendant's Conference Decision Letter, dated October 22, 2003, affirming and modifying Defendant's auditor's adjustments for tax years 1993 through 2000. A trial was held in the Oregon Tax Courtroom, Salem, Oregon, on February 14 and 15, 2006. Plaintiffs were represented by Scott G. Seidman and Mark F. LeRoux, Attorneys at Law, Tonkon Torp LLP, Portland, Oregon. Terry Pinna (Pinna), President, Crystal Communications, Inc., and Stephen Kaffee (Kaffee), Attorney at Law, testified on behalf of Plaintiffs. Defendant was represented by James C. Wallace, Assistant Attorney General, Department of Justice, Salem, Oregon. Robert Williamson (Williamson), Senior Tax Auditor, Oregon Department of Revenue, testified on behalf of Defendant.

Prior to testimony, Defendant verbally withdrew its Motion for an Order Compelling Document Production, filed October 11, 2005. The court received the following exhibits from the parties: Plaintiffs' Exhibits 1-83, and Defendant's Exhibits A through I, and K, with no

objections. In addition, the court received Defendant's Exhibits J and L, which were summaries of information contained on previously admitted documents. Plaintiffs objected because the exhibits were not submitted in accordance with the court's rules of exchange.

The parties submitted post-trial briefs on March 1, 2006. This matter is now ready for decision.

I. STATEMENT OF FACTS

The statement of facts for the above-entitled matter is divided among three topics: Formation and Sale of Crystal Communications, Inc; Operations of Crystal Communications, Inc.; and Income Tax Compliance, Audit, and Appeal.

A. *Formation and Sale of Crystal Communications, Inc.*

On June 22, 1988, Crystal Communications Systems Company, a general partnership (Partnership), was formed. (Def's Ex E, Tab 1 at CCI 003235.) "The sole business for which the Partnership is formed shall be to carry on the business of ownership, management and operation of cellular telephone systems and application for licensing with respect thereto." (*Id.*)

"In 1989, the Federal Communications Commission (FCC) conducted a lottery for distributing cellular licenses to operate cellular communications systems in various regions of the" United States. (Ptfs' Third Am Compl at 2.) The FCC granted the Partnership a radio station authorization and call sign (KNKN309) for Oregon #1 Rural Service Area (RSA), #606 - Clatsop, on September 29, 1989. (Ptfs' Ex 16 at 1.) The authorized territory for Oregon #1 RSA consisted of four counties: Columbia, Clatsop, Tillamook, and Yamhill. (Ptfs' Ex 10, Tab 10 at CCI 004879.) Under the terms of the authorization, the Partnership was required to file its application for a radio station license within "eighteen months from the original grant

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date" or its authorization would expire. (Ptfs' Ex 16 at 3.) On March 21, 1991, the Partnership received from the FCC its license "to operate a radio transmitting station." (Ptfs' Ex 13.)

On October 23, 1991, Pinna wrote that, during a conference call the previous evening, all partners except one partner who was not present voted to form an "S" Corporation "under the name of Crystal Communication Systems, Inc." (Ptfs' Ex 3 at 1.) Between the date of Pinna's letter and incorporation in Oregon on January 30, 1992, the name of the corporation changed to Crystal Communications, Inc. (Crystal). (Def's Ex A, Tab 1 at CCI 000299.) The stated corporate purpose was to "operate a cellular telephone business in one or more territories within the United States." (System) (*Id.* at CCI 000302.) All of the above-named individual Plaintiffs who are non-residents of Oregon held an ownership interest in the stock of Crystal. According to Kaffee, the FCC approved the transfer of the license from the Partnership to Crystal even though it received contrary advice from its trial staff who was involved in license revocation proceedings against Crystal and 30 other parties.

On September 18, 1997, Crystal entered into an agreement with Falkenberg Capital (Falkenberg), allowing Falkenberg to act as its "exclusive agent for the sale of the properties and assets * * * relating to the cellular telephone system (including the cellular license) serving the Oregon #1 RSA." (Ptfs' Ex 9 at 2.) Crystal received a notice of proposed acquisition from Triton Cellular Partners, L.P. on April 28, 1998. (Def's Ex B, Tab 9 at CCI 003657.) In response, AT&T Wireless Services, Inc. (AWS), the successor in interest to McCaw Cellular Communications, Inc. (McCaw), wrote to Kaffee, stating "its interest in purchasing the assets of Crystal." (Def's Ex B, Tab 9 at CCI 003656.) On June 1, 1999, the board of directors of Crystal

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approved the sale of its assets, including FCC license, to AWS for $51,500,000. (Def's Ex E, Tab 3 at CCI 000693; 000696.) The sale proceeds were allocated as follows: $45,600,000 to the FCC License and the balance to other assets. (Ptfs' Ex 80.)[1]

B. *Operations of Crystal Communications, Inc.*

Prior to receiving its license in March 1991, Crystal entered into an "Agreement in Principle Regarding Operational Cooperation; OR-1 RSA" with McCaw Cellular Communications, Inc. (McCaw) and Interstate Mobilephone Company (IMC). (Def's Ex B, Tab 1 at CCI 000908.) Kaffee testified that McCaw possessed an FCC license for the "adjacent market" (Portland and Salem). Under the terms of the operating agreement, McCaw agreed to "[s]ell cell site and microwave equipment adequate for activation of two cell sites in the McMinnville/Newberg area" to Crystal "at McCaw's cost, * * * [p]rovide roaming outcollect clearinghouse functions for" Crystal "at cost" and loan funds to Crystal "adequate to purchase cell site and microwave equipment" as agreed, and "cover operating deficits up to $5,000/month for first six months of" operation. (*Id.* at CCI 000911.) IMC agreed to "[a]rrange for construction of system, [a]ccount for Roaming Revenues * * *, [p]rovide technical maintenance for System at cost * * * , [a]ccount for expenses attributable to System operation," using its "existing staff or third-party contractors." (*Id.* at 000911-000912.) Crystal's responsibilities were to "[m]ake all appropriate FCC filings" and "sign" the following agreements: "lease agreements for McMinnville and Newberg cell sites," "interconnection agreements with local telco(s)," "number transfer agreements (if necessary)," and "other necessary agreements with

