STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
INFOSYS TECHNOLOGIES LIMITED	:	DETERMINATION DTA NO. 820669
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ended March 31, 2001 and March 31, 2002.	: : :	

Petitioner, Infosys Technologies Limited, 6607 Kaiser Drive, Fremont, California 94555-3608, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended March 31, 2001 and March 31, 2002.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 7, 2006 at 10:30 A.M. and was continued to conclusion on March 8, 2006 at the same time and location, with all briefs to be submitted by August 26, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared by Ernst & Young LLP (Kenneth T. Zemsky, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Jennifer L. Baldwin, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined that for the periods at issue, petitioner was required to include foreign source income in the computation of its entire net income for purposes of the New York State corporation franchise tax.

II. If so, whether equity compels an adjustment to the deficiency since such deficiency distorts petitioner's activities within New York State due to the fact that a substantial portion of petitioner's activities related to servicing New York clients occurs in India.

III. Whether petitioner has sustained its burden of proving that its use of separate accounting properly determined its New York State corporation franchise tax liability.

FINDINGS OF FACT

1. Petitioner, Infosys Technologies Limited ("Infosys"), is a software development and consulting firm; it provides software development and maintenance services to a wide variety of companies around the world. It was incorporated and is headquartered in Bangalore, India. While it provides managed software solutions to clients worldwide, Infosys utilizes an extensive infrastructure based in India to provide these solutions.

2. During the years at issue, Infosys earned approximately 71 percent of its total revenue from clients located in the United States. For the years at issue, Infosys did not have an office in the State of New York,[1] did not maintain a stock of goods, employ capital or own or lease property within the State. Inofosys earned revenue in New York based upon the software development activities carried out by its employees at client locations in the State.[2] In the three

---

[1] During the audit period, Infosys had United States offices in California, Illinois, New Jersey and Massachusetts.

[2] Infosys concedes that "[w]hile small, this presence did create nexus for Article 9-A purposes."

years preceding the audit period, Infosys had some property in the State, primarily office space, which it rented during these years.

3. Infosys provides services in New York and elsewhere through its "Global Delivery Model" which it described in a July 8, 2003 letter to the Division of Taxation ("Division") as follows:

> The Global Delivery Model involves small teams of in-country engineers teamed with much larger "off-shore development centers." When a contract is entered into with a client, a small team of engineers will arrive at the client's site. They will conduct fact-finding regarding the needs of the client, then communicate the results to the much larger team of engineers located at an off-shore development center.
>
> The engineers sited at the client's workplace will coordinate the work on the project at a very high level and liaise with the client as needed. Most work on the project actually happens at an offshore development center. When development is complete, the taxpayer deploys an augmented team of engineers to the client's workplace for a short time to facilitate installation and implementation of the software solution.
>
> The Global Delivery Model allows the taxpayer to take advantage of time-zone differences to produce software significantly faster than would otherwise be possible. The vast majority of the offshore development centers are located in various cities in India. The time zone difference between India and the United States and most of Europe is such that, while client personnel are sleeping in the United States, the taxpayer's engineers are working on the project in India. The presence of small teams of engineers at the client site allows the client and the taxpayer's personnel to constantly monitor the progress of the project, and allows for adjustments of the specifications and timing while the project is ongoing.

4. The Infosys employees who spend time on-site at a client's location are sent from offices in India and they report to the project manager in India on a regular basis. A typical project can take from six to fifteen months to complete and these Infosys employees stay with the client during the entire time. While the skills required to understand the client's needs and requirements are different from those required to develop the applications, Infosys's employees working at the clients' locations are similarly skilled to those in India.

Each of Infosys's applications is custom developed for the particular client and it must "start from scratch" with every client. Design work cannot be carried over from one client to another.

5. Because of the comparative costs of living between the United States and India, wages paid to the Indian professionals are considerably lower (approximately one-tenth) than the wages paid to its employees who are sent to the United States.

6. For the fiscal years ended March 31, 2001 ("the 2000 tax year") and March 31, 2002 ("the 2001 tax year"), Infosys computed its New York State corporation franchise tax liability based upon separate accounting. Included as "Statement No. 5" in its 2000 tax year franchise tax return (form CT-3) was the following statement:

> The Taxpayer is an information technology services company which was incorporated under India law and is headquartered in India. The Taxpayer conducts business activities in numerous worldwide locations, several of which are in the United States, including New York. For purposes of filing its U.S. federal corporate income tax return, the Taxpayer files a form 1120F, U.S. Return of a Foreign Corporation. Form 1120F reports only its U.S. operational income and balance sheet. The Taxpayer has determined that its New York corporate income tax liability would be out of proportion to its New York activities if the Taxpayer were to compute its New York tax liability based on worldwide income, worldwide balance sheet information, and worldwide apportionment figures. In accordance with 20 NYCRR Section 4-6.1(b) and the case of British Land (Maryland), Inc. v. Tax Appeals Tribunal of the State of New York (85 NY2d 139 {1995}), the Taxpayer has determined that its New York corporate income tax liability would be more properly reflected by using the so-called "separate accounting method." Accordingly, the Taxpayer has used this method in computing its New York corporate income tax liability reported on this tax return for the year ending March 31, 2001.

7. For the 2000 tax year, Infosys determined its total revenue from services performed in New York ($9,404,973.00) and then deducted its New York costs ($5,784,178.00) or those costs directly attributable to employees who provided services in New York which included manpower, travel, legal and professional and rates and taxes. Next, Infosys deducted its

allocated direct U.S. expenses ($327,844.00), expenses (branch expenses, salary cost, legal and professional and data communication expenses) which were incurred as a result of its U.S. operations, but not directly attributable to services provided in New York. Finally, Infosys deducted its allocated indirect expenses, overhead ($2,172,841.00) and depreciation ($174,572.00) not directly attributable to services performed in New York, but resulting from its global operations which were determined by a ratio of Infosys's New York revenue to its global revenue. The overhead expenses allocated to New York represented 47.5 percent of Infosys's total overhead expenses allocated to the U.S. ($2,172,841.00/$4,574,710.00) while its New York revenue ($9,404,973.00) equaled only 5.14 percent of its U.S. revenue for the year ($9,404,973.00/$183,031,870.00). Pursuant to Infosys's calculations, the balance, $945,538.00, was its New York entire net income which was reported on its franchise tax return.

8. A similar formula was utilized by Infosys for the 2001 tax year wherein it calculated its New York entire net income for the year to be $1,926,406.00. Per its 2001 Federal income tax return, Infosys's gross receipts earned in the U.S. were approximately $225.2 million. Since its revenues from services performed in New York were approximately $13.7 million, only about 6 percent of its U.S. revenue was from New York.

