Filed in Tax Court
State of Minnesota
06/24/2024

STATE OF MINNESOTA | TAX COURT
COUNTY OF RAMSEY | REGULAR DIVISION

E. I. duPont de Nemours and Company & Subsidiaries,

Appellant,

vs.

Commissioner of Revenue,

Appellee.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Docket No. 9485-R

Filed: June 24, 2024

This matter came on for trial before The Honorable Wendy S. Tien, Judge of the Minnesota Tax Court.

Nicole L. Johnson and Melanie L. Lee, Blank Rome LLP, represent Appellant E. I. duPont de Nemours and Company & Subsidiaries (collectively "DuPont").

Jennifer A. Kitchak and Jeremy D. Eiden, Assistant Minnesota Attorneys General, represent appellee Commissioner of Revenue (the "Commissioner").

The court, having heard and considered the evidence adduced at trial and the arguments of counsel, and upon all of the files, records, and proceedings herein, now makes the following:

FINDINGS OF FACT

1. DuPont has standing to maintain this appeal; all statutory and jurisdictional requirements have been fulfilled; and the court has jurisdiction over the parties to this appeal.
2. E. I. DuPont is a science and technology company whose businesses manufacture and sell a wide range of products to many different markets, including the nutrition, health care, pharmaceuticals, agriculture, automotives, textiles, home and construction,

packaging, electronics, and transportation markets. Its principal place of business is in Delaware. As of December 31, 2015, DuPont had operations in approximately 90 countries worldwide, and 60 percent of its consolidated net sales were made to customers outside of the United States.

3. At all relevant times during the tax years ending December 31, 2013, December 31, 2014, and December 2015 (the "years at issue"), DuPont conducted significant international operations resulting in a large number of currency transactions from international sales, purchases, investments, and borrowings, including numerous subsidiaries engaged in business with foreign customers.

4. For U.S. financial reporting purposes, and in line with Generally Accepted Accounting Principles ("GAAP"), DuPont was required to report its global earnings in U.S. dollars, although it received payment for the sale of goods by E. I. DuPont (and its subsidiaries) in foreign currencies.

5. One important form of foreign currency risk that DuPont experienced is fluctuation in the reported book value of foreign-denominated payables or receivables between the original transaction date and its settlement date.

6. DuPont adopted a risk management policy (the "NMA Program") to address this type of risk (among others) and manage its foreign exchange exposure. The NMA Program buys and sells forward exchange contracts ("FECs") to offset DuPont's aggregate or "net" exposure from business transactions in the corresponding currency pairings.

7. E. I. DuPont's Treasury Department personnel in Delaware managed the NMA Program. None of DuPont's activities related to the NMA Program or the FECs were conducted in Minnesota during the years at issue.

8. The purpose of FEC transactions was to protect DuPont's earnings, and to enable investors to see the true operating performance of DuPont, unaffected by currency fluctuations.

9. DuPont entered into FECs on a regular and recurring basis during the years at issue. Gross receipts from FECs were earned in the ordinary course of business, and the terms of FEC transactions were on a gross basis. DuPont's counterparties to FEC transactions were typically financial institutions.

10. DuPont's FEC transactions and DuPont's other business activities were qualitatively different from each other.

11. FEC transactions did not serve an independent profit-oriented purpose. Including FEC gross receipts in the Minnesota apportionment factor substantially distorted DuPont's income arising from taxable business activities in Minnesota during the years at issue, as it quantitatively distorts total sales, net income, and, ultimately, the apportionment factor by nearly threefold.

12. The general apportionment method in Minnesota Statutes, section 290.191, subdivision 2(a) (2022), as applied by DuPont, does not fairly reflect all of DuPont's taxable net income allocable to Minnesota for the years at issue.

13. The Commissioner's alternative apportionment method, excluding FEC gross receipts from the calculation of the apportionment factor but including net income from FEC transactions, fairly reflects DuPont's net income in Minnesota for the years at issue.

CONCLUSIONS OF LAW

1. The Commissioner presented sufficient evidence to rebut the statutory presumption that the general apportionment method in Minnesota Statutes, section 290.191, subdivision 2(a), as applied by DuPont, is correct with respect to each of tax years 2013, 2014, and 2015.

2. The Commissioner presented sufficient evidence to require the use of an alternative apportionment method as provided by Minnesota Statutes, section 290.20, subdivision 1(4) (2022) with respect to each of tax years 2013, 2014, and 2015.

ORDER

1. Not later than 60 days from the date of this Order, the parties must file a stipulation as to the tax amounts due under Minnesota Statutes chapter 290, consistent with this Order, and the parties' earlier Joint Stipulation Narrowing Issues for Decision, filed October 5, 2023.

2. Upon receipt of the parties' stipulation, this court will file a final order for judgment in the correct amount of tax for each of the years at issue, per the parties' stipulation. If the parties are unable to reach agreement within that period of time, they must contact the court administrator for a post-trial conference.

IT IS SO ORDERED.

BY THE COURT:

Wendy S. Tien Digitally signed by Wendy S. Tien Date: 2024.06.24 15:12:10 -05'00'

WENDY S. TIEN, Judge
MINNESOTA TAX COURT

Dated: June 24, 2024

MEMORANDUM

This appeal concerns the apportionment of DuPont's multistate income to the State of Minnesota, as set forth in the Order of the Commissioner dated May 4, 2021 (the "Commissioner Order") for the periods December 31, 2013, December 31, 2014, and December 31, 2015 (collectively the "years at issue"). Specifically, this case presents two questions for the court's decision. First, has the Commissioner presented substantial evidence that DuPont's use of the

general statutory apportionment method in Minnesota Statutes section 290.191, subdivision 2(a), does not "fairly reflect all or any part of taxable net income allocable" to Minnesota? Second, if so, has the Commissioner presented substantial evidence to require the use of his alternative method under Minnesota Statutes section 290.20, subdivision 1(4)? The Commissioner asks the court to apply an alternative apportionment method that includes the net income from DuPont's transactions in forward exchange contracts ("FECs"), and not gross receipts, when calculating the apportionment factor.

This case came on for trial on December 6, 2023.[1] The parties previously entered into a stipulation[2] that consensually resolved Counts I, IV, V, and VI of its Notice of Appeal, leaving for trial only the issues in Counts II and III. In addition, the parties stipulated to material facts, and provided the trial testimony of expert witnesses only.[3] The Commissioner Order[4] affirmed the Department's assessment, less penalties, for the years at issue, in the amount of $9,187,623 and interest in the amount of $2,275,722.[5] On June 22, 2021, DuPont timely filed a Notice of Appeal from the Commissioner Order with the court.[6] In 2022, DuPont and the Commissioner agreed to a Joint Stipulation Narrowing Issues for Decision before the court, leaving only the issues concerning tax treatment of DuPont's use of FECs.[7]

[1] Trial Tr. (Dec. 6, 2023).

[2] Jt. Stip. Narrowing Issues for Decision ("Jt. Stip.") (filed Oct. 5, 2023) ¶¶ 2-4.

[3] Stip. Material Facts ("Stip.") (filed Nov. 20, 2023).

[4] Notice of Determination on Appeal (dated May 4, 2021) (the "Commissioner Order"); Stip. ¶ 37.

[5] Stip. ¶ 38; *see* Stip. ¶¶ 30-37 for procedural history of administrative appeals.

[6] Stip. ¶ 39; Commissioner Order.

[7] Stip. ¶ 40.

At trial, the parties each presented case-in-chief and rebuttal expert testimony.[8] The parties filed post-trial briefs,[9] and the Court heard closing arguments on March 29, 2024.[10]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. DuPont Operations

E. I. DuPont was founded in 1802 and incorporated in Delaware in 1915.[11] It is a science and technology company whose businesses manufacture and sell a wide range of products to many different markets, including the nutrition, health care, pharmaceuticals, agriculture, automotives, textiles, home and construction, packaging, electronics, and transportation markets.[12] As of December 31, 2015, DuPont had operations in approximately 90 countries worldwide, and 60 percent of its consolidated net sales were made to customers outside of the United States.[13]

DuPont conducts significant international operations resulting in a large number of currency transactions from international sales, purchases, investments, and borrowings,[14] including numerous subsidiaries engaged in business with foreign customers.[15] DuPont received

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[8] Appellant's Exs. P1-P2 (Expert Report dated March 3, 2023 and Rebuttal Report dated May 10, 2023 of Brian J. Cody); P3-P4 (Expert Report undated and Rebuttal Report undated of Prof. Richard D. Pomp); Comm'r's Exs. A-B (Expert Report dated January 20, 2023 and Rebuttal Report dated April 10, 2023 of Renee R. McMahon).

[9] Appellant's Brief (filed Feb. 20, 2024); Comm'r's Post-Tr. Br. (filed Feb. 20, 2024); Appellant's Reply Br. (filed Mar. 19, 2024); Comm'r's Post-Tr. Resp. Br. (filed Mar. 19, 2024). All briefs referenced in this Memorandum are post-trial briefs.

[10] Closing Tr. (Mar. 29, 2024).

[11] Stip. ¶ 1. "E. I. DuPont" refers to E. I. du Pont de Nemours and Company. Stip. ¶ f. "DuPont" refers to the appellant and all its subsidiaries collectively. Stip. ¶ e.

[12] Stip. ¶ 2.

[13] Stip. ¶ 3.

[14] Stip. ¶ 4.

[15] Stip. ¶ 12.

payment for goods in foreign currencies,[16] and its business and operating results are subject to exposure from foreign currency, interest rate, and commodity price risks,[17] as described more fully below. Generally, each of the DuPont entities keeps its books and records in either the primary currency of its headquarters location or in U.S. dollars,[18] For U.S. financial reporting purposes, and in line with Generally Accepted Accounting Principles ("GAAP"), however, DuPont was required to report its global earnings in U.S. dollars.[19]

Changes in the value of monetary assets and liabilities that are denominated in foreign currencies create risks of exchange gains or losses that are recorded in DuPont's income statement.[20] As stated above, DuPont was required to report its global earnings in U.S. dollars,[21] although it received payment for the sale of goods by E. I. DuPont (and its subsidiaries)[22] in foreign currencies.[23] The U.S. dollar-denominated value of these foreign currency-denominated transactions fluctuates with the value of the foreign currency[24] between the time of the original transaction and when that transaction settles, i.e., when payment is received.[25] Accordingly, one important form of foreign currency risk that DuPont experiences is fluctuation in the reported book

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[16] Stip. ¶ 13.

[17] Stip. ¶ 5.

[18] Stip. ¶ 10.

[19] Stip. ¶ 11.

[20] Stip. ¶ 14.

[21] Stip. ¶¶ 10-11 (providing that DuPont entities keep books and records in either the primary currency of their headquarters location or in U.S. dollars).

