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STATEMENT OF AUDIT PROCEDURE

Computation of the Property Factor for Corporations Engaged in the Business of Broadcasting

This Statement of Audit Procedure concerns the computation of the business allocation percentage for corporations that are subject to the City's General Corporation Tax and engaged in the business of broadcasting films and television programs.

I. BACKGROUND

Corporations subject to the General Corporation Tax must calculate a business allocation percentage to determine the amount of their income allocated to the City for tax purposes. The business allocation percentage ("BAP") is calculated on the basis of a three factor formula that includes a receipts factor, a property factor and a payroll factor.

Before 2008, the New York State Department of Taxation and Finance ("DTF") permitted taxpayers engaged in the business of broadcasting films and television programs to include the value of licensed films and television programming delivered on videocassette in their property factor, on the basis that the videocassette was tangible personal property. The DTF changed this position in Corporation Tax Memo TSB-M-08(6)C, and advised that films or television programs produced by others and aired by broadcasters under a licensing arrangement for a certain number of times and/or over a limited period of time would be considered an intangible right or license to use the film or program. Accordingly, the DTF would not permit broadcasters to include these films or programs in their allocation percentage for their Metropolitan Commuter Transportation District (MCTD) surcharge even if the broadcaster received the film or program in hard copy. New York had adopted single sales factor apportionment for its Article 9-A franchise tax and the guidance only applied to the MCTD surcharge. However, the DTF noted that films and programming that the broadcaster had obtained in electronic form, as opposed to videocassette, were always considered an intangible right or license to use property, and were thus already excluded from the BAP for entire net income and the MCTD allocation percentage, for any tax period.

Later, *In Matter of Meredith Corporation v. Tax Appeals Trib.*, NY Slip Op. 7909 (3d Dep't, Nov. 21, 2012), which involved tax years prior to 2008, the Third Department reviewed a DTF franchise tax assessment that excluded licensed television programming from the property factor because the taxpayer obtained the programming primarily by satellite transmission. In its decision, the court found no rational reason that delivery by satellite transmission, rather than hard copy, should result in differential treatment of licensed programming under the property factor. It noted the Tax Appeal Tribunal's conclusion that licensed programming delivered by videocassette is indistinguishable from licensed programming delivered by satellite; under this analysis, the same pre-2008 rule would be applicable to both. The court accordingly ruled that it was an invalid, retroactive application of a new policy to exclude the taxpayer's electronically delivered programming from its property factor in periods prior to 2008.

Separately, in accordance with Statement of Audit Procedure GCT-2008-03, the Department of Finance (“Finance”) has permitted any taxpayer engaged in the business of broadcasting films and television programs to include the value of films and programs in the property factor of its business allocation percentage on the basis set forth in New York State Department of Taxation and Finance (“DTF”) Corporation Tax Memo TSB-M-83 (20)C, which applied solely to films and television programs produced by a taxpayer. This policy commenced with tax years beginning in 1982 and 1983.

II. POLICY

A taxpayer may not include any licensed film or television or video program in its property factor as tangible personal property, regardless of whether the taxpayer stores or receives the material in electronic or hard copy form.

Finance agrees with the analysis in TSB-M-08(6)C and has always considered a taxpayer’s license to use films or television or video programs to be intangible property that may not be included in the property factor. Finance adopted DTF’s policy regarding programming produced by a taxpayer, but it did not adopt an analogous policy for films or programming licensed by a taxpayer. Consistent with the *Matter of Meredith Corporation*, Finance finds that no distinction can be made between the electronic and hard copy format for licensed films and other licensed television and video programming for property factor purposes, and therefore does not permit these licensed materials to be included in the property factor.

This Statement of Audit Procedure applies for all tax periods and is a confirmation of the Department’s position.