On its Federal return, listed under "other deductions" was approximately $5.2 million in overhead expenses. On its New York franchise tax return, overhead expenses of approximately $2.1 million, or about 40 percent of total U.S. overhead expenses were allocated against Infosys's New York revenue despite the fact that its New York revenue represented only about 6 percent of its total U.S. revenue for the year.

9. In April 2003, the Division commenced an audit of Infosys for the 2000 and 2001 tax years. By letter dated April 18, 2003, the Division asked Infosys for information and

documentation including Infosys's business activity inside New York, the U.S. and on a worldwide basis. The letter also sought a detailed explanation as to why a worldwide basis for the computation of the corporation's business allocation percentage and alternative business allocation would not be appropriate and why it would be more properly reflected using a separate accounting method. By a letter dated July 8, 2003, Infosys's representative, Ernst & Young (Kenneth T. Zemsky, Esq.) replied to the Division's request for information.

10. After reviewing Infosys's response, the Division determined that the proper filing for Infosys was on a worldwide basis and, therefore, computed its franchise tax liability using the standard apportionment formula. Accordingly, on May 9, 2005, the Division issued a Notice of Deficiency to Infosys asserting the following deficiencies[3]:

Period Ended	Tax/MTA Surcharge	Interest	Total Due
03-31-01	$139,775.00	$40,289.23	$180,264.23
03-31-01	$25,159.00	$7,287.40	$32,446.40
03-31-02	$144,787.00	$30,029.54	$174,816.54
03-31-02	$27,690.00	$5,743.42	$33,433.42
TOTALS	$337,411.00	$83,549.59	$420,960.59

Prior to the issuance of the Notice of Deficiency, on or about November 9, 2004, Infosys, by its representative, executed a consent extending the period of limitation for assessment of franchise taxes whereby it was agreed that such taxes due from Infosys for the period April 1, 2000 through March 31, 2001 could be determined or assessed at any time on or before June 15, 2005.

[3] The first amount listed as "Tax /MTA Surcharge" for each of the years at issue represents corporation franchise tax imposed pursuant to Tax Law § 209 while the second amount for each year represents the temporary metropolitan transportation business tax surcharge imposed pursuant to Tax Law § 209-B.

11. In recomputing Infosys's franchise tax liabilities for 2000 and 2001, the Division rejected Infosys's separate accounting methodology. It accepted Infosys's computation of the apportionment or allocation percentage on a worldwide basis. Since Infosys allocated its receipts based on where the services were performed, the Division made no adjustments to the numerator of Infosys's receipts factor. Therefore, Infosys's New York receipts were accepted as filed. While, subsequent to the issuance of the Notice of Deficiency, Infosys contended that its receipts should be determined based upon the location of its employees or by a head count of the number of employees located in New York, the Division rejected this contention because it believed that a head count would not properly reflect a receipts factor since in most companies, there are cost centers with employees who do not generate any revenue.

Infosys also contended to the Division that its New York receipts should be determined based upon time spent in and out of New York. This, too, was rejected by the Division because, in its opinion, the receipts factor is intended to represent the marketplace and looking at manhours or the number of people in the State erroneously places the same value on every employee and every service and thereby leaves out what a customer is willing to pay for the service. It must be noted that the Division's auditor admitted that no analysis was performed which would value Infosys's services within or without New York.

12. For years prior to the audit period, Infosys filed its returns on a worldwide basis. For tax years ended March 31, 1998, March 31, 1999 and March 31, 2000, Infosys's receipts factor was 7.2294 percent, 3.9311 percent and 4.0806 percent, respectively. For these years, the Division accepted these receipts factors as filed.

13. For the 2000 tax year (fiscal year ended March 31, 2001), the Division computed Infosys's New York State factors and Business Allocation Percentage ("BAP") as follows:

	WORLDWIDE[4]	NEW YORK STATE[5]	NYS FACTOR
PROPERTY	$131,338,468.00	-0-	0.0%
SALES/RECEIPTS	$428,214,414.00	$9,404,973.00	2.1963%
PAYROLL	$154,974,846.00	$3,620,936.00	2.3365%

By adding together the property factor, the receipts factor twice[6] and the payroll factor (0.0% + 2.1963% + 2.1963% + 2.3365% = 6.7291%) and dividing the sum by four, a BAP of 1.6823% was computed by the Division.

For the 2001 tax year (fiscal year ended March 31, 2002), the Division, again utilizing "worldwide" figures from information supplied by Infosys and "New York State" figures from its franchise tax returns, computed Infosys's New York State factors and BAP as follows:

	WORLDWIDE	NEW YORK STATE	NYS FACTOR
PROPERTY	$210,419,233.00	-0-	0.0%
SALES/RECEIPTS	$559,162,083.00	$13,736,028.00	2.4565%
PAYROLL	$226,728,796.00	$7,123,346.00	3.1418%

By adding together the property factor, the receipts factor twice and the payroll factor (0.0% + 2.4565% + 2.4565% + 3.1418% = 8.549%) and dividing the sum by four, a BAP of 2.0137% was computed.

14. V. Balakrishnan, who joined Infosys in 1991, is its senior vice president and secretary. Because of its global delivery model, Infosys has a competitive advantage over most of its

[4] These amounts were derived from annual financial statements provided to the Division by Infosys.

[5] These amounts were taken from Infosys's New York State franchise tax return (lines 151 and 158).

[6] Pursuant to Tax Law § 210(3)(a) and 20 NYCRR 4-2.2(b), the receipts factor is to be added twice, and to calculate the BAP, the sum of the property, receipts (twice) and payroll factors are divided by four.

competitors in the U.S. market.[7] Pursuant to the global delivery model, most of Infosys's software development takes place in India. Infosys operates globally through branch operations. It has marketing offices in the U.S., Europe and parts of Asia.

Whenever Infosys is hired on a project, some team members travel from India, go to the client's location to take the specifications, get the sign-off and do the knowledge transfer. Some of the team members return to India. At least 70 to 75 percent of the actual development of the software takes place in India. By means of dedicated data communications lines, software is downloaded to the client's location. A project typically involves 20 to 25 people, 5 or 6 of whom travel to the client's location to service the client. After obtaining the specifications of the project, three (of the five or six who traveled to the client's location) will then travel back to India to develop the applications. After the application development is complete, three or four people from the Indian development center who were part of the project travel back to the client's location, hand over the application, get the sign-off and return to India. Out of the total of 25 to 30 people who are involved in the project, 2 or 3 will stay at the client's location until the project is completed.