[22] Stip. ¶ 12.

[23] Stip. ¶ 13.

[24] Ex. P1, at 2; Ex. A, at 14-15.

[25] Ex. P1, at 2; Ex. A, at 14-15.

value of foreign-denominated payables or receivables between the original transaction date and its settlement date.[26]

As described more fully in section II, DuPont adopted a risk management policy (the "NMA Program") to address this type of risk (among others) and manage its foreign exchange exposure.[27]

II. NMA PROGRAM, FECS, AND EXPERT TESTIMONY

A. FECs

At trial, both parties provided expert testimony concerning the basic mechanics of FEC transactions, how foreign exchange exposure generally arises in the business operations context, and how businesses (such as DuPont) typically use FECs to protect income against foreign exchange exposure, providing illustrative examples.[28] The parties' experts agreed for the most part as to these aspects of FEC mechanics and usage.

As both experts explained, FECs are contracts whereby one party agrees to purchase a specified amount of one currency in exchange for another currency from a counterparty on an agreed future date at an agreed price.[29] For instance, suppose Company A contracts to sell €100,000 to Bank B in 90 days in exchange for a US dollar rate of $1.25/€1.00. The stated exchange rate is the "forward exchange rate."[30] The parties thus agree to transact at the forward exchange rate on that future date. If, on that future date, the spot market rate is $1.20/€1.00,

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[26] Ex. P1, at 2-4, 6; Ex. A, at 11, 15.

[27] Stip. ¶¶ 5, 7. DuPont maintained this policy during the years at issue in the form of a Corporate Financial Risk Management Policy and Corporate Financial Risk Management Guidelines. Stip. ¶¶ 6-7; Ex. J8.

[28] Ex. P1, at 4-8; Ex. A, at 13-18 (similar example).

[29] Ex. P1, at 3; Ex. A, at 10.

[30] Ex. P1, at 3 (simplified example), 5-6 (more complex example); *see also* Ex. A, at 13-18.

Company A's gain on the transaction would be $5,000. This is because the amount Company A agreed to receive, $125,000, is $5,000 greater than what Company A could receive in the market at the settlement date, $120,000. The gain or loss would then be settled between the parties; generally, the party incurring the loss would pay the net settlement amount to the other party.[31]

The NMA Program buys and sells FECs to offset DuPont's aggregate or "net" exposure from business transactions in the corresponding currency pairings (for example, Mexican Pesos for Eurodollars or U.S. Dollars for Japanese Yen).[32] Both parties' experts described the purpose of FEC transactions through the NMA Program as "to reduce earnings and cash flow volatility,"[33] as well as "to protect the value of its existing foreign currency-denominated assets, liabilities, commitments, and cash flows," as opposed to being a standalone profit center for DuPont.[34] Both parties agree that another important purpose of these FEC transactions is to enable investors to see the true operating performance of DuPont, unaffected by currency fluctuations.[35] They agree that DuPont entered into FECs on a regular and recurring basis,[36] and that gross receipts from FECs are earned in the ordinary course of business.[37] They also agree that the terms of the FECs are on

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[31] Trial Tr. 29, 37, 123.

[32] Stip. ¶¶ 15-16, 22-23.

[33] Ex. P1, at 2; Ex. A, at 12-13; *see* Ex. J8, at 3-5.

[34] *See* Ex. J8, at 3-5. *See also* Ex. P1, at 3-4, 6; Ex. A, at 14-15; Appellant's Br. 3; Comm'r's Br. 4-6.

[35] Stip. ¶ 24; Appellant's Br. 4-5; Comm'r's Post-Tr. Br. 5-6. The experts agreed as well. *See* Ex. P1, at 9; Ex. A, at 21.

[36] Stip. ¶ 25.

[37] Jt. Stip. ¶ 1.

a gross basis,[38] meaning that they are bought and sold on their gross terms, not based on net settlement amounts between the parties at the end of the FEC term.[39]

E. I. DuPont's Treasury Department personnel in Delaware managed the NMA Program.[40] None of DuPont's activities related to the NMA Program or the FECs were conducted in Minnesota during the years at issue.[41] DuPont's counterparties to FEC transactions were typically financial institutions.[42] DuPont entered into FECs on a regular and recurring basis during the years at issue.[43]

E. I. DuPont's net income (gains) from FEC transactions during the years at issue were as follows:[44]

Table 1

Tax Year Ended	Net Gains From FECs
December 31, 2013	$59,950,407
December 31, 2014	$647,489,427
December 31, 2015	$407,355,440

E. I. DuPont's gross receipts from FEC transactions ("FEC gross receipts") during the years at issue were as follows:[45]

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[38] Stip. ¶ 23.

[39] Trial Tr. 86-87 (testimony that currency exchange in the FEC context is at gross).

[40] Stip. ¶ 8.

[41] Stip. ¶ 9.

[42] Stip. ¶ 20.

[43] Stip. ¶ 25.

[44] Stip. ¶ 26.

[45] Stip. ¶ 27.

Table 2

Tax Year Ended	FEC Gross Receipts
December 31, 2013	$64,622,559,835
December 31, 2014	$64,607,697,993
December 31, 2015	$47,626,900,571

E. I. DuPont's total gross receipts during the years at issue were as follows:[46]

Table 3

Tax Year Ended	Total Gross Receipts
December 31, 2013	$91,096,500,130
December 31, 2014	$88,736,926,488
December 31, 2015	$64,657,573,794

E. I. Dupont's total gross receipts or sales, as reported on line 1a of its U.S. Corporation Income Tax returns for the years at issue, were as follows:[47]

[46] Stip. ¶ 28.

[47] Stip. ¶ 29.

Table 4

Tax Year Ended	1120 Line 1a Sales[48]
December 31, 2013	$23,757,363,991
December 31, 2014	$23,132,014,648
December 31, 2015	$19,624,972,106

B. Expert testimony: Fair Reflection of Minnesota Income[49]

Although the parties' experts generally agreed concerning the mechanics of FECs and DuPont's reasons for using them, they disagreed as to their ultimate opinions, which concerned whether (1) inclusion of FEC gross receipts in the calculation of the apportionment factor fairly reflects DuPont's Minnesota taxable net income, and (2)an alternative apportionment method that excludes FEC gross receipts in the calculation of the apportionment factor fairly reflects DuPont's Minnesota taxable net income.[50]

The Commissioner's expert, Ms. McMahon, testified that, in her opinion, including FEC gross receipts in the calculation of the apportionment factor "economically distorts the apportionment factor used for purposes of allocating DuPont's business income to the State of Minnesota, because . . . [it] overstates and does not accurately reflect DuPont's receipts for sales

[48] "1120" refers to Dupont's U.S. Corporation Tax Return Form 1120. Minn. R. Evid. 201(b)(1) (authorizing judicial notice of facts "generally known within the territorial jurisdiction of the trial court").

[49] This court's scheduling order provides that the expert witness's written report serves as their direct testimony. Sched. Ord. (filed Oct. 15, 2021) ¶¶ 2-5.

[50] Ex. P1, at 1, 17; Ex. A, at 3, 25 (conclusions of opinion for both experts). Dr. Cody also included an opinion concerning a reasonable alternative apportionment method on behalf of DuPont. Ex. P1, at 17.

of goods and services."[51] Ms. McMahon provided an illustrative hypothetical, in which DuPont entered into a sales transaction on January 1, 2013 in the contract amount of €1,000,000, or $1,318,600 at the USD-to-Eurodollar exchange rate as of January 1, 2013, with a future settlement date of December 31, 2014.[52] Although the expected settlement amount of the contract is €1,000,000, the actual U.S. dollar value of that amount on December 31, 2014, is unknown as of January 1, 2013, due to foreign currency-based risk. Accordingly, to manage the risk of exchange rate fluctuation between the transaction's contract and settlement dates, as well as on an interim year-end recognition date, DuPont (through its NMA program) engages in two FEC transactions.[53] "Even though the exchange rate changed from when the contract was entered through the time the revenue was recorded (December 31, 2013) and again when the cash was assumed to be received (December 31, 2014), the FECs allowed the ultimate value received by DuPont to equal the original amount."[54] DuPont records gross receipts from the underlying €1,000,000 sale and the two related FEC transactions totaling $4,074,400,[55] even though gain on the FEC transactions perfectly offsets losses due to foreign currency rate fluctuations on the underlying business transaction, yielding no net income.[56] Ms. McMahon acknowledges that her illustrative example is a simplification, but that it "illustrates the inherent benefit of undertaking such activities – to

[51] Ex. A, at 19.

[52] Ex. A, at 13-18 (illustrative example for a period beginning on January 1, 2013, and ending on December 31, 2014), 20-21 (explaining gross receipts resulting from the illustrative example); Tr. 32-39.

[53] Ex. A, at 18 t. 9 (summarizing transactions, including payment by DuPont subsidiary's customer for purchased goods/services).

[54] Ex. A, at 20.

[55] Ex. A, at 20 & t. 10 (explaining that "if only the gross inflows associated with all of these transactions (including the FECs) were considered, the total "sales" associated with this single $1.3 million contract would exceed $4 million").

[56] Ex. A at 16-18; Tr. 38-39 (describing the hypothetical transactions as a "perfect" hedge).

stabilize and reduce cash flow volatility associated with changes in foreign currency exchange rates . . ."[57] She also opined that it illustrates the distortive effect of including FEC gross receipts in total gross receipts; the inclusion of FEC gross receipts increased the total recognized sales[58] by a factor of approximately three times (2.96) the actual gross receipts from the contract itself.[59]

Ms. McMahon testified that, based on DuPont's actual financial data,[60] the inclusion of FEC gross receipts in everywhere sales had an even greater distortive effect: for 2013, it increased everywhere sales by a factor of 3.44; for 2014, by a factor of 3.68; and for 2015, by a factor of 3.80.[61] Viewing DuPont's tax data somewhat differently, Ms. McMahon testified that FEC gross receipts comprised over 70 percent of DuPont's everywhere sales in each of the years at issue.[62] At the same time, FEC net income comprised a very small portion of DuPont's total net income during the same time period, never exceeding 5 percent.[63]

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[57] Ex. A, at 18 (stating that the illustration "represents a simplified example of hedging processes that are certainly far more complex at DuPont (in terms of timing, volume, etc.)").

[58] Ms. McMahon does not define the term "recognized sales" but from the context of the example, "recognized sales" means the sum of "actual sales" from the sale transaction as well as the gross receipts from FEC transactions. Ex. A, at 20. Total recognized sales serves, in the example, as a proxy for everywhere sales. Minn. Stat. § 290.191, subd. 2(a)(1) (2022) ("total sales wherever made in connection with the trade or business during the tax period").

[59] Ex. A, at 20.

