CORPORATIONS:
INCOME APPORTIONMENT:
INCOME TAX:
TAXATION:

Answers to six questions arising under Section 143.040, RSMo 1949, relating to corporate income apportionment.

April 7, 1959

FILED
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Honorable L. A. Haake
Acting Supervisor
Income Tax Department
Department of Revenue
Jefferson City, Missouri

Dear Mr. Haake:

You recently asked this office for an opinion on the following situations:

> "This office has before us the following case:
>
> "'Taxpayer is a foreign corporation not qualified to transact business in the State of Missouri, and is engaged in the manufacture (outside of Missouri) and sale of products to both wholesale distributors and individual retail outlets.
>
> "'Taxpayer employs sales personnel, on a salary-plus-bonus basis, who solicit orders for taxpayer's product from distributors and retail outlets over a multi-state area. Some of the salesmen who are concerned with Missouri as a portion of their sales territory reside in states other than Missouri, and some of the salesmen are Missouri residents who also solicit orders in a multi-state area.
>
> "'Taxpayer's product is of such nature that its correct use and application requires some degree of technical knowledge and skill which can best be obtained through practical demonstration. For this reason,

taxpayer leases, on a monthly basis, office space within Missouri which is used as a center to demonstrate the correct use of taxpayer's product. Taxpayer employs personnel, skilled in the use and application of taxpayer's product to operate this center and make the demonstrations, but no sales are made by these employees, no stock is maintained on hand for sale, (in fact the only stock located at the demonstration center has a value which at no time exceeds $100.00, and which is kept solely for use in demonstrations) and no orders for taxpayer's product are solicited by such employees.

"'Taxpayer does not maintain either at this center or anywhere else within Missouri, facilities for bookkeeping or for the processing, filing or transmission of orders or reports of the various salesmen who solicit orders for taxpayer's product within a territory which includes Missouri. All orders taken by taxpayer's salesmen (regardless of the extent or location of their territory) (a) are transmitted directly to the home office of the company (outside Missouri); (b) all such orders are accepted at the home office of the company; (c) all products shipped in response to such orders are shipped from the home office of the company directly to the customer; (d) all bookkeeping and billing is handled at the home office of the Company; and (e) all payments for products are mailed directly to and received at the home office of the company.

"'Except for occasional inspection trips or for other trips of similar and impermanent nature, there are no executive personnel of the company within the State of Missouri.'"

* * * * * * * *

"In view of the foregoing, it is respectfully requested that an official opinion be given in connection with the following questions:

"'1. Under the facts hereinabove set forth,

is any transaction a "transaction wholly in this state" so as to require inclusion for Missouri income tax purposes of 100% of the net income resulting from such transaction?

"'2. Is an order solicited from a Missouri customer by a salesman of taxpayer, which is transmitted by the salesman directly to the taxpayer's office outside Missouri, (the product being shipped in response to such order directly to the customer from the home office, and the billing for such product and the payments in respect thereto being made from and to the home office, respectively), a transaction partially in this state and partially in another state or states, so as to require income apportionment in accordance with the provisions of R. S. Mo. 1949, 143.040 and 143.080?

"'3. Does the order of a Missouri customer mailed directly to taxpayer's home office by such customer, (the product being shipped in response to such order directly to the customer from the home office, and the billing for such product and the payments in respect thereto being made from and to the home office, respectively, without the intervention of any salesman), constitute a transaction partially in this state and partially in another state or states, so as to require income apportionment in accordance with the provisions of R. S. Mo. 1949, 143.040 and 143.080?

"'4. Is an order solicited from a customer outside Missouri by a salesman of taxpayer who is a Missouri resident, which is transmitted from the salesman's residence in Missouri directly to taxpayer's home office, outside Missouri, with the product being shipped, in response to such order, directly to the customer outside, Missouri, a transaction partially in this state and partially in another state or states so as to require income apportionment in accordance with the provisions of R. S. Mo. 1949, 143.040 and 143.080?

"'5. The circumstances are identical to 4 above, except that the order is transmitted to taxpayer's home office while the salesman is still outside Missouri.