There are two kinds of services performed by Infosys, to wit, one is time and material while the other is fixed priced. These are specified in the contract with the client. For time and material, Infosys bills the client based on effort spent on a monthly basis. The fixed price billed to the client is based on milestones achieved for any software development. There may be three or four milestones during the project period. Higher rates are charged by Infosys for work performed in the U.S.

---

[7] Mr. Balakrishnan stated that the global delivery model is not unique to Infosys but is utilized by many of its competitors in India.

A “core team” is placed at the client’s location to coordinate the job, talk to the client, get the correct specifications and transfer this knowledge to a development team in India. The people in India are highly skilled; they are recruited from the top engineering colleges in India.

The cost of an employee who works outside India is approximately $80,000.00 per year while the cost of an employee located in India is approximately $7,800.00 per year, which is due to the considerable difference in the cost of living.

According to Mr. Balakrishnan, all of the risk is taken by the corporate headquarters in India. Outside India, Infosys operates on a branch operation basis where the branch takes no risk. All of the project managers are in India. During the years at issue, there were no project managers in New York. While sales personnel are sometimes located outside India on a permanent basis, they do only sales, no development.

During the audit period, Infosys allocated revenue to its U.S. branches based on services rendered. Income is sourced based on the actual efforts spent with the client, i.e., revenues are treated as U.S. source income if work is performed in the U.S.

15. Murali Krishna is Infosys’s vice president of systems integration practice and is based in Lisle, Illinois, a suburb of Chicago. He supervises people worldwide and described himself as “the executive face for Infosys in the U.S.” Infosys does no advertising; most of its leads are through “cold calling.” During the years at issue, sales personnel working out of the New Jersey office covered New York.

For a new client, a master services agreement is entered into whereby everything including rates is worked into a contract which then goes through a cycle of approval with Infosys personnel in India. Sales personnel cannot bind the company; all orders must be approved in India. Once that documentation is completed, employees from India come to the client’s location to do requirements gathering. Then the high level design begins. While the detail design is being worked on in India, the on-site team works at the client's location in a coordination role. A typical project for Infosys would last from 6 to 15 months.

For a typical project, the fact-gathering, which is the first step, occurs both at the client's place of business and in India, often by means of audio or video conferencing. The next step, the design activity, takes place entirely at the development centers in India. The prototype phase also takes place in India. The development, testing and integration happens at the development centers in India. Finally, the implementation stage takes place both at the client's location and with a supporting team located in India.

The person who has direct responsibility for a particular project is the project manager who is located in the development center in India. Mr. Krishna described the people in India as the creative minds while those at the client's site were described as client liaisons.

During the years at issue, Infosys did not have an office in New York but it now has an office in Manhattan. During the audit period, Infosys had at least 15 projects in New York. Infosys's New York clients include companies such as Ralph Lauren and J.P. Morgan.

16. S. Krishnan is the head of global taxation for Infosys and is based in Bangalore, India. He is responsible for all tax plans around the world, operating in 30 jurisdictions. While Mr. Krishnan does not prepare the New York State tax returns for Infosys, he has a team which is responsible for the preparation of the returns. Mr. Krishnan's job is to ensure that the team properly allocated revenue and paid the correct amount of tax to the various jurisdictions.

Infosys tracks its employees to determine where services are provided. Infosys has an on-site and an offshore rate and thereby knows what to charge its customers.

Employees of Infosys are primarily based in India so they receive salaries based on their work in India. When they travel outside India, they are compensated for the costs incurred in those locations, which is referred to as a "minimum overseas allowance." The compensation received by employees while in the U.S. is almost ten times what is paid to the employees in India. Mr. Krishnan prepared the following chart which compared wages, by salary grade, paid to an employee in India and to an employee while on assignment to New York:

Grade	India Salary + NY allowance	Salary in India
I	$10,618	$2,132
II	$9,435	$1,839
III	$8,728	$1,455
IV	$7,760	$1,158
V	$6,427	$778
VI	$5,872	$574
VII	$5,575	$491

Pursuant to Infosys's annual report, for the 2000 tax year, a total of 94,419 "person-months"[8] were billed by Infosys which represents the amount of time, on a per month basis, that its employees worked for clients of Infosys. This amount included on-site, offshore, nonbillable and training. Of the 57,101 billable person-months, 19,425 or 34% were on-site and 37,676 or 66% were offshore. In the following year (the 2001 tax year), of a total of 124,532 person-months, a total of 78,645 person-months were billed for the year. Of the 78,645 billable person-months, 54,472 person-months or 69.30 percent of Infosys's work was done offshore (in India) and 24,173 or 30.70 percent was performed on-site (at the clients' locations). Despite these figures, more income was derived by Infosys from on-site work during the audit period. Because

[8] By multiplying person-months by 30, the number of "person-days" may be calculated.

rates charged to clients for work done in India were considerably lower than for work done on-site and because more work was done in India than on-site, clients paid less and were, therefore, happy with the global delivery model of Infosys.

17. In order to determine whether taxes paid by Infosys in the U.S. as a jurisdiction were in the proper amounts, Infosys engaged the firm of PricewaterhouseCoopers ("PwC"). PwC studied Infosys's branch operations in the U.S. and thereafter recommended the most appropriate method for reporting branch income for U.S. income tax reporting purposes for the tax year ended March 31, 2003. The study undertaken by PwC was based on financial data from the tax years at issue herein.

Prior to the PwC report, Infosys filed in each jurisdiction based upon a net income basis, i.e., it took the revenue from the jurisdiction where the employees were based and deducted the costs associated therewith. PwC advised Infosys that it did not necessarily have to file in this manner. Instead, it could follow what is called a "cost plus model" using a range of between three and eight percent. Pursuant to this model, Infosys decided that it could file its returns based upon total cost in the U.S. plus seven percent, and it has filed its Federal returns in this manner since 2003. It must be noted that the PwC report did not compute the proper amount of tax which Infosys should pay for purposes of the New York State corporation franchise tax.

As a result of this new filing system, Infosys has paid a lower amount of taxes than paid previously. The PwC report captures the fact that Infosys takes a lot more risk in India and takes into consideration the work of its employees on-site and offshore.

18. For the years at issue (tax years 2000 and 2001), Infosys filed its Federal tax returns based on a net income method. In simplistic terms, for Federal purposes, revenues from work performed in the U.S. were listed on the Federal returns as taxable revenues. Thereafter, it filed

its Federal returns utilizing the cost plus seven percent method. However, for purposes of its New York franchise tax returns, it filed using a separate accounting methodology. The decision to utilize this separate accounting methodology was made by Mr. Krishnan and his management team after seeking and receiving advice from Ernst & Young, the accounting firm that prepared Infosys's New York State franchise tax returns for the years at issue.

