

OHIO BOARD OF TAX APPEALS

US Telecom, Inc.,)
)
 Appellant,) (FRANCHISE TAX)
)
 vs.) DECISION AND ORDER
)
 Roger W. Tracy, Tax Commissioner)
 of Ohio,)
)
 Appellee.)

APPEARANCES:

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Entered May 26, 2000

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

This cause and matter is before the Board of Tax Appeals as a result of a notice of appeal having been filed on behalf of US Telecom, Inc. on July 30, 1997. Appellant appeals a final determination of the Tax Commissioner, dated June 19, 1997, wherein that official affirmed corporate franchise tax assessments previously issued and denied appellant's requests for refunds relating to tax years 1990 and 1991.

We now proceed to consider this matter based upon appellant's notice of appeal, the statutory transcript certified by the Tax Commissioner pursuant to R.C.

5717.02, the hearing conducted by this Board,¹ the deposition transcripts and associated exhibits stipulated into the record by counsel² and the post-hearing brief submitted on behalf of appellant. Although accorded an opportunity to file written argument in support of his position, as well as an extension of time within which to do so, a brief on behalf of the Tax Commissioner has not been forthcoming. At this Board's hearing, appellant presented the testimony of three individuals: Don A. Jensen, appellant's Vice President and Secretary; Terrence D. Frederick, Director of State and Local Corporate Tax for Sprint/United Management Company; and Andrew Beckerman-Rodau, a professor at Ohio Northern University, Pettit College of Law.

Appellant is a Kansas corporation with its principal place of business in Westwood, Kansas. During the period in issue, appellant was the general partner in US Sprint Communications Company Limited Partnership ("US Sprint"), a Delaware limited partnership.³ Although it is uncontested that US Sprint conducted business in Ohio during the period in question, appellant has never had a physical presence within this state. Instead, appellant's sole connection with Ohio is its ownership interest in the US Sprint limited partnership.

¹ Although a single hearing was conducted with respect to both this case and another related appeal, *i.e.*, *UCOM, Inc. v. Tracy*, B.T.A. No. 97-K-880, announced this date, through an Order issued on December 17, 1997, it was determined to be inappropriate to consolidate these appeals for final disposition as they involve unique corporate identities, each of which had asserted different grounds for reversal of the Tax Commissioner's final determinations.

² The depositions referred to above were those of three employees of the Ohio Department of Taxation: Ronald Pottorf, Administrator of the Corporate Franchise Tax Audit Division; Charles E. Ortlieb, Assistant Administrator of the Corporate Franchise Tax Audit Division; and Jeffrey P. Sherman, legal counsel with the Income Tax Audit Division.

³ The limited partners in US Sprint were GTE Communications Services Incorporated and UCOM, Inc. ("UCOM"). Both appellant and UCOM were owned by United Telecommunications, Inc. Although appellant's witnesses described in further detail the manner in which the US Sprint limited partnership evolved, as well as the manner through which it acquired its interests therein, given the conclusion which we reach, we find it unnecessary to elaborate upon those facts in this decision.

Appellant filed corporate franchise tax returns and paid corporate franchise tax for tax years 1990 and 1991. These returns were audited and assessments were issued. Appellant then filed petitions for reassessment and requests for refund, asserting that both its net worth property and its business done factors should be zero, resulting in it having only the minimum franchise tax liability, *i.e.*, \$50. The basis for its contention was that it had no property nor conducted any business which could be attributed to Ohio. Rejecting appellant's arguments, the Tax Commissioner stated that Ohio recognizes the "aggregate" nature of partnerships." He therefore concluded that appellant's interest in the US Sprint limited partnership was includable in each of the aforementioned factors because "the partnership interest has a business situs in several states, including Ohio ***." S.T. at 2. From the foregoing decision, appellant appealed to this Board.