"'6. Would the answers to any of the questions set forth above be modified in any respect if the taxpayer qualified to transact business in the State of Missouri, and, if so, in what respect or respects?'"

Section 143.040, RSMo 1949, subsection 1, reads in part as follows:

"1. Each year, at the times and in the manner, now or hereafter provided, a tax shall be levied upon, assessed against, collected from, and paid by every corporation, joint stock company, and joint stock association organized, authorized or existing under the laws of this state, and by every corporation, joint stock company and joint stock association, licensed to do business in this state, or doing business in this state, and not organized, authorized, or existing under the laws of this state, or by any receiver in charge of the property of any such corporation, joint stock company or joint stock association, except such as may now or hereafter be exempted, and except corporations which operate a railroad line or lines, bus lines, truck lines, air lines and other forms of transportation extending from this state into another state or states over lines or routes owned, leased, or used, except corporations which operate a telephone line or lines extending from this state into another state or states, or a telegraph line or lines, extending from this state into another state or states, and except corporations whose only activity is the investment or reinvestment of its own funds in stocks, bonds, any other securities, real estate, leaseholds, annuities, and other interest in real estate, or holding stocks, bonds, other securities, real estate, leaseholds, annuities or any other interest in real estate, in such per cent, as now or hereafter provided of the net income from all sources in this state during the preceding year. Income shall include all gains,

> profits and revenue from the transactions of the business of the corporations in this state, including gains, profits and revenue from the doing in this state of such portions of each transaction of the business of the corporation which transaction is partly done in this state and partly done in another state or states, and all other income from sources in this state as income is otherwise defined. *****"

The remainder of subsection 1 deals with deductions. Subsection 2 deals with a formula for apportionment.

According to the factual situation given us, the company that we are dealing with is an out-of-state corporation maintaining no branch offices in Missouri but maintaining demonstration centers here. Sales are solicited in Missouri by salesmen, some of whom live in Missouri.

The Missouri Supreme Court took up a situation almost the exact converse of the situation you describe in Artophone Corporation v. Coale, 133 S.W. 2d 343, which was decided in 1939. There have been no changes in the basic provisions of this law since then, and this case has been cited with approval as late as 1955 in Green v. Missouri Tax Commission, 277 S.W. 2d 544.

In the Artophone case, the facts insofar as they are herein applicable are as follows: The taxpayer had his only place of business in Missouri. He distributed electrical appliances which he received from out of state. Some of the appliances were sold out of state by traveling salesmen working out of the Missouri office. They solicited orders subject to the approval of the Missouri office. Goods sold were shipped from the taxpayer's warehouse in Missouri. The state auditor ruled that all income of a domestic corporation having no branch office in another state was taxable in Missouri. The taxpayer, on his return, allocated the income from sales made out of state. The question presented was the propriety of this allocation. The court held that the allocation was proper and that the auditor's ruling that all income of a domestic corporation having no branch office was taxable was in error. The court in that case took a very broad view of the term "transaction" and at page 348, quoting from another case, said:

> "* * *'"Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.' * * *"

The court has also had an opportunity to pass on the propriety of newspapers allocating their income in the case of In re Kansas City Star Co., 142 S.W. 2d 1029. The court held such allocation proper and said, l.c. 1037, as follows:

> "Arguing further from principle and texts and decisions construing the Federal income tax law and statutes of other states, appellants say the source of the income is determined by the nature and location of its producing cause. If it be from labor, the place where the labor was performed is decisive; if it be from capital the place where the capital was employed governs. The source is not merely the place where the income was captured by delivery of the finished product and collection of the proceeds. The question is, where was the income earned or produced. But, say appellants, when a business is 'unitary' the place where the business is carried on fixes the situs of the income, and things done elsewhere will be treated as 'incidental' -- especially when they were controlled or subject to confirmation in the taxing jurisdiction.
>
> "We agree to the first part of this thesis, holding the source of the income is the place where it was produced, but cannot assent to the latter part making an exception when the business is unitary. * * * "

The court ruled in the case of Burkhart v. Goale, 139 S.W. 2d 502, that income from a Missouri corporation domesticated in several other states need not be allocated when a factory owned by this corporation and located in another state ships merchandise to purchasers in still another state. In this case the home office of the concern was in Missouri and the court held under the above facts that no income tax was due Missouri on the above-mentioned transactions. More recently in A. P. Green v. Missouri State Tax Commission, 277 S.W. 2d 544, the court held that income from trademarks, patents, and the like which Green allowed foreign corporations to use, the use being outside of Missouri, was not income in Missouri or as a result of a transaction partially within the state and partially outside the state and thus did not need to be allocated.

In the factual situation you describe, we feel that the court would hold the visit of the salesman so as to make the contact with the customer, sell him on the product and secure the business, the activities in demonstrating and the resultant orders, all a part of the transaction resulting in the income. It should be borne in mind, however, that under the law of sales some of the transactions would not be taxable as sales occurring in Missouri. We feel, however, that the court in the Artophone Corporation case draws a distinction between contracts, sales, and the broader term "transactions".

Now, for the answers to your specific questions:

> "'1. Under the facts hereinabove set forth, is any transaction a "transaction wholly in this state" so as to require inclusion for Missouri income tax purposes of 100% of the net income resulting from such transaction?'"

We do not believe that any of the transactions mentioned are taxable as occurring wholly within the state.

> "'2. Is an order solicited from a Missouri customer by a salesman of taxpayer, which is transmitted by the salesman directly to the taxpayer's office outside Missouri, (the product being shipped in response to such order directly to the customer from the home office, and the billing for such product and the payments in respect thereto being made from and to the home office, respectively), a transaction partially in this state and partially in another state or states, so as to require income apportionment in accordance with the provisions of R. S. Mo. 1949, 143.040 and 143.080?'"

We feel that this transaction is one partially within Missouri and partially in another state and, therefore, requires income apportionment.

> "'3. Does the order of a Missouri customer mailed directly to taxpayer's home office by such customer, (the product being shipped in response to such order directly to the customer from the home office, and the billing for such product and the payments in respect thereto being made from and to the home office, respectively, without the intervention of any salesman),

> constitute a transaction partially in this state and partially in another state or states, so as to require income apportionment in accordance with the provisions of R. S. Mo. 1949, 143.040 and 143.080?'"

Certainly, from the facts presented, the buyer of the product would have probably availed himself of a free demonstration of the product before ordering and in the usual case the original order would normally be solicited by personnel in Missouri. If this were true and the business in mind is actually a re-order situation, it is then without doubt a part of the original transaction. In case of an unsolicited order from a person who had received no demonstration, the question is somewhat more difficult. We feel, however, even in that situation the court would hold the order of the customer as a part of the transaction within the meaning of this law and require income apportionment.

> "'4. Is an order solicited from a customer outside Missouri by a salesman of taxpayer who is a Missouri resident, which is transmitted from the salesman's residence in Missouri directly to taxpayer's home office, outside Missouri, with the product being shipped, in response to such order, directly to the customer outside, Missouri, a transaction partially in this state and partially in another state or states so as to require income apportionment in accordance with the provisions of R. S. Mo. 1949, 143.040 and 143.080?'"

We feel that the answer to question four is no. The residence of the salesman and the use of a mailbox or some other means in Missouri to transmit the order to the home office is not sufficient to bring this transaction within the provisions of the statute requiring apportionment.

> "'5. The circumstances are identical to 4 above, except that the order is transmitted to taxpayer's home office while the salesman is still outside Missouri.'"

The answer to question four explains why this question must also be answered no.

> "'6. Would the answers to any of the questions set forth above be modified in

> any respect if the taxpayer qualified to transact business in the State of Missouri, and, if so, in what respect or respects?'"

The State purports to tax corporations licensed to do business in Missouri or doing business in Missouri. We feel that the corporation is taxable as to its income in either instance.

CONCLUSION

It is the opinion of this office that in instances where a part of the transaction resulting in income to a corporation doing business in Missouri is within the state and a part outside of Missouri, that income is taxable on an apportioned basis in Missouri and that transaction as used in this statute has a broad meaning that may include many occurrences depending not so much upon the immediateness of their connection as upon their logical relationship.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James E. Conway.

Yours very truly,

JOHN M. DALTON
Attorney General

JEC:mc