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[1] According to the AT&T Wireless Services, Inc. and Subsidiaries OR-1 Purchase Price Allocation, 5/25/99, Form 8594 Detail, $47,774,425 was allocated to Class IV & V, Intangibles. (Def's Ex F at CCI 000189.)

third parties." (*Id.* at 000910.) In addition, Crystal was required to "[a]gree to use equipment compatible with Portland equipment" and "[c]ooperate with IMC and its affiliates * * *." (*Id.*)

However, "[b]efore Crystal could begin construction," Kaffee testified that "the FCC initiated a revocation proceeding against [Crystal] and other lottery winners that had allegedly entered an agreement which violated the Commission's rules." (Def's Ex B, Tab 9 at CCI 003428.) That agreement among the Crystal partners was commonly referred to by the parties as a "Revenue 'RISK SHARING' plan developed by Tye St. James and The Cellular Corporation 'TCC'. " (Def's Ex E, Tab 3 at CCI 004763.) "The risk-sharing agreements provided that, in the event any signatory applicant won the lottery, that licensee would retain ownership and control of the cellular system, but each signatory to the Agreement would have the right to receive income and sales proceeds from the signatories whose RSA applications had been granted. Algreg Cellular Engineering at 8152-53." (Ptfs' Ex 64 at 6.) "With the cloud on its license caused by the ongoing revocation proceeding, Crystal could not obtain financing to construct the OR-1 system from the customary sources, such as equipment manufacturers or commercial lenders. Toward the end of the 18 month initial construction period, Crystal entered into" the above referenced operating agreement with McCaw.[2] (Def's Ex B, Tab 9 at CCI 003428.)

Crystal entered into a similar agreement for "construction, operations and ownership of a cell site and microwave point of presence site located in Megler, Washington and Astoria, Oregon" on September 16, 1992. (Def's Ex B, Tab 3 at CCI 000862.) At all times, Crystal's ownership was in " 'Equipment' * * * defined to include but not be limited to, radio transmitters

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[2] According to Kaffee, "[a]fter approximately eight years of litigation, and several adverse decisions by lower-level decision-makers, Crystal prevailed before the full FCC." (Def's Ex B, Tab 9 at CCI 003428.)

and receivers, antennas and associated electronics." (Def's Ex B, Tab 3 at CCI 000865.) Pinna testified that the land on which the cell sites were located was leased.

Crystal continued to develop cell sites with McCaw and IMC pursuant to a plan developed by McCaw. (*See* Def's Ex B, Tab 3 at CCI 003334 (Interoffice Memo, June 8, 1992); Def's Ex B, Tab 4 at CCI 004086 (Oregon RSA #1 Proposed Development Plan, Oct 13, 1993).) On November 16, 1993, the parties signed a Letter Agreement relating to the "development of a cell site to be located at Cape Meares, Tillamook County, Oregon." (Def's Ex B, Tab 4 at CCI 000720.) Crystal's responsibilities remained as detailed above.

On June 1, 1994, Pinna wrote to McCaw, authorizing it to "initiate work for the construction of additional cell sites located at Seaside, Mount Hebo and Neakhanie (*sic*) to serve the Oregon 1 RSA." (Def's Ex B, Tab 5 at CCI 004361.) Pinna stated that "[t]his authorization is based upon the intention of Crystal and McCaw to enter into a Management Agreement on mutually satisfactory terms that will provide for McCaw to oversee construction of such cell sites and to manage the operation of the OR-1 system – all subject to Crystal's approval, direction, and control." (*Id.*) The parties entered into the referenced Management Agreement on August 16, 1994. (Def's Ex B, Tab 6 at CCI 000002.) Under Article II, Obligations/Operation, McCaw was authorized to "manage and supervise the operation of the System * * * [s]ubject to Crystal's oversight, review and ultimate control." (*Id.* at CCI 000006.) Both Kaffee and Pinna testified that, even though the Management Agreement gave Crystal the right to oversee, review and control the System, the terms of the agreement were not followed by the parties. Pinna testified that McCaw/AT&T made all the decisions related to location, construction, operation, maintenance, and staff.

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Kaffee testified that during the time the "cloud hung over Crystal's license," Crystal expanded the System in order to "enhance the entire value of the System." He testified that the shareholders' ultimate goal was to sell the FCC license. According to Kaffee, if they had failed to build the first cell site within 18 months, the FCC would have revoked the license. Further, he stated that failure to meet the required build-out within the five year time period would have resulted in "unserved areas subject to filings by other parties." (Ptfs' Ex 14.)

In addition to cell site construction, Crystal entered the retail market by negotiating agreement with various retailers, including Price Costco, Fred Meyer, and Aircall NW, to solicit subscribers for its services. (*See* Def's Ex A, Tab 14 at CCI 003947-004058; Def's Ex C, Tab 12 at CCI 004625.) The agreements with retailers were followed by the opening of service centers. In May 1996, Crystal entered into a commercial lease in Warrenton, Oregon. (Def's Ex A, Tab 18 at CCI 001406.) As part of its retail marketing activities, Crystal entered into a license agreement with Cellular One, a general partnership, on July 3, 1996. (*Id*., Tab 16 at CCI 003864.) Using the service mark, Cellular One, Crystal promoted its cellular telephone service under the terms of the agreement. (*See* Def's Ex A, Tab 19 at CCI 001430-001437(Commercial Lease and Deposit Receipt).) Between 1996 and 1998, Crystal took "a more active roll in the marketing of NW subscribers" which resulted in "an increase over previous years." (Def's Ex B, Tab 9 at CCI 003611.)

