STATE OF MAINE
KENNEBEC, ss.

MAINE BOARD OF TAX APPEALS
DOCKET NO. BTA-2020-11

[CORPORATE TAXPAYER],

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

[Corporate Taxpayer] (the "Company") appeals from an assessment of corporate income tax made by Maine Revenue Services ("MRS") for the period [year 1] through [year 3]. The assessment stems from a disagreement between MRS and the Company regarding how the Company's receipts from its sales of services should be sourced to Maine. Based on the evidence presented and the applicable law, we uphold the assessment in full.

I. Background

During the tax years at issue, the Company was a [non-Maine] corporation that provided advertising services worldwide, including in Maine, to sellers of goods and services (the "Sellers"). The Company displayed the Sellers' advertisements on internet websites for viewing and interaction by prospective purchasers (the "Consumers"). The Company's advertising service enabled it to selectively transmit advertisements to Consumers based on such factors as Consumer location, age, gender identity, interests, and behaviors, and the Company marketed this ability in selling its advertising services to the Sellers.

The Company filed Maine income tax returns for the period at issue. In computing its Maine income tax liability, the Company apportioned its income to Maine, treating the services it

sold as having been received in the states where the respective Seller's business headquarters were located. Following an audit, MRS determined that the Company should have apportioned its income to Maine based on its services having been received in the respective states where the Consumers were located. Consequently, MRS recomputed the Company's Maine income tax liability for the subject years and issued the assessment in the total amount of $[amount]. This appeal followed.

The only issue presented on appeal is whether the Company correctly apportioned its income to Maine for tax years [year 1] through [year 3]. The Company contends that it did so, and requests that the assessment be cancelled in full. It is the Company's burden to show that it is entitled to the relief it seeks. 36 M.R.S. § 151-D(10)(F). We consider the matter de novo as to both facts and law. *Id.* § 151(2)(G).

II. Discussion

For purposes of the Maine income tax, a corporation doing business both in Maine and in other states is required to apportion its income to Maine based upon the ratio of the corporation's sales in Maine to its sales everywhere. 36 M.R.S. § 5211(1), (8), (14). As used in the apportionment statute, the term "sales" is defined as "all gross receipts of the taxpayer." *Id.* § 5210(5). The requirement to apportion income applies whether a corporation makes sales of goods or, as in the present case, sales of services. *Id.* § 5211(16-A)(A). In computing the apportionment ratio for income from sales of services, gross receipts "must be attributed to the state *where the services are received*." *Id.* (emphasis added). The apportionment statute further provides, however, that

> [i]f the state where the services are received is not readily determinable, the services are deemed to be received at . . . the office of the customer from which the services were ordered in the regular course of the customer's trade or business.

Id.

The Company argues that its services were received by the Sellers at their respective places of business or, alternatively, that they must be deemed to have been received by the Sellers at their offices because the place of receipt was not readily determinable. We consider each of these arguments in turn.

A. Location Where Advertising Services are Received

As stated above, the Company generated revenue through its sales of advertisement services. To "advertise" means "to call public attention to[,] especially by emphasizing desirable qualities so as to arouse a desire to buy or patronize." "Advertise." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/ dictionary/advertise (def. 2(c)) (last visited May 12, 2021). Maine's income tax apportionment statutes do not define the term "receive." However, in determining the plain meaning of terms, the Maine courts "often rely on the definitions provided in dictionaries." *Apex Custom Lease Corp. v. State Tax Assessor*, 677 A.2d 530, 533 (Me. 1996) (citations omitted). The dictionary defines the verb "receive" as to "acquire" or to "experience." "Receive." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/receive (def. 5(c)) (last visited May 12, 2021).[1] Accordingly, we find that where advertisement services have been provided, they are received at the location of the Consumers to whom the advertisements were directed. This is especially clear where, as here, the advertisements are selectively transmitted to Consumers based on their geographic locations. For purposes of Maine income tax apportionment, the services provided by the Company during the period at issue were received in

[1] We note that the first part of this definition is commonly used when referring to the receipt or acquisition of property, while the second part applies more directly to the beneficial receipt of services.

the state where the Consumers were located, based on the plain language of the statute. No adjustment to the assessment on this basis is warranted.

B. Location Not Readily Determinable

The Company alternatively argues, pursuant to section 5211(16-A)(A), that the location where its advertising services were received is not "readily determinable" and that the revenue from its sales of those services must therefore be attributed to the states where the Sellers maintain their offices. The Company's argument has three components.

First, the Company explains that, although it sells advertising services that target or are selectively transmitted to Consumers at the Consumers' respective locations, the Company's Consumer location estimates are insufficient for tax apportionment purposes.[2] We are not persuaded by this argument. The evidence presented shows that the advertising services sold by the Company were based in part on its Consumer location estimates. The Company has not shown that these location estimates were not equally valid for purposes of apportionment computation. No adjustment to the assessment on the basis of this first argument is warranted.

