

California – Gross receipts were not excluded from sales factor as occasional sales

June 14, 2013

In brief

The California State Board of Equalization (SBE) found that gross receipts from a diversified media corporation's sales of 13 television stations located outside of California were not excluded from the sales factor under the occasional sale rule of California Code of Regulations (CCR) section 25137(c)(1)(A). While no formal opinion or letter decision has been issued, the decision provides some guidance as to how the SBE addresses the occasional sale rule. The Board apparently did not reach the issue of the potentially distortive effect of income inclusion without factor representation. [*Appeal of Emmis Communications Corp.*, SBE Case No. 547964, June 11, 2013]

In detail

On June 11, 2013, the SBE held a hearing on this matter and rendered its decision. No formal opinion or letter decision has been issued. The following summarizes: (1) the SBE staff's [Hearing Summary](#) prepared in anticipation of the hearing and (2) our observations of the June 11, 2013 hearing.

Emmis Communications Corporation (Emmis) is a diversified media company that focuses principally on radio broadcasting, but also participates in magazines, television, and other activities. Emmis began acquiring television properties in 1998 as an outgrowth of its radio broadcasting business. During

its 2006 tax year, Emmis sold 13 of its 16 television stations and received gross proceeds of \$931 million. The sales occurred on four separate dates with four unrelated purchasers; none of the television stations were located in California.

Furthermore, the rest of Emmis' business operated at a loss in 2006 and therefore Emmis asserted that income from the television station sales represented 100 percent of Emmis' taxable income for the year.

CCR section 25137(c)(1)(A) interprets California's alternative apportion provisions under California Revenue and Taxation Code (R&TC) section 25137. The occasional sale rule under CCR section

25137(c)(1)(A) provides generally that when substantial gross receipts arise from an occasional sale of property held or used in the regular course of the taxpayer's business, such gross receipts shall be excluded from the sales factor.

The California Franchise Tax Board (FTB) attempted to exclude the gross receipts from the sale of the television stations from the sales factor (in this case only from the denominator and thus, increasing the California sales factor) arguing the occasional sale rule under CCR section 25137(c)(1)(A) applied. The FTB argued that sale of the stations was an occasional sale because Emmis primarily generated revenue from selling advertising and was

not in the business of divesting whole segments of its operations. FTB characterized the series of transactions as one sale, that of the exit from the television broadcasting business. The FTB cited the *Appeal of Fluor* (95-SBE-016) as reflecting the SBE's position that the special rules of CCR section 25137 must be applied whenever the facts and circumstances of a particular appeal match those set forth in the regulation.

Emmis argued that: (1) the acquisition and disposition of media properties were part of its operations and thus the television station sales were not occasional because the sales were an integral and ordinary part of its business, and (2) that if the sales were deemed to be occasional sales and removed from the factor, including the gain from the sale in its income base (representing 100% of its unitary income) would be distortive without the corresponding receipts in the apportionment factor.

During the hearing, the arguments focused on the nature of Emmis' business, and whether the sales of the 13 television stations were part of its usual business. Emmis stated that its business was comprised of buying broadcast stations, increasing the

stations' cash flow, and then selling the stations. Emmis stated that selling the television stations during the year at issue was an extension of this business (and also stated it had made bids to purchase more television stations). Further supporting this characterization of its business was the fact that Emmis reported 41 acquisitions/ exchanges and 28 dispositions/exchanges of radio and television broadcasting properties from 1998 to 2006.

The FTB repeatedly noted that the sale of an entire line of business was not in the taxpayer's ordinary course of business but rather a single plan to get out of the business, making the sale occasional. The SBE noted that the FTB argued in *Appeal of Comcast* (Case ID No. 424198, decided February 7, 2012) that the transactional test had been satisfied because Comcast regularly engaged in merger and acquisition transactions and therefore such activity was in its ordinary course of business. The FTB agreed that the transactional test for business income was very similar to the test of an occasional sale, but claimed the tests were not identical.

The Board took the parties' arguments under consideration and decided in

favor of Emmis, finding that the occasional sale rule did not apply to the television station sales. As a result, gross receipts from the television station sales were included in Emmis' sales factor.

The takeaway

There were two questions at issue: (1) whether the occasional sale rule applied to Emmis' television station sales and (2) whether excluding television station sales gross receipts from the apportionment factor was distortive. During oral presentations, Emmis and the FTB addressed both issues. However, the SBE members' questions and discussion centered on the application of the occasional sale rule without reaching a discussion on the distortion question. Furthermore, the SBE did not offer any explanation as to the specific points that led to their determination. This means that taxpayers will receive little guidance from this case as to the SBE's view of the specific arguments.

The amount at issue did not meet the new threshold to require publication of the SBE's decision. Accordingly, it is likely that the SBE's decision will be an informal, unpublished decision.

Let's talk

If you have any questions regarding the *Appeal of Emmis* decision, please contact:

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