

Chair Burdick
Senate Finance and Revenue Committee
RE: HB 4138 Interstate Broadcasters

February 26, 2014

During the hearing on February 24, 2014 in Senate Finance and Revenue, you heard testimony from Brian O’Leary (tax counsel for NBC Universal) that indicated four other states had moved to a commercial domicile method of apportionment for broadcaster receipts. The states Mr. O’Leary listed included North Carolina, Florida, Michigan, and Illinois. You asked specifically how many states have gone to this system [exclusively customer domicile based] and whether they have moved from a viewership system to this system. Below is information from those four states to supplement the information provided by Mr. O’Leary. Also included is as a chart of states that have broadcaster provisions and the method of apportionment they choose (see page 5).

SUMMARY:

- North Carolina – No special law for broadcasters; North Carolina follows the Uniform Division of Income Tax Purposes Act (UDITPA). Issued a Private Letter Ruling to the Motion Picture Association of America, member and parent companies indicating:
- Performance of Services: Apportioned based on the location of the income-producing activity and Costs of Performance
 - Intangible property: Apportioned based on receipts received from sources within North Carolina
- Florida Has a special Television and Radio Broadcaster rule that apportions based on an audience factor. It issued a Technical Assistance Advisement (TAA) specific to a cable network indicating they were not considered a broadcaster and must apportion subscription and advertising revenues based on the taxpayer’s customer location. This TAA applied to one specific Florida taxpayer.
- Michigan Michigan uses both a commercial domicile method and an audience-based method of apportionment. Baseline law is that media receipts are attributable to Michigan if the commercial domicile of the customer is in Michigan and the customer has a direct relationship with the customer. For advertising revenue, Michigan has a general rule that if the “benefit of the advertising” is in Michigan, then advertising receipts are apportioned using an audience factor.
- Illinois Illinois also seems to use a hybrid method of apportionment. The Illinois statute generally provides that receipts from the sale of broadcasting services are sourced to Illinois if the broadcasting services are received in Illinois (audience factor). The exception to this rule is for advertising receipts which are sourced based on the commercial domicile of the customer.

DISCUSSION

North Carolina – The North Carolina Department of Revenue issued a private letter ruling to the MPAA (see Attachment A) stating that advertising and licensing revenue are sourced to the state where the negotiation/agreement took place, relying on the Cost-of-Performance method.

NC does not have industry-specific apportionment provisions for broadcasters. For NC purposes, broadcaster receipts are sourced pursuant to their general apportionment provisions, N.C. Gen. Stat. § 105-130.4, which apply to receipts from services and intangible property.

Under NC’s general apportionment provisions,

- receipts from the performance of services (such as broadcaster advertising fees) are sourced to NC based upon the widely accepted UDITPA provisions (dependent upon the location of the income-producing activity and the costs of performance).
- receipts from intangible property (such as broadcaster licensing fees) are sourced to NC if the receipts are received from sources within NC.

Florida – Florida also issued a Technical Assistance Advisement (basically a private letter ruling) (see Attachment B) which provides that a cable network must source its subscription and advertising revenues dependent upon the location of the income-producing activity and the costs of performance. See F.A.C. 12C-1.0155

The TAA indicated that because the cable network did not have direct contact with or receive revenue directly from the individual subscribers/customers of the distributors, that the cable network was not required to use an audience-based apportionment provided in F.A.C 12C-1.0155(2)(i).

Florida does provide industry specific apportionment provisions for television and radio broadcasters. They require the use of an audience factor to apportion their income.

F.A.C. 12C-1.0155(2)(i) provides, *“Television and Radio Broadcasting. Gross receipts, including advertising revenues, from broadcasting within and without the state will be attributed to the numerator of the sales factor on the basis of the ratio of the audience within the state to the audience everywhere.”*

Michigan – Has industry-specific apportionment provisions in statute for broadcasters. Under MCL 206.665(20), media receipts are sourced to Michigan if the commercial domicile of the customer is in Michigan.

