



Activities of a single employee create corporate income tax nexus in Virginia

TAX AND BENEFITS CHALLENGES | NOV 15, 2013

The Virginia Tax Commissioner advised in a recent ruling (**PD 13-172**) (the Ruling) that a foreign corporation (i.e., non-Virginian corporation) (the Taxpayer) must pay Virginia corporate income tax because the activities of a single employee located in Virginia created sufficient nexus with the state to impose such income tax.

The Taxpayer was headquartered outside of Virginia and did not have any customers in Virginia. The Taxpayer did have a single employee who worked out of a home office in Virginia developing test methods and who travelled to customers' facilities and to the Taxpayer's office to provide consulting services and conduct training sessions. The Taxpayer acknowledged that it would need to withhold Virginia income tax from such employee's compensation.

The Virginia tax code imposes income tax on the Virginia taxable income for each taxable year of every foreign corporation that has income from Virginia sources. A foreign corporation will have income from Virginia sources if there is sufficient business activity with the state to make the applicable apportionment factor (property, sales and/or payroll) positive.

Federal law (P.L. 86-272) prohibits a state from imposing a net income tax where the only contacts with the state constitute solicitation of orders for sales of tangible personal property. The Ruling noted that the Virginia Department of Tax (the Department) extends the application of P.L. 86-272 to sales other than tangible personal property, but narrowly interprets P.L. 86-272 as applying only to those activities that constitute solicitation, are ancillary to solicitation or are *de minimis* in nature.

The Virginia employee was engaged in the development of test methods from her home office in Virginia. The Ruling inferred that such test methods were related to the consulting and training services provided to customers outside of Virginia. In a prior ruling (P.D. 01-70), the Department held that providing technical training to customers exceeds the protection provided in P.L. 86-272. Similarly, in this Ruling, the Department determined that the services being provided by the Virginia employee were outside of the protections provided in P.L. 86-272 because such services do not appear to be related to the sale of products by the Taxpayer.

Consequently, the Department determined that the Virginia employee's activities of creating tests related to the provision of consulting and training services to customers would create nexus for the foreign corporation in Virginia, unless such activities were found to be *de minimis*. The Department stated that it did not have enough information to determine if such activities were *de minimis*.

Therefore, based on the facts presented, the Department determined that the Taxpayer's activities in Virginia appear to create sufficient nexus to allow Virginia to impose income tax on the Taxpayer's income that is apportioned to Virginia. The existence of a positive Virginia apportionment factor, in this case the payroll factor, establishes income from Virginia sources. Consequently, the Department determined that based on these facts, it would appear that the Taxpayer would be required to file Virginia corporate income tax returns due to the activities of its employee in Virginia.

Click [here](#) to read the full text of the Ruling.