Pinna testified that Crystal's business relationship with McCaw was often strained when it came to revenue sharing and operating cost allocations, specifically allocation of backroom expenses. (*See* Def's Ex B, Tab 1 at CCI 004628 (Agenda (undated), Item III*, McCaw Unresponsiveness to Crystal Requests and Directives*); Def's Ex B, Tab 2 at CCI 003279 (Ltr to McCaw, Oct 24, 1991).) From time to time, McCaw/AT&T paid to Crystal amounts in

settlement of accounting disputes. For example, on April 8, 1994, Crystal received a check in the amount of $123,289 “for agreed adjustments per our recent discussions about clarifying financial reporting for Oregon-1.” (Ptfs’ Ex 28 at 1.) After numerous meetings and exchange of written correspondence, McCaw and Crystal entered into a Cell Site Revenue Sharing Agreement (Revenue Sharing Agreement) on August 26, 1994. (Def’s Ex B, Tab 9 at CCI 000087-000097.) That Revenue Sharing Agreement significantly changed the flow of cash between the parties, allowing Crystal to receive a share of the “Net Revenues” from which it could then repay construction loans with McCaw, rather than McCaw offsetting the outstanding loans with revenues collected. (*Id.*)

Unfortunately the Revenue Sharing Agreement did not solve all the accounting issues between Crystal and McCaw. Throughout their relationship, Crystal continued to raise questions about income and activity reports. For example, on May 1, 1995, Kaffee, in his role as counsel for Crystal, wrote to McCaw/AT&T’s legal counsel, seeking “detailed information regarding the calculation of its revenues.” (Ptfs’ Ex 29; *see also* Def’s Ex B, Tab 7 at CCI 004245-004248, (Ltr to James Morgan, from Kaffee, June 24, 1996); *Id.* at CCI 003597 (Meeting Agenda, Oct 22, 1996).) On February 24, 1998, Kaffee on behalf of Crystal communicated with Peat Marwick, Certified Public Accountants, regarding a forensic audit of certain transactions between Crystal and AT&T Wireless Services, Inc. (AWS). (*Id.*; Tab 9 at CCI 003428-003434.) At about the same time, Kaffee wrote to AT&T Wireless Services, Inc. to demand arbitration, listing eight matters for arbitration, including the ongoing dispute of the amount charged by McCaw/AT&T for “backroom” personnel costs for services such as accounting, marketing, etc., and failure of AWS to compensate Crystal for the use of its microwave facilities and leased lines. (*Id.* at CCI 003425-003427.) At times, the disagreements expanded beyond accounting to

operational issues, specifically allegations of breach of Section 10.3 of the Sales, Loan and Security Agreement, dated August 16, 1994, between the parties and handling of major accounts. (*See* Def's Ex B, Tab 8 at CCI 004416-004418; Def's Ex B, Tab 9 at CCI 003438-003440.)

On July 27, 1998, the parties (Crystal and AWS) entered into a Settlement Agreement to "resolve all claims previously made" and "arbitration initiated by letter dated February 25, 1998." (Def's Ex B, Tab 9 at CCI 003348-003352.) The parties agreed to extend the Management Agreement to September 30, 1999, and pledged to work together to resolve revenue sharing, equipment and monthly reporting issues for the System. (*Id*. at CCI 0003349; CCI 003351.) Crystal received a cash settlement in the amount of $200,000 in exchange for a mutual release "of and from any and all actions, causes of action, claims or demands for damages * * *." (*Id*. at CCl 003348, CCI 003353.)

Pinna testified that he was the sole employee of Crystal. (*See* Def's Ex A, Tab 28 at 1-7.) He stated that beginning in 1995 he devoted 80 to 90 percent of his time to the corporate activities of Crystal. Those corporate activities included following the FCC litigation, communicating with shareholders, and disbursing payments for corporate expenses. In addition, Pinna testified that, as previously described, he challenged the financial reporting of McCaw/AT&T and monitored cell strength by performing drive tests. He stated that the corporate headquarters were initially located in Columbus, Ohio, and then moved to Florida when he relocated. Beginning in 1997, Crystal leased an apartment in McMinnville where, according to Pinna, he stayed two or three times a month for three to four days. On October 31, 1996, Crystal entered into a lease agreement with Ford Motor Company. (Def's Ex A, Tab 17 at CCI 003726-CCI 003728.) A 1997 Ford F150 truck was leased for Pinna's use. Pinna testified that he stayed no more than 45 days per year in Oregon.

C. *Income Tax Compliance, Audit, and Appeal*

For each of the tax years under appeal, Crystal timely filed Oregon S Corporation Tax Returns. (Def's Ex G, Tabs 1-8.) On February 15, 2003, Crystal filed Amended Oregon S Corporation Tax Returns for tax years 1993, 1994, and 1995. (*Id.*; Tabs 1-3.) On March 6, 2000, Crystal filed Amended Oregon S Corporation Tax Returns for tax years 1996, 1997, and 1998. (*Id.*; Tabs 4-6.) The amended returns were filed to change the apportionment formula. For tax years 1993 through 1998, the original returns did not use "apportionment formulas." (*Id*. Tabs 1-6; Ptfs' Ex 25 at 20-21.) The amended returns for tax years 1993 through 1995 apportioned income between Oregon and Ohio. The amended return for tax year 1996 apportioned income between Oregon, Florida, and Ohio. For tax years 1997 and 1998, the amended returns apportioned income between Oregon and Florida. (Def's Ex G, Tabs 1-6.)

For tax year 1999, Crystal timely filed an Oregon S Corporation Tax Return. Crystal apportioned "ordinary income from operations" to Oregon and Florida and "allocated entirely to Florida" all the "capital gain" from the sale of Crystal. (Def's Ex G, Tab 7.) For tax year 2000, no income was allocated to Oregon.

Williamson testified that beginning in March 2002, Defendant audited Crystal's income tax returns. After a review of the books and records of Crystal, Williamson concluded that "[t]he entire income producing activity" of Crystal "was within the State of Oregon." (Ptfs' Ex 25 at 20.) For tax years 1996, 1997, 1998, and 1999, the sales factor was adjusted to include the income from the operation of the System in Oregon and the payroll factor was "eliminated from the apportionment formula." (*Id.* at 21.) Because "[a]pportionment formulas were not used in the original filings for tax years 1993, 1994 and 1995," Williamson concluded that "[a] 100% apportionment percentage" should be "used for these years." (*Id.* at 21.)

Subsequently, at trial, Williamson testified that the apportionment formula should include the payroll factor. He stated that a portion of Pinna's salary should be included in the numerator of the payroll factor and the salaries paid to McCaw/AT&T employees who worked for Crystal should be included in the numerator and denominator of the factor. (*See* Def's Ex K.) On cross examination, Williamson conceded that there is no statutory basis for "allocating Pinna's time" within and without Oregon.

