

Letter of Findings: 02-20120316
Corporate Income Tax
For the Years 2007, 2008, and 2009

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ISSUE

I. Service Income – Corporate Income Tax.

Authority: [IC 6-3-2-1](#); [IC 6-3-2-2](#); [IC 6-3-2-2\(e\)](#); [IC 6-3-2-2\(f\)](#); [IC 6-8.1-5-1\(c\)](#); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 3.1-1-52](#); [45 IAC 3.1-1-55](#); [45 IAC 3.1-1-55\(d\)](#); [45 IAC 3.1-1-55\(d\)](#) example 2.

Taxpayer argues that money it receives from providing audience profile information to Indiana customers should not have been included in the sales factor numerator.

STATEMENT OF FACTS

Taxpayer is an out-of-state media and marketing services business. Taxpayer measures the number and characteristics of the audience members listening to radio programs, television programs, and other media. Taxpayer acquires this information by conducting surveys. Taxpayer compiles the survey results and sells this information to various interested parties.

Taxpayer formerly maintained an Indiana office until 2008. After the Indiana office closed, Taxpayer's Indiana employees worked from home offices. The Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns. The audit resulted in the assessment of additional corporate income tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted by phone and this Letter of Findings results.

I. Service Income – Corporate Income Tax.

DISCUSSION

The audit found that Taxpayer did not include certain receipts in its "sales factor." Taxpayer included money received from selling software to Indiana customers but did not include money received from selling audience and polling information to Indiana customers. The audit made a correction to include in the sales factor money received from selling audience and polling information to Indiana customers. The "correction" resulted in the assessment of additional tax. Taxpayer disagrees stating that "zero service income" should be attributed to Indiana. Taxpayer concludes that it should pay no Indiana income tax on this income.

Taxpayer maintains that the additional assessment is incorrect. In considering Taxpayer's protest and as a threshold issue, it is Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in [IC 6-8.1-5-1\(c\)](#), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

In support of its argument, Taxpayer cites to [45 IAC 3.1-1-55\(d\)](#) which states:

Gross receipts for the performance of personal services are attributable to this state to the extent such services are performed in this state. If the services are performed partly within and without this state, such receipts shall be attributed to this state based upon the ratio which the time spent in performing such services in this state bears to the total time spent in performing such services everywhere. Time spent in performing services includes the amount of time expended in the performance of a contract or other obligation which gives rise to such gross receipts. Personal service not directly connected with the performance of the contract or other obligation, as for example, time expended in negotiating the contract, is excluded from the computations.

Taxpayer explains that its "core business is conducting public opinion surveys." Taxpayer explains that it did not spend time in Indiana conducting public opinion surveys. Taxpayer further cites to a specific example which states:

The taxpayer, a public opinion survey corporation, conducted a poll by its employees in State C and in this state for the sum of \$9,000. The project required 600 man hours to obtain the basic data and prepare the survey report. Two hundred of the 600 man hours were expended in this state. The receipts attributable to this state are: \$3,000. [45 IAC 3.1-1-55\(d\)](#) example 2.

Although the Department does not discount Taxpayer's reliance on the example cited, it should be noted that the Department does not regard an "example" as having the force of law.

[IC 6-3-2-1](#) imposes a tax "on that part of the adjusted gross income derived from sources within Indiana of every corporation." [IC 6-3-2-2](#), in relevant part, provides:

(a) With regard to corporations... "adjusted gross income derived from sources within Indiana", for the purposes of this article, shall mean and include:

- (1) income from real or tangible personal property located in this state;
- (2) income from doing business in this state;

...

In the case of business income, only so much of such income as is apportioned to this state under the provision of subsection (b) shall be deemed to be derived from sources within the state of Indiana....

(b) Except as provided in subsection (l), if business income of a corporation... is derived from sources within the state of Indiana and from sources without the state of Indiana, then the business income derived from sources within this state shall be determined by multiplying the business income derived from sources both within and without the state of Indiana by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three (3)....

"The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year."

[IC 6-3-2-2\(e\)](#). "The numerator of the sales factor generally includes gross receipts from sales attributable to this state, and includes all interest income, service charges, carrying charges, or time-price differential charges incidental to such sales." [45 IAC 3.1-1-52](#).

[IC 6-3-2-2\(f\)](#) states:

Sales, other than receipts from intangible property covered by subsection (e) and sales of tangible personal property, are in this state if:

- (1) the **income-producing activity is performed in this state**; or
- (2) the income-producing activity is performed both within and without this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance. (**Emphasis added**).

[45 IAC 3.1-1-55](#), in relevant part, further explains

The term "**income producing activity**" means the act or acts **directly engaged in by the taxpayer for the ultimate purpose of obtaining gains or profit**. Such activity does not include activities performed on behalf of the taxpayer, such as those conducted on its behalf by an independent contractor. Accordingly, "income producing activity" includes but is not limited to the following: (1) The rendering of personal services by employees or the utilization of tangible and intangible property by the taxpayer in performing a service. (2) The sale, rental, leasing, or licensing the use of or other use of tangible personal property. (3) The sale, licensing the use of or other use of intangible personal property.

Income producing activity is deemed performed at the situs of real, tangible and intangible personal property or the place where personal services are rendered. The situs of real and tangible personal property is at its physical location. The situs of intangible personal property is the commercial domicile of the taxpayer (i.e., the principal place from which trade or business of the taxpayer is directed or managed), unless the property has acquired a "business situs" elsewhere. "Business situs" is the place at which intangible personal property is employed as capital; or the place where the property is located if possession and control of the property is localized in connection with a trade or business so that substantial use or value attaches to the property. Example: Taxpayer, a corporation whose principal business activity is the manufacture and sale of hot water heaters, obtains notes for the sale of such water heaters in connection with its Indiana business activity. The property has a business situs in this state, therefore, interest income derived from such notes is attributable to this state. (**Emphasis added**).

Taxpayer earned money from selling information to Indiana customers in the ordinary course of Taxpayer's business. Under [IC 6-3-2-2](#). The money constitutes "adjusted gross income gross income derived from sources within Indiana" because it was "income from doing business in this state."

The Department must respectfully disagree with Taxpayer's assertion that the money was earned by conducting surveys at out-of-state locations. The surveys provided the raw data upon which Taxpayer's saleable information was compiled, but Taxpayer did not earn the money from conducting surveys; it earned money because it compiled and analyzed that data and sold the compilations of data to Indiana customers. In this case, Taxpayer's reliance on [45 IAC 3.1-1-55\(d\)](#) example 2 is unfounded. In the example cited, the taxpayer earned money from conducting a survey; it conducted a survey and was paid \$9,000 for doing so. Part of the work to earn the \$9,000 took place in Indiana, part of the work took place outside Indiana, and the \$9,000 was properly apportioned between the income producing activity in one state and the income producing activity in another state. In Taxpayer's case, the out-of-state surveys it conducted did not produce income because Taxpayer was not paid money to conduct surveys in this state or any other state. It was paid money because it sold compilations of data based on the surveys to Indiana customers.

The money earned from selling compilations of audience data was properly sourced to Indiana and should have been included in the sales factor. The "income producing activity" took place in Indiana because Indiana is

the place where services were provided to Indiana customers and the place where Taxpayer derived this income.
[45 IAC 3.1-1-55](#).

FINDING

Taxpayer's protest is respectfully denied.

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