DEPARTMENT OF STATE REVENUE

02-20090999R.LOF
02-20100336.LOF

Letter of Findings Number: 09-0999R; 10-0336
Indiana Corporate Income Tax
For the Tax Years 2005-2008

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ISSUES

I. Corporate Income Tax–Imposition.

Authority: IC § 6-3-1-19; IC § 6-3-1-35 (effective Jan. 1, 2009); IC § 6-3-2-2 (effective Jan. 1, 2009); IC § 6-3-4-11; IC § 6-8.1-9-2 (effective July 1, 2009); 45 IAC 3.1-1-106; 45 IAC 3.1-1-153; Riverboat Development, Inc. v. Indiana Dep't of State Revenue, 881 N.E.2d 107 (Ind. Tax Ct. 2008); Chief Industries v. Indiana Dep't of Revenue, 792 N.E.2d 972 (Ind. Tax Ct. 2000); Hunt Corp. v. Dep't of State Revenue, 709 N.E.2d 766 (Ind. Tax Ct. 1999).

Taxpayer protests the denial of refund of corporate income taxes.

II. Corporate Income Tax–Unitary Partnership.

Authority: 45 IAC 3.1-1-153.

Taxpayer protests the determination that it has a unitary relationship with one partner.

III. Tax Administration–Estimated Tax Penalty.

Authority: IC § 6-3-4-4.1.

Taxpayer protests the imposition of the ten percent penalty for failure to make sufficient estimated tax payments during the tax year.

STATEMENT OF FACTS

Taxpayers are two corporations that registered with the Indiana Secretary of State as foreign corporations doing business in Indiana and will be referred to as "Taxpayer." Taxpayer is one of the partners in a general partnership ("Partnership") and a partner in a second limited partnership (LP). The Partnership and LP were organized outside Indiana and are not registered with the Indiana Secretary of State to do business in Indiana.

Taxpayer filed amended Indiana adjusted gross income tax returns claiming refunds of corporate income taxes for the 2005, 2006, 2007, and 2008 tax years. After an initial review, the Indiana Department of Revenue ("Department") denied Taxpayer's claims for refund. Taxpayer protested the refund denials.

Additionally, one of the Taxpayers was audited for the 2007 tax year. Based on that audit, the Department imposed additional tax and a penalty for insufficient estimated taxes. Taxpayer acknowledges that, if the other issues in its protest are denied, Taxpayer owes the additional tax pursuant to the audit; however, Taxpayer protests the penalty. Further facts will be supplied as required.

I. Corporate Income Tax–Imposition.

DISCUSSION

For the 2005 to 2008 tax years, Taxpayer filed original Indiana adjusted gross income returns reporting Taxpayer's share of two partnerships' income as income from nonunitary partnerships. Taxpayer itself had no business activity in Indiana. Taxpayer filed amended Indiana adjusted gross income tax returns for the 2005 to 2008 tax years claiming refunds of corporation income taxes based on its contention that it had no Indiana adjusted gross income. The Department denied the refund claims maintaining that the filings as they were originally reported by Taxpayer were correct. The issue is whether Taxpayer had Indiana-source income for corporate income tax purposes based on the partnerships' Indiana activities.

IC § 6-3-1-19 provides:

> (a) The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this chapter, a corporation or a trust or an estate. The term also includes a limited liability company that is treated as a partnership for federal income tax purposes.
>
> (b) The term "partner" means a member of a partnership.

The partnerships filed partnership tax returns in Indiana based on their operations in Indiana. Pursuant to IC § 6-3-4-11(a), Taxpayer, the partner, is liable for the adjusted gross income tax in its separate or individual capacity and is required to report its part of the partnership's Indiana business activity, as represented on the Indiana K-1, on Taxpayer's Indiana adjusted gross income tax return.