The Company next explains that, while it collects Consumer location data for use in targeted advertising, the format of the data is difficult for the Company's accounting and tax functions to access and use.[3] According to the Company, this difficulty causes the location at which the Company's advertising services are received to be "not readily determinable" under

[2] According to the Company, the geographic location of its Consumers is estimated based on a number of factors, such as the Consumer's IP address and self-disclosed location. These factors may not always accurately reflect the user's actual location. For example, a Consumer may appear to be accessing [the Company] from the location of the proxy server that the user connects to rather than from the Consumer's actual location. Further, the methodologies used to measure Consumer metrics may also be susceptible to algorithm or other technical errors.

[3] We are mindful that, under some circumstances, difficulties involving technology and administration may preclude the use of certain apportionment practices. *See, e.g., Goldberg v. Sweet,* 488 U.S. 252, 265 (1989) ("An apportionment formula based on mileage or some other geographic division of individual telephone calls would produce insurmountable administrative and technological barriers.).

section 5211(16-A)(A), and that its sales must be deemed received in the states where the Sellers maintain their offices. We disagree. Although the circumstances described by the Company may present some measure of administrative problems, the circumstances do not make the location at which the Company's advertising services were received any less determinable. No adjustment on this basis is warranted.

Finally, the Company argues that, as applied, Maine's apportionment statute is so vague that taxpayers must guess at its meaning. In support of its position, the Company cites the Maine Law Court case of *State v. McCurdy*, 2010 ME 137, 10 A.3d 686. In that case, state fishing laws and regulations limited the taking of undersized scallops by imposing a maximum 35-scallop-meat-per-pint harvest limitation. The regulations did not, however, specify whether the sample used to measure the scallops was to be randomly selected from the fisherman's catch or culled from the fisherman's smallest scallops. The Law Court found that this imprecision "violated basic due process principles" by forcing fishermen to guess at how the regulation would be applied. *Id.* ¶ 21. The circumstances presented in *McCurdy* are unlike those of the present case.

The Maine apportionment statute requires that income derived from the performance of a service must be apportioned to the state where the service is received. 36 M.R.S. § 5211 (16-A)(A). Unlike the variable measurement in *McCurdy*, the location of where a service is received is a matter of fact, not perspective. Unlike *McCurdy*, the statute is not susceptible to a different application based on a different reading. Here, the taxpayer is not left to guess as to where the services it sells are received. Furthermore, the apportionment statute is not subject to alternate readings or interpretations.

In the present case, we are unpersuaded by the Company's arguments that the location is indeterminable within the meaning of Maine apportionment law. The Company's advertisement

services were received at the location where the advertisements were displayed and viewed. On the evidence presented, no adjustment to the assessment is warranted.

III. Decision

After considering the arguments and evidence presented, we find that the Company's advertising services were received at the location of the Consumers as defined above. We therefore uphold the assessment for tax years [year 1] through [year 3] in full. No adjustment is warranted.

The Board may, in limited circumstances, reconsider its decision on any appeal. If either party wishes to request reconsideration, that party must file a written request with the Board within 20 days of receiving this decision. Contact the Appeals Office at 207-287-2864 or see the Board's rules, available at http://www.maine.gov/boardoftaxappeals/lawsrules/, for more information on when the Board may grant reconsideration. If no request for reconsideration is filed within 20 days of the date of this proposed decision, it will become the Board's final administrative action. If either party wishes to appeal the Board's decision in this matter to the Maine Superior Court, that party must do so within 60 days of receiving this decision. During the 60-day period in which an appeal may be filed with the Superior Court, the Company may contact Maine Revenue Services at 207-624-9595 for the amount of tax that is currently due, together with any interest or penalties owed. After that 60-day period has expired, MRS will contact the Company with an updated amount of tax and any interest or penalties due at that time.

BY ORDER OF THE BOARD

Date: _____ _____, Chair/Member

CONCURRENCE of Board Member.

I concur with the result reached by the Board, however, I disagree with conclusions contained within the majority opinion.

Pursuant to section 5211, sales of services must be "attributed to the state *where the services are received*." In my opinion, the *services are received* by the Seller and not by the end-user, the Consumers. The Consumers in this type of industry are not receiving services, but instead are targets for the message of the Seller, and therefore, the services should be attributed to the Seller. In my opinion, it is the Sellers who received the benefit of the Company's advertising services, not the Consumers. If the intent of the Maine State legislature is to apply the sourcing of services to the end-users in this evolving business environment, rather than the Sellers, then I recommend that the law clearly state this variation to clarify the intent of the law.

Concurring:

Date: _____ _____, Chair/Member