

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)
) DOCKET NO. 17090
[REDACTED])
)
Petitioner.) DECISION
)
)
_____)

On November 15, 2002, the Tax Discovery Bureau of the Idaho State Tax Commission issued a Notice of Deficiency Determination to [Redacted]. (the taxpayer), proposing additional income tax, penalty, and interest for tax years ending 12/31/96, 12/31/97, 12/31/98, 12/31/99 and 12/31/2000 in the total amount of \$147,371.

On January 8, 2003, a timely protest and petition for redetermination was filed by the taxpayer. An informal conference was requested by the taxpayer and held on February 13, 2003, adjourned, and then concluded on May 23, 2003.

The Tax Commission has reviewed the file, is advised of its contents, and hereby issues its decision modifying the Notice of Deficiency Determination. The issues for determination are (1) whether the taxpayer is subject to income tax in Idaho and (2) the amount of tax due if the first issue is answered in the affirmative. The Tax Commission finds that the taxpayer was subject to income tax in Idaho in all years except 1997, and modifies the tax calculation to reflect additional information supplied.

Facts

The taxpayer manufactures, distributes, installs, and services specialized machinery used in one of Idaho's major natural resource industries. The taxpayer reported Idaho payroll to the Idaho Department of Labor for all of the audit years. The Tax Commission sent questionnaires to some of the Idaho employees. The employees who responded stated that they performed work for the

taxpayer outside of Idaho, although they were aware that customers in Idaho were using machinery manufactured and sold by the taxpayer.

The taxpayer stated that its employees visited Idaho for “field service” work, 5 to 10 times in 1996, twice in 1997, 4 times in 1998, and 5 to 10 times each in 1999 and 2000. The taxpayer’s representatives defined “field services” as “troubleshooting.” They also stated that the taxpayer sends employees to customers’ sites to perform warranty repairs and to give advice on reconfiguring manufacturing lines.

Questionnaires sent to certain Idaho customers of the taxpayer reported that the taxpayer’s employees visited annually to repair and maintain the equipment and sometimes installed equipment. Two former employees corroborated this in answers to questionnaires sent to them.

Law and analysis

Constitutional nexus

As a matter of constitutional law, a taxpayer is subject to tax in a state if it has a substantial physical presence there. *Cf. Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)(use tax collection case). Visits of a few days’ duration two or three times a year by the taxpayer’s employees may fall short of substantial physical presence. The Tax Commission finds that the taxpayer, with only two service visits in 1997, did not have nexus in that year. The greater number of visits in the other years are sufficient to support constitutional nexus.

Nexus under Public Law 86-272

Congress has required a higher threshold of activity than the constitutional standard to support application of a state’s income tax. Public Law 86-272, 15 U.S.C. § 381, provides in pertinent part:

- (a) No State ... shall have power to impose, for any taxable year ..., a net income tax on the income derived within such State by any

person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; ...

The issue under P.L. 86-272 is whether the taxpayer's activities exceeded the protected activities listed in paragraph (a)(1), quoted above.

The authoritative case interpreting "solicitation" is *Wisconsin Dept. of Rev. v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992). There, the taxpayer Wrigley was held to be doing more in Wisconsin than solicitation, because the replacement of stale chewing gum, the supplying of gum through agency stock checks, and storage of gum had a business function to Wrigley separate from the requesting of orders. On the other hand, Wrigley's salesmen's activities in helping to resolve credit disputes with customers was held to fall within the scope of protected solicitation, because the purpose of such help was "to ingratiate the salesman with the customer, thereby facilitating requests for purchases." 505 U.S. at 235. The sum of the unprotected activities was not *de minimis*, so Wisconsin could subject Wrigley to income tax.

Here, the taxpayer's employees performed troubleshooting and warranty repairs and gave advice on reconfiguring manufacturing lines. These activities clearly exceed solicitation, and the taxpayer's representatives conceded as much.

Conclusion

The Tax Commission concludes that the taxpayer was subject to income tax in Idaho in all years except 1997, when the number of service visits was *de minimis*. Subject to audit within the applicable statute of limitations, the Tax Commission accepts the taxpayer's revised apportionment

factor. The penalties for failure to file are recomputed to reflect the reduced tax liability, and as so recomputed, are affirmed.

WHEREFORE, the Notice of Deficiency Determination dated November 15, 2002, is hereby MODIFIED, and as so modified, is APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the taxpayer pay the following tax, penalty, and interest (computed through 09/30/03)(interest runs at \$3.87 per day):

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
12/31/96	\$1,934	\$483	\$931	\$3,348
12/31/98	6,083	1,521	1,931	9,535
12/31/99	18,891	4,723	4,619	28,233
12/31/003	1,380	345	228	<u>1,953</u>
			TOTAL DUE	<u>\$43,069</u>

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of the taxpayer's right to appeal this decision is enclosed with this decision.

DATED this ____ day of _____, 2003.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2003, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[REDACTED]

[Redacted]