Taxpayer's original filings–reporting its portion of the Indiana business activity attributable to the partnerships' separate operations–reported the partnership income of the partnerships as income from a nonunitary partnership and allocated the partnerships' income derived from the partnership based on the partnerships' Indiana apportionment factors. See 45 IAC 3.1-1-106 (stating that "[a] partnership is not subject to the adjusted gross

income tax. The partners will include their share of partnership income... on their separate or individual returns... [and] a corporate partner will report its share [of the partnership income] in accordance with section 153 of this rule"); See also 45 IAC 3.1-1-153(c) and (e) (detailing treatment of the business income of nonunitary partnerships).

Taxpayer maintains that these original filings were incorrect because it does not have Indiana income. Taxpayer bases its argument on Chief Industries v. Indiana Dep't of Revenue, 792 N.E.2d 972 (Ind. Tax Ct. 2000) and Riverboat Development, Inc. vs. Indiana Dep't of State Revenue, 881 N.E.2d 107 (Ind. Tax Ct. 2008) and asserts it "did not have sufficient presence" to be subject to Indiana corporate income tax.

However, Taxpayer is mistaken in both its presentation of fact and of law. First, Taxpayer errs concerning its connections to Indiana. For the years at issue, Taxpayer registered with the Indiana Secretary of State as a foreign for-profit corporation doing business in Indiana, even though the partnerships did not register in Indiana.

Second, Taxpayer's reliance on either Chief Industries or Riverboat Development is misplaced. Riverboat Development is not relevant because in that case the Tax Court addressed an out-of-state S-Corporation's duty to withhold on behalf of its non-resident shareholders' receipts from intangibles, which are not at issue here. Chief Industries is not relevant as the Tax Court examined a taxpayer's receipts from the sale of stocks under a prior 1986 statutory scheme and version of IC § 6-3-2-2(a)(5), which are also not at issue here. Most importantly, the Tax Court addressed the situation of a corporate partner reporting its corporate partnership income in Hunt Corp. v. Dep't of State Revenue, 709 N.E.2d 766, 773 (Ind. Tax Ct. 1999) (noting that as of "January 1, 1984... corporate partnerships are treated like any other partnerships" for Indiana tax purposes). The Tax Court found that "in order to determine what income is attributable to Indiana, it must be first determined whether the income sought to be attributed is business or non-business income.... If the income is business income, the income attributable to Indiana is calculated by using a three-factor apportionment formula." Id. at 771. For Taxpayer, the income was business income of the partnerships, and Taxpayer's treatment of the income from the partnerships on its originally-filed returns–as income from non-unitary partnerships–was appropriate pursuant to 45 IAC 3.1-1-153. Accordingly, Taxpayer, a partner in two partnerships, correctly reported that it had Indiana adjusted gross income in its original filings.

As an aside, Taxpayer should take note of the Indiana General Assembly's recent clarification of Indiana law for "pass through entities."

IC § 6-3-1-35 (effective Jan. 1, 2009) provides:

As used in this article, "pass through entity" means:

(1) a corporation that is exempt from the adjusted gross income tax under IC § 6-3-2-2.8(2);
(2) a partnership;
(3) a trust;
(4) a limited liability company; or
(5) a limited liability partnership.

IC § 6-3-2-2(a) (effective Jan. 1, 2009), in relevant part, provides:

Income from a pass through entity shall be characterized in a manner consistent with the income's characterization for federal income tax purposes and shall be considered Indiana source income as if the person, corporation, or pass through entity that received the income had directly engaged in the income producing activity. Income that is derived from one (1) pass through entity and is considered to pass through to another pass through entity does not change these characteristics or attribution provisions.

IC § 6-8.1-9-2(c) (effective July 1, 2009) provides:

As used in this subsection, "pass through entity" means a corporation that is exempt from the adjusted gross income tax under IC 6-3-2-2.8(2), a partnership, a limited liability company, or a limited liability partnership and "pass through income" means a person's distributive share of adjusted gross income for a taxable year attributable to the person's interest in a pass through entity. This subsection applies to person's overpayment of adjusted gross income tax for a taxable year if:

(1) the person has filed a timely claim for refund with respect to the overpayment under IC 6-8.1-9-1;
(2) the overpayment:
  (A) is with respect to a taxable year beginning before January 1, 2009;
  (B) is attributable to amounts paid to the department by:
    (i) a nonresident shareholder, partner, or member of a pass through entity;
    (ii) a pass through entity under IC 6-3-4-12 or IC 6-3-4-13 on behalf of a nonresident shareholder, partner, or member of a pass through entity; or
    (iii) a pass through entity under IC 6-3-4-12 or IC 6-3-4-13 on behalf of a nonresident shareholder, partner, or member of another pass through entity; and
(3) the overpayment arises from a determination by the department or a court that the person's pass through income is not includible in the person's adjusted gross income derived from sources within Indiana as a result of the application of IC 6-3-2-2(a)(5) and IC 6-3-2-2.2(g).

The department shall apply the overpayment to the person's liability for taxes that have been assessed and are currently due as provided in subsection (a) and apply any remaining overpayment as a credit or credits in

satisfaction of the person's liability for listed taxes in taxable years beginning after December 31, 2008. If the person, including any successor to the person's interest in the overpayment, does not have sufficient liability for listed taxes against which to credit all the remaining overpayment in a taxable year beginning after December 31, 2008, and ending before January 1, 2019, the taxpayer is not entitled for any taxable year ending after December 31, 2018 to have any part of the remaining overpayment applied, refunded, or credited to the person's liabilities for listed taxes. If an overpayment or part of an overpayment is required to be applied as a credit under this subsection to the person's liability for listed taxes for a taxable year beginning after December 31, 2008, and has not been determined by the department or a court to meet the conditions of subdivision (3) by the due date of the person's return for a listed tax for a taxable year beginning after December 31, 2008, the department shall refund to the person that part of the overpayment that should have been applied as a credit for such taxable year within ninety (90) days of the date that the department or a court makes the determination that the overpayment meets the conditions of subdivision (3). However, the department may establish a program to refund small overpayment amounts that do not exceed the threshold dollar value established by the department rather than crediting the amount against the tax liability accruing for a taxable year after December 31, 2008. A person that receives a refund or credit under this subsection shall file a report with the department in the form and in the schedule specified by the department that identifies under penalties of perjury the home state or other jurisdiction where the income subject to refund or credit was reported as income attributable to that state or jurisdiction.

Apart from Taxpayer's contentions regarding Riverboat Development, Taxpayer raises the issue that its receipts previously sourced to Indiana should be sourced outside Indiana on a "cost-of-performance" basis pursuant to IC § 6-3-2-2(f). However, Taxpayer did not substantiate an appropriate attribution of receipts based on cost of performance and further did not establish that its original attribution of receipts to Indiana was otherwise erroneous.

FINDING

Taxpayer's protest is respectfully denied.

II. Corporate Income Tax–Unitary Partnership.

DISCUSSION

Taxpayer asserts that, if the Department should find that the income derived from the partnerships is in fact taxable in Indiana, then it should be treated as a non-unitary partner with the partnerships. Under 45 IAC 3.1-1-153(b) and (c), one looks to determine whether a partnership is unitary with its corporate partner "under established standards, disregarding ownership requirements." Taxpayer has established that it is not unitary with the partnerships that it partially owns; thus, the income attributable to the partnerships should be treated as income from nonunitary partnerships under 45 IAC 3.1-1-153.

FINDING

Taxpayer's protest is sustained regarding nonunitary partnership tax treatment.

III. Tax Administration–Estimated Tax Penalty.

DISCUSSION

Taxpayer protests the imposition of the ten percent penalty imposed because of Taxpayer's failure to make sufficient estimated tax payments as required pursuant to IC § 6-3-4-4.1(d).

Taxpayer has provided sufficient information to conclude that it made the required estimated payments for the 2007 tax year. Thus, Taxpayer's protest is sustained.

FINDING

Taxpayer's protest is sustained.

CONCLUSION

I. Taxpayer's protest of the refund denial is denied.

II. Taxpayer's protest of the income as income derived from a unitary partnership is sustained; thus, the income should be treated as that from a nonunitary partnership.

III. Taxpayer's protest of the estimated tax penalties for 2007 for one entity is sustained.

Posted: 10/27/2010 by Legislative Services Agency
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