[60] Ex. A, at 21 t. 11 (referencing Ex. J13, at Admissions 7 and 8).

[61] Ex. A, at 21 t. 11.

[62] Ex. A, at 5 & t. 1 (FEC gross receipts as a percentage of DuPont total gross receipts 70.94 percent in 2013, 72.81 in 2014, and 73.66 percent in 2015) (referencing Ex. J13, at Admissions 7 and 8).

[63] Trial Tr. 23; Ex. A, at 5 & t. 1 (FEC net income as a percentage of DuPont total income 0.48 percent in 2013, 4.49 percent in 2014, and 3.24 percent in 2015) (referencing Ex. J13, at Admissions 9 through 11).

Ms. McMahon next illustrated the effect of removing FEC gross receipts from the apportionment factor calculation. As filed, DuPont had Minnesota sales and everywhere sales yielding apportionment factors as follows:[64]

Table 5

Year	**2013**	**2014**	**2015**
Minnesota Sales	$ 453,908,499	$421,732,246	$422,903,384
Everywhere Sales (Including FEC Gross Receipts)	$91,096,500,130	$88,736,926,488	$64,657,573,794
Apportionment Factor as filed (%)	0.50	0.475	0.65

Because DuPont had no FEC transaction activity in Minnesota, however, removing FEC gross receipts from the calculation, DuPont had Minnesota sales and everywhere sales yielding revised apportionment factors as follows:[65]

Table 6

Year	**2013**	**2014**	**2015**
Minnesota Sales	$ 453,908,499	$421,732,246	$422,903,384
Everywhere Sales (Excluding FEC Gross Receipts)	$26,473,940,295	$24,129,228,495	$17,030,673,223
Apportionment Factor as revised (%)	1.71	1.75	2.48

[64] *See* Ex. A, at 6 t. 2.

[65] *See* Ex. A, at 7 t. 3.

The effect of removing FEC gross receipts from everywhere sales was to increase the apportionment factor by 244 percent in 2013; 268 percent in 2014; and 280 percent in 2015.[66] On this basis, Ms. McMahon opined that the inclusion of FEC gross receipts in the calculation of the apportionment factor is "economically distortive" and does not fairly reflect DuPont's Minnesota-based income during the years at issue.

The Appellant's first expert to testify, Dr. Cody, contends that excluding FEC gross receipts from the calculation of the apportionment factor "is economically inconsistent and unreasonable on its face" because, as the parties have stipulated, FEC transactions generate gross receipts in the ordinary course of business.[67] In the same way that DuPont's contractual obligation for a sale of inventory equals the gross receipts for that transaction and not its net margin, Dr. Cody opines that with respect to FEC transactions, DuPont's contractual obligation upon settlement also equals the gross receipts for such transactions and not their net margin.[68] For all types of business activity, he explained, "[g]ross receipts are taken as a representative measure of business activity for the purpose of allocating income."[69]

Furthermore, Dr. Cody opined that because FECs are intended to protect DuPont's income and generated substantial income for the Company during each of the years at issue, FEC gross receipts "reflect the level of economic activity necessary to generate this income," rendering it "economically necessary to include those gross receipts in the apportionment factor."[70] Dr. Cody testified that DuPont's NMA program purposefully limits the use of FECs to protect against

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[66] Ex. A, at 7 & chart 1.

[67] Ex. P1, at 10 (referencing Jt. Stip. ¶ 1).

[68] Ex. P1, at 10-11.

[69] Ex. P1, at 11.

[70] Ex. P1, at 12.

DuPont's net, not gross, foreign exchange exposure, limiting purchases to "only those that are necessary to mitigate the Company's foreign exchange exposure."[71] To illustrate the significance of the net versus gross distinction, he provided an example of a "perfect natural hedge," or an instance in which two foreign currency-denominated transactions – one creating an account receivable in a non-U.S. currency and the other generating an account payable in the same currency – yielded a precisely offsetting gain and loss, or in other words, one offsetting the foreign exchange exposure of the other. In that hypothetical instance, DuPont would not enter into an FEC transaction, as it had no net foreign exchange exposure.[72] Dr. Cody explained that the NMA program evaluates DuPont's ordinary business transactions to eliminate natural hedges and to determine the amount of net foreign exchange exposure when engaging in FEC transactions.[73]

For these reasons, Dr. Cody concluded that including FEC gross receipts in the calculation of the apportionment factor is reasonable.

C. Expert testimony: Alternative Apportionment Method

The parties' experts also disagreed concerning the Commissioner's alternative apportionment method, which excludes FEC gross receipts from the apportionment factor calculation and includes net receipts from those transactions instead.

Ms. McMahon testified that "an approach that incorporates DuPont's net FEC receipts into the total sales determination . . . would represent a fair reflection of DuPont's business income

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[71] Ex. P1, at 11-12. *See also* Ex. A, at 22 ("[A]t the time DuPont enters into an FEC, it does not know whether that particular contract will produce a gain, a loss, or will result in no change at all.").

[72] Ex. P1, at 12.

[73] Ex. P1, at 12.

attributable to the State of Minnesota."[74] She testified that because FEC transactions result in income gain or loss, including net income (as opposed to excluding all income) in the apportionment factor calculation maintains a relationship between the transaction and the sales apportionment factor without "overwhelming the factor" with the FEC activity.[75] She testified that DuPont uses this "net" approach in the State of Delaware, where DuPont conducts the majority (if not all) of its FEC activity through the NMA Program, and opined that maintaining consistency with such an approach "would more closely accomplish the fair and consistent economic distribution of DuPont's income across different tax jurisdictions . . . ensuring that all of DuPont's domestic income is allocated to one state or another (at least as between Minnesota and Delaware)."[76]

In addition, Ms. McMahon opined that including FEC net income better reflects the economic reality of FEC transactions, which DuPont undertakes as "a simultaneous exchange on the date where the contract matures . . . [t]hat has a net impact and a net result that offsets a change in some underlying position . . ."[77] "It is to generate a net impact of stabilizing the profits that [DuPont] earned from [its] underlying business activities . . . [i]t's a support function . . . run by the Treasury Department."[78] "It's an important part of making sure that [DuPont is] able to conduct

[74] Ex. A, at 23-24; *see also* Ex. B, at 13-14; Trial Tr. 38-42. Ms. McMahon testified that "various alternative apportionment methodologies could be conceived to more fairly reflect the economic realities of allocating DuPont's income," for instance, excluding FEC gross receipts entirely from the apportionment factor calculation. Ex. A, at 23.

[75] Trial Tr. 39-41.

[76] Ex. A, at 24; Trial Tr. 39-42.

[77] Trial Tr. 40.

[78] Trial Tr. 40-41.

business in foreign jurisdictions where they operate with a different currency, but it's not something that is driving the demand for [DuPont's] products or services."[79]

Removing FEC gross receipts from everywhere sales, DuPont had Minnesota sales and everywhere sales yielding revised apportionment factors as follows:[80]

Table 7

Year	**2013**	**2014**	**2015**
Minnesota Sales	$449,405,969	$420,753,468	$428,230,737
Everywhere Sales (Excluding FEC Gross Receipts)	$26,473,940,295	$24,129,228,495	$17,030,673,223
Other COR Modifications	(2,485,146,566)	(837,595,622)	(225,974,633)
FEC Net Income	59,950,407	647,489,427	407,355,440
Alternative Apportionment Factor (%)	1.87	1.76	2.49

DuPont provided the additional expert testimony of Dr. Richard Pomp, who testified that the purpose of the policy underlying the apportionment formula is "to determine the share of the tax base that a state can legitimately tax as a matter of sound policy."[81] He opined that including net income from FEC transactions in the apportionment factor as opposed to gross receipts contravenes sound apportionment policy, likening apportionment of unitary business to the determination of each state's share of a pizza pie.[82] As "a state's slice of the pizza must represent

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[79] Trial Tr. 41.

[80] Ex. A, at 7 t. 3, 24 t. 12 & nn. 53-54 (referencing Ex. J16 and noting that "other COR modifications" incorporates previously agreed adjustments not at issue in this case).

[81] Ex. P3, at 6.

[82] Ex. P3, at 2-3.

a legitimate claim on the pizza," "[n]o state can reach income that is not fairly attributable to economic activity within its borders."[83] Dr. Pomp offers the example of a unitary business operating in neighboring states, with substantially different amounts of gross receipts as well as profit margins, such that one state's operations generate profits and the other's generate none. Dr. Pomp opines that, under a net income apportionment methodology, the state where the unitary business generated no profits would have no taxable income, "an erroneous result."[84]

Although he opined that FEC gross receipts should be included in full in calculating the denominator of the apportionment factor, Dr. Cody proposed an alternative apportionment method for the court's consideration. Dr. Cody explained that "the majority of DuPont's foreign exchange exposure related to its net monetary assets arises through the Company's intercompany transactions," for example, between DuPont subsidiaries in different countries, as opposed to transactions with unrelated third parties, which normally would be between a DuPont entity and a customer in its own country.[85] He explained further that some FEC transactions involve a DuPont subsidiary in the United States and one outside the United States, and others involve parties situated entirely outside the United States. Concerning the latter, "the exchange rate gain (loss) resulting from foreign currency fluctuations would be recorded on their books, not those of a U.S. DuPont subsidiary."[86] "The foreign exchange generated income impact would eventually be realized in the U.S. upon consolidation, but the immediate impact would nevertheless be on the non-U.S. subsidiary's income."[87] On that basis, Dr. Cody proposed to include in the apportionment

[83] Ex. P3, at 8.

[84] Ex. P3, at 7.

[85] Ex. P1, at 14.

[86] Ex. P1, at 15.

[87] Ex. P1, at 15.

factor only "a share of the FEC gross receipts equal to the share of international sales," which he calculated by determining the ratio of international sales to total sales during each year at issue.[88]

Applying Dr. Cody's method of including FEC gross receipts adjusted to reflect only the percentage attributable to international sales, DuPont had Minnesota sales and everywhere sales yielding revised apportionment factors as follows:[89]

Table 8

Year	2013	2014	2015
Minnesota Sales	$453,511,086	$421,732,246	$427,863,768
Everywhere Sales (Before Adjusted International FEC Gross Receipts)	$26,473,940,295	$24,129,228,495	$17,030,673,223
Adjusted International FEC Gross Receipts	$19,088,590,410	$16,519,491,475	$13,161,684,364
Alternative Apportionment Factor (%)	1.00	1.04	1.42

III. GOVERNING LAW

A. Apportionment of Income to Minnesota

Minnesota imposes a tax on the taxable income of businesses that "engage in contacts with [Minnesota] that produce gross income attributable to [Minnesota]." Minn. Stat. § 290.02 (2022). Under Minnesota law, "[a]ll income of a trade or business is subject to apportionment except nonbusiness income." Minn. Stat. § 290.17, subd. 3 (2022). When a trade or business is conducted

[88] Ex. P1, at 16 (referencing Exs. J1-J3, ratio of international sales as reported on Form 1120 to total sales). For 2013, this percentage was 29.5; for 2014, 25.6; and for 2015, 27.6. Ex. P1, at 16 t. 3.