19. Sunil Dhareshwar's duties with Infosys are to ensure that Infosys is complying with tax regulations in the U.S., Canada and countries in the Asia Pacific region. During the 2000 tax year (ended March 31, 2001), Infosys had 9,831 employees (8,656 were software professionals with 1,175 support personnel); for the 2001 tax year (ended March 31, 2002), Infosys had 10,738 employees (9,405 software professionals and 1,333 support). The number of employees has increased sharply each year. In the tax year ended March 31, 2005, Infosys employed 32,178 people, 30,147 of whom were software professionals.

Infosys prepared a summary of its employees, on a month-by-month basis, in New York for the period April 2001 to March 2002. This summary was derived from Infosys's payroll records. Based upon this summary, it was determined that for this period, Infosys had "total person days" of employees in New York of 34,325. On average, Infosys had approximately 100 employees per month in New York during this period. Mr. Dhareshwar indicated that the figures for the previous year were comparable.

20. Mr. Dhareshwar analyzed the Division's audit results and reached the following conclusions:

a. The Division's results attribute Infosys's profits from India to New York. Since the amount of profit in India is significantly higher than that in New York, the audit results are skewed; and

b. The Division's results translate into a profit percentage of nearly 25 percent. Mr. Dhareshwar indicated that based upon Infosys's own economic evaluation, the profit percentage should be in the range of between three to eight percent.

21. The PwC report indicated to Infosys that New York State taxes seemed to be significantly higher when compared to the rest of the states to which Infosys was paying taxes and that the taxable income computed for each state should, when added together, equal taxable income for Federal purposes.

SUMMARY OF THE PARTIES'S POSITIONS

22. The position of Infosys may be summarized as follows:

a. Tax Law § 208(9) does not authorize taxation of income that is not included in Federal taxable income or in modifications to Federal taxable income under Tax Law § 208(9)(a) and (b). Inofosys contends that paragraph (c) of section 208(9), which states that "[e]ntire net income shall include income within and without the United States" cannot create a new definition of entire net income that is contained in the opening paragraph ("preamble") of section 208(9) and the modification paragraphs ([a] and [b]) which follow. Infosys states that paragraph (c) clarifies the definition of entire net income, i.e., it states that what has been included in reported Federal taxable income may not be excluded from New York entire net income merely because of its source. Infosys asserts that the other paragraphs within section 208(9) do not purport to redefine entire net income but instead clarify or amplify provisions already contained therein. Therefore paragraph (c) should be no different, i.e., it should not be an entirely new starting point for computing entire net income.

b. If assuming, *arguendo*, that worldwide net income is the starting point for determining entire net income for purposes of New York State corporation franchise tax, Infosys's computation of its tax liability is the more accurate methodology when compared to the results of the audit conducted by the Division; and

c. If the Division's application of the worldwide net income base of taxation and its calculation of the business allocation percentage are correct, then equity compels an adjustment to the deficiencies computed by the Division. The Division's methodology does not account for where services were performed nor does it account for the value of services rendered. Infosys contends that the distortion in this methodology could be corrected in three ways: (1) by allowing separate accounting as a measure of its activities within the State; (2) by adjusting the business allocation factors; or (3) by removing worldwide income as petitioner's tax base.

23. In response, the Division asserts the following:

a. Pursuant to the Tax Law and the regulations promulgated thereunder, Infosys is required to include foreign (non-U.S.) source income in the computation of its entire net income for purposes of the New York State corporation franchise tax;

b. The Division's regulation (20 NYCRR 3-2.3[a][9]) is a reasonable and rational interpretation of Tax Law § 208(9);

c. Infosys has not proven that its use of separate accounting is an appropriate means of determining its franchise tax liability; and

d. Infosys's equity argument must fail because to invoke the Division's discretionary authority to adjust Infosys's business allocation percentage due to the difference between wages in India and in New York results in an unfair allocation of its income to New York.

CONCLUSIONS OF LAW

A. Tax Law § 208(9) provides, in pertinent part, as follows:

> The term "entire net income"means total net income from all sources, which shall be presumably the same as the entire taxable income (but not alternative minimum taxable income),
>
> (i) which the taxpayer is required to report to the United States treasury department, or
>
> * * *
>
> except as hereinafter provided, and subject to any modification required by paragraphs (d) and (e) of subdivision three of section two hundred ten of this article.

Paragraph (a) of Tax Law § 208(9) lists a number of items (not relevant to the present matter) which are not included in entire net income while paragraph (b) of the statute states that "[e]ntire net income shall be determined without the exclusion, deduction or credit of" certain items (again not relevant to this proceeding).

B. Tax Law § 208(9)(c) provides that "[e]ntire net income shall include income within and without the United States."

The Division's regulation, 20 NYCRR 3-2.3, provides:

> (a) In computing entire net income, Federal taxable income must be adjusted by adding to it:
>
> * * *
>
> (9) in the case of a taxpayer organized outside the United States, all income from sources within and without the United States less all allowable deductions attributable thereto, which were not taken into account in computing Federal taxable income.

C. For Federal tax purposes, domestic corporations are, in general, taxed on all income, whether from sources within or without the U.S. (***see***, IRC §§ 861, 862). Pursuant to IRC § 901, subject to certain limitations, a foreign tax credit for income taxes paid to foreign countries is provided to reduce or eliminate the U.S. tax owed on such income.

Since the computation of entire net income for New York State corporation franchise tax purposes would thereby include income within and without the U.S. for a domestic corporation, it must be determined whether paragraph (c) of Tax Law § 208(9) serves to subject a foreign corporation's worldwide income, i.e., its income from sources within and without the United States to the State corporation franchise tax.

Infosys contends that Tax Law § 208(9) does not authorize the taxation of income that is not included in Federal taxable income or in modifications to Federal taxable income under section 208(9)(a) and (b). Infosys argues that the opening paragraph (or "preamble") to section 208(9) states that entire net income is to be determined by starting with Federal taxable income to which modifications set forth in section 208(9)(a) and (b) are then applied. It further argues that Federal taxable income is the mandatory starting point for the computation of entire net income for New York State franchise tax and that paragraph (c) of section 208(9) is not an additional add-back. In support of its position that paragraph (c) is not an additional add-back provision, Infosys points to the fact that it is separate and apart from the other add-back provision, paragraph (b). In summary, Infosys asserts that entire net income includes Federal taxable income (as stated in the preamble of section 208[9]) minus the subtraction modifications in paragraph (a) of section 208(9) and plus the add-back modifications in paragraph (b) of section 208(9).

