DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 03-0073
Corporate Income Tax
For the Years 1997-1999

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ISSUES

I. Gross Income Tax-Imposition of Tax

Authority: IC 6-8.1-5-1 (b), IC 6-2.1-2-2(a)(2), 45 IAC 1.1-2-5(f)(2).

The taxpayer protests the imposition of tax on certain income.

II. Adjusted Gross Income Tax- Sales Factor for Apportionment

Authority: IC 6-3-2-1(a), IC 6-3-2-2(a), 20 NYCRR 4-4.3[d][2], 45 IAC 3.1-1-38.

The taxpayer protests the inclusion of certain revenue in the numerator of the sales factor for apportionment for the adjusted gross income tax.

STATEMENT OF FACTS

The taxpayer, commercially domiciled in New York, provides information and programming via satellite to customers throughout the United States. The taxpayer provides each customer the use of a fixed KU-band satellite dish, two video cassette recorders, 19-inch color television monitors and internal wiring. The taxpayer owns this equipment which is provided for the customer's use at no cost. The taxpayer also regularly services the equipment free of charge. If the customer were to stop using the taxpayer's services, the taxpayer would retrieve the equipment from the customer. All of the taxpayer's income is generated through national advertising sales that take place solely in the state of New York. The taxpayer's broadcasts originate from its studio in California. It has no employees in Indiana. Its only physical presence in Indiana is the television and satellite equipment it owns in the state. The taxpayer receives no payments in any form from those Indiana users.

After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," determined that there was no additional gross income tax liability for 1997 or 1998 and assessed

additional gross income tax, interest, and penalty for 1999. In the audit, the department also included the taxpayer's revenue in the numerator of the sales factor for apportionment for the adjusted gross income tax. This change did not, however, result in an additional assessment of adjusted gross income tax. The taxpayer protested the assessment of gross income tax, redetermination of the numerator of the sales factor, and penalty. A hearing was held and this Letter of Findings results.

I. Gross Income Tax-Imposition of Tax

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

The taxpayer's first protest concerns the department's imposition of gross income tax on its Indiana income. Indiana imposes a gross income tax on the "taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." IC 6-2.1-2-2(a)(2).

On January 1, 1999, a duly promulgated regulation became effective. That regulation defines "services performed within Indiana," for the telecommunications industry at 45 IAC 1.1-2-5(f)(2) as follows:

> . . .sale of telecommunications, including telephone, telegraph, and non-cable television, if the telecommunications originate or terminate in Indiana and are charged to an Indiana address, and the charges are not taxable under the laws of another state.

To be considered income from an Indiana source and subject to the Indiana gross income tax, telecommunications must meet three tests. First, they must originate or terminate in Indiana. The taxpayer's signals sent to its Indiana customers clearly meet the first test of terminating in Indiana. Second, the fees for the services must be charged to an Indiana address. The taxpayer receives its income from advertisers located outside the state. No billings are sent to or fees received from the Indiana addresses of the taxpayer's Indiana customers. Since the subject services do not meet the second test, it is unnecessary to consider the third test. The subject telecommunication transmissions do not meet the standard to subject the taxpayer's income to Indiana gross income tax.

FINDING

The taxpayer's protest is sustained.

II. Adjusted Gross Income Tax-Sales Factor for Apportionment

Discussion

The department recalculated the taxpayer's sales apportionment factor to include the taxpayer's Indiana advertising revenue in the numerator. Although this change has no effect on the

taxpayer's proposed tax assessment, the taxpayer protested the change of the sales numerator. The taxpayer contends that since it had no employees in the state of Indiana and its sole source of income is advertising income sold outside of Indiana there is no basis for imposition of the Indiana adjusted gross income tax.

IC 6-3-2-1(a) imposes an adjusted gross income tax on "that part of the adjusted gross income derived from sources within Indiana of every nonresident person." IC 6-3-3-2(a) provides that adjusted gross income derived from sources within Indiana includes "income from doing business in this state."

The standard of "doing business in this state" is clarified at 45 IAC 3.1-1-38 as follows:

> For apportionment purposes, a taxpayer is "doing business" in a state if it operates a business enterprise or activity in such state including, but not limited to:
>
> (1) Maintenance of an office or other place of business in the state
>
> (2) Maintenance of an inventory of merchandise or material for sale distribution, or manufacture, or consigned goods
>
> (3) Sale or distribution of merchandise to customers in the state directly from company-owned or operated vehicles where title to the goods passes at the time of sale or distribution
>
> (4) Rendering services to customers in the state
>
> (5) Ownership, rental or operation of a business or of property (real or personal) in the state
>
> (6) Acceptance of orders in the state
>
> (7) Any other act in such state which exceeds the mere solicitation of orders so as to give the state nexus under P.L. 86-272 to tax its net income.

The taxpayer owns business personal property, fixed KU-band satellite dishes, video cassette recorders, 19-inch color television monitors, that is located in Indiana. The taxpayer also regularly services this personal property inIndiana. This servicing exceeds the mere solicitation of orders. Either of these conditions establishes sufficient nexus for Indiana to tax the proportion of adjusted gross income that comes from Indiana.

All of the taxpayer's income is derived from sales of advertising in the state of New York. In 1978, New York enacted a law considering the apportionment of advertising at 20 NYCRR 4-4.3[d][2] which provided, in pertinent part that:

> The broadcasting of . . . commercial messages by way of radio and television . . . is deemed to be a service. When a lump sum is received for such service,

> that lump sum shall be allocated to New York State and another state or states according to the number of listeners or viewers in each state.

This New York law indicates that New York does not tax the portion of the income from commercials on television that is derived from television viewers in other states. The department properly took the figure in the numerator of the Indiana sales factor from the taxpayer's books and records concerning the apportionment of the taxpayer's advertising income among the various states.

Finding

The taxpayer's protest is denied.

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