Franchise tax is an excise tax levied upon domestic and foreign for profit corporations for the privilege of exercising their corporate franchises in Ohio. R.C. 5733.01. Franchise tax is based upon the "value of the issued and outstanding shares of stock of the taxpayer ***." Pursuant to R.C. 5733.05, this value is calculated using both the "net worth" and the "net income" bases. The franchise tax due is based upon the greater of these two amounts. R.C. 5733.06. As indicated by the Tax Commissioner's final determination, the issue presented in this appeal is whether appellant's investment in US Sprint is appropriately situated to Ohio or, as advocated by appellant, to its state of commercial domicile, *i.e.*, Kansas. For the reasons which follow, we find the latter and reverse the Tax Commissioner's final determination.

In *Global Industrial Technologies v. Tracy* (June 30, 1999), B.T.A. No. 97-K-1072, unreported, this Board concluded that a foreign corporation's less than fifty-one

percent interest in a domestic partnership could not be situated to Ohio. We specifically addressed the provisions relied upon by the Tax Commissioner for reaching the opposite conclusion in this case:

“Under the net worth method, the taxpayer computes ‘[t]he total value, as shown by the books of the company, of its capital, surplus, whether earned or unearned, undivided profits and reserves ***’ less certain exclusions. R.C. 5733.05. Corporations which own property located within and without Ohio must apportion net worth under a two factor formula so that the portion of net worth attributable to Ohio may be determined. The total net worth is apportioned in and out of Ohio by means of the ‘property’ and ‘business done’ factors. The property factor, at issue herein, is a fraction, the numerator representing ‘the net book value of all the corporation’s property owned or used by it in this state’ and the denominator representing ‘the net book value of all its property wherever situated ***.’

“R.C. 5709.02 provides that intangible property ‘of persons residing in this state’ is subject to taxation in Ohio unless an exclusion set forth in R.C. 5709.03, which fixes the situs of certain classes of property within and without the state, applies. These general provisions are made specifically applicable to corporate franchise taxpayers by virtue of R.C. 5733.05:

“In determining the value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation, the commissioner shall be guided by sections 5709.02 and 5709.03 of the Revised Code ***.’

“Appellant is a Delaware corporation which maintains its principal place of business outside this state. Therefore, as a foreign corporation, appellant’s intangible property is not situated to Ohio unless a special situsing provision applies. None of the situsing provisions set forth in R.C. 5709.03 specifically address a corporate taxpayer’s interest in a partnership. R.C. 5709.03 declares that only certain types of property, *e.g.*, accounts receivable, prepaid items, accounts payable, certain types of deposits, money and investments, ‘be considered to arise out of business transacted in a state

other than that in which the owner resides ***.’ The only class of property within which appellant’s interest in the Komatsu Dresser partnership could arguably be included is the general classification of ‘investments.’ However, this argument must fail given the definition of ‘investments’ set forth in R.C. 5701.06:

“As used in Title LVII [57] of the Revised Code, “investments” includes:

“***

“(C) Annuities, royalties, and other contractual obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature from which income is or may be derived, however evidenced, *excepting*:

“***

“(2) Contracts *** of partnership ***.’ (Emphasis added.)” *Id.* at 9-10.

Although we discussed only the property factor in the preceding decision, the basis upon which the Tax Commissioner concluded that appellant was required to include its interest in US Sprint in its business done factor was the same, *i.e.*, the “‘aggregate’ nature of partnerships.” S.T. 3. We find no basis, nor, as previously indicated, has one been advanced on behalf of the Tax Commissioner, for distinguishing *Global Industrial Technologies* from the present case. Appellant is a general partner in US Sprint and that interest is appellant’s only connection with Ohio. We therefore reject the reasoning set forth in the Tax Commissioner’s final determination which would require appellant to include such interest in the property and business done factors of the net worth method.

Based upon the foregoing, it is the decision of the Board of Tax Appeals that appellant’s arguments as discussed herein are well-taken. Accordingly, it is the order

of this Board that the Tax Commissioner's final determination must be, and hereby, is
reversed. ohiosearchkeybta