The Division, on the other hand, contends that paragraph (c) is a further modification of section 208(9). The Division asserts that there is no indication in the statute (section 208[9]) which would limit the modification of Federal taxable income to just the add-back provisions of paragraph (a) and the subtraction provisions of paragraph (b). In furtherance of its position, the Division states that in addition to paragraph (c), there are other paragraphs within section 208(9) which modify Federal taxable income. As examples, the Division points to paragraph (g) which contains a subtraction provision for industrial waste treatment facilities and air pollution control facilities and to paragraph (m) which contains an add-back provision for emerging technology companies. Paragraph (c), the Division states, taxes alien corporations on entire worldwide income since foreign source income is already included in a domestic corporation's tax base by virtue of IRC § 61(a) which defines Federal gross income.

D. Infosys's brief acknowledges that the Division's regulation (20 NYCRR 3-2.3[a][9]) supports its inclusion of "all income from sources within and without the United States" (foreign source income). However, it maintains that the statute (Tax Law § 208[9]) does not authorize such an inclusion.

Clearly, the Division of Tax Appeals has the authority to rule on the validity of regulations promulgated by the Division of Taxation (***see***, Tax Law § 2006[7]). If determined to be reasonable, such regulations have the force and effect of law (***see***, ***Molina v. Games Management Services***, 58 NY2d 523, 462 NYS2d 615). In general, the Division's regulations must be upheld unless shown to be irrational and inconsistent with the statute (***Matter of Slattery Assocs. v. Tully***, 79 AD2d 761, 434 NYS2d 788 ***affd*** 54 NY2d 711, 442 NYS2d 978) or erroneous (***Matter of Koner v. Procaccino***, 39 NY2d 258, 383 NYS2d 295). Since the regulation indisputably would subject Infosys's foreign source income to the New York State corporation franchise tax by means of its inclusion in the computation of petitioner's entire net income, it is necessary to ascertain whether the regulation is in conflict with the applicable statute. In order to do so, it must be determined whether paragraph (c) of Tax Law § 208(9) is an additional add-back.

E. Infosys asserts that its position is sustainable when the history of Tax Law § 208(9) is examined. Former Article 9-A of the Tax Law was enacted by chapter 726 of the Laws of 1917 and section 209, contained within this article, defined "net income" as that "upon which income such corporation is required to pay a tax to the United States." (L 1917, ch 726, § 1.) Chapter 276 of the Laws of 1918 defined "net income" as "presumably the same as the income upon which such corporation is required to pay a tax to the United States."

"Net income" was later changed to "entire net income" by an amendment to former section 209 (L 1919, ch 628, § 3). In 1920, an amendment to former section 209 imposed the tax on the foreign source income of foreign or alien corporations by the following language:

> except that the entire net income of a corporation not organized under the laws of any state within the United States which shall be taken as the basis of computation by the tax commission shall be the entire net income in fact rather than the amount earned in the United States or the amount returned to the United States treasury department (L1920, ch 640, § 1).

Former Article 9-A included a section 208 which contained "definitions" and section 209 which imposed the State franchise tax. In their briefs, the parties are in agreement that this provision (and subsequent amendments) clearly taxed foreign source income of foreign or alien corporations.

The add-back provisions set forth in paragraph (b) of section 208(9) first appeared in the statute by means of amendments made in 1931. Subsection 3 of section 208 of the Tax Law (entitled "Definitions") defined "entire net income" as follows:

> The term "entire net income" means total net income from all sources, without deduction of (1) items or sums excluded from the definition of gross income in use by any other taxing authority, (2) dividends received on stocks, (3) taxes paid to the government of the United States on either

> profits or net income, (4) any specific amount allowed by any other taxing authority, or (5) losses sustained by the corporation in other fiscal or calendar years, whether deducted by the government of the United States or not (L 1931, ch 515, § 1).

When these add-backs were inserted into section 208(9) (as a new subsection 3), they were separately codified from the provision in former section 209 which required foreign or alien corporations to include foreign source income in its computation of entire net income which was not part of U.S. source income.

In 1944, a major revision of the Tax Law occurred and the parties herein are in conflict as to the effect of this revision. Chapter 415 of the Laws of 1944 repealed Article 9-A of the Tax Law and, in its place, added a new Article 9-A. The new section 208 set forth a number of definitions, including subdivision 9 which defined "entire net income" to mean "total net income from all sources, which shall be presumably the same as the entire net income which the taxpayer is required to report to the United States treasury department, except as hereinafter provided." Paragraphs (a) and (b) contained subtraction modifications and add-back modifications similar to those in the present statute. A new paragraph (c) was added to provide that "[e]ntire net income shall include income within and without the United States." This language is identical to the language currently in paragraph (c) of section 208(9).

In its brief, the Division refers to the recommendations contained in a Report to Governor Dewey, dated November 12, 1943, submitted by the State Tax Commission which informed the Governor of the results of a survey relating to the provisions of former Article 9-A and changes recommended for the new Article 9-A (***see***, Governor's Bill Jacket, L 1944, ch 415). The Division argues that the changes cited in the Report do not include removing the provision in former section 209 which taxed alien corporations on entire net income from sources within and without the United States, and there is no recommendation therein to effectuate such a change.

Since, the Division states, there is no mention of a change in the manner of taxing alien corporations and because such an important and far-reaching change would have been mentioned, it must be assumed that no such change occurred.

Although the Division's argument utilizing the Governor's Bill Jacket is not particularly persuasive, a review of the legislative history of sections 208 and 209 (from 1920 through the present) leads to the unmistakable conclusion that the Legislature intended to and did, in fact, impose the New York State corporation franchise tax on the foreign source income of foreign or alien corporations. Some minor changes in language were made over the years, but there can be little doubt of the legislative intent. While it is true, as Infosys contends, that the 1944 repeal of the former Article 9-A was "a major revision of the tax code," it is incorrect when it states that "[i]n so doing, it [the Legislature] removed this (and any) version of explicit taxing power upon foreign source income not included in federal taxable income." (Petitioner's brief, p. 18). Perhaps moving the language that "[e]ntire net income shall include income within and without the United States" to a separate paragraph caused some confusion to taxpayers such as petitioner; however, at no time since the introduction of the original language in 1920 has there been a lapse in New York's taxation of this foreign source income.

In addition to statutory language, the regulations of the Division have left no doubt as to the taxability of foreign source income. Former regulation section 3.11, in effect prior to the current regulation (20 NYCRR 3-2.3 [a][9] [which, with some minor amendment, was originally filed August 31, 1976]), provided as follows:

> a. Entire net income means total net income from all sources, and is presumed to be the same as the taxable income which the taxpayer is required to report to the United States Treasury Department for purposes of the Federal income tax imposed by the 1954 Internal Revenue Code . . .