Legislative Testimony

However, MCL 206.655(20) requires use of an audience factor for broadcaster advertising receipts. The Michigan statute provides, “[f]or purposes of this subsection, if the taxpayer is a broadcaster and if the customer receives some of the benefit of the advertising in this state, the media receipts for that sale of advertising from that customer shall be proportioned based on the ratio that the broadcaster’s viewing or listening audience in this state bears to its total viewing or listening audience everywhere.”

Illinois – The Illinois statute generally provides that receipts from the sale of broadcasting services are sourced to Illinois if the broadcasting services are received in Illinois. It does specifically address five different broadcaster receipts. Under Illinois law:

- (i) advertising revenue is sourced based upon commercial domicile of the customer;
- (ii) receipts from film or radio programming provided by a station, a network, or a cable system from the recipient of the broadcasting is sourced based on the billing/mailling address of recipient located in that state
- (iii) receipts from film or radio programming provided by a station, a network, or a cable system received from the person providing the programming are sourced based upon an audience factor located in that state

The other two categories are sourced based upon what appears to be a market approach – where service is received—and is a shift away from the standard “cost-of-performance” method of apportionment under UDITPA.

Illinois law – 35 ILCS 5/304(a)(3)(B-7)

(B-7) For taxable years ending on or after December 31, 2008, receipts from the sale of broadcasting services are in this State if the broadcasting services are received in this State. For purposes of this paragraph (B-7), the following terms have the following meanings:

"Advertising revenue" means consideration received by the taxpayer in exchange for broadcasting services or allowing the broadcasting of commercials or announcements in connection with the broadcasting of film or radio programming, from sponsorships of the programming, or from product placements in the programming.

"Audience factor" means the ratio that the audience or subscribers located in this State of a station, a network, or a cable system bears to the total audience or total subscribers for that station, network, or cable system. The audience factor for film or radio programming shall be determined by reference to the books and records of the taxpayer or by reference to published rating statistics provided the method used by the taxpayer is consistently used from year to year for this purpose and fairly represents the taxpayer's activity in this State.

"Broadcast" or "broadcasting" or "broadcasting services" means the transmission or provision of film or radio programming, whether through the public airwaves, by cable, by direct or indirect satellite transmission, or by any other means of communication, either through a station, a network, or a cable system.

"Film" or "film programming" means the broadcast on television of any and all performances, events, or productions, including but not limited to news, sporting events, plays, stories, or other literary, commercial, educational, or artistic works, either live or through the use of video tape, disc, or any other type of format or medium. Each episode of a series of films produced for television shall constitute separate "film" notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

"Radio" or "radio programming" means the broadcast on radio of any and all performances, events, or productions, including but not limited to news, sporting events, plays, stories, or other literary, commercial, educational, or artistic

Legislative Testimony

works, either live or through the use of an audio tape, disc, or any other format or medium. Each episode in a series of radio programming produced for radio broadcast shall constitute a separate "radio programming" notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

(i) In the case of advertising revenue from broadcasting, the customer is the advertiser and the service is received in this State if the commercial domicile of the advertiser is in this State.

(ii) In the case where film or radio programming is broadcast by a station, a network, or a cable system for a fee or other remuneration received from the recipient of the broadcast, the portion of the service that is received in this State is measured by the portion of the recipients of the broadcast located in this State. Accordingly, the fee or other remuneration for such service that is included in the Illinois numerator of the sales factor is the total of those fees or other remuneration received from recipients in Illinois. For purposes of this paragraph, a taxpayer may determine the location of the recipients of its broadcast using the address of the recipient shown in its contracts with the recipient or using the billing address of the recipient in the taxpayer's records.

(iii) In the case where film or radio programming is broadcast by a station, a network, or a cable system for a fee or other remuneration from the person providing the programming, the portion of the broadcast service that is received by such station, network, or cable system in this State is measured by the portion of recipients of the broadcast located in this State. Accordingly, the amount of revenue related to such an arrangement that is included in the Illinois numerator of the sales factor is the total fee or other total remuneration from the person providing the programming related to that broadcast multiplied by the Illinois audience factor for that broadcast.

(iv) In the case where film or radio programming is provided by a taxpayer that is a network or station to a customer for broadcast in exchange for a fee or other remuneration from that customer the broadcasting service is received at the location of the office of the customer from which the services were ordered in the regular course of the customer's trade or business. Accordingly, in such a case the revenue derived by the taxpayer that is included in the taxpayer's Illinois numerator of the sales factor is the revenue from such customers who receive the broadcasting service in Illinois.