After receipt of Defendant's Notices of Deficiency, Crystal requested a conference with Defendant, which was held on July 29, 2003. (Def's Ex A, Tab 12 (Conf Decision Ltr, Oct 22, 2003.)) After a review of the facts, the conference officer, Paul J. Guthrie (Guthrie), concluded that "the income from the sale of the FCC license is business income." (*Id.* at 5.) Further, Guthrie concluded that "Crystal is not in the business of operating a license for public use." Therefore "Crystal is not a public utility" and the "apportionment of its income is governed by ORS 314.650 through 314.670 [1991 through 1999 edition]." (*Id.* at 9.) Guthrie stated that "Crystal's one employee only reviewed the operation of the system to ensure performance of the services contract with McCaw/AT&T and "[t]he payroll factor must be included in the apportionment formula." (*Id.*) In support of the auditor's adjustment to the sales factor, Guthrie concluded OAR 150-314.665(4)(3)(a) required that "[t]he income from allowing McCaw/AT&T to use Crystal's license must be included in the numerator of the sales factor." (*Id.* at 9-10.)

Plaintiffs appealed the Conference Decision Letter to this court on January 16, 2004. The parties pursued a lengthy discovery process and the matter was set for trial.

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II. ISSUES

1. Is Crystal engaged in a trade or business?

2. Is the net taxable income reported by Crystal for tax years 1993 through 2000, including income from the sale of assets and FCC license, "income arising from transactions * * * in the regular course of the taxpayer's trade or business" under ORS 314.610 (1)?[3]

3. If the net taxable income arises "from transactions * * * in the regular course of the taxpayer's trade or business," is it subject to apportionment under ORS 314.650 through ORS 314.670, or ORS 314.280 (public utility)?

4. Does the three-factor statutory formula fairly represent Crystal's business activity in Oregon?

III. ANALYSIS

Plaintiffs, in this case, are an Oregon corporation, Crystal, taxed under the Subchapter S provisions of the federal Internal Revenue Code, and individuals who are nonresident shareholders in Crystal. It is well-settled law in Oregon that nonresident shareholders are taxed on the corporate income attributable to activities in Oregon based on their ownership interest. *See Kulick v. Department of Revenue*, 290 Or 507, 624 P2d 93 (1981); ORS 316.127(5).[4] In determining the tax imposed by ORS chapter 316 on a nonresident Subchapter S shareholder, "the shareholder's pro rata share of the corporation's separately stated items of income, loss or deduction and nonseparately computed income or loss, as determined under or for purposes of

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[3] With respect to ORS 314.610(1), all references to the Oregon Revised Statutes (ORS) are to year 1999. There have been no statutory changes to ORS 314.610(1) during the tax years before the court.

[4] For the tax years at issue, there were no statutory changes to ORS 316.127(5): "Notwithstanding subsection (3) of this section [intangible personal property], the income of an S corporation for federal income tax purposes derived from or connected with sources in this state does constitute income derived from sources within this state for a nonresident individual who is a shareholder of such a corporation."

section 1366 of the Internal Revenue Code * * * with the modifications, additions and subtractions provided under this chapter and ORS chapter 316 * * * shall be taken into account." ORS 314.734(1)(1999).[5]

A. *Trade or business.*

To allocate the pro rata share of the corporate income to each named individual Plaintiff, the character of the income, ordinary or investment, is the basis for the parties disputing whether Crystal is engaged in a trade or business. Plaintiffs conclude that "[t]he evidence presented at trial irrefutably supports the Conference Officer's finding [that "Crystal was not in the business of operating a license for public use"] and Plaintiffs' corollary allegation that Crystal was not engaged in a trade or business." (Ptfs' Post-Trial Mem at 2.) Plaintiffs allege that because the shareholders of Crystal and its one employee, Pinna, lacked "the ability or expertise to develop and operate a cellular system," Crystal was not "engaged in a trade or business" but "merely held the [FCC] License that was necessary for a major cellular communications company [McCaw/AT&T] to expand its business into the territory" controlled by Crystal. (Ptfs' Pre-Trial Mem, at 10, 12.) Plaintiffs characterize Crystal's activities as "actions taken * * * to preserve or enhance the value of the investment" in the FCC license.
(*Id*. at 9.)

The parties agree that the terms "trade" or "business" are not defined in the statutes or administrative rules. They also agree that when determining income subject to taxation, ORS 314.011(2) provides that because the terms have not been "specifically defined in this

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[5] The court disagrees with Defendant that the "threshold issues arise under ORS 316.127(2) and (3)." (Def's Post-Trial Br at 11.) The nonresident individual Plaintiffs in this case are taxed based on their allocated ownership interest in the income of Crystal, a subchapter S corporation. ORS 316.127(5). The first issue is to determine Crystal's income.

chapter," trade or business shall have "the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes." Like Oregon, with limited exceptions for specific code sections, *e.g*., Internal Revenue Code (IRC) section 355, distribution of stock of a controlled corporation, there is no federal statutory or regulatory definition of the terms trade or business.

Courts faced with the issue of whether a taxpayer is engaged in a trade or business have concluded "that to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit." *Comm. v. Groetzinger*, 480 US 23, 35, 107 S Ct 980, 94 L Ed 2d 25 (1987). Frequently, a dispute arises with respect to whether the activities engaged in by a taxpayer are a trade or business in contrast to an investment. Generally, courts agree that to reach a conclusion it "requires an examination of the facts in each case." *Higgins v. Comm.*, 312 US 212, 217, 61 S Ct 475, 85 L Ed 783 (1941). Plaintiffs reminded the court that " '[t]here is nothing unique or improper about a corporation engaging in exclusively investment activity,' including under this rubric a Subchapter S corporation.' " (Ptfs' Pretrial Mem at 8 (citing *Buono v. Comm.*, 74 TC 187 (1980) (citation omitted)).)

Plaintiffs state that "[i]n this case, as in most cases, the profit motive is not in question." (Ptfs' Pre-Trial Mem at 9.) Plaintiffs would like this court to reach the same conclusion as the United States Tax Court in *Buono*, holding that taxpayers who owned unimproved property engaged solely in activities which were "purely legal steps to make" their land "more marketable" and those activities were not taken "in the regular course of the taxpayer's trade or business." *Buono* 74 TC at 201; ORS 314.610(1).