> b. Federal "taxable income" is the starting point in the computation of entire net income.
>
> * * *
>
> After determination of Federal taxable income, it must be adjusted as follows:
>
> A. Add to Federal taxable income:
>
> * * *
>
> (7) In the case of a taxpayer organized outside the United States, all income from sources outside the United States, less all allowable deductions attributable thereto, which were not taken into account in computing Federal taxable income *(Monatt's New York State Tax Atlas*, 1964, ¶ 37.1801)

F. "As a general matter courts should defer to the interpretation given a statute by the agency charged with its enforcement if the interpretation is neither irrational, unreasonable, nor inconsistent with the governing statute." (***Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman***, 57 NY2d 588, 597, 457 NYS2d 466, 470.)

In the ***Matter of Reuters Limited v. Tax Appeals Tribunal*** (82 NY2d 112, 115, 603 NYS2d 795, 797), the Court of Appeals affirmed the Appellate Division which had confirmed a 1991 determination of the Tax Appeals Tribunal which had calculated a British corporation's franchise tax on the basis of a worldwide net income apportionment method. The Court noted that in computing the corporation franchise tax of a multinational international company doing business in New York, the first step is to calculate a business allocation percentage and "[t]he corporation's worldwide business income is then multiplied by the business allocation percentage to arrive at the entire net income base . . . ." In ***Reuters Limited*** (***supra***), the Tribunal affirmed the Administrative Law Judge who sustained the computations of the Division. Clearly, therefore, worldwide or foreign source income has long been found to be subject to the franchise tax by the agencies (the Division of Taxation, the Division of Tax Appeals and the Tax Appeals Tribunal) charged with interpreting the provisions of the Tax Law.

Even in a situation where a statutory provision is somewhat ambiguous, if the regulation interpreting the statute does not run counter to the clear wording of the statutory provision, judicial review is limited to whether the interpretation embodied in the regulation was irrational or unreasonable (***Matter of Howard Johnson Co. v. State Tax Commn.***, 105 AD2d 948, 481 NYS2d 909).

Since 1920, the Tax Law has consistently held the foreign source income of a foreign or alien corporation to be subject to the New York State corporation franchise tax. It is clear that a regulation existed for at least 36 years prior to the years at issue in this proceeding which not only does not run counter to the statute but states, in no uncertain terms, that all income of a corporation organized outside the United States, from sources both within and without the United States, is to be included for purposes of the tax imposed by Article 9-A of the Tax Law.

G. Infosys insists that the opening paragraph (or "preamble") to section 208(9) states that entire net income is to be determined by starting with Federal taxable income to which modifications set forth in section 208(9)(a) and (b) are then applied. It maintains that Federal taxable income is the mandatory starting point for the computation of entire net income for New York State franchise tax and that paragraph (c) of section 208(9) is not an additional add-back since it is separate and apart from the other add-back provision, paragraph (b). This position is without merit.

At the end of the preamble (***see***, Conclusion of Law "A") is language which states that the term "entire net income" means the entire net taxable income which the taxpayer is required to report to the U.S. Treasury Department, i.e., Federal taxable income "*except as hereinafter* *provided and"* (emphasis added) subject to certain modifications required by section 210(3)(d) and (e). One of the provisions which is "hereinafter provided" is paragraph (c) which states with all due clarity that "[e]ntire net income shall include income within and without the United States." The modifications to Federal taxable income are not limited solely, as petitioner contends, to the subtraction provision of paragraph (a) and the add-back provision of paragraph (b). There are a number of other modifications within section 208(9), some of which apply to a specific type of corporation (such as a foreign air carrier or qualified public utility) and some which apply to all corporations.

Accordingly, despite petitioner's arguments to the contrary, it is hereby concluded that pursuant to the provisions of Tax Law § 208(9)(c) and 20 NYCRR 3-2.3(a), the foreign source income of an alien or foreign corporation was properly held by the Division to be subject to the New York State corporation franchise tax imposed pursuant to Article 9-A of the Tax Law.

H. Having determined that Inofosys was required to include foreign source income in the computation of its entire net income for purposes of the New York State corporation franchise tax, the issue which now must be addressed is whether equity compels an adjustment to the deficiency asserted by the Division. Infosys contends that such an adjustment is warranted because so many of its activities related to servicing New York customers occur in India (the vast majority of its employees are located in India) thereby distorting its activities within the State. According to petitioner's data for the 2001 tax year, its gross profit from New York activities is 41.73 percent while its gross profit from offshore (India) is 86.78 percent. Because of the substantial wage and cost structure differential inherent in its Global Delivery Model, Infosys asserts that the Division's deficiency results in a gross distortion since the Division did not consider where the services were performed, the value of services performed by location and the costs of performance associated with services performed and revenues earned.

Infosys states that this distortion can be corrected in three ways: (1) remove worldwide income as the tax base (this has already been considered and has been rejected hereinabove); (2) by adjusting Infosys's business allocation factors; or (3) by allowing separate accounting as a measure of petitioner's activities within the State.

I. Infosys included a statement (Statement No. 5) with its 2000 form CT-3 (General Business Corporation Franchise Tax Return) that "[t]he Taxpayer has determined that its New York corporate income tax liability would be out of proportion to its New York activities if the Taxpayer were to compute its New York tax liability based on worldwide income . . . ." The statement then goes on to say that "[i]n accordance with 20 NYCRR Section 4-6.1(b) and the case of British Land (Maryland) v. Tax Appeals Tribunal of the State of New York (85 NY2d 139 {1995}), the Taxpayer has determined that its New York corporate income tax liability would be more properly reflected by using the so-called "separate accounting method."

It must first be noted that Infosys, while citing to the provisions of 20 NYCRR 4-6.1(b), has failed to comply with its provisions. This regulation permits the Commissioner of Taxation and Finance, in his or her discretion, to adjust a taxpayer's business allocation percentage to "more accurately reflect the business activity within New York State." However, before such an adjustment may be made by the Commissioner, the taxpayer must comply with the provisions of paragraph (c) of the regulation. This paragraph states, unequivocally, that the taxpayer may not vary the statutory business allocation percentage "without the prior consent of the commissioner." Paragraph (c) also states that a taxpayer making a request for an adjustment "must file its report and compute its tax in accordance with the statutory formulas" as well as set forth full information and a computation of tax under the taxpayer's proposed method.

Infosys did not compute its tax liabilities in accordance with the statutory formulas nor did it obtain the prior consent of the Commissioner. Therefore, the discretionary adjustment which Infosys sought was properly denied by the Division.

