

Document Number: 21-131
Tax Type: BPOL Tax
Description: Situs : Apportionment - Compensation Included in Numerator of Payroll Factor
Topic: Appeals
Date Issued: 09-28-2021
September 28, 2021

Re: Appeal of Final Local Determination

Taxpayer: *****

Locality: *****

Business, Professional and Occupational License Tax

Dear *****:

This final state determination is issued upon the application for correction filed by you on behalf of your client, ***** (the "Taxpayer"), with the Department of Taxation. You appeal an assessment of the Business, Professional and Occupational License (BPOL) tax issued to the Taxpayer by ***** (the "County") for the 2018 tax year.

The BPOL tax is imposed and administered by local officials. *Virginia Code* § 58.1-3703.1 authorizes the Department to issue determinations on taxpayer appeals of BPOL tax assessments. On appeal, a BPOL tax assessment is deemed *prima facie* correct, *i.e.*, the local assessment will stand unless the taxpayer proves that it is incorrect.

The following determination is based on the facts presented to the Department summarized below. The *Code of Virginia* sections and public documents cited are available on-line at www.tax.virginia.gov in the Laws, Rules and Decisions section of the Department's web site.

FACTS

The Taxpayer was headquartered in ***** (State A). It maintained offices globally and throughout the United States including an office in the County. Taxpayer employees worked at the County office and remotely from residences in Virginia.

The Taxpayer was audited by the County and it was mutually agreed that payroll apportionment was appropriate for the 2018 tax year going forward. The Taxpayer's methodology for the calculation of the payroll apportionment numerator was to include only those employees working at the County location or those Virginia remote workers who reported to the County office. The County disagreed with this methodology and issued a BPOL tax assessment for the 2018 tax year utilizing the Taxpayer's entire Virginia payroll.

The Taxpayer appealed the assessment. In its final local determination, the County concluded that the Taxpayer's payroll apportionment numerator should include the payroll of all employees working in Virginia. The Taxpayer filed an appeal with the Department, contending that only those employees based at the County office or who reported to the County office should be included in the payroll apportionment calculation.

ANALYSIS

The general rule for establishing situs for the BPOL tax is that whenever the tax is measured by gross receipts, "the gross receipts included in the taxable measure shall be only those gross receipts attributed to the exercise of a privilege subject to licensure at a definite place of business within [the] jurisdiction." See *Virginia Code* § 58.1-3703.1 A 3 a. In determining the situs of gross receipts, *Virginia Code* §§ 58.1-3703.1 A 3 a 4 and 58.1-3703.1 A 3 b state that receipts from services are to be taxed based on (in order): (i) the definite place of business at which the service is performed, or if not performed at any definite place of business, (ii) the definite place of business from which the service is directed or controlled; or as a last resort (iii) when it is impossible or impractical to determine where the service is performed or from where the service is directed or controlled, by payroll apportionment between definite places of business.

Virginia Code §§ 58.1-3703.1 A 3 a 4 and 58.1-3703.1 A 3 b clearly indicate a preference that gross receipts from services to be attributed to a definite place of business. A "definite place of business" is defined as an office or a location at which occurs a regular and continuous course of dealing for 30 consecutive days or more. See *Virginia Code* § 58.1-3700.1. Some characteristics that may help determine whether the location is a definite place of business include, but are not limited to, the following on-site activities: (1) a continuous presence; (2) having an office with a phone; (3) the reception of mail; (4) having employees; (5) record keeping; and (6) and advertising or otherwise holding oneself out as engaging in business at the particular location. See Public Document (P.D.) 97-201 (4/25/1997).

To the extent that any gross receipts are not attributable to services performed at a definite place of business, then they must be situated to the definite place of business from which the services are directed and controlled. Only if it is not possible or practical to determine where the service is performed or where the service is directed or controlled, then the receipts must be situated based on payroll apportionment.

The County contends that the Taxpayer is commingling the situs rules by situsing remote Virginia employees based on where they report to, *i.e.* where they are directed and controlled. The Taxpayer contends that the location where employees are controlled from is relevant because the statute requires that some activities occur at or be directed and controlled from the definite place of business where gross receipts are being sitused.

When it becomes necessary to use payroll apportionment, the general payroll apportionment formula, as stated in P.D. 04 80 (8/25/2004) and P.D. 10-230 (9/29/2010), for determining gross receipts sitused to a Virginia definite place of business is:

Gross receipts from all sources multiplied by the payroll attributed to the definite place of business in the numerator divided by total payroll everywhere in the denominator.

Virginia Code § 58.1-3703.1 A 3 b provides that when payroll apportionment is used “the gross receipts of the business shall be apportioned between definite places of business on the basis of payroll, “so long as “some activities under the applicable general rule occurred at, or were controlled from, such definite place[s] of business.” See also *Nielsen Company (US), LLC v. County Board of Arlington County*, 289 Va. 79, 767 S.E. 2d 1 (2015).

Pursuant to *Virginia Code* § 60.2-217 A 1, employment includes an individual’s entire service, performed within or both within and without Virginia if the service is localized in Virginia. The County asserts that the remote Virginia employees should be included in the numerator of the payroll apportionment calculation because Virginia home based employees whose services are localized to Virginia are included in determining Virginia unemployment tax. The assigned meanings of the terms defined in Title 60.2 are those “as used in this title [60.2].” See *Virginia Code* § 60.2-200. As such, the definition of employment in the unemployment compensation title of the *Code of Virginia* only applies to unemployment compensation and has no bearing on the issue of where gross receipts should be sitused for BPOL tax purposes using payroll apportionment.

The County also cites the case of *Telebright Corp. v. Director, Division of Taxation*, 424 N.J. Super. 384 (NJ App. Div. 2012) in which telecommuter working in New Jersey was “doing business” in New Jersey such that his employer became subject to New Jersey corporate income tax. For a state corporate income tax, a taxpayer’s activities within the state as a whole would be relevant in determining the taxpayer’s liability for such tax. The BPOL tax, however, is a local tax separate and distinct from a state-level corporate income tax. As such this case has no relevance whatsoever on the issue presented in this appeal.

Tax statutes are generally strictly construed most strongly in favor of the taxpayer, and are not to be extended by implication beyond the plain meaning of the language used. See *Commonwealth Ex Rel. Moore v. P. Lorillard Co., Inc.*, 129 Va. 74, 105 S.E. 683 (1921).

When payroll apportionment is used, *Virginia Code* § 58.1-3703.1 A 3 b provides that “[g]ross receipts shall not be apportioned to a definite place of business unless some activities under the applicable general rule occurred at, or were controlled from, such definite place of business.” This language does not require the payroll of remote employees to be situated to the definite place of business to which they report. This statement merely means that a licensable activity must have occurred at the definite place of business for any payroll to be apportioned there. In this case, employees were performing services at the definite place of business in the County, so licensable activities were occurring there. Therefore, this statutory requirement was satisfied as to the application of payroll apportionment in this case.

Further, in P.D. 14-121 (7/24/2014), the Department observed that an employee’s home may constitute a definite place of business if there is a regular and continuous course of dealing for 30 consecutive days or more. Ultimately, the determination as to whether a home office is a definite place of business must be made by the locality in which the home office is located. One locality’s ability to claim the payroll of home-based employees based on where they report to would infringe on the authority of other localities to determine whether payroll should be apportioned to definite places of business in their jurisdictions.

Finally, requiring the payroll of home-based employees to be apportioned on a direction and control basis would reintroduce the types of factual complexities that payroll apportionment was designed to avoid. As the County itself correctly observed, the Taxpayer could not commingle another situs rule with payroll apportionment.

DETERMINATION

Based on the above analysis, the County had no basis in law to allocate all of the payroll of the Taxpayer’s remote workers in Virginia to the Taxpayer’s definite place of business in the County. Further, I find that the numerator of the payroll apportionment calculation should not include any employees who worked remotely outside of the County, regardless of what office they reported to. As such, I am remanding this case back to the County in order to adjust the assessment in accordance with this determination. If further information is required from the Taxpayer, the Taxpayer is instructed to work with the County to provide such information.

If you have any questions regarding this determination, you may contact ***** in the Office of Tax Policy, Appeals and Rulings, at *****.

Sincerely,

Craig M. Burns
Tax Commissioner

AR/3723.B

Related Documents:

[97-30804-8010-23014-121](#)

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