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Unfortunately, this court does not reach the same conclusion as the United States Tax Court did in *Buono*. In contrast to the taxpayers in *Buono*, Crystal did substantially more than engage in "purely legal steps" to preserve its ownership rights in its FCC license. *Buono,* 74 TC at 201. Crystal constructed a cellular telephone system with 13 cell sites over a ten-year period with an estimated original cost of approximately $5 million. (Def's Ex A, Tab 8, Form 1120S at 8.) In *Buono*, the court noted that "a lack of improvements, construction, or sale of the tract in individual lots" supported the taxpayers' position that their land was "held solely for investment purposes." *Buono,* 74 TC at 198, 200. In this case before the court, Plaintiffs entered into the FCC license lottery with full knowledge that, if they were granted a radio station authorization and subsequent FCC license, the first cell site must be developed within 18 months followed by a specified build-out within five years. Crystal met and exceeded those requirements, delivering cellular telephone service in a regular, continuous manner over a considerable period of years.

In contrast to the taxpayers in *Buono*, Crystal engaged in a "continuing commercial activity," including retail marketing. *Id*. at 203. Crystal's retail marketing activities represented to the public that it was selling and providing cellular telephone service. Crystal's Articles of Incorporation state that its purpose is the operation of a cellular telephone system. In addition, Crystal stated in its federal and state income tax return filings that its business activity was telecommunications and its service was cellular telephone service. (Def's Ex A, Tabs 2-9.)

Despite its representations to the public and governmental agencies, Plaintiffs emphasize that all the actions taken by Crystal were at the direction and control of McCaw/AT&T, Inc. Because its shareholders, "third-party consultants," and attorneys lacked "the ability or expertise to develop and operate a cellular system," Crystal was not "engaged in the cellular communications business, or any other trade or business." (Ptfs' Pre-Trial Mem at 10.)

"By contrast, McCaw and AT&T were clearly in the trade or business of developing and operating a cell system." (*Id.*)

There is no dispute that McCaw and AT&T were in the trade and business of operating a cellular telephone system. However, it is incorrect to conclude that Crystal was not in a trade or business simply because it contracted with another entity, McCaw/AT&T, to perform services on its behalf. The agreements and contracts between Crystal and McCaw/AT&T stated that Crystal retained the right to oversee, review and control the System. (*See* Def's Ex B, Tab 6 at CCI 000006.) The reservation of those rights to Crystal was in compliance with the rules and regulations of the FCC. Defendant states "that 47 USC §310(d), prohibits the transfer of both *de jure* **and** *de facto* control without prior FCC approval." (Def's Post-Trial Br at 7 (citing *In re Brian L. O'Neill*, FCC 91-144 (April 26, 1991) (listing factors used to determine who controls a cellular radio licensee)); *see* Def's Ex H, Tab 4 at CCI 003290.) The FCC license was granted to Crystal and no other entity.

Plaintiffs allege that the agreements reserving those rights to Crystal "were written to evidence the requisite *indicia of control*, thereby establishing, at least as a matter of form, that no transfer of control had occurred." (Ptfs' Post-Trial Mem at 6) (emphasis in original).) The issue of control is not determinative of whether Crystal was engaged in a trade or business. The focus must be placed on the "transactions" or "activities" of the corporation and whether those transactions or activities were undertaken "in the regular course of the taxpayer's trade or business." ORS 314.610(1). McCaw and AT&T managed Crystal's non-wireless cellular telephone system. The management agreement, which could be terminated with 90 days notice for a change in control of the cellular authorization, required McCaw/AT&T to "provide billing,

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accounting, maintenance, customer service, and most other day-to-day management services." (Ptfs' Ex 10 at 9.) It is clear that all transactions undertaken by McCaw/AT&T on behalf of Crystal were directly related to the operation of a cellular telephone system. Pinna's activities on behalf of Crystal and its shareholders included drive tests, asset verification, monitoring FCC litigation, and accounting reconciliations–each of which was directly related to his fiduciary duty to protect and enhance the assets of the cellular telephone system for the benefit of Crystal's shareholders. Kaffee handled the legal affairs for Crystal, including the often turbulent negotiations with McCaw and AT&T. Again, the activities undertaken by Kaffee were significantly related to the effective and efficient operation of a cellular telephone system, which was Crystal's trade or business.

B. *Income*

Having concluded that Crystal was engaged in a trade or business, the next issue is whether the income arising from those transactions was business income. "Business income" is defined in ORS 314.610(1) as:

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

The Oregon Supreme Court has previously concluded that ORS 314.610(1) "has two parts" and "[e]ach part involves a separate test." *Pennzoil Co. v. Dept. of Rev.*, 332 Or 542, 546, 33 P3d 314 (2001) (citing *Willamette Industries, Inc. v. Dept. of Rev.*, 331 Or 311, 316, 15 P3d 18 (2000) (*Willamette*)). Part one, "income derived from 'transactions and activity in the regular course of the taxpayer's trade or business' * * * requires a 'transactional test.' " *Id.* Part two, "income derived from property 'if the acquisition, the management, use or rental, and the disposition of the property constitute integral parts of the taxpayer's regular trade or business

operations' * * * requires a 'functional test.' " *Id.* "If the income in question satisfies either test, then it may be apportioned as 'business income.' "[6] *Id.* at 546-47 (citing *Willamette,* 331 Or at 316).

Looking first to the transactional test, Crystal's primary and only business conducted in Oregon was the operation of a cellular telephone system. The taxable income reported by Crystal in each of the tax years prior to the sale of the FCC License and termination of the business in 1999, arises from transactions in the regular course of Crystal's business and the operation of the cellular telephone system. Because Crystal's income for tax years 1993 through 1998 was "business income under the transactional test * * * it is unnecessary to apply the functional test." *Pennzoil,* 332 Or at 549.

In 1999, Crystal transferred ownership of its assets, including its FCC authorization and license. The issue for tax years 1999 and 2000 is whether the income arising from the transfer is business income. The transactional test is clearly not applicable here because the transfer of assets terminated Crystal's trade or business. "The functional test addresses transactions involving property, more specifically, the property of businesses that sell or otherwise dispose of property." *Willamette*, 331 Or at 318. In applying the functional test, the Oregon Supreme Court held that when an involuntary sale to the government through condemnation of timber and land occurred, "that disposition was as much an integral part of the taxpayer's regular business operations for purposes of the statutory definition as were the initial acquisition, management,

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[6] Plaintiffs' Pre-Trial Memorandum (page 20) overlooks the Supreme Court's analysis in *Pennzoil* and incorrectly concludes that "[t]he Oregon Supreme Court has never expressly ruled on whether ORS 314.610(1) creates * * * two alternative tests, including a functional test." *See also Willamette*, stating that "[t]axpayers may prevail only if we conclude that the royalty income in question satisfies neither the transactional test nor the functional test." 331 Or at 316.

and use of the timberland." *Simpson Timber Company v. Dept. of Rev*., 326 Or 370, 377, 953 P2d 366 (1998) (*Simpson*). In reaching that conclusion, the Court stated that "the just compensation paid as a condemnation award may create a *recognizable, taxable business gain identical to that created by a voluntary sale of the same assets for the same amount*." *Id*. at 376 (emphasis added). Thus, according to the Court, the result would be a "taxable business gain" whether it was a voluntary or involuntary sale. *Id*.

In *Willamette*, the court reached a different conclusion when the assets sold were not integral to the taxpayer's business. The taxpayer was taxed on the sale of its underlying mineral rights to its timber lands. The Court held that "the acquisition, management, use or rental, and disposition of the minerals were not integral to taxpayers' regular business operations of harvesting timber and making forest products." *Willamette*, 331 Or at 319. The Court concluded that the royalty income received from its disposition of minerals was "not taxable as business income in Oregon." *Id*. at 319.

This case before the court is more like *Simpson* than *Willamette*. Plaintiffs' acquisition, management, use, and disposition of its FCC license was integral to its regular business operations of a cellular telephone system. The court concludes that the income received from the sale of Crystal's assets, including the FCC license, was business income in tax years 1999 and 2000.

C. *Apportionment - Public Utility*

Under the laws of this state, business income is apportioned. The next issue is the determination of the applicable statutes governing the method of apportionment. ORS 314.615[7]

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[7] There were no changes made to ORS 314.615 in any of the tax years at issue.

provides that "[a]ny taxpayer having income from business activity which is taxable both within and without this state, other than activity as a * * * public utility * * * shall allocate and apportion the net income of the taxpayer as provided in ORS 314.605 to 314.675. Taxpayers engaged in activities as a * * * public utility shall report their income as provided in ORS 314.280 and 314.675."

The parties disagree as to whether Crystal is a public utility. ORS 314.610(6)[8] defines public utility as: "any business entity whose principal business is ownership and operation for public use of any plant, equipment, property, franchise, or license for the transmission of communications * * * ." Plaintiffs' argument adopts the Conference Officer's determination that Crystal was "**not in the business of operating a license for public use**" emphasizing that Crystal "merely held the License." (Ptfs' Pre-Trial Mem at 13 (emphasis in original).) Having previously reached a conclusion contrary to that of the Conference Officer, the court agrees with Defendant that Crystal meets the statutory definition of a public utility. Crystal owned equipment and operated through its management agreement with McCaw/AT&T a cellular telephone system in a four county area for public use. Crystal's income shall be apportioned "as provided in ORS 314.280 * * *." ORS 314.615.

ORS 314.280 states that the method of apportionment must "fairly and accurately" * * * "reflect the net income of the business done within the state." Defendant states that "[u]nder ORS 314.280, there are no statutory factors or formula, and there is no presumption for a pre-determined factor or formula," (Def's Post-Trial Br at 14 (citing *Fisher Broadcasting*, *Inc. v. Dept. of Rev.*, 321 Or 341, 898 P2d 1333 (1995) (*Fisher*).) Defendant concludes, and the court

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[8] There have been no statutory changes to ORS 314.610(6) during the tax years before the court.

agrees, that "the department's rules under UDITPA apply in this case through adoption under ORS 314.280 to the extent they do not violate ORS 314.280." (*Id.* at 15.)[9] *See Fisher*, 321 Or at 355 (holding that "the department's effort to incorporate, by rule, the UDITPA reporting presumption from which utilities and financial organizations were specifically excluded by statute exceeded the department's authority under ORS 314.280(1).").

D. *Apportionment Factors*

Crystal's income was apportioned using the three-factor (payroll, property, and sales) formula. The parties do not dispute that the three-factor formula "fairly and accurately" reflects "the net income of the business" done by Crystal "within" Oregon. ORS 314.280(1). "Crystal and the Department of Revenue agreed to a property factor of 99 percent because substantially all of Crystal's real and tangible personal property was located in Oregon." (Ptfs' Pre-Trial Mem at 14.) The parties dispute the numerator of both the sales and payroll factors.

1. *Sales Factor*

Plaintiffs allege that the sales factor should be zero. (Ptfs' Pre-Trial Mem at 16.) Plaintiffs conclude that, even though the denominator of the sales factor should include all gross receipts arising from the activities on its behalf by McCaw and AT&T, the numerator of the sales factor should be zero. In support of their conclusion, Plaintiffs state that the "income-producing activity" was performed on the behalf of Crystal by independent contractors, McCaw and AT&T, and "should not be considered. *See* OAR 150-314.665(4)(2)." (Ptfs' Pre-Trial Mem at 15-16.) Plaintiffs further conclude that McCaw's and AT&T's "costs of performance * * * are unrelated

[9] The Editor's Note preceding Defendant's Administrative Rules addressing appointment of income for public utilities states: "(1) The general definitions and definitions of the property, payroll and sales factors contained in the Uniform Act are adopted by OAR 150-314.280-(B) and OAR 150-314.280-(F) for general use in connection with financial organizations and public utilities." and "(2) The statutory rules as to allocation of income contained in the Uniform Act are adopted as rules under OAR 150-314.280-(D)."

to Crystal's income producing activities" and "a greater proportion of the costs of performance of these activities," specifically management and oversight by Pinna, "occurred in Ohio and Florida." (*Id.*) Defendant disagrees, arguing that "all of Crystal's sales occurred within Oregon" because all the " 'income-producing activity' " was performed in Oregon. (Def's Post-Trial Br at 21.)

A definition of sales other than sales of tangible personal property is set forth in ORS 314.665(4)[10] which states:

> "Sales, other than sales of tangible personal property, are in this state if (a) the income-producing activity is performed in this state; or (b) the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance."

Sales are Oregon sales if one part of the two-part definition found in ORS 314.665(4) is met. First, ORS 314.665(4) states: "Sales, other than sales of tangible personal property, are in this state if (a) the income-producing activity is performed in this state." "Income Producing Activity" is defined as follows:

> "The term 'income producing activity' applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gains or profit. Such activity does not include transactions and activities performed on behalf of a taxpayer, such as those conducted on its behalf by an independent contractor."

OAR 150-314.665(4)(2).

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[10] The provisions of ORS 314.650, which set forth the formula for apportionment of business income, state that the sales factor is determined under ORS 314.665. Oregon Administrative Rule (OAR) 150-314.280-(A) states that "[t]he provisions of ORS 314.650, as amended in 1989 and thereafter incorporated in the several parts of OAR 150-314.280, apply to all tax returns of financial organizations and public utilities for all tax years beginning on or after January 1, 1991."

There were no applicable changes to ORS 314.665(4) and the above-referenced OAR during the tax years under appeal.

Income producing activities include but are not limited to "(c) [t]he rental, leasing, licensing or other use of tangible personal property" and (d) [t]he sale, licensing or other use of intangible personal property." OAR 150-314.665(4)(2)(c),(d).

This court concludes that Crystal was engaged in a trade or business, specifically the operation of a cellular telephone system, and there is no dispute that it was for profit. Crystal owned the FCC license and equipment that was used to provide cellular service in four Oregon counties. Crystal engaged in retail marketing, using the brand name Cellular One and AT&T Wireless Services. Those income producing activities meet the statutory and OAR requirements.

Plaintiffs allege that all the activities were performed on behalf of Crystal by independent contractors, McCaw/AT&T, and that under the statute such activity does not meet the definition of "income producing." Plaintiffs' conclusion places too much significance on the backroom personnel who were primarily responsible for the marketing activities of McCaw/AT&T. Plaintiffs ignore the income producing activities that are attributable to Crystal because it owned the license and equipment. Crystal held the FCC license and used equipment it owned to deliver cellular telephone service. Without the FCC license, which was issued and held by Crystal, none of the income producing activities could have been undertaken.

The court, having concluded that Crystal's activities meet the statutory requirement of the first part of the definition of "income producing," need not address Plaintiffs' second argument that focuses on costs of performance. Plaintiffs shall include all sales in both the numerator and denominator of the sales factor.

2. *Payroll Factor*

Defendant, contrary to the tax assessments it issued to Plaintiffs, alleges that the payroll factor numerator should not be zero; it should include (1) the compensation paid to McCaw and

AT&T employees who were reimbursed by Crystal under the terms of the management agreement; and (2) "that portion of Mr. Pinna salary that represents the time he spent in Oregon working for Crystal." (Def's Post-Trial Br at 15.)

ORS 314.660 sets forth how the payroll factor is determined.[11] The numerator of the payroll factor is "the total amount paid in this state during the tax period by the taxpayer for compensation" and the denominator is "the total compensation paid everywhere during the tax period." ORS 314.660(1). "Compensation is paid in this state if: (a) The individual's service is performed entirely within the state." ORS 314.660(2)(a). Defendant alleges that all the compensation paid to McCaw/AT&T employees who were assigned to perform work for Crystal should be included in the numerator and denominator of the payroll factor. Defendant promulgated OAR 150-314.660(1) to explain the components of the payroll factor. Specifically, OAR 150.314-660(1)(4) states that "[o]ther than this exception relating to guaranteed payments [for services from a partnership], payments made to an independent contractor or *any other person not properly classifiable as an employee* are excluded." (Emphasis added.) "Employee" is defined in OAR 150-314.660(1)(6) to include "any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee."

The testimony and evidence submitted to the court state that the individuals assigned by McCaw/AT&T to work for Crystal were McCaw/AT&T employees. For example, Plaintiffs'

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[11] The provisions of ORS 314.650, which set forth the formula for apportionment of business income, state that the payroll factor is determined under ORS 314.660. Oregon Administrative Rule (OAR) 150-314.280-(A) states that "[t]he provisions of ORS 314.650, as amended in 1989 and thereafter incorporated in the several parts of OAR 150-314.280, apply to all tax returns of financial organizations and public utilities for all tax years beginning on or after January 1, 1991."

There were no changes to ORS 314.660 and the above-referenced OAR during the tax years under appeal.

Exhibit 10, page 27, states that "All individuals are AT&T Wireless Services employees, but CCI [Crystal] is obligated to pay their salaries." Defendant concludes that those same employees were "Crystal's common law employees" because Crystal had a right under the terms of the Management Agreement to "hire, fire, and control the day-to-day performance of McCaw's and AT&T's 'employees' who were working on behalf of Crystal." (Def's Post-Trial Br at 16-17.) Relying on case law addressing whether an individual is an employee or an independent contractor, Defendant concludes that "the right to control" rather than the "actual exercise of control" establishes an "employee relationship." (Def's Post-Trial Br at 17.)

The court disagrees with Defendant's conclusion that "the right to control" is sufficient to make the McCaw/AT&T employees who performed accounting, sales, and other work on behalf of Crystal, the employees of Crystal. Under the terms of the Management Agreement, Crystal was paying McCaw/AT&T to "manage and supervise the operation of the System." Crystal was required to reimburse McCaw/AT&T for the costs it incurred "in the performance of its responsibilities," including out-of-pocket expenses based on the "individual employees' annual salaries, payroll taxes, fringe benefits and required equipment." (Def's Ex B, Tab 6 at CCI 000011.) Crystal's role was a paying agent; it was not the employer. Crystal's reimbursement was a payment for the services of persons who were not "properly classifiable as" employees of Crystal. OAR 150.314. 660(1)(4).

The court disagrees with Defendant's conclusion that the terms of the Management Agreement provided that the operation of the System, including the "hiring, supervision and dismissal of personnel" by McCaw/AT&T, were responsibilities granted to Crystal. Even though the terms of Management Agreement granted Crystal "oversight, review and ultimate control," there was no employer-employee relationship between Crystal and the employees of

McCaw/AT&T. (Def's Ex B, Tab 6 at CCI 000006.) Crystal was not charged with "hiring, supervision and dismissal of personnel." (Def's Ex B, Tab 6 at CCl 000009.) Crystal retained an opportunity to critique the performance of those responsibilities contracted to McCaw/AT&T. (*Id.*) The terms of Management Agreement and the actions of the parties support the conclusion that there was no day-to-day employer-employee relationship between Crystal and those employees of McCaw/AT&T who managed and operated the System.

Defendant also alleges that a portion of Pinna's "salary that represents the time he spent in Oregon working for Crystal" should be included in the numerator of the payroll factor.[12] The court finds no statutory basis for Defendant's assertion. ORS 314.660 (2)(b) requires compensation paid to an individual who performs services both within and without Oregon to include the compensation in the numerator when the "service performed without the state is incidental to the individual's service within the state." Pinna testified that his services performed within Oregon for Crystal during the tax years at issue never exceeded 12 to 13 percent of the total services performed. There was no evidence that Pinna's services performed outside of Oregon were "incidental" to the services he performed "within the state."[13] To the contrary, the facts support a conclusion that the services Pinna performed in Oregon were incidental to the services he performed in Ohio and Florida.

Because there is no statutory basis for including McCaw and AT&T employee compensation, and a portion of Pinna's salary in the numerator of the payroll factor, Defendant is requesting that the court adopt a different method. When one party "desires a different method,"

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[12] The parties do not dispute that all of Pinna's salary should be included in the denominator of the payroll factor.

[13] ORS 314.660(2)(c) is not applicable to the facts of this case because Pinna's residence was not in Oregon.

that party "has the burden of proof." *Twentieth Century-Fox Film v. Dept. of Rev.*, 299 Or 220, 225, 233, 700 P2d 1035 (1985) (citing *Donald M. Drake Co. v. Dept. of Rev.*, 263 Or 26, 32, 500 P2d 1041 (1972) (holding that "the use of any method other than apportionment should be exceptional and the party–the taxpayer or the Department of Revenue–who seeks to invoke the applicability of ORS 314.670 has the burden of proof.")).

Plaintiffs state that "[f]or tax years 1993 through 1998, ORS 314.670 allowed a departure from the standard 3-factor formula only upon a showing that the formula as-applied was unfair *and unconstitutional.*" (Ptfs' Post-Trial Mem at 11, fn 4 (emphasis in original).) Though Plaintiffs may have correctly defined the standard for departure from the 3-factor formula under ORS 314.670, the applicable apportionment statute for utilities and this case is ORS 314.280. The Supreme Court has previously held that ORS 314.280(1) "has, from its beginning, required nothing less than a fair and accurate reflection of net Oregon *income*." *Fisher* 321 Or at 356. (emphasis in original). The Supreme Court explained that ORS 314.280 "seeks a *fair* and *accurate* method of reporting *net income in Oregon*. Uniformity [a legislative goal of the UDITPA statutes, specifically ORS 314.670] is not part of its equation." (*Id.* at 358 (emphasis in original).)

Defendant alleges that "[a] zero payroll factor indicates that, based on payroll alone, there was no net income from business activity in Oregon" which " 'distorts' Crystal's business activity" and does "not produce a fair and accurate apportionment of net income from business activity in Oregon." (Def's Post-Trial Br at 18.) Defendant focuses on one factor, concluding that a zero payroll factor would not meet the statutory requirement of apportionment. However, the law requires that the apportionment of income be computed using the applicable factors, not just one factor, with the result being "a fair and accurate reflection of net Oregon *income*."

Fisher 321 Or at 356 (emphasis in original). In determining whether a modification of an apportionment formula is appropriate, facts and circumstances, including an understanding of the business of the taxpayer, are crucial. *See also Crocker Equipment Leasing, Inc. v. Dept. of Rev*., 314 Or 122, 838 P2d 552 (1992) (holding that an alternative apportionment formula which included intangible property in the property factor fairly reflected the extent of the taxpayer's business in Oregon).

Looking first to the McCaw/AT&T compensation, the inclusion of that compensation in Crystal's payroll factor would ignore Defendant's rule defining compensation to specifically exclude payments made to "any other person not properly classifiable as an employee." OAR 150-314.660(1)(4). There is no evidence disputing the fact that those individuals were "employees" of McCaw and AT&T, receiving W-2 wage statements from those two entities and not Crystal. Defendant's proposed payroll factor could result in "double taxation." Assuming with no evidence to the contrary that the compensation of those individuals who were employees was included in the payroll factor of McCaw and AT&T, an allocated portion of the contract reimbursement from Crystal for the services of those employees would be taxed by Oregon. Defendant fails to discuss whether the inclusion of the compensation paid to those employees in the payroll factors of Crystal, McCaw, and AT&T would "fairly and accurately" reflect "the net income of the business" done in Oregon by those entities. ORS 314.280(1). The court is not persuaded to grant Defendant's proposed modification to the payroll factor.

With respect to Pinna's compensation, Defendant suggests that a portion be allocated to Oregon based on the time Pinna spent in Oregon handling various business matters for Crystal. Defendant's proposal is contrary to ORS 314.660(2)(b). Defendant is asking the court to ignore the statute and substitute its own conclusion for that of the legislature. The court declines.

The court concludes that a zero payroll factor, when combined with the uncontested property factor and the sales factor determined herein, result in a "fair and accurate reflection" of Crystal's "net Oregon *income*." *Fisher* 321 Or at 356 (emphasis in original).

IV. CONCLUSION

After carefully reviewing the testimony and voluminous evidence, the court concludes as follows. Now, therefore,

IT IS THE DECISION OF THIS COURT that Crystal operated a trade or business in Oregon, and that the net taxable income reported by Crystal for tax years 1993 through 2000, including the sale of assets and FCC license, was "income arising from transactions * * * in the regular course of the taxpayer's trade or business" under ORS 314.610(1); and

IT IS FURTHER DECIDED that Crystal meets the statutory definition of a public utility (ORS 314.280) and its taxable income shall be apportioned using the statutory formula including an undisputed property factor and the sales factor and zero payroll factor determined by the court.

Dated this _____ day of May 2006.

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JILL A. TANNER
PRESIDING MAGISTRATE

If you want to appeal this Decision, file a Complaint in the Regular Division of the Oregon Tax Court, by mailing to: 1163 State Street, Salem, OR 97301-2563; or by hand delivery to: Fourth Floor, 1241 State Street, Salem, OR.

Your Complaint must be submitted within 60 days after the date of the Decision or this Decision becomes final and cannot be changed.

This document was signed by Presiding Magistrate Jill A. Tanner on May 26, 2006. The Court filed and entered this document on May 26, 2006.