Georgia Letter Ruling: LR IT-2018-01
Topic: Permanent Establishment
Date Issued: June 20, 2018

This letter is in response to your letter requesting a ruling to determine the position taken by Company regarding its position on the Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital ("Canada-U.S. Treaty") and its applicability to income taxes in the state of Georgia.

Facts as Presented by the Taxpayer

Company was incorporated <deleted> in the country of Canada. <deleted> Company is carrying on a trade or business within the United States through the continuous solicitation of sales to U.S. customers. As a result, they have a U.S. federal tax return filing requirement under U.S. domestic law. The company does not have a permanent establishment in the U.S. and by virtue of the Canada-U.S. treaty is exempt from paying U.S. federal income tax.

Company only has a fixed place of business in Canada and all fixed assets and inventory owned by the taxpayer are located in Canada. The taxpayer also does not have any employees in the United States. The only activity conducted by Company in the United States is the solicitation of sales through sales agents of a related company.

Issue

Is Company exempt from income taxes in the state of Georgia subject to the Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital ("Canada-U.S. Treaty")?

Legal Authorities

O.C.G.A. § 48-7-21(a) provides that:

> Every domestic corporation and every foreign corporation shall pay annually an income tax equivalent to 6 percent of its Georgia taxable net income. Georgia taxable net income of a corporation shall be the corporation's taxable income from property owned or from business done in this state. A corporation's taxable income from property owned or from business done in this state shall consist of the corporation's taxable income as defined in the Internal Revenue Code of 1986, with the adjustments provided for in subsection (b) of this Code section and allocated and apportioned as provided in Code Section 48-7-31.

O.C.G.A. § 48-7-31(a) provides that:

> The tax imposed by this chapter shall apply to the entire net income, as defined in this article, received by every foreign or domestic corporation owning property within this state, doing business within this state, or deriving income from sources within this state to the extent permitted by the United States Constitution. A corporation shall be deemed to be doing business within this state if it engages within this state in any activities or transactions for the purpose of financial profit or gain whether or not:
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> (1) The corporation qualifies to do business in this state;
> (2) The corporation maintains an office or place of doing business within this state; or
> (3) Any such activity or transaction is connected with interstate or foreign commerce.

Ruling

Foreign corporations owning property, doing business, or deriving income from sources in Georgia are required to pay six percent tax on their "Georgia taxable net income." O.C.G.A. §§ 48-7-21(a), -31(a). It appears your ruling request concedes that Company is "doing business" in Georgia and hence is subject to taxation in Georgia. As such, Company must file a return and compute its Georgia taxable net income. "Georgia taxable net income of a corporation . . . shall consist of the corporation's taxable income as defined in the Internal Revenue Code of 1986, with the adjustments provided for in subsection (b) of Code Section 48-7-21 and allocated and apportioned as provided in Code Section 48-7-31."

Whether Company has any "taxable income as defined in the Internal Revenue Code" is another matter. Under the Internal Revenue Code, "[a] tax is . . . imposed for each taxable year on the taxable income of every corporation." I.R.C. § 11(a). See generally I.R.C. § 63(a) ("[F]or purposes of this subtitle, the term 'taxable income' means gross income minus the deductions allowed by this chapter[.]"); I.R.C. § 61(a) ("Except as otherwise provided in this subtitle, gross income means all income from whatever source derived"). In the case of foreign corporations, the tax imposed by I.R.C. § 11(a) applies only as provided by I.R.C. § 882. I.R.C. § 11(d). "A foreign corporation engaged in trade or business within the United States . . . shall be taxable as provided in section 11 . . . on its taxable income which is effectively connected with the conduct of a trade or business within the United States." I.R.C. § 882(a)(1). See also I.R.C. § 882(a)(2) ("In determining taxable income for purposes of paragraph (1), gross income includes only gross income which is effectively connected with the conduct of a trade or business within the United States"). At the same time, with exceptions not applicable here, "[i]ncome of any kind is not included in gross income and is exempt from tax under Subtitle A (relating to income taxes), to the extent required by any income tax convention to which the United States is a party." Treas. Reg. § 1.894-1(a). By virtue of the Treaty, if Company had no gross income effectively connected with the conduct of a trade or business in the United States, then it would have no "taxable income" for purposes of I.R.C. § 11(a). But Company could still have a positive Georgia taxable net income if there are any additions to federal taxable income required by O.C.G.A. § 48-7-21(b), depending on how the allocation and apportionment provisions of O.C.G.A. § 48-7-31 apply.

The opinions expressed in this ruling are based upon the information contained in your request and limited to the specific transactions, facts, circumstances and taxpayer in question. The facts herein are those presented by the taxpayer and the Department accepts them as true for this ruling. If the facts presented herein change, are not true, are different, or material facts have been omitted, the conclusions reached in this ruling may change. In addition, subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this advice is based may subject similar future transactions to a different tax treatment than that expressed in this ruling.