It must also be noted that the issue in ***Matter of British Land (Md.) v. Tax Appeals Tribunal*** (85 NY2d 139, 623 NYS2d 772) was whether the sale of commercial property in another state by a nondomiciliary corporation was properly subject to New York State corporation franchise tax on about 64% of the corporation's gain from that sale, an issue quite unlike anything involved in the present matter. However, in ***British Land***, the Court of Appeals held that the New York statutory formula was fair on its face and then noted that a petitioner must meet its heavy burden to show, by clear and cogent evidence, that the application of the New York statutory formula attributes New York income to petitioner out of all proportion to the business transacted by it in New York. It must, therefore, be determined whether Infosys has met "its heavy burden."

J. Since it has been determined that Tax Law § 208(9)(c) and 20 NYCRR 3-2.3(a) require the inclusion of petitioner's foreign source (worldwide) income in computing its entire net income for purposes of the New York State corporation franchise tax, it is clear that petitioner's separate accounting method is both flawed and contrary to law. Therefore, since removing worldwide income and allowing separate accounting have been rejected hereinabove, the only "remedy" left for petitioner is an adjustment to its business allocation factors.

K. For the years at issue, petitioner was subject to New York's corporation franchise tax which was computed upon the portion of its entire net income allocable to New York. This allocable portion is determined by multiplying petitioner's business income by its BAP. The BAP is based on three factors: property, receipts, and payroll. Since it is agreed by and between the parties that Infosys owned no real or tangible personal property in New York during the audit period, it will only be necessary to consider the receipts and payroll factors herein.

Tax Law § 210(3)(a) provides for calculating the receipts and payroll factors (those at issue herein) as follows:

> (2) ascertaining the percentage which the receipts of the taxpayer, computed on the cash or accrual basis according to the method of accounting used in the computation of its entire net income, arising during such period from
>
> (A) sales of its tangible personal property where shipments are made to points within this state,
>
> (B) services performed within the state . . . ,
>
> (C) rentals from property situated, and royalties from the use of patents or copyrights, within the state, . . . and
>
> (D) all other business receipts earned within the state, bear to the total amount of the taxpayer's receipts, similarly computed, arising during such period from all sales of its tangible personal property, services, rentals, royalties, . . . whether within or without the state; . . .
>
> (3) ascertaining the percentage of the total wages, salaries and other personal service compensation, similarly computed, during such period of employees within the state, except general executive officers, to the total wages, salaries and other personal service compensation, similarly computed, during such period of all the taxpayer's employees within and without the state, except general executive officers.

The corresponding regulation, 20 NYCRR 4-2.2 provides, in relevant part, as follows:

> (a) Except for corporations principally engaged in the conduct of aviation or in the conduct of a railroad or trucking business, the taxpayer's business allocation percentage is generally computed on the basis of a formula consisting of three factors. The three factors, expressed as percentages, are:

(1) real and tangible personal property within and without New York State, including real and tangible personal property rented to the taxpayer (Subpart 4-3 of this Part);

(2) business receipts within and without New York State (Subpart 4-4 of this Part); and

(3) payroll within and without New York State (Subpart 4-5 of this Part).

(b) The business allocation percentage is computed by (1) adding the percentages allocated to New York State during the period covered by the report of the taxpayer's real and tangible personal property factor, business receipts factor, payroll factor and an additional factor equal to the business receipts factor, and (2) dividing the total by four. If either the property or payroll factor is missing, the three remaining factors are added and the sum is divided by three, and if the property factor and payroll factor are both missing, the receipts factor is the business allocation percentage. A factor is not missing merely because its numerator is zero, but a factor is missing if both its numerator and denominator are zero.

L. Specifically relating to the receipts factor, 20 NYCRR 4-4.1 (b) provides, in part, as follows:

All business receipts for the period covered by the report, computed on a cash or accrual basis according to the method of accounting used in the computation of its entire net income, must be taken into account. The following business receipts are allocable to New York State:

(1) 100 percent of receipts from sales of tangible personal property where shipments are made to points within New York State;

(2) 100 percent of receipts from services performed in New York State;

20 NYCRR 4-4.3 applies to receipts from compensation for services and provides:

(a) The receipts from services performed in New York State are allocable to New York State. All receipts from such services are allocated to New York State, whether the services were performed by employees, agents or subcontractors of the taxpayer, or by any other persons. It is immaterial where such receipts are payable or where they are actually received.

While Tax Law § 208(11) provides a definition of "tangible personal property," there is no mention of computer software. Therefore, while not part of Article 9-A, it would be appropriate to examine the provisions of another section of the Tax Law, Tax Law § 1101(b)(6), which defines "tangible personal property" to include "pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser." Tax Law § 1115(a)(28) exempts from sales tax (which is imposed upon the receipts from every retail sale of tangible personal property) "[c]omputer software designed and developed by the author or creator to the specifications of a specific purchaser." Since it has been found that each of Infosys's applications is custom developed for the particular client and must be started from scratch with every client (***see***, Finding of Fact "4"), it must be concluded that Infosys is primarily a service provider and not a seller of tangible personal property.

Because 20 NYCRR 4-4.3(a) states that the receipts from services performed in New York are allocable to New York, an inquiry must be made, as petitioner suggests, into its records which detail the location of Infosys's employees by job site by month.

S. Krishnan, head of global taxation for Infosys, indicated that because Infosys has an on-site (at the work site of the client outside India) and offshore (work performed in India) rate of compensation of its employees, the company has various mechanisms (most notably salary records) with which to track the whereabouts of the employees. Pursuant to Infosys's annual report, for the 2000 tax year, a total of 57,101 "person-months" were billed by Infosys which represents the amount of time, on a per month basis, that its employees worked for clients of Infosys. Of the 57,101 person-months, 19,425 or 34% were on-site and 37,676 or 66% were offshore.

Sunil Dhareshwar, who was assigned the duty of ensuring that Infosys complied with tax regulations in the U.S., Canada and countries in the Asia Pacific region, testified, utilizing a summary prepared by Infosys relating to its employees in New York during the period April 2001 to March 2002 (the 2001 tax year which is the second of the two tax years at issue herein). Pursuant to this summary, Infosys determined that its employees spent 34,325 person-days in New York. As indicated in Infosys's annual report (***see***, Finding of Fact "16"), the total person-months for the 2001 tax year was 124,532. By multiplying 124,532 by 30, total person-days are calculated to be 3,735,960. Dividing New York person-days by total person-days (34,325 ÷ 3,735,960) results in a New York employee percentage of .92%. This .92% is the amount which petitioner, in its brief, contends should be its receipts factor.