[89] Ex. P1, at 15 t. 2, 16 t. 3 & 4.

partly within and partly outside of Minnesota, and that trade or business is part of a unitary business,[90] "the entire income of the unitary business is subject to apportionment pursuant to section 290.191." Minn. Stat. § 290.17, subd. 4(a) (2022).

To ensure that Minnesota taxes only income earned within its borders consistent with constitutional due process principles, *Container Corp.*, 463 U.S. at 165-66, 103 S.Ct. at 2940-41, when a unitary business conducts business in Minnesota and other states, its combined income is allocated to each state through "an apportionment formula that generates a fair share of the combined income attributable to each state for tax purposes." *Associated Bank, N.A. v. Comm'r of Revenue*, 914 N.W.2d 394, 397 (Minn. 2018) (quoting *Kimberly-Clark Corp. v. Comm'r of Revenue*, 880 N.W.2d 844, 846 (Minn. 2016)) (citing Minn. Stat. § 290.17, subd. 3). With respect

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[90] Minnesota law defines a unitary business as "business activities or operations which result in a flow of value between them." Minn. Stat. § 290.17 subd. 4(b) (2022). In assessing the tax liability of a multistate business, Minnesota "may not tax value earned outside its borders." *Comm'r of Revenue v. Associated Dry Goods, Inc*., 347 N.W.2d 36, 38 (Minn. 1984) (citing *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 316, 102 S.Ct. 3103, 3109, 73 L.Ed.2d 787 (1982)). Under the unitary business principle, "[i]f a trade or business conducted wholly within this state or partly within and partly without this state is part of a unitary business, the entire income of the unitary business is subject to apportionment pursuant to section 290.191." Minn.Stat. § 290.17, subd. 4(a). Thus when a business is "unitary," the apportionment formula is applied to the income of the entire business. *Associated Dry Goods*, 347 N.W.2d at 38; *Amoco Corp. v. Comm'r of Revenue*, 658 N.W.2d 859, 865 (Minn. 2003). Minnesota has adopted the unitary business principle and apportionment approach to determine the portion of the income subject to tax. *YAM Special Holdings, Inc. v. Comm'r of Revenue*, 947 N.W.2d 438, 442 (Minn. 2020); Minn. Stat. § 290.17, subds. 3-4; Minn. Stat. § 290.191, subd. 1(a) (2022); *see also Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 165, 103 S.Ct. 2933, 2940, 77 L.Ed.2d 545 (1983). (discussing the unitary business principle and apportionment approach).

To satisfy the Due Process Clause, state apportionment of unitary business income must meet two requirements. *Id*. at 165-66, 103 S.Ct. at 2940. First, "a 'minimal connection' or 'nexus' " must exist "between the interstate activities and the taxing State." *Id*. (citation omitted). Second, there must be "a rational relationship between the income attributed to the State and the intrastate values of the enterprise." *Mobil Oil Corp. v. Comm'r of Taxes of Vermont*, 445 U.S. 425, 437, 100 S.Ct. 1223, 1231, 63 L.Ed.2d 510 (1980). The parties do not appear to dispute that DuPont is a unitary business for Minnesota purposes. Tr. 105 (testimony of Dr. Cody agreeing that DuPont is unitary in Minnesota), 162, 165 (testimony of Dr. Pomp to the same effect).

to unitary businesses, the state applies an apportionment formula based on a percentage of the business's Minnesota sales[91], to determine the amount of business income subject to tax. Minn. Stat. § 290.191, subd. 2(a); *YAM Special Holdings*, 947 N.W.2d at 442. This formula yields the apportioned amount of unitary business income attributable to this state, obtained by taking the sum of:

> (1) the percent for the sales factor under paragraph (b) of the percentage which the sales made within this state in connection with the trade or business during the tax period are of the total sales wherever made in connection with the trade or business during the tax period;
>
> (2) the percent for the property factor under paragraph (b) of the percentage which the total tangible property used by the taxpayer in this state in connection with the trade or business during the tax period is of the total tangible property, wherever located, used by the taxpayer in connection with the trade or business during the tax period; and
>
> (3) the percent for the payroll factor under paragraph (b) of the percentage which the taxpayer's total payrolls paid or incurred in this state or paid in respect to labor performed in this state in connection with the trade or business during the tax period are of the taxpayer's total payrolls paid or incurred in connection with the trade or business during the tax period.

Minn. Stat. § 290.191, subd. 2(a). Stated more simply, the apportionment factor, or proportion of Minnesota income subject to apportionment in this state, represents the sum of:

$$\frac{\textbf{Minnesota payroll}}{\textbf{Everywhere payroll}} + \frac{\textbf{Minnesota property}}{\textbf{Everywhere property}} + \frac{\textbf{Minnesota sales}}{\textbf{Everywhere sales}}$$

The apportionment factor is multiplied by total income to obtain Minnesota income. Minn. Stat. § 290.191, subd. 2(a). For tax year 2013, the sales factor percentage in subdivision 2(a)(1) was 96 percent, the property factor percentage was 2 percent, and the payroll factor percentage

[91] Before 2014, the Minnesota apportionment formula included property and payroll as well. Minn. Stat. § 290.191, subd. 2(b) (referencing property and payroll factors for years preceding 2014).

was 2 percent. Minn. Stat. § 290.191, subd. 2(b) (2022). For later calendar years, only the sales factor is considered. *Id*. The sales factor includes all sales, gross earnings, or receipts received in the ordinary course of the business, except for interest, dividends, sales of capital assets as defined in IRC section 1221, sales of property used in the trade or business (unless leased property is regularly sold and leased), and sales of debt instruments as defined in IRC section 1275(a)(1). Minn. Stat. § 290.191, subd. 5(a) (2022).

Any increase in the denominator of the sales factor ("everywhere sales") decreases the percentage of the taxpayer's business income that is taxable in the state. That is, it reduces the taxpayer's state franchise taxes. *See General Mills, Inc. v. Franchise Tax Bd*., 208 Cal.App.4th 1290, 1296, 146 Cal.Rptr.3d 475, 480 (2012) ("*General Mills II*") (describing the mechanics of changes in everywhere sales).

B. Alternative Apportionment

1. In general

The general apportionment methodology in section 290.191, subdivision 2(a) "shall be presumed to determine fairly and correctly the taxpayer's taxable net income allocable to this state." Minn. Stat. § 290.20, subd. 1 (2022). If the general apportionment method "do[es] not fairly reflect all or any part of taxable net income allocable to this state," the taxpayer may petition for, "or the commissioner may require the determination of net income by the use of another method, if that method fairly reflects net income." *Id*. These other methods may include: separate accounting; excluding any one or more of the factors; including one or more additional factors; or some other method. *Id*. at (1)-(4).

Section 290.20 creates a rebuttable presumption that the apportionment methods in section 290.191 "fairly and correctly" determine the taxpayer's taxable net income allocable to Minnesota. *Associated Bank*, 914 N.W.2d at 402 (noting that language in section 290.20 stating that "the

commissioner may require the determination of net income by the use of another method" created a rebuttable presumption); Minn. Stat. § 290.20, subd. 1. The commissioner, by invoking the alternative apportionment authority under section 290.20, subdivision 1, bears the burden to overcome this presumption. *Associated Bank*, 914 N.W.2d at 402 (citing *C.O. v. Doe*, 757 N.W.2d 343, 352 (Minn. 2008); *see also Microsoft Corp. v. Franchise Tax Bd*., 39 Cal.4th 750, 768, 139 P.3d 1169, 1178 (2006)). To rebut this presumption, the commissioner must present substantial evidence that the taxpayer's apportionment method does not "fairly reflect all or any part of taxable net income allocable" to Minnesota, and that an alternative method does so. *Associated Bank*, 914 N.W.2d at 403; Minn. Stat. § 290.20, subd. 1; *see also Conga Corp. v. Comm'r of Revenue*, 868 N.W.2d 41, 53 (Minn. 2015)).

Courts of this state have interpreted the alternative apportionment statute only rarely. In *HMN Financial, Inc. v. Commissioner of Revenue*, 782 N.W.2d 558 (Minn. 2010), the supreme court held, among other things, that section 290.20 does not constitute a general grant of authority to adjust a taxpayer's Minnesota tax liability by disregarding a taxpayer's corporate structure, when the commissioner has not invoked its specific provisions for challenging the methodology of the general apportionment statute. In *HMN*, where the commissioner neither argued that HMN failed to follow the general apportionment methods prescribed by section 290.191, nor attempted to rebut the presumption that those methods produce fair and correct results, alternative apportionment under section 290.20 was not available. *Id*. at 567 (stating that the commissioner could not simply "take issue with the result rather than the methods" applied by the taxpayer to apportion its taxes as part of an "economic substance" approach to assessment).

In *Associated Bank*, the court held that section 290.20 expressly authorized the Commissioner to employ alternative apportionment upon a specific determination that applying

the general apportionment formula prescribed under section 290.191 did not "fairly reflect" the Bank's "taxable net income allocable" to Minnesota. *Associated Bank*, 914 N.W.2d at 399. The court made two holdings. First, the commissioner must accept the results of the taxpayer's apportionment under section 290.191 unless the commissioner rebuts the presumption established by section 290.20, subdivision 1. *Id*. at 403. To do so, however, the commissioner need not show that the general apportionment formula "results in a grossly inequitable allocation," but rather must present substantial evidence that the taxpayer's apportionment method does not "fairly reflect all or any part of taxable net income allocable" to Minnesota. *Id*. at 403-04 (citing Minn. Stat. § 290.20, subd. 1; *Conga*, 868 N.W.2d at 53). This means the commissioner must present substantial evidence that the method prescribed under section 290.191 does not show, to a full degree or extent, all or any part of the taxpayer's income arising from taxable business activities in Minnesota. *Associated Bank*, 914 N.W.2d at 405.

Unlike in *HMN*, the Commissioner in *Associated Bank* explicitly determined that applying the general apportionment formula to certain Wisconsin limited liability companies that were part of the taxpayer's unitary business, as prescribed under section 290.191, did not "fairly reflect" its "taxable net income allocable" to Minnesota.[92] On that basis, the Commissioner determined that applying the general apportionment formula distorted the taxpayer's income by failing to report "Minnesota sourced income" that should have been allocated to the State, and accordingly failed to account for Associated Bank's Minnesota business activities. The court distinguished this specific determination from the reliance on a "general implicit statutory authority to impose tax

[92] A detailed recounting of the complex facts in *Associated Bank* is not relevant to its application in this case. For a full account, see *Associated Bank*, 914 N.W.2d at 396-401.

obligations" on "economic substance" grounds that it rejected in *HMN*. *Id*. at 401-02 (citing *HMN Financial*, 782 N.W.2d at 560-61).

