

OHIO BOARD OF TAX APPEALS

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

APPEARANCES:

For the Appellant - Todd S. Swatsler
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For the Appellee - Betty D. Montgomery
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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 UCOM, 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 request for refund 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 Missouri corporation with its principal place of business in Westwood, Kansas. During the period in issue, appellant was a limited 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

¹ Although a single hearing was conducted with respect to both this case and another related appeal, *i.e.*, *US Telecom, Inc. v. Tracy*, B.T.A. No. 97-K-879, 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 general partner in US Sprint was US Telecom, Inc. and the other limited partner was GTE Communications Services Incorporated. 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

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.

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, arguing that as a foreign corporation whose only contact with Ohio was as a limited partner in a limited partnership which conducted business in Ohio, appellant could not be considered to be doing business in Ohio. Even if the opposite conclusion were reached, appellant insisted that its net worth property and its business done factors should be zero, since it had no property nor conducted any business which could be attributed to Ohio. Rejecting appellant's arguments, the Tax Commissioner first concluded that appellant was indeed subject to corporate franchise tax because Ohio recognizes the "aggregate" nature of partnerships" and because "it appears that the taxpayer may have used 'a part or all of its capital or property in this state' ***." 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. ⁴

Footnote contd. _____

therein, given the conclusion which we reach, we find it unnecessary to elaborate upon those facts in this decision.

⁴ Appellant also challenged the Tax Commissioner's final determination on constitutional grounds. However, as this Board is without jurisdiction to decide such claims, we will not address them further. See *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195

Pursuant to R.C. 5733.01, franchise tax is an excise tax levied upon domestic and foreign for profit corporations:

“for the privilege of doing business in this state, owning or using a part or all of its capital or property in this state, or holding a certificate of compliance with the laws of this state authorizing it to do business in this state.”

Although we agree with the Tax Commissioner that the preceding statute is to be read in the disjunctive so that a corporation which does any of the three described activities may be subject to Ohio franchise tax, see *Pullman v. Evatt* (1944), 144 Ohio St. 295, paragraph two of the syllabus, a review of the existing record fails to support the conclusion that appellant is acting in a manner which would indeed subject it to such tax. The undisputed facts in this matter reveal that appellant is a foreign corporation which has neither a presence nor conducted business in this state. Appellant’s only connection to Ohio is the fact that it is a limited partner in the US Sprint limited partnership. No evidence exists before this Board which would suggest that appellant is anything more than a passive investor in US Sprint, consistent with its limited partnership interest. Accordingly, we conclude that appellant is not subject to Ohio corporate franchise tax. See 1989 OhioAtty.Gen.Ops. No. 81.

Even if we were to conclude otherwise, based upon our prior decision in *Global Industrial Technologies v. Tracy* (June 30, 1999), B.T.A. No. 97-K-1072, unreported, and the decision in *US Telecom, Inc. v. Tracy*, B.T.A. No. 97-K-879, announced this date, we would conclude that appellant’s limited partnership interest in US Sprint is not be includable in the property and business done factors under the net

worth method because such investment interest must be situated to appellant's commercial domicile which is outside the state of Ohio.

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.

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