(v) In the case where film or radio programming is provided by a taxpayer that is not a network or station to another person for broadcasting in exchange for a fee or other remuneration from that person, the broadcasting service is received at the location of the office of the customer from which the services were ordered in the regular course of the customer's trade or business. Accordingly, in such a case the revenue derived by the taxpayer that is included in the taxpayer's Illinois numerator of the sales factor is the revenue from such customers who receive the broadcasting service in Illinois.

Legislative Testimony

For your convenience, below is a chart of all states that have some sort of provision for broadcaster apportionment and the method they choose.

Broadcaster Apportionment Methods					
Other States	UDITPA	Market	Audience	Domicile	Citation
Colorado			X		CO Special Reg 5A(1)(d)(ii)(2)
Connecticut			X		Conn. Code 12-218(L)
Florida			X		F.A.C. 12C-1.0155(2)(i)
Georgia			X		GA Rule 560-7-7-.03(5)(c)
Hawaii			X		HAR 18-235-38-06.04
Illinois			X	X	35 ILCS 5/304(a)(3)(B-7)
Indiana*	X				Indiana Code 6-3-2-2
Iowa			X		Iowa Rule 701-54.7(5)
Louisiana			X	X	LA. RS 47:287.95
Michigan			X	X	MCL 208.1305(20)
Minnesota		X			Minn. Stat. 290.191(5)(j)
Missouri	X				Missouri Stat. 143.451
New Jersey			X		NJAC 18:7-8.10(a)
New York		X	X		20 CRR-NY 4-4.3
North Carolina	X				N.C. Gen. Stat. 105-130.4
North Dakota			X		ND 81-03-09-38
Texas**		X			Texas Rule 3.591(22)
Washington			X		Revised Code WA 82.04.280
Wisconsin		X			Wisconsin Stats. 71.25(9)

* Indiana proposed legislation in 2013 (HB 1296) to change from a UDITPA income-producing activity method to a commercial domicile approach - the proposed legislation did not pass.

** Texas proposed legislation in 2013 (HB 2145) to change from a market sourcing method to a commercial domicile approach - the proposed legislation did not pass.

For more information about this testimony, contact Deanna Mack 503-947-2082 or Jeff Henderson 503-947-2124.

ATTACHMENT A

12/28/2012 10:22

919-733-1821

NCDOR SALES USE INCM

PAGE 02/05



North Carolina Department of Revenue

Beverly Eaves Perdue
Governor

David W. Hoyle
Secretary

December 28, 2012

Mr. William W. Nelson
Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P.
Post Office Box 2611
Raleigh, North Carolina 27602-2611

Re: Motion Picture Association of America, its Member Companies and Affiliates

Dear Mr. Nelson:

This ruling is limited to the parties to whom it is directed. Because of the unique nature of the broadcasting industry, this ruling has no application to and may not be relied upon by other taxpayers.

I have received your letter dated December 27, 2012 requesting information on the sourcing of advertising and license fee revenues received by broadcasters and distributors for purposes of calculating the sales factor of North Carolina's apportionment formula.

This letter is directed to you on behalf of: (1) the Motion Picture Association of America (the "Association"), (2) its member companies (the "Members"), and (3) the Members' respective parent companies and their direct and indirect subsidiaries, including corporate and non-corporate entities in which they have a controlling or non-controlling interest (collectively, the "Member Companies"). The Members and their respective parent companies are identified on Exhibit A.

As used in this letter:

- (1) The term "broadcaster" means a television or radio station licensed by the Federal Communications Commission, a television or radio broadcast network, a cable program network or any other distributor of television and/or radio programming. The term "broadcaster" does not include a cable system operator as defined in NCGS 105-164.3(1m) or a direct broadcast satellite system operator.

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Mr. William W. Nelson
 December 28, 2012
 Page 2

- (2) The term "cable program network" means an organization which produces programs available for simultaneous transmission by a cable or direct broadcast satellite system operator.
- (3) The term "distributor" means a provider of television and/or radio programming to other parties in any medium and through any means. The term "distributor" does not include a cable system operator as defined in NCGS 105-164.3(1m) or a direct broadcast satellite system operator.