Second, if the commissioner satisfies this initial burden, the commissioner also must present substantial evidence that an alternative method fairly reflects net income. *Associated Bank*, 914 N.W.2d at 403, 406-07 (stating that the language of section 290.20, subdivision 1, is "broad and allows the Commissioner to use another method, including some other method, so long as the selected method fairly reflects net income.") (internal quotes omitted). The court accepted the Commissioner's alternative method and rejected Associated Bank's challenge, holding that "the alternative method applied by the Commissioner—accounting for the LLC members' pro-rata shares of the LLCs' receipts and intangible property—is 'another method' because it is not the method applied by the taxpayer under section 290.191." *Associated Bank*, 914 N.W.2d at 406-07 (citing Minn. Stat. § 290.20, subd. 1).

2. Specific transactions

a) "Treasury functions": ***Sherwin-Williams*** **and** ***Microsoft***

Several state appellate courts have considered the effect on apportionment of the so-called "treasury functions" of multistate entities. In this context, "treasury functions" refers to the operations of a department within a unitary business, sometimes characterized as a treasury group or department, that invests in securities and other assets. *See, e.g., Microsoft Corp.*, 39 Cal.4th at 757, 139 P.3d at 1173 (describing operations of Microsoft's treasury department, which invests excess operating income in various short-term marketable securities, some of which it resells to third parties, and others of which it redeems at maturity); *id*. at 765-80, 139 P.3d at 1178-81 (reviewing other cases involving treasury functions). These cases have addressed two issues; (1) whether the gross receipts from treasury functions are included within everything sales for purposes of calculating the general apportionment factor; and (2) whether a statute providing for

alternative apportionment (sometimes known as a statutory relief provision) authorizes the commissioner of revenue to propose an alternative method to determine taxable net income that excludes gross receipts from treasury functions. "[W]hen the court's jurisprudence is undeveloped in an area, as it is here, the court often considers case law from other jurisdictions for guidance." *State ex rel. Swanson v. 3M Co*., 845 N.W.2d 808, 814 (Minn. 2014) (citing *Gordon v. Microsoft Corp*., 645 N.W.2d 393, 402 n. 9 (Minn. 2002)).

In *Sherwin-Williams Co. v. Johnson*, 989 S.W.2d 710 (Tenn. Ct. App. 1998), the Tennessee court of appeals considered whether the Tennessee commissioner of revenue properly applied the alternative apportionment statute concerning working capital invested pursuant to treasury functions. Sherwin-Williams is a manufacturer of paint and paint products, which maintained a treasury department in Ohio. There, its personnel made daily decisions to invest excess working capital in various short-term interest bearing securities. These investments sometimes had maturity dates as short as one day – for example, the trial record contained the example of a wire transfer of $11 million to a bank on January 3, 1990, which the bank transferred back to Sherwin-Williams the next day in the amount of $11 million plus interest in the amount of $2,539.93. *Id*. at 712.

Although Sherwin-Williams and the Tennessee commissioner of revenue agreed that the interest income and any net gains or losses from treasury activities should be included in the calculation of the apportionment factor, for purposes of Tennessee apportionment, Sherwin-Williams sought to include in everywhere sales the full principal amounts of the working capital invested, which were returned to Sherwin-Williams when the securities matured and were redeemed or sold – in other words, gross receipts from the treasury activities. *Id*. This reduced its taxable income considerably. "The efforts by taxpayers to include return of working capital invested in the denominator of the sales factor is not new to states operating under the Uniform

Division of Income for Tax Purposes Act[93] or under comparable legislative enactments. The result in each instance is a hyper-inflated sales factor." *Id*. at 713. Based on the plain language of the Tennessee general apportionment statute,[94] the court agreed that the term "gross receipts" for purposes of determining the general apportionment factor includes investment gross receipts. *Id*. at 715 (citing *South Central Bell Tele. Co. v. Olsen*, 669 S.W.2d 649, 652 (Tenn. 1984)) (examining meaning of "gross receipts" in Tennessee Code Annotated section 67–4–301).

Despite the plain language of the general apportionment statute, however, the court observed that did not end matters. "[T]he commissioner may opt for a different scheme of assessment whenever the resulting apportionment does not fairly represent the taxpayer's business in this state," using Tennessee's alternative apportionment statute. *Id*. at 715 (rejecting "absurd result standard" that several other jurisdictions employed to disregard gross receipts under general apportionment rules). Not only that, the court observed, "[t]he very absurdity of the result sought by Sherwin-Williams[] lays a sound basis for the implementation" of the alternative apportionment statute.[95] *Sherwin-Williams*, 989 S.W.2d at 715.

Tennessee law provided for alternative apportionment by, among other methods, "[t]he employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's earnings." Tenn. Code Ann. § 67–4–812(a)(4) (1994). Considering whether the commissioner had demonstrated that his alternative computation reached an equitable result as to the apportionment, the court concluded that the commissioner had done so. By including the gross

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[93] The Uniform Division of Income for Tax Purposes Act ("UDITPA") is a uniform law that Tennessee, among a number of other states, had adopted as of the time of Sherwin-Williams.

[94] Tenn. Code Ann. § 67–4–811(g).

[95] Tenn. Code Ann. § 67–4–812(a) (1998). Although Minnesota law does not explicitly incorporate UDITPA, the language governing alternative apportionment in section 290.20 is similar to that in UDITPA. Compare Minn. Stat. § 290.20 with Tenn. Code Ann. § 67–4–812(a).

receipts from the sales of short term securities, Sherwin-Williams did not fairly and accurately represent the total amount of sales subject to state taxation within everywhere sales, and therefore did not fairly represent its taxable net income in Tennessee. *Sherwin-Williams*, 989 S.W.2d at 715. The court examined the nature of the treasury activities the taxpayer claimed were "sales," and concluded there existed "a very high probability that the same investment basis may be used in these admittedly efficient short-term purchases and sales to barely increase the company's overall net worth, while profoundly increasing the out-of-state portion of their "gross receipts" for UDITPA purposes." *Id*. at 716. The court concluded that such transactions did not "fairly represent" Sherwin-Williams's income connection to the state. "It strains the bounds of good sense to assert that the taxpayer is attempting to fairly and completely represent his business connection to this state, when, as fortune would have it, Ohio statutes do not require inclusion of the "gross receipts" in its receipt factor." *Id.*

Several years later, in *Microsoft*, the California supreme court considered how California law[96] should govern the treatment of gross receipts arising from the redemption of marketable securities, which constitute both a critical part of Microsoft's treasury functions and a feature of our modern global economy. *Microsoft Corp.*, 39 Cal.4th at 754, 139 P.3d at 1171. Microsoft is an international software company that operated as a unitary business in California, but with its headquarters and principal offices in Washington State. Similarly to Sherwin-Williams, its software business generated excess operating cash, which its treasury department, located in Washington, invested in various short-term marketable securities. Microsoft reported the entire

[96] Like Tennessee, California law incorporated UDITPA. Cal. Rev. & Tax. Code §§ 25120-39. At the time of the *Microsoft* decision, UDITPA had been adopted by 22 states and the District of Columbia. *Microsoft*, 39 Cal.4th at 755, 139 P.3d at 1171.

amount it received from sales and redemptions of marketable securities, as gross receipts for purposes of determining its California business income. As these sales took place outside California, however, these gross receipts contributed only to Microsoft's everywhere sales but not its sales factor numerator, diluting the sales factor (from roughly 11 percent to 3 percent) and cutting Microsoft's California income tax nearly in half. *Id*. at 757, 139 P.3d at 1172–73.

The court considered first whether the redemption of marketable securities at maturity generates "gross receipts" that are includible in the general apportionment formula used to calculate a multistate entity's tax (specifically, in everywhere sales). *Id*. at 758-64, 139 P.3d at 1175-78. To do so, the court examined the plan language of California law, which defined "sales" to mean "all gross receipts of the taxpayer not allocated [as nonbusiness income]" under the UDITPA. *Id*. at 758, 139 P.3d at 1174 (citing Cal. Rev. & Tax. Code §§ 25120, subd. e; 25123-25127). As in *Sherwin-Williams*, the court agreed with Microsoft that gross receipts include the entire amount received upon redemption of a marketable security, and not, as the Franchise Tax Board (the "FTB") contended, the net proceeds received in excess of purchase price upon redemption; accordingly, the gross redemption amounts were includible in everywhere sales for purposes of the general apportionment formula. *Microsoft Corp.*, 39 Cal.4th at 758, 139 P.3d at 1174.

Second, the court considered whether UDITPA's so-called "relief provision" applied; in other words, whether alternative apportionment provided any relief from "rote application" of the general apportionment formula under the circumstances. *Id*. at 764, 139 P.3d at 1178 (citing Cal. Rev. & Tax. Code § 25137). The party invoking the relief provision - in this case the FTB - bears the burden of proving by clear and convincing evidence that (1) the approximation provided by

the standard formula is not a fair representation, and (2) its proposed alternative is reasonable. *Id*. at 765.

In concluding that the FTB met its burden under the relief provision, the court examined several earlier cases concerning treasury functions, in California and other states, stating that "operation of a large treasury department unrelated to a taxpayer's main business is a paradigmatic example of circumstances warranting invocation" of the relief provision. *Id*. at 764-67, 139 P.3d at 1178-80 (discussing with approval several administrative decisions interpreting the relief provision "to allow for correction of distortions arising from the operation of a large corporate treasury department"). As the court explained, "[t]he inclusion of this enormous volume of investment receipts substantially overloads the [everywhere] sales factor in favor of [the treasury department state], and thereby inadequately reflects the contributions made by all other states, including California, which supply the markets for the . . . services provided by [taxpayer]." *Id*. at 765, 139 P.3d at 1178 (examining Washington treasury activities and rejecting idea that more than 24 percent of taxpayer's entire unitary business activities "should be attributed to any single state solely because it is the center of working capital investment activities that are clearly only an incidental part of one of America's largest, and most widespread, businesses").

Furthermore, the court determined that that mixing the gross receipts from Microsoft's short-term investments with the gross receipts from its other, principal, business activity "seriously distorts the standard formula's attribution of income to each state." Although the treasury functions generated minimal income, accounting for under 2 percent of business income in the year at issue, they accounted for 73 percent of gross receipts, reducing roughly by half the estimated income attributed to California. The court concluded the size and type of distortion warranted the application of the relief provision. *Microsoft Corp.*, 39 Cal.4th at 770-71, 139 P.3d at 1182.