Petitioner's contention is without merit. This is because the .92% calculation, as it pertains to the receipts factor, is flawed in two ways. First, if this calculation warrants any adjustment at all, it is to the payroll factor, not the receipts factor of the BAP. The .92% figure relates to the location of Infosys's employees which were derived from payroll figures and does not pertain to sales or receipts. Moreover, since the actual receipts (New York versus worldwide) were derived from petitioner's own figures (financial statements and tax returns), it must be found that no adjustment to the receipts factor is warranted. However, it does appear that an adjustment must be made to petitioner's payroll factor.

M. Specifically relating to the payroll factor, 20 NYCRR 4-5.1 states, in relevant part, as follows:

> (d) Employees within New York State include all employees regularly connected with or working out of an office of place of business of the taxpayer within New York State, irrespective of where the services of such employees were performed. However, if the taxpayer establishes to the satisfaction of the Tax Commission that (1) a substantial part of its payroll was paid to employees attached to an office in New York State

> who performed a substantial part of their services outside New York State and (2) establishes that the computation of the payroll factor according to the general rule stated above would not properly reflect the amount of the taxpayer's business done within New York State by its employees, then the Tax Commission may permit the payroll factor to be computed on the basis of the amount of compensation paid for services performed within New York State. Services performed within New York State will be deemed to be:
>
> > (1) in the case of an employee whose compensation depended directly on the volume of business secured by him, such as a salesman on a commission basis, the amount received by him for the business attributable to his efforts within New York State;
> >
> > (2) in the case of an employee whose compensation depended on other results achieved, the proportion of the total compensation which the value of his services within New York State bears to the value of all his services; and
> >
> > (3) in the case of an employee compensated on a time basis, the proportion of the total amount received by him which the working time within New York State bears to the total working time.

As noted above, since it has been established by the credible testimony of Infosys's employees that the payroll factor, as computed by the Division's auditor, does not properly reflect the amount of Infosys's business done within the State by its employees due to: (1) the great disparity in the amount of wages paid to employees in New York versus wages paid to employees in India; (2) the fact that for each project performed for a New York client, a far greater number of employees based in India (offshore) work on the project; and (3) the offshore employees account for a far greater number of person-days performed for each New York customer. Accordingly, it is hereby determined that an adjustment to Infosys's payroll factor is warranted herein.

While the .92% figure represents the percentage of New York employees out of the total Infosys employees, taking into account the Division's valid assertion that a head count is not an accurate measure due to the fact that in most companies, there are a number of employees who do not generate revenue, a more realistic and appropriate figure would be the percentage of New York billable employees versus total billable Infosys employees (on-site and offshore). Pursuant to the annual report, total billable person-months for the 2001 tax year were 78,645 or, in person-days, 2,359,350. Dividing New York person-days by total billable person-days (34,325 ÷ 2,359,350) results in a percentage of 1.45%. While figures for New York person-days for the 2000 tax year were not available, the testimony of Sunil Dhareshwar that the figures for such year were comparable leads to the conclusion that despite the fact that for the 2000 tax year, Infosys had fewer billable person-months (57,101), the percentage of 1.45% shall nonetheless be utilized as the New York State payroll factor for both years at issue.

N. As indicated in Finding of Fact “13”, the Division, utilizing worldwide property, receipts and payroll figures for the years at issue furnished by Infosys and New York property, receipts and payroll figures from Infosys’s own franchise tax returns filed for such years, computed a BAP of 1.6823% for the 2000 tax year and a BAP of 2.0137% for the 2001 tax year in compliance with the provisions of Tax Law § 210(3)(a) and 20 NYCRR 4-2.2.

Tax Law § 210(8) provides as follows:

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

20 NYCRR 4-6.1 provides, in relevant part, as follows:

(a) Generally, the business allocation percentage results in a fair allocation of the taxpayer's business capital and business income to New York State. However, experience in this and other states which impose similar franchise taxes has shown that due to the nature of certain businesses the formulas used to compute the percentages may work hardship in some cases and not do justice either to the taxpayer or to the State. Article 9-A of the Tax Law authorizes the commissioner to use other methods to more accurately reflect the business activity within New York State. If a different method is used, it must be calculated to effect a fair and proper allocation of the business income, business capital and alternative business income reasonably attributable to the State.

(b) When it appears that the business allocation percentage or alternative business allocation percentage does not properly reflect the activity, nature of business, income or capital of the taxpayer in New York State, the commissioner, in his or her discretion, may adjust the business allocation percentage or alternative business allocation percentage by:

(1) excluding one or more factors;

(2) including one or more factors, such as expenses, purchases or contract values minus subcontract values;

(3) excluding one or more assets used in computing any factor included in the business allocation percentage, provided the income therefrom is also excluded in determining entire net income or minimum taxable income; or

(4) any other similar or different method calculated to effect a fair and proper allocation.

(c) A taxpayer may not vary the statutory business allocation percentage or alternative business allocation percentage formulas described in sections 4-2.2 of this Part and 210(3-a)(a) of the Tax Law, respectively, without the prior consent of the commissioner. A taxpayer making a request for an adjustment of its business allocation percentage or alternative business allocation percentage must file its report and compute its tax in accordance with the statutory formulas. A request to vary the statutory formulas must be attached to the report setting forth full information on which the request is based, together with a computation of the amount of tax which would be due under the proposed method.

O. Due to the adjustment to the payroll factor as set forth in Conclusion of Law "N", Infosys's BAP for the 2000 tax year shall be recalculated as follows: property factor (0.0%) +

receipts factor twice (2.1963% + 2.1963% = 4.3926) + revised payroll factor (1.45%) = 5.8426%. Dividing 5.8426% by four results in a BAP of 1.4607%

For the 2001 tax year, the BAP shall be recalculated as follows: property factor (0.0%) + receipts factor twice (2.4565% + 2.4565% = 4.913%) + revised payroll factor (1.45%) = 6.363%. Dividing 6.363% by four results in a BAP of 1.5908%.

As a result of the adjustments to Infosys's BAP for the years at issue, the Notice of Deficiency issued on May 9, 2005 (***see***, Finding of Fact "10") must be revised as follows: (1) for the fiscal year ended March 31, 2001, the additional franchise tax due is recomputed from $139,775.00 to $110,777.00, plus applicable interest, and the additional MTA surcharge is recomputed from $25,159.00 to $19,940.00, plus applicable interest; and (2) for the fiscal year ended March 31, 2002, the additional franchise tax due is recomputed from $144,787.00 to $82,014.00, plus applicable interest and the additional MTA surcharge is recomputed from $27,690.00 to $15,685.00, plus applicable interest.

P. The petition of Infosys Technologies Limited is granted to the extent provided in Conclusion of Law "O"; the Division of Taxation is hereby directed to modify the Notice of Deficiency issued on May 9, 2005 accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
February 15, 2007

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE