



NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

COMMISSIONER OF REVENUE vs. AT&T CORPORATION.

11-P-1462

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Commissioner of Revenue (commissioner) appeals from a decision of the Appellate Tax Board (board) that allowed AT&T Corporation's (AT&T) abatement application for the years 1996 through 1999. On appeal, the commissioner argues that the board erred in determining AT&T's income-producing activity. We affirm.

For the years 1996-1999, AT&T paid Massachusetts corporation franchise taxes in the amount of \$7,706,624. In October, 2005, AT&T filed an application for abatement of its franchise tax for those years, claiming a \$2,108,137 reduction in its liability. AT&T sought this abatement by seeking to exclude receipts from telephone calls that began in Massachusetts, but terminated out of State. 'Where a corporation such as [AT&T] conducts business both within and outside Massachusetts, the share of its taxable net income subject to corporate excise tax in Massachusetts is calculated by utilizing the so-called 'statutory method' provided in G. L. c. 63, § 38.' *Boston Professional Hockey Assn., Inc. v. Commissioner of Rev.*, 443 Mass. 276, 279 (2005). For purposes of this case, the most important aspect of the excise tax calculation is the determination of the 'sales factor.' To determine the sales factor, the statute requires that the 'total sales of the corporation in this commonwealth during the taxable year' be divided by the 'total sales of the corporation everywhere during the taxable year.' G. L. c. 63, § 38(f), inserted by St. 1966, c. 698, § 58. AT&T argued, and the board agreed, that for purposes of the sales factor, telephone calls that originated with Massachusetts customers, but terminated out of State, were not income-producing activity qualifying as a sale in the Commonwealth. See G. L. c. 63, § 38(f); 830 Code Mass. Regs. § 63.38.1(9)(d)(1) (1995). The regulations define income-producing activity as 'a transaction, procedure, or operation directly engaged in by a taxpayer which results in a separately identifiable item of income. In general, any activity whose performance creates an obligation of a particular customer to pay a specific consideration to the taxpayer is an income-producing activity.' 830 Code Mass. Regs. § 63.38.1(9)(d)(2) (1995). If that activity is performed in two separate States, but the cost of performing that activity is greater in Massachusetts, then the activity is taxed here. 830 Code Mass. Regs. § 63.38.1(9)(d)(1). AT&T argues that the income-producing activity for the telephone calls in question was the operation of a global telecommunications network based in New Jersey. The commissioner argues that each long-distance call originating in Massachusetts constituted the income-producing activity. We affirm the board's decision. There are two approaches to determining income-producing activity for the purpose of whether the costs of performance is greater in the Commonwealth than any other State. The first approach, taken by the board, is the so-called 'operational' approach. Under the operational view, the income-producing activity of the taxpayer consists of the over-all operation that was needed to provide the service. See *Interface Group v. Commissioner of Rev.*, 72 Mass. App. Ct. 32, 38 (2008). In contrast, 'the transactional approach to the income-producing activity requires' consideration of each individual transaction from which the taxpayer receives payment from a customer. *Id.* at 38-40. The commissioner argues that the transactional approach should be used because AT&T's customers paid the company for each long-distance telephone call originating in Massachusetts. Under this analysis,

the costs of performance incurred in Massachusetts are greater than any other State, therefore making it taxable in the Commonwealth. AT&T argues, and the board agreed, that its customers were actually paying for a reliable system of telecommunications, and that it was the operation of its global network based in New Jersey that qualified as its income-producing activity. Under this analysis, the costs of performance were greater in New Jersey.

'We will not modify or reverse a decision of the board if the decision is based on both substantial evidence and a correct application of the law.' *Boston Professional Hockey Assn., Inc.*, *supra* at 285. '[B]ecause the board is an agency charged with administering the tax law and has 'expertise in tax matters,' we will give weight to its interpretation of tax statutes, and will affirm its statutory interpretation if that interpretation is reasonable.' *AA Transp. Co. v. Commissioner of Rev.*, 454 Mass. 114, 119 (2009) (citations omitted). After hearing from several AT&T witnesses, and one witness from the commissioner, the board determined that the operational approach best suited the facts of this case. [\[FN1\]](#) The board found that it would be nearly impossible to use a transaction-based analysis because of the complexity of tracing the long-distance telephone calls in question. In *Interface*, *supra* at 40, we stated that 'the application of the regulation depended on the facts in issue' and that application of an operational approach is not guaranteed. [\[FN2\]](#)

Here, the board adequately explained why it used the operational approach. In light of the facts of this case, there was sufficient evidence to conclude that it was the more appropriate method. The board found that AT&T could not have provided the long-distance telephone calls to its customers without the integrated long-distance network based in New Jersey and other locations. [\[FN3\]](#) As in *Interface*, the board stressed the importance of the activities that took place at the headquarters of the company. We cannot conclude that this was an improper application of the law or an unreasonable application based on the facts presented. See *General Mills, Inc. v. Commissioner of Rev.*, 440 Mass. 154, 174-176 (2003) (affirming the board's treatment of the taxpayer's income-producing activity as its 'business operations [including billing and customer relations] and management . . . , all of which were located in Massachusetts'); *Boston Professional Hockey Assn., supra* at 286 (concluding that the board's finding, that Boston Professional Hockey Association's 'income-producing activity was the operation of an NHL franchise rather than the playing of individual games[,] fits comfortably within the text of the regulation'). [\[FN4\]](#)

Decision of the Appellate Tax

Board affirmed.

By the Court (Trainor, Grainger & Meade, JJ.),

Entered: July 13, 2012.

[FN1.](#) The commissioner does not challenge the board's factual findings.

[FN2.](#) In that case, we remanded so the board could make a more meaningful decision as to whether the transactional or operational analysis was appropriate. *Interface, supra* at 41. We affirmed the board's decision after remand in an unpublished decision pursuant to our rule 1:28. See *Interface Group v. Commissioner of Rev.*, 75 Mass. App. Ct. 1116 (2009).

[FN3.](#) The board credited testimony by an AT&T expert about the intricacy of the long-distance call process and the near impossibility of tracing each transaction. The board noted that the United States Supreme Court has acknowledged the complexity of interstate telephone calls. See *Goldberg v. Sweet*, 488 U.S. 252, 255 (1989) ('[T]he path taken by the electronic signals [for interstate telephone calls] is often indirect and typically bears no relation to state boundaries. The number of possible paths, the nature of the electronic signals, and the system of computerized switching make it virtually impossible to trace and record the actual paths taken by the electronic signals which create an individual telephone call').

[FN4.](#) Because we find the board properly applied the operational method, we do not need to address whether access fees should be included as part of AT&T's cost of performance.

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