Having determined that the FTB demonstrated that the standard apportionment formula did not provide a fair approximation of Microsoft's business activities in California, the court also concluded the FTB's proposed alternative apportionment method was reasonable. The FTB proposed including net receipts from redemption upon disposition in calculating the apportionment factor and the court accepted that approach because those net receipts were "so small in comparison with Microsoft's nontreasury income and receipts." *Id*. at 771, 139 P.3d at 1182.[97]

b) Hedging activities

Following *Microsoft*, the California court of appeals specifically addressed the use of a hedging strategy to protect against price fluctuations in basic commodities such as flour and grain, which it used in the manufacture and sale of consumer food products. *General Mills II*, 208 Cal.App.4th at 1294, 146 Cal.Rptr.3d at 478 (concerning apportionment under Cal. Rev. & Tax. Code, § 25120-39). Again, as in *Sherwin-Williams* and *Microsoft*, the FTB sought to apply an alternative apportionment formula to gross receipts resulting from trading by General Mills in agricultural commodity futures. *Id*.[98]

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[97] The court suggested that exclusion of all receipts from calculating everywhere sales also was appropriate, but because those receipts were negligible relative to non-treasury gross receipts, and because the FTB's proposal accordingly was reasonable, it was "not empowered to substitute our own formula." *Microsoft Corp.*, 39 Cal.4th at 771, 139 P.3d at 1182 (citing Cal. Rev. & Tax. Code § 25137).

[98] The cited case was a decision on remand from the California supreme court following its decision in *Microsoft*. In its earlier decision, the court of appeals held that the gross proceeds from hedging transactions were properly included in gross receipts for purposes of calculating everywhere sales in the standard apportionment formula, and the relief provision applied. *General Mills v. Franchise Tax Bd.*, 172 Cal.App.4th 1535, 1548, 92 Cal.Rptr.3d 208, 218 (2009) ("*General Mills I*"). The supreme court vacated and remanded at least two other cases following *Microsoft*. *Toys R Us v. Franchise Tax Bd.*, 147 P.3d 1013 (Cal. 2006); *see also Ltd. Stores, Inc. v. Franchise Tax Bd.*, 152 Cal.App.4th 1491, 1502, 62 Cal.Rptr.3d 191, 200 (2007) (decision after remand holding that relief provision applied, but that full redemption price of short-term investments was included in gross receipts for purposes of calculating everywhere sales in the standard apportionment formula).

The court examined the principal purpose of General Mills's business activities as well as the purposes underlying its hedging transactions. It concluded that hedging activity—while integral to its main consumer food business—both was qualitatively different from its other sales made for profit, and that the quantitative distortion from inclusion of those receipts on the percentage of General Mills's income apportioned to California was substantial.[99]

First, the court rejected General Mills's contention that "an activity is qualitatively different [from the unitary business] only if it has no value to the unitary business beyond the income it directly generates." *Id*. at 1307, 146 Cal.Rptr.3d at 489. "Hedging futures sales serve a risk management function and are not sales for profit. They rarely result in actual delivery of and payment for goods." *Id*. at 1305, 146 Cal.Rptr.3d at 487. The court acknowledged that hedging was "critical to the success of General Mills's primary lines of business," but concluded that "this fact does not preclude a finding of qualitative difference." *Id*. at 1305, 146 Cal.Rptr.3d at 488 (explaining that "qualitative inquiry does not turn on whether the challenged activity is fundamental or integral to the taxpayer's primary business") (citing *Limited Stores, Inc. v. Franchise Tax Bd*., 152 Cal.App.4th 1491, 1499, 62 Cal.Rptr.3d 191, 197 (2007)) Its principal focus is not to serve as a profit center for the company; even though it is not unrelated to General Mills's main business, it is a risk management tool that directly supports General Mills's main line of business. *General Mills II*, 208 Cal.App.4th at 1305-07, 146 Cal.Rptr.3d at 487-89. On this basis, the *General Mills II* court concluded, the facts "present[ed] a different and equally valid

[99] The court did not establish or endorse a two-part test requiring separate factual determinations of qualitative difference and quantitative endorsement, but rather an "ultimate goal" of "assessing whether the standard formula fairly represents the company's business activity" in the state. *General Mills II*, 208 Cal.App.4th at 1301, 146 Cal.Rptr.3d at 484 ("the discussion concerns both effects").

paradigm" for applying the UDITPA relief provision as in the treasury function cases. *Id*. at 1301, 146 Cal.Rptr.3d at 484.

Second, the court examined four quantitative metrics: the amount of business activity attributed to a single state; percentage of income versus gross receipts; profit margin in the challenged activity as compared to the primary business of the company; and the percentage change in the standard apportionment formula. *Id*. at 1309-13, 146 Cal.Rptr.3d at 491-94. The court concluded that, taken as a whole, while some of the quantitative distortions were not as great as in the treasury case, they were still substantial, particularly because hedging is "not intended to be a profit center at all." Rather, the purpose of hedging is to protect the profit margins in the company's primary business. "Using hedging gross receipts to dilute that profit margin, therefore, does not fairly represent California's market for General Mills's goods." *Id*. at 1313, 146 Cal.Rptr.3d at 494.

Finally, the court concluded the FTB's alternative apportionment formula, including only the net gains from General Mills's hedging activities, was reasonable and consistent with the requirements of the allocation and apportionment statute. *Id*. at 1316, 146 Cal.Rptr.3d at 496 (agreeing that including net gains "still gives some representation to the futures trading activity in the sales factor and . . . treats General Mills consistently with the taxpayers in the treasury cases"). As in *Microsoft*, the court concluded that because the FTB's proposed alternative apportionment method was reasonable, it was "not empowered" to substitute its own formula. *Id*. at 1314, 146 Cal.Rptr.3d at 495 (citing *Microsoft*, 39 Cal.4th at 771, 139 P.3d at 1182).

IV. Burden of Proof

Ordinarily, the order of the commissioner enjoys presumptive validity, and the appellant bears the burden of overcoming this presumption of validity by introducing evidence that the tax assessment is incorrect. Minn. Stat. § 271.06, subd. 6 (2022). In this case, however, the parties

have stipulated to all gross receipts and taxable (Form 1120) income, and have resolved previously disputed issues for trial other than the issue of alternative apportionment.[100] As the sole issue for decision is the Commissioner's use of the alternative apportionment method, DuPont enjoys a presumption that its use of the statutory apportionment factors in section 290.191 is correct, and the Commissioner bears the burden to overcome this presumption. *Associated Bank*, 914 N.W.2d at 403.

To rebut this presumption, the Commissioner must present substantial evidence that the taxpayer's apportionment method does not "fairly reflect all or any part of taxable net income allocable" to Minnesota, and that an alternative method does so. *Id*. at 403, 405-07; Minn. Stat. § 290.20, subd. 1; *see also Conga*, 868 N.W.2d at 53). "Substantial evidence" that the assessment is incorrect is required to overcome the presumptive validity of the assessment. *Harmon v. Comm'r of Revenue*, 894 N.W.2d 155, 159 (Minn. 2017) (citing *Conga*, 868 N.W.2d at 53)). For evidence to be "substantial," it must be "credible evidence." *Guardian Energy, LLC v. Cnty. of Waseca*, 868 N.W.2d 253, 258 n.6 (Minn. 2015). Decisions regarding the credibility of evidence and witness testimony are within the discretion of the factfinder, which is the judge in a nonjury trial. *State v. King*, 990 N.W.2d 406, 420 (Minn. 2023) (deferring on appeal to trial court's determination on credibility "because credibility and the 'weight to be given' to a witness's testimony are determinations for the factfinder.") (quoting *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992)).

V. ANALYSIS

The parties stipulated that gross receipts from forward exchange contracts are sales, gross revenues, or receipts earned in the ordinary course of business pursuant to Minnesota Statutes

[100] Jt. Stip.

section 290.191, subdivision 5.[101] Accordingly, the parties do not dispute whether FEC gross receipts would constitute gross receipts for purposes of everywhere sales in calculating the general apportionment formula, if it applies.

The sole issues for this court's decision are (1) whether the Commissioner presented substantial evidence that the taxpayer's apportionment method does not "fairly reflect all or any part of taxable net income allocable" to Minnesota, and if so, (2) that the Commissioner's alternative method, which excludes all FEC gross receipts from the calculation of everywhere sales, but instead includes net proceeds from FEC transactions, does so.

For the reasons set forth below, the Commissioner has met his burden to demonstrate that DuPont's apportionment method does not fairly reflect all of the taxable net income allocable to Minnesota. The Commissioner has demonstrated by substantial evidence that FEC transactions differ materially from DuPont's other business transactions, and that including FEC gross receipts in the calculation of the general apportionment factor results in a substantial quantitative distortion of DuPont's Minnesota income. In addition, the Commissioner has met his burden to demonstrate that his alternative apportionment method, which includes net proceeds from FEC transactions in the calculation of the apportionment factor, fairly reflects all of DuPont's taxable net income allocable to Minnesota.

A. Fair Reflection of Minnesota Income

DuPont maintains – correctly – that the Commissioner bears the burden to demonstrate, through substantial evidence, that the standard apportionment method does not fairly reflect all or any part of DuPont's taxable income allocable to Minnesota.[102] The Commissioner contends that

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[101] Jt. Stip. ¶ 1.

[102] Appellant's Br. 1-2, 7-9, 11-14, 18-22.

DuPont's use of the general apportionment formula does not fairly reflect all or any part of taxable net income allocable to this state because including the FEC gross receipts in the calculation of the general apportionment factor distorts the effect of FEC transactions on Minnesota income by substantially reducing the value of the apportionment factor.[103]

To satisfy his initial burden, the Commissioner need not show that the general apportionment formula "results in a grossly inequitable allocation"[104] but rather must present substantial evidence that the taxpayer's apportionment method does not "fairly reflect all or any part of taxable net income allocable" to Minnesota, by demonstrating that the method prescribed under section 290.191, subdivision 2 does not show, to a full degree or extent, all or any part of the taxpayer's income arising from DuPont's taxable business activities in Minnesota. *Associated Bank*, 914 N.W.2d at 403, 405 (citing Minn. Stat. § 290.20, subd. 1; and *Conga*, 868 N.W.2d at 53).

1. Qualitative difference

The Commissioner contends that, while a legitimate business function, DuPont's FEC activity is not a profit-oriented line of business but is a risk management tool intended to protect DuPont's other business activities and profits.[105] Moreover, the Commissioner contends FEC transactions would not occur independently of transactions with customers, but serve only a

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[103] Comm'r's Br. 1-2, 10-14.

[104] DuPont does not seriously contend that the Commissioner's proposed alternative apportionment method violates the Due Process Clause. *See Gen. Mills II*, 208 Cal.App.4th at 1316, 146 Cal.Rptr.3d at 496-97 (constitutional violation occurs only if the apportionment formula is "out of all proportions to the business transacted . . . in that State")(citing *Container Corp.*, 463 U.S. at 170, 103 S. Ct. at 2942-43). DuPont's argument comprises only an assertion that the parties stipulated that FEC gross receipts were earned in the ordinary course of business. Appellant's Br. 23. Accordingly, the court will not address constitutional arguments.

[105] Comm'r's Br. 13-14.

supportive risk management function.[106] DuPont contends that gross receipts from FEC transactions arise in the ordinary course of business and Minnesota law contains no textual requirement that gross receipts arise from a taxpayer's "core" business.[107]

There is no dispute between the parties concerning the nature of DuPont's principal business activities or the purposes underlying its FEC transactions. The stipulated trial record is clear that DuPont is a science and technology company whose principal business activities comprise chemical, agricultural, electronic, manufacturing, and consumer products-related sales[108] to many different markets worldwide.[109] These activities do not include transacting in FECs with customers. Further, neither party contends that DuPont is a financial institution or that its business is in the sale of securities or financial instruments.

Rather, DuPont adopted a management policy to address risk [110] associated with the large number of currency transactions from its international sales, purchases, investments, and borrowings,[111] which subject its business operations to exposure from foreign currency, interest rate, and commodity price risks.[112] The parties agree that DuPont entered into FECs on a regular and recurring basis,[113] normally with financial institutions,[114] and that gross receipts from FECs

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[106] Comm'r's Br. 14.

[107] Appellant's Br. 19-21.

[108] Stip. ¶ 2 (specifying the nutrition, health care, pharmaceuticals, agriculture, automotives, textiles, home and construction, packaging, electronics, and transportation markets).

[109] Stip. ¶ 3.

[110] Stip. ¶¶ 5-6.

[111] Stip. ¶ 4.

[112] Stip. ¶ 5.

[113] Stip. ¶ 25.

[114] Stip. ¶ 20.

are earned in the ordinary course of business.[115] They also agree that the purpose of these FEC transactions is to protect DuPont's earnings, and to enable investors to see the true operating performance of DuPont, unaffected by currency fluctuations.[116] Dr. Cody testified that "FECs serve to protect the level (i.e., amount) of book and taxable income, [and] they can have a secondary benefit of helping to mitigate the interim income variability generated by foreign exchange exposures, facilitating financial and operational planning and reporting."[117] Both parties' experts describe the purpose of FEC transactions through the NMA Program as "to reduce earnings and cash flow volatility,[118] as well as "to protect the value of its existing foreign currency-denominated assets, liabilities, commitments, and cash flows," as opposed to a standalone profit center for DuPont.[119]

The court agrees with the Commissioner that FEC transactions and DuPont's other business activities were qualitatively different from each other and that including FEC gross receipts in the calculation of the general apportionment factor does not accurately show, to a full degree or extent, DuPont's income arising from its taxable business activities in Minnesota. *Associated Bank*, 914 N.W.2d at 403, 405 (citing Minn. Stat. § 290.20, subd. 1). Based on the undisputed factual record, FEC transactions served as "a risk management tool that directly supports [DuPont's] main line of business." *See Gen. Mills II*, 208 Cal.App.4th at 1306, 146 Cal.Rptr.3d at 488. DuPont did not provide evidence to contradict this; its expert opined that the

[115] Jt. Stip. ¶ 1.

[116] Stip. ¶ 24; Appellant's Br. 4-5; Comm'r's Br. 5-6.

[117] Ex. P1, at 9.

[118] Ex. P1, at 2; Ex. A, at 12-13; *see* Ex. J8, at 1-5.

[119] *See* Ex. J8, at 1-5; *see also* Ex. P1, at 3-4, 6; Ex. A, at 14-15; Appellant's Br. 3; Comm'r's Br. 4-6.

NMA program is a strategic, protective, risk management program "only entering into FECs necessary to protect income from foreign exchange exposures based upon the level, currency composition, maturity, etc. of the company's monetary assets."[120] "From the perspective of the NMA program, there is no economic incentive for DuPont to enter into unwarranted FECs or to continue the program if it were not effective."[121] Although FEC transactions "serve an important and even a critical supportive function" to DuPont's other, profit-making, business activities because they protect against the risk of currency-related value fluctuations, "they play only a supportive function and would be economically meaningless" removed from their underlying purpose, by DuPont's own acknowledgment. *Id*. at 1305, 146 Cal.Rptr.3d at 487–88 (observing that qualitative inquiry does not turn on whether the challenged activity is fundamental or integral to the taxpayer's primary business; "[i]t is almost always true that a treasury department's revenue production will be utilized to support or enhance the company's primary business.") (citing *Limited Stores*, 152 Cal.App.4th at 1499, 62 Cal.Rptr.3d at 197).

Although the court agrees with DuPont that gross receipts from FEC transactions are earned in the ordinary course of business, and that section 290.191, subdivision 5 explicitly includes such gross receipts in the definition of the sales factor for purposes of section 290.191, subdivision 2, the Commissioner does not dispute this.[122] Instead, the Commissioner seeks alternative apportionment on the grounds that FEC transactions, though a regular and recurring part of DuPont's business—and even integral to DuPont's main business activities—were qualitatively different from its other sales made for profit. Minn. Stat. § 290.20, subd. 1. Including

[120] Ex. P1, at 11.

[121] Ex. P1, at 11; *see also* Ex. A, at 23 ("FECs are not a line of business; rather, they are a tool for managing risk and stabilizing cash flow and profitability.").

[122] Jt. Stip. ¶ 1.

gross receipts from FEC transactions in everywhere sales does not accurately reflect DuPont's business activities in Minnesota,[123] because FEC transactions played a supportive risk management function: to mitigate cash flow volatility associated with foreign exchange rate fluctuation and to protect the value of DuPont's assets, operations, and cash flows. *See Gen. Mills II,* 208 Cal.App.4th at 1305-07, 146 Cal.Rptr.3d at 487-89 (determining that hedging activities were a risk management tool that directly supports General Mills's main line of business but were qualitatively different from its other business activities).

2. Quantitative distortion

In addition, the Commissioner contends that including gross receipts from FEC transactions in the calculation of the general apportionment factor distorts DuPont's taxable net income allocable to Minnesota.[124] DuPont contends that the Commissioner mistakenly, and without evidence, characterizes the inclusion of FEC gross receipts in calculating the apportionment factor as "duplicative" of other business gross receipts.[125]

Ms. McMahon, testified that, in her opinion, including FEC gross receipts "economically distorts the apportionment factor used for purposes of allocating DuPont's business income to the State of Minnesota, because including [them] in the denominator of the apportionment factor overstates and does not accurately reflect DuPont's receipts for sales of goods and services."[126] Ms. McMahon provided an illustrative hypothetical, in which a hypothetical DuPont foreign subsidiary entered into a sales transaction with a customer and correspondingly enters into an FEC

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[123] FEC transactions took place in Delaware, not Minnesota; accordingly, FEC gross receipts are not included in Minnesota sales.

[124] Comm'r's Br. 11-12.

[125] Appellant's Br. 20-22.

[126] Ex. A, at 19.

transaction to hedge against anticipated currency-based risk associated with that transaction,[127] and compared that hypothetical to DuPont's actual FEC gross receipts.[128] Although Ms. McMahon acknowledges that her illustrative example is a simplification,[129] she opines that it "illustrates the inherent benefit of undertaking such activities – to stabilize and reduce cash flow volatility associated with changes in foreign currency exchange rates."[130] More to the point, it also demonstrates the manner in which DuPont's FEC transactions resulted in gross receipts for the years at issue that distort its taxable net income allocable to Minnesota. In the illustrative example, the inclusion of FEC gross receipts increased the total recognized sales by a factor of approximately three times (2.96) the actual gross receipts from the contract itself because DuPont has multiple "receipts" associated with the same underlying transaction, two of which were FEC transactions "designed to protect DuPont's assets and cash flow."[131]

Ms. McMahon provided three examples how the inclusion of FEC-related gross receipts in the calculation of the apportionment factor distorted DuPont's taxable net income allocable to Minnesota. For 2013, including FEC gross receipts in everywhere sales increased everywhere sales by a factor of 3.44; for 2014, by a factor of 3.68; and for 2015, by a factor of 3.80.[132] Stated somewhat differently, Ms. McMahon testified that FEC gross receipts comprised over 70 percent

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[127] Ex. A, at 13-18.

[128] Ex. A, at 19-22.

[129] Ex. A, at 18 (stating that the illustration "represents a simplified example of hedging processes that are certainly far more complex at DuPont (in terms of timing, volume, etc.)").

[130] Ex A, at 18.

[131] Ex. A, at 20.

[132] Ex. A, at 21 t. 11.

of DuPont's everywhere sales in each of the years at issue.[133] At the same time, FEC net income comprised a very small portion of DuPont's total net income during the same time period, never exceeding 5 percent.[134]

She also illustrated the effect of removing FEC gross receipts from the calculation of the apportionment factor, which increased the apportionment factor by a multiple of 3.4 (2013) to 3.8 (2015) times.[135] In other words, the effect of removing FEC gross receipts from the calculation of the apportionment factor was to increase the apportionment factor by 244 percent in 2013; 268 percent in 2014; and 280 percent in 2015.[136]

DuPont does not dispute Ms. McMahon's testimony concerning the effect on its apportionment factors of including FEC gross receipts in the apportionment factor, as opposed to excluding them. Rather, DuPont contends that Ms. McMahon erroneously characterizes FEC gross receipts as "duplication" of business gross receipts.[137] Specifically, DuPont suggests that Ms. McMahon failed to recognize that FEC transactions are distinct and "completely separate

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[133] Ex. A, at 5 & t. 1 (FEC gross receipts as a percentage of DuPont total gross receipts 70.94 percent in 2013, 72.81 percent in 2014, and 73.66 percent in 2015) (referencing Ex. J13 at Admissions 7 and 8).

[134] Ex. A, at 5 & t. 1 (FEC net income as a percentage of DuPont net income 0.48 percent in 2013, 4.49 percent in 2014, and 3.24 percent in 2015) (referencing Ex. J13 at Admissions 9 through 11).

[135] *See* Ex. A, at 6 t. 2, 7 t. 3 (dividing revised apportionment factors in table 3 by those as filed in table 2).

[136] Ex. A, at 7 & chart 1.

[137] Although Ms. McMahon used the term "duplication" in her ultimate opinion and explanation of the role of FEC gross receipts in calculating the apportionment factor, Ex. A, at 3, 25, Ex. B, at 13, the court understands her testimony not to refer to literal duplication. Ex. B, at 9-10; Trial Tr. 51, 196-205 (testimony "not that it is the exact same transaction as the underlying business transaction, but that it is an economic overlap with some or all of the transactions that we see that are being hedged through the FECs").

transactions" from business activities.[138] However characterized, both the mechanics of FEC transactions and the effect of including FEC gross receipts in the apportionment factor, as opposed to excluding them, are plain. DuPont's FEC transactions involve both the purchase and sale of FECs, each of which DuPont records separately on a gross basis for purposes of calculating everywhere sales.[139] The apportionment factor with FEC gross receipts included is less than one-third of the apportionment factor with FEC gross receipts excluded.[140] DuPont does not dispute this,[141] but asserts that because FEC transactions indisputably arise in the ordinary course of its business, there exists no economic reason to exclude FEC gross receipts from the calculation of the apportionment factor;[142] and that doing so would break the "economic link between the activity of the parties and the income that is generated."[143]

But the very purpose of alternative apportionment is to address unfairness or incorrectness in the taxable income allocable to a particular state due to the existence of such transactions, not simply to apply the general statutory apportionment formula in section 290.191, subdivision 2 to all receipts earned in the ordinary course of business; otherwise, the alternative apportionment statute would be superfluous. *See Sherwin-Williams*, 989 S.W.2d at 715 (holding that, despite the plain language of the general apportionment statute, "the commissioner may opt for a different

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[138] Appellant's Br. 21; Trial Tr. 102-104, 160.

[139] Stip. ¶ 23 (terms of FECs are on a gross basis). Ex. P1, at 10 ("Company's contractual obligation equals the full gross receipts amount for each transaction").

[140] *See* Ex. A, at 7 t. 3 & chart 1.

[141] Trial Tr. 84-91 (mechanics of FECs and DuPont's use in general); 103 (testimony of Dr. Cody agreeing that FEC gross receipts consisted of over 70 percent of company's total receipts); 104 (agreeing that removing FEC gross receipts from sales factor increases sales factor by approximately 260 percent and that this determination is "simply math").

[142] Trial Tr. 104-05.

[143] Trial Tr. 106.

scheme of assessment whenever the resulting apportionment does not fairly represent the taxpayer's business in this state" and the "very absurdity" of the apportionment result the taxpayer sought "lays a sound basis for the implementation" of the alternative apportionment statute). Section 290.20, subdivision 1 explicitly affords relief "[i]f the methods prescribed by section 290.191 do not fairly reflect all or any part of taxable net income allocable to this state," by alternative methods that may include, without limitation, "excluding any one or more of the factors . . . or some other method." Minn. Stat. § 290.20, subd. 1(2) and (4). The Legislature is presumed to intend that "the entire statute . . . be effective and certain." Minn. Stat. § 645.17(2) (2022). For this reason, the statutory language in dispute is not examined in isolation; rather, all provisions in the statute must be read and interpreted as a whole. *State v. Riggs*, 865 N.W.2d 679, 683 (Minn. 2015). Every statutory word has meaning, and no word is "superfluous, void, or insignificant." *State v. Jorgenson*, 946 N.W.2d 596, 607 (Minn. 2020) (quoting *Allan v. R.D. Offutt Co*., 869 N.W.2d 31, 33 (Minn. 2015)); Minn. Stat. § 645.16 (2022) (requiring construction of every law to "give effect to all its provisions").

Accordingly, in *General Mills II*, where quantitative distortion in income apportioned to California as a result of hedging transactions was substantial, the court excluded the gross receipts from those transactions for purposes of calculating the apportionment factor. Similarly, General Mills's hedging activities produced at most 2 percent of the company's income (and in two of six years operated at a loss) while it generated between 8 and 30 percent of the company's gross receipts. *General Mills II*, 208 Cal.App.4th at 1309-10, 146 Cal.Rptr.3d at 491. In DuPont's case, FEC transactions produced between 1.7 and 4.5 percent of income and generated over 70 percent of gross receipts. Likewise, in *Microsoft*, the court determined that the state met its burden of proof concerning the application of the relief provision when including treasury gross receipts in the

standard formula reduced Microsoft's California income tax by half. *Microsoft*, 39 Cal.App.4th at 771, 139 P.3d at 1182 (treasury activities accounted for approximately 2 percent of business income in the year at issue, but accounted for 73 percent of gross receipts, reducing roughly by roughly half the estimated income attributed to California and warranting application of the relief provision). *See also In re Buffets Holdings, Inc*., 455 B.R. 94, 101 (Bankr. D. Del. 2011), *aff'd*, 483 B.R. 433 (D. Del. 2012) (relief provision warranted where inclusion of treasury receipts reduced debtor's California tax liability by an average of 44 percent over six years).

Although the Commissioner is not required to show that the general apportionment formula "results in a grossly inequitable allocation" of DuPont's taxable net income to Minnesota, *Associated Bank*, 914 N.W.2d at 403, the Commissioner has presented clear, convincing, and substantial evidence that the method prescribed under section 290.191 does not show, to a full degree or extent, all or any part of DuPont's income arising from taxable business activities in Minnesota. *Id*. at 405. FEC transactions constitute an ordinary business activity and are an unquestionably prudent risk management practice, but they play a supportive risk management function: to mitigate cash flow volatility associated with foreign exchange rate fluctuation and to protect the value of DuPont's assets, operations, and cash flows, which was distinct from its other business practices. By DuPont's own account, FEC transactions did not serve an independent profit-oriented purpose. Moreover, including FEC gross receipts in the Minnesota apportionment factor substantially distorts DuPont's income arising from taxable business activities in Minnesota, as it quantitatively distorts total sales, net income, and, ultimately, the apportionment factor by nearly threefold.

B. Alternative apportionment method

Having met his burden to demonstrate by substantial evidence that the general apportionment method does not fairly or accurately reflect all or any part of DuPont's taxable net

income allocable to this state, the Commissioner also bears the same burden to demonstrate that an alternative method fairly reflects DuPont's net income in Minnesota. Minn. Stat. § 290.20, subd. 1; *Associated Bank*, 914 N.W.2d at 405-07.

The Commissioner proposes an alternative method that removes FEC gross receipts from the calculation of the apportionment factor,[144] and substitutes net income from FEC transactions.[145] Because no FEC transactions took place in Minnesota, this alternative only affects everywhere sales.[146] The Commissioner contends that this alternative method recognizes the economic reality of DuPont's FEC activity, which adds only a small amount to its taxable income, while "maintain[ing] a connection between that income and the apportionment factor."[147]

The court agrees that the Commissioner's proposed alternative apportionment method fairly reflects DuPont's net income in Minnesota. Minn. Stat. § 290.20, subd. 1. Ms. McMahon testified that such a method maintains a relationship between the FEC transactions and the sales apportionment factor without "overwhelming the factor" with the FEC activity.[148] In particular, she opined that FEC net income better reflects the economic reality of FEC transactions, which DuPont undertakes as "a simultaneous exchange on the date where the contract matures . . . [t]hat has a net impact and a net result that offsets a change in some underlying position," ultimately to stabilize profits earned from underlying business activities.[149] Although Ms. McMahon acknowledged that FEC transactions are "an important part of making sure that [Dupont is] able

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[144] Stip. ¶ 31; Comm'r's Br. 8-9.

[145] Ex. J16; Comm'r's Br. 8-9, 14-15.

[146] Comm'r's Br. 14-15.

[147] Comm'r's Br. 14-15.

[148] Trial Tr. 42-43.

[149] Trial Tr. 40-41.

to conduct business in foreign jurisdictions where they operate with a different currency, [] it's not something that is driving the demand for [their] products or services."[150] She also testified that DuPont uses this "net" approach in the State of Delaware, where DuPont conducts the majority (if not all) its FEC activity through the NMA Program, and opined that maintaining consistency with such an approach "would more closely accomplish the fair and consistent economic distribution of DuPont's income across different tax jurisdictions . . . ensuring that all of DuPont's domestic income is allocated to one state or another (at least as between Minnesota and Delaware)."[151]

Under similar circumstances concerning the use of hedging functions to protect against commodity price-related risk, the court in *General Mills II* concluded the FTB's alternative apportionment formula, including only the net gains from General Mills's hedging activities, was reasonable and consistent with the requirements of the alternative apportionment statute. *General Mills II*, 208 Cal.App.4th at 1316, 146 Cal.Rptr.3d at 497 (agreeing that including net gains "still gives some representation to the futures trading activity in the sales factor and . . . treats General Mills consistently with the taxpayers in the treasury cases"). *See also Sherwin-Williams*, 989 S.W.2d at 715 (examining the nature of the treasury activities and concluding that such transactions did not "fairly represent" Sherwin-Williams's income connection to the state, warranting inclusion of net income only), and 716 (observing that the laws of Ohio, where Sherwin-Williams engaged in treasury activities, "do not require inclusion of the "gross receipts" in its receipt factor."),

Although DuPont proposes an alternative apportionment method that it contends "includes only those FEC gross receipts that relate to the international transactions" reported by those

[150] Trial Tr. 40-41.

[151] Ex. A, at 24.

subsidiaries included in its Minnesota returns,[152] the court does not agree that this proposed alternative fairly reflects DuPont's net income allocable to Minnesota. The parties stipulate that DuPont's FEC activity is U.S.-based, conducted entirely – or nearly entirely – in the state of Delaware, and the net income from FEC transactions is included in its Form 1120 income.[153] Even though section 290.20, subdivision 1 provides for alternative apportionment methods based on separate accounting, excluding any one or more of the standard apportionment factors, including one or more additional factors; or some other method, DuPont has not explained how treating some Delaware-sited transactions differently than others would fairly reflect DuPont's net income allocable to Minnesota.

Based on the foregoing, the Commissioner has presented clear, convincing, and substantial evidence that its alternative apportionment method, excluding FEC gross receipts from the apportionment factor calculation but including net income from FEC transactions, fairly reflects DuPont's net income in Minnesota. *See Associated Bank*, 914 N.W.2d at 406-07; *General Mills II*, 208 Cal.App.4th at 1314, 146 Cal.Rptr.3d at 495; *see also Microsoft*, 39 Cal.4th at 771, 139 P.3d at 1182 (same; both determining that court lacked discretion to substitute a different method upon a successful showing).

W.S.T.

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[152] Appellant's Br. 10-11; Ex. P1, at 18).

[153] Stip. ⁋⁋ 8-9; Ex. J12, at Response No. 13 (setting forth admitted amounts of FEC net income included in Forms 1120, lines 10 and/or 26, during the years at issue); Ex. J4, at COR7885. Form 1120 income forms the basis for the calculation of Minnesota net income *See* Ex. J1-J3, Form M4I, Line 1, Federal taxable income before NOL deduction and special deductions, from federal Form 1120, line 28.