



FINANCE
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THE CITY OF NEW YORK
DEPARTMENT OF FINANCE
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March 6, 2008

Re Request for Ruling
General Corporation Tax
FLR-074870-006

Dear Mr. _____ :

This is in response to your request for a hypothetical ruling received on November 29, 2007. Your request concerns the calculation of business allocation percentage for the hypothetical taxpayer (the "Taxpayer") to be used in allocating the business income portion ("Business Income") of its entire net income ("ENI") to New York City (the "City") for purposes of determining its General Corporation Tax (GCT) liability based on ENI in the hypothetical situation presented below.

The hypothetical facts presented are as follows:

FACTS:

The Taxpayer is a manufacturing corporation located within the City that is subject to GCT based on its ENI. Approximately 98 percent of its sales are made to customers located outside of the City. The Taxpayer's sales are considered "Dock Sales" in that all goods are shipped by common carrier from the Taxpayer's City warehouse on an "F.O.B. Taxpayer's warehouse" basis. Title to the sold goods passes from the Taxpayer upon shipment from its City warehouse.

ISSUE:

Whether the Taxpayer may use a single receipts factor to calculate its business allocation percentage for purposes of allocating its Business Income to the City for purposes of determining its GCT liability?

CONCLUSION:

The Taxpayer may not use a single receipts factor to calculate its business allocation percentage for GCT purposes.

DISCUSSION:

Section 11-604(1)(E)(a)(1) of the City's Administrative Code (the "Code") imposes a tax on the portion of a corporation's ENI allocated to the City. Section 11-604(3)(a) of the Code provides for a corporation to

allocate the Business Income part of its ENI in accordance with the corporation's Business Allocation Percentage ("BAP"). In general, a corporation must compute its BAP using the traditional, three-factor formula in which an asset factor, a wage factor and a receipts factor are each computed,¹ and the three factors are then averaged. See Code §§ 11-604(3)(a)(1) through 11-604(3)(a)(4). For tax years beginning on or after July 1, 1996, a manufacturing corporation, as defined in section 11-604 of the Code, may elect to "double weight" its receipts factor. See Code § 11-604(3)(a)(8).

Sections 11-604(8) and 11-604(9) of the Code authorize the Commissioner of Finance (the "Commissioner") to adjust the BAP if she determines that the corporation's BAP, computed using the traditional, three-factor formula, "does not properly reflect the corporation's activity, business, income or capital within the City." This adjustment may include the exclusion of one or more factors in the calculation of BAP. The Commissioner's authority to adjust the BAP is also reflected in Title 19, Section 11-67 of the City's Rules ("RCNY"). RCNY Title 19, Section 11-67(a) provides that the Commissioner may adjust the BAP because, "due to the nature of certain businesses the [three-factor] formula may work hardship in some case and not do justice either to the taxpayer or the [C]ity."

In this connection, a corporation questioning the GCT's apportionment formula bears a "distinct burden" of showing by 'clear and cogent evidence' that [the tax at issue] results in extraterritorial values being taxed..." Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, at 164 (1983); Butler Bros. v. McCollgan, 315 U.S. 501, 507 (1942). Hence, the Taxpayer has the burden of demonstrating that the applicable three-factor formula for apportioning the Business Income portion of ENI results in a distortion of taxable income and causes the taxation of extraterritorial values.

Here, the Taxpayer requests that it be permitted to use only its receipts factor of approximately 2 percent as its BAP. However, the Taxpayer has not shown how the application of the three-factor formula works a hardship, does any injustice to it or is otherwise distortive so as to tax income that is unrelated to its City activities. The mere fact that the Taxpayer's receipts factor percentage is only 2 percent, because 98 percent of its sales are to customers outside of the City, is not, without more, a sufficient basis for excluding the asset factor and the wage factor. The use of the single sales factor as the taxpayer's BAP would do violence to the legislative scheme provided in section 11-604(3)(a) of the Code, and cannot be justified under sections 11-604(8) or 11-604(9) of the Code, RCNY title 19, section 11-67 or under any relevant case law. Finally, we note the Taxpayer, as a manufacturer, might well qualify to the election to "double-weight" its receipts factor pursuant to section 11-604(3)(a)(8) of the Code.

Sincerely,

Dara Jaffee,
Assistant Commissioner,
Legal Affairs

¹ Each of these three factors is a percentage determined by dividing the city amount by the overall amount and multiplying by 100.