The Member Companies, directly or through their affiliates, conduct broadcasting and content distribution activities. Broadcasters derive receipts from advertisers for including the advertisers' commercial messages in their programs and distributing them through broadcasting, over the internet and through other means. Broadcasters also derive receipts from licensing content to other parties in exchange for license or other distribution fees.

North Carolina's general apportionment formula defines the sales factor as a fraction the numerator of which is the taxpayer's total sales in North Carolina and the denominator of which is the taxpayer's total sales everywhere. N.C. Gen. Stat. §105-130.4(1)(1). The statute provides that receipts from the performance of services are sourced to North Carolina if the income-producing activities are in North Carolina. *See*, N.C. Gen. Stat. §105-130.4(1)(3)c. The statute provides that receipts from intangible property are sourced to North Carolina if they are received from sources within North Carolina. *See*, N.C. Gen. Stat. §105-130.4(1)(3)b.

Fees received from advertisers are receipts for services and are attributable to this State if the income-producing activities that give rise to such receipts are performed in this State. The income-producing activities that give rise to advertising receipts are the solicitation, negotiation and execution of the advertising services agreement with the advertiser and the transmission of the advertisements and the programs in which they are incorporated.

License fees received from licensees or other parties are receipts from intangible property and are attributable to this State if received from sources within this State. License fees are received from sources within this State if the fees are received pursuant to a contract approved by the executive management of the licensee or other party (i.e., the payor) in this State.

The following examples illustrate the application of this advice:

Example 1: Taxpayer A is a national broadcast network. Taxpayer A sells advertising services to a national consumer products manufacturer. The solicitation, negotiation and execution of the advertising services agreement and the transmission of the advertisements and programs in which they are incorporated take place outside North Carolina. Because none of Taxpayer A's income-producing activities that give rise to the advertising receipts are performed in North Carolina, Taxpayer A's advertising receipts are not attributable to this State and are not included in the numerator of Taxpayer A's sales factor.

Mr. William W. Nelson
December 28, 2012
Page 3

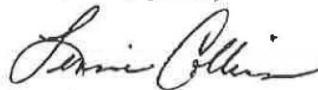
Example 2: Taxpayer C is a national cable program network. Taxpayer C licenses programming to cable system operators X and Y. In each case, Taxpayer C has a direct contractual relationship with the cable system operator. Both of the cable system operators have subscribers in North Carolina. Cable system operator X's executive management approved the contract with Taxpayer C in New York. Cable system operator Y's executive management approved the contract with Taxpayer C in North Carolina. The license fees received pursuant to the contract with cable system operator X are not attributable to this State, because cable system operator X's executive management approved the contract pursuant to which the fees are paid outside North Carolina, and such receipts are not included in the numerator of Taxpayer C's sales factor. The license fees received from cable system operator Y are attributable to this State, because cable system operator Y's executive management approved the contract pursuant to which the fees are paid in this State, and such receipts are included in the numerator of Taxpayer C's sales factor.

Example 3: Taxpayer D is a national cable program network. Taxpayer D licenses programming to a cable system operator pursuant to a contract approved by the cable system operator's executive management in New York. The cable system operator has subscribers in North Carolina and other states. Taxpayer D has a direct contractual relationship with the cable system operator. Taxpayer D also operates a local cable franchise and, as a provider of cable services to subscribers in North Carolina, receives subscriber fees from its subscribers. The license fees received from the cable system operator are not attributable to this State, because the cable system operator's executive management approved the contract pursuant to which the fees are paid outside North Carolina, and such receipts are not included in the numerator of Taxpayer D's sales factor. The subscriber fees received by Taxpayer D from its cable service subscribers in North Carolina are sourced under the rules applicable to cable system operators.

This information contained herein constitutes written specific advice pursuant to G.S. 105-264. The advice provided is based on the facts presented and any material difference in the facts does not afford the taxpayer the ability to rely on the advice given. The advice contained in this letter is binding on the Department and relieves the taxpayer from tax, penalties and interest otherwise due if the advice is erroneous. The advice contained in this letter is an interpretation of existing law and applies to all open taxable periods as well as future taxable periods, subject to any applicable changes in the law and subject to the other limitations set forth in G.S. 105-264.

If you have any questions or require additional information, please let me know.

Very truly yours,



Lennie Collins, Director
Income Tax Division
TEL: (919) 733-8510
FAX: (919) 733-1821

EXHIBIT A

**Motion Picture Association of America
Members and Parent Companies**

Member

Paramount Pictures Corporation
Universal City Studios LLC
Walt Disney Studios Motion Pictures
Warner Bros. Entertainment Inc.
CBS Corporation

Parent Company

Viacom Inc.
NBC Universal Media LLC
The Walt Disney Company
Time Warner Inc.
NA

ATTACHMENT B

Cases and Rulings in the News States A-M, Florida Department of Revenue, FL—Technical Assistance Advisement, No. 11C1-008, Florida, (Sep. 15, 2011)

[Click to open document in a browser](#)

Executive Director *Lisa Echeverri*

TAX: Corporate Income Tax

TAA NUMBER : 11C1-008

ISSUE: Sales Apportionment

STATUTE CITES: Section 220.15(5), F.S.

RULE CITES: Rule 12C-1.0155, F.A.C.

QUESTION: What is the appropriate method for apportioning cable network income?

ANSWER: A taxpayer is required to source subscription revenue and advertising revenue pursuant to Rule 12C-1.0155(2)(f), F.A.C.

September 15, 2011

XXX

XXX

XXX

Re: Technical Assistance Advisement 11C1-008

Corporate Income Tax

XXX. ("Taxpayer")

Dear XXX:

This letter is in response to your letter of XXX, requesting a ruling as to the appropriate method for apportioning subscription revenue and advertising revenue. This response constitutes a Technical Assistance Advisement ("TAA") under Chapter 12-11, Florida Administrative Code, and is issued to you under the authority of Section 213.22, Florida Statutes.

FACTS ¹

Taxpayer, a XXX corporation, is a leading XXX and XXX company. Taxpayer classifies its business into the following three reporting segments:

- XXX;
- XXX;
- XXX.

Taxpayer's XXX include domestic and international XXX and XXX programming. The programming of Taxpayer's XXX is distributed via XXX systems, XXX distribution systems, XXX companies and other distribution XXX. Among the Taxpayer's brands are XXX, XXX, XXX, XXX, XXX, XXX, XXX, XXX, XXX, XXX and XXX.

LEGAL AUTHORITY

Section 220.02, F.S., states in part:

(1) It is the intent of the Legislature in enacting this code to impose a tax upon all corporations, organizations, associations, and other artificial entities which derive from this state or from any other jurisdiction permanent and inherent attributes not inherent in or available to natural persons, such as perpetual life, transferable ownership represented by shares or certificates, and limited liability for all owners. It is intended that any limited liability company that is classified as a partnership for

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federal income tax purposes and formed under chapter 608 or qualified to do business in this state as a foreign limited liability company not be subject to the tax imposed by this code. **It is the intent of the Legislature to subject such corporations and other entities to taxation hereunder for the privilege of conducting business, deriving income, or existing within this state.** ... (Emphasis Supplied)

Section 220.15, F.S., states in part:

(1) Except as provided in ss. 220.151 and 220.152, adjusted federal income as defined in s. 220.13 shall be apportioned to this state by taxpayers doing business within and without this state by multiplying it by an apportionment fraction composed of a sales factor representing 50 percent of the fraction, a property factor representing 25 percent of the fraction, and a payroll factor representing 25 percent of the fraction. If any factor described in subsection (2), subsection (4), or subsection (5) has a denominator that is zero or is determined by the department to be insignificant, the relative weights of the other factors in the denominator of the apportionment fraction shall be as follows:

(5) The sales factor is a fraction the numerator of which is the total sales of the taxpayer in this state during the taxable year or period and the denominator of which is the total sales of the taxpayer everywhere during the taxable year or period.

(a) As used in this subsection, the term "sales" means all gross receipts of the taxpayer except interest, dividends, rents, royalties, and gross receipts from the sale, exchange, maturity, redemption, or other disposition of securities.

However:

1. Rental income is included in the term if a significant portion of the taxpayer's business consists of leasing or renting real or tangible personal property; and
2. Royalty income is included in the term if a significant portion of the taxpayer's business consists of dealing in or with the production, exploration, or development of minerals.

(b)1. Sales of tangible personal property occur in this state if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point, other conditions of the sale, or ultimate destination of the property, unless shipment is made via a common or contract carrier. However, for industries in SIC Industry Number 2037, if the ultimate destination of the product is to a location outside this state, regardless of the method of shipment or f.o.b. point, the sale shall not be deemed to occur in this state.

(7) The term "everywhere," as used in the computation of apportionment factor denominators under this section, means "in all states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country, or any political subdivision of the foregoing."

Rule 12C-1.0155, F.A.C., states in part:

(1) For the purposes of the sales factor, the term "sales" means all gross receipts received by the taxpayer from transactions and activities in the regular course of its trade or business.

(h) Sales of services. In the case of a taxpayer engaged in providing services, such as the operation of an advertising agency, the performance of equipment service contracts, or research and development contracts, "sales" includes the gross receipts from the performance of such services including fees, commissions, and similar items.

(2) Florida sales. The numerator of the sales factor shall include gross receipts attributed to this state which were derived by the taxpayer from transactions and activities in the regular

course of its trade or business. All interest income, service charges, carrying charges, or time-price differential charges incident to such gross receipts shall be included regardless of the place where the account records are maintained or the location of the contract or other evidence of indebtedness.

(a) Sales of Tangible Personal Property in Florida. Gross receipts from sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state regardless of the F.O.B. point, other conditions of the sales, or the ultimate destination of the property. Tangible personal property shipped by common or contract carriers will use a destination test to determine whether the sale is a Florida sale or a sale without this state.

1.a. Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is located in this state, even though the property is ordered from outside this state.

b. Example: The taxpayer, with inventory in State A, sold \$100,000 of its products to a purchaser having branch stores in several states including this state. The order for the purchase was placed by the purchaser's central purchasing department located in State B. \$25,000 of the purchaser's order was shipped directly to purchaser's branch store in this state. The branch store in this state is the "purchaser within this state" with respect to \$25,000 of the taxpayer's sales.

2.a. Property is delivered or shipped to a purchaser within this state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.

b. Example: The taxpayer makes a sale to a purchaser who maintains a central warehouse in this state at which all merchandise purchases are received. The purchaser reships the goods to its branch stores in other states for sale. All of the taxpayer's products shipped to the purchaser's warehouse in this state are property "delivered or shipped to a purchaser within this state."

4.a. The term "purchaser within this state" shall include the ultimate recipient of the property if the taxpayer in this state, at the designation of the purchaser, delivers to or has the property shipped to the ultimate recipient within this state.

b. Example: A taxpayer in this state sold merchandise to a purchaser in State A. Taxpayer directed the manufacturer or supplier of the merchandise in State B to ship the merchandise to the purchaser's customer in this state pursuant to purchaser's instructions. The sale by the taxpayer is in this state.

(e) Personal Services.

1. Gross receipts for the performance of personal services are attributable to this state if such services are performed in this state.

2.a. If services relating to a single item of income are performed partly within and partly without this state, the gross receipts for the performance of such services shall be attributable to this state only if a greater portion of the services were performed in this state, based on costs of performance.

b. The term "costs of performance" means direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the taxpayer's trade or business. Where independent contractors are used to complete a contract, the term "costs of performance" will include amounts paid to the independent contractors.

3. Where services are performed partly within and partly without this state, the services performed in each state may constitute a separate income producing activity, even though the client is billed a lump sum amount. In such cases, the gross receipts for the performance of services attributable to this state shall be measured by the ratio which the time spent in performing such services in this state bears to the total time spent in performing such services everywhere. Time spent in performing services includes the amount of time expended in the performance of a contract or other obligation which gives rise to such gross receipts. Personal services not directly connected with the performance of the contract or other obligation, as for example, time expended in negotiating the contract, are excluded from the computations.

(i) Television and Radio Broadcasting. Gross receipts, including advertising revenues, from broadcasting within and without the state will be attributed to the numerator of the sales factor on the basis of the ratio of the audience within the state to the audience everywhere.

(j) Newspaper and Magazine Revenue. Receipts from the sale of newspapers and magazines, including advertising fees, will be considered Florida sales on the basis of the ratio of circulation within the state to circulation everywhere.

(l) Other Sales in Florida. Gross receipts from other sales shall be attributed to this state if the income producing activity which gave rise to the receipts is performed wholly within this state. Also, **gross receipts shall be attributed to this state if the income producing activity is performed within and without this state but the greater proportion of the income producing activity is performed in this state, based on costs of performance. The term "income producing activity" applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer for the ultimate purpose of obtaining gains or profits.** Where independent contractors are used to complete a contract, the term "income producing activity" will include amounts paid to the independent contractors.

... (Emphasis Supplied)

ISSUE PRESENTED

What is the appropriate method of apportionment of income for Taxpayer's XXX?

DISCUSSION AND ANALYSIS

A state is allowed by the U.S. Constitution to tax the income of a multistate corporation if the state applies a formula that fairly apportions a percentage of the corporation's income attributable to business activities inside and outside the state.² Under Section 220.15, F.S. and Rule 12C-1.015, F.A.C., a Florida corporation that conducts business activities occurring both within and without Florida and that, by virtue of that activity, are taxable in another state, must apportion its business income to Florida. Florida has adopted an apportionment fraction with a sales factor representing 50% of the fraction, a property factor representing 25% of the fraction, and a payroll factor representing 25% of the fraction.

The Florida sales factor is a measure of receipts received from business activity conducted in Florida. Subsection (5) of Section 220.15, F.S., provides the general proposition that the "sales factor is a fraction the numerator of which is the total sales of the taxpayer in this state during the taxable year or period and the denominator of which is the total sales of the taxpayer everywhere during the taxable year or period." Rule 12C-1.0155(2), F.A.C., states that "the numerator of the sales factor shall include gross receipts attributed to this state which were derived by the taxpayer from transactions and activities in the regular course of its trade or business." The determination of whether a sale is to be attributed (or "sourced") to Florida generally will be based upon the factors and concepts set forth in paragraph (b) of subsection (5) of Section 220.15, F.S., and Rule 12C-1.0155(2), F.A.C.

Neither the statutes nor the rules provide an enumerated method for determining the portion of the receipts from the type of XXX programming revenue and advertising revenue received by the Taxpayer that should be sourced to Florida. Therefore, Taxpayer's receipts from these activities appear to constitute "sales other than tangible personal property" under Rule 12C-1.0155(2)(l), F.A.C.

Rule 12C-1.0155(2)(l), F.A.C., focuses on each separate item of income and the activities which produce that income. To paraphrase that rule, sales are attributed to Florida if the income producing activity which gave rise to the receipt is within Florida. "Income producing activity" is defined by Rule 12C-1.0155(2)(l), F.A.C., as "the transaction and activity directly engaged in by the taxpayer for the ultimate purpose of obtaining gains or profits." On the other hand, Rule 12C-1.0155(2)(e)1., F.A.C., which pertains to personal services, focuses on where those services are performed. The term "personal services" has limited meaning and does not include the type of income producing activity present in this case. Therefore, receipts from the activities conducted by the Taxpayer would seem to be attributed to Florida if the income-producing activity is performed entirely or predominately in Florida. See, Rule 12C-1.0155(2)(l), F.A.C.

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Based on the information provided, Taxpayer generates revenues from providing programming to XXX XXX operators, XXX distribution companies, XXX companies and other distributors ("Distributors") that have contracted to receive and distribute this programming ("subscription revenue") and from the sale to XXX advertisers ("Advertisers") of space on Taxpayer's programming ("advertising revenue").

Subscription Revenue

Taxpayer receives income from its contracts with Distributors that broadcast XXX XXX to the public. Taxpayer earns revenue as programming services are provided to Distributors based on negotiated contractual programming rates. Taxpayer's agreements with its Distributors are typically long-term arrangements that provide for annual service fee increases and have fee arrangements that are generally related to the number of subscribers served by the Distributors.

The income producing activity underlying the sale is the Taxpayer's delivery of programming content to the Distributors. Performance occurs when the license period has commenced and the Distributor is able to access the programming content. Taxpayer is simply making its XXX/programming available to the distributors, who then deals directly with the public and distributes Taxpayer's XXX/programming directly to the public. Taxpayer does not have a direct contact and receives no revenue directly from the individual subscribers/customers of the Distributors. Therefore, Taxpayer is not required to utilize Rule 12C-1.0155(2)(i), F.A.C., but instead subscription revenue earned from Distributors, who accessed the programming content, will constitute a Florida sale when the Distributor (Taxpayer's customer) is located in Florida.

Advertising Revenue

The Taxpayer also receives income from sales of advertising time XXX. Taxpayer's advertising consists of consumer advertising, which is sold primarily on a national basis in the U.S. and on a panregional or local-language feed basis outside the U.S. Generally, Taxpayer sells space XXX to national advertisers to promote their products/services. Local advertising space is typically sold by the Distributors. Advertising contracts generally have terms of one year or less. Advertising revenues are generated from a wide variety of advertising categories. In the U.S., advertising revenues are a function of the size and demographics of the audience delivered, the "CPM," which is the cost per thousand viewers delivered, and the number of units of time sold. Units sold and CPMs are influenced by the quantitative and qualitative characteristics of the audience of each network, the perceived quality of the network and of the particular programming, as well as overall advertiser demand in the marketplace.

Rule 12C-1.0155(2)(l), F.A.C., provides that sales are attributed to Florida if the income producing activity which gave rise to the receipt is within Florida. As was previously noted, Rule 12C-1.0155(2)(l), F.A.C., defines the term "income producing activity" as "the transaction and activity directly engaged in by the taxpayer for the ultimate purpose of obtaining gains or profits." Here, although activities related to the production of the income may occur within or outside of Florida (such as the gathering, accumulating and processing of all necessary information to develop and produce the advertisements), those activities cannot rightly be called income producing activity. Those activities may have caused or led up to income producing activity, but they did not constitute such activity. Taxpayer's income producing activity with respect to its advertising sales is performed throughout the U.S. because the Taxpayer is paid to advertise on a national basis and contracts regarding advertising activity are negotiated and entered into across the U.S. Therefore, advertising revenue will constitute a Florida sale when the Advertiser (Taxpayer's customer) is located in Florida.

CONCLUSION

The taxpayer is required to source its subscription revenue and advertising revenue pursuant to Rule 12C-1.0155(2)(l), F.A.C. Subscription revenue earned from Distributors will constitute a Florida sale when the Distributor is located in Florida. Advertising revenue earned by Taxpayer will be sourced to Florida when the Advertiser is located in Florida. Solely for purposes of this TAA, a Distributor or an Advertiser will be deemed to be located in Florida when the principal place from which the trade or business of the Distributor or Advertiser is directed or managed is within Florida. Please note that the results reached in this TAA are based upon information provided in your XXX request and other publically available facts. Should additional facts or information, such as the terms and conditions or any contracts, agreements, or other documents

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with Distributors or Advertisers, differ from those in your request or in this advisement, the response provided herein may be different.

This response constitutes a Technical Assistance Advisement under s. 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice, as specified in s. 213.22. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes or judicial interpretation of the statutes or rules upon which this advice is based may subject similar future transactions to a different treatment from that which is expressed in this response.

You are further advised that this response, your request and related backup are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of s. 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request Technical Assistance Advisement, the backup material and this response, deleting names, addresses and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 15 days of the date of this letter.

Sincerely,

Jermane L. Wright

Senior Attorney

Technical Assistance and Dispute Resolution

JLW/

Record ID: 109119

Child Support Enforcement - *Ann Coffin, Director* • General Tax Administration - *Jim Evers, Director* Property Tax Oversight - *James McAdams, Director* • Information Services - *Tony Powell, Director*

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Footnotes

- 1 The facts set forth include those provided by the Taxpayer as well as other information found in publically accessible resources. The Taxpayer did not provide with its request any contracts, agreements, or other documents concerning the subscription revenue and advertising revenue discussed in this TAA.
- 2 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

Legislative Testimony
