SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALYSTS and AARON DAVIS, Plaintiffs,	)	
	)	
	)	
v.	)	No. 2020 CA 1999 B
	)	Judge Matini
DISTRICT OF COLUMBIA,	)	Next event: 17 May 2024, 10 A.M.
Defendant.	)	(Further status conference)

APPENDIX TO PLAINTIFFS' RESPONSE TO DEFENDANT'S *VAUGHN* INDEX AND AFFIDAVIT

The following exhibits were previously filed in the record in June 2020 as exhibits to the declaration of plaintiff Aaron Davis. They are compiled in this appendix for the Court's convenience.

Internal Revenue Service

Number: **202019007**
Release Date: 5/8/2020

Index Number: 1362.04-00, 1362.02-02, 1361.01-04

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:B01
PLR-111829-19

Date:
November 29, 2019

LEGEND

X =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

State =

Dear :

This responds to a letter dated May 17, 2019, submitted on behalf of X by X's authorized representative, requesting relief under § 1362(f) of the Internal Revenue Code.

FACTS

According to the information submitted and representations within, X was formed on Date 1, under the laws of State. Effective Date 2, X elected to be treated as an S corporation.

Plaintiffs' Exhibit 8

On Date 2, X's operating agreement contained terms causing X to have more than one class of stock. Specifically, the agreement provided for the maintenance of capital accounts for each member with each account adjusted for capital contributions, income, gain, loss, deductions, and distributions made to the member. The capital accounts were not proportionate to membership interests. The agreement also provided that liquidation proceeds were to be distributed in accordance with capital accounts rather than pro rata based on membership interests. In addition, on Date 2, X's Form 2553 was missing the signature of one of X's shareholders. Thus, X's S election on Date 2 was ineffective.

On Date 3, X amended its operating agreement. However, the operating agreement still contained the same terms that caused X to have more than one class of stock. Thus, had X's S corporation election not been ineffective on Date 2, X's S corporation election would have terminated on Date 3.

X represents that it has taken corrective action by amending its operating agreement on Date 4 to provide that all outstanding units in X have identical distribution and liquidation proceeds.

X represents that neither X nor its shareholders intended to terminate X's S election and that X and its shareholders have filed consistently with X being an S corporation. In addition, X represents that, other than the ineffective S election on Date 2 and the potential termination due to a second class of stock on Date 3, X has qualified as a small business corporation at all times since its election on Date 2. Lastly, X and its shareholders agree to make any adjustments required as a condition of obtaining relief under the inadvertent termination rule as provided under § 1362(f) as may be required by the Secretary.

LAW AND ANALYSIS

Section 1361(a)(1) provides that the term "S corporation" means, with respect to any taxable year, a small business corporation for which an election under § 1362(a) is in effect for the year.

Section 1361(b)(1) defines a "small business corporation" as a domestic corporation which is not an ineligible corporation and which does not (A) have more than 100 shareholders, (B) have as a shareholder a person (other than an estate, and a trust described in § 1361(c)(2), or an organization described in § 1361(c)(6)) who is not an individual, (C) have a nonresident alien as a shareholder, and (D) have more than 1 class of stock.

Section 1362(d)(2)(A) provides that an election under § 1362(a) shall be terminated whenever (at any time on or after the first day of the first taxable year for which the corporation is an S corporation) such corporation ceases to be a small business corporation. Section 1362(d)(2)(B) further provides that the termination shall be effective on and after the date of cessation.

Treas. Reg. § 1.1361-1(l)(1) of the Income Tax Regulations provides that a corporation is generally treated as having only one class of stock if all outstanding shares of stock of the corporation confer identical rights to distribution and liquidation proceeds.

Section § 1.1361-1(l)(2)(i) provides, in part, that the determination of whether all outstanding shares of stock confer identical rights to distribution and liquidation proceeds is made based on the corporate charter, articles of incorporation, bylaws, applicable state laws, and binding agreements relating to distribution and liquidation proceeds (collectively, governing provisions). Although a corporation is not treated as having more than one class of stock so long as the governing provisions provide for identical distribution and liquidation rights, any distributions (including actual, constructive, or deemed distributions) that differ in timing and amount are to be given appropriate tax effect in accordance with the facts and circumstances.

Section 1362(f) provides, in relevant part, that if (1) an election under § 1362(a) by any corporation was not effective for the taxable year for which made (determined without regard to § 1362(b)(2)) by reason of a failure to meet the requirements of § 1361(b) or to obtain shareholder consents; (2) the Secretary determines that the circumstances resulting in such ineffectiveness were inadvertent; (3) no later than a reasonable period of time after discovery of the circumstances resulting in such ineffectiveness, steps were taken so that the corporation for which the election was made is a small business corporation; and (4) the corporation for which the election was made, and each person who was a shareholder in such corporation at any time during the period specified pursuant to § 1362(f), agrees to make the adjustments (consistent with the treatment of such corporation as an S corporation) as may be required by the Secretary with respect to such period, then, notwithstanding the circumstances resulting in such ineffectiveness, such corporation shall be treated as an S corporation during the period specified by the Secretary.

CONCLUSION

Based on the facts submitted and the representations made, we conclude that X's S election was ineffective on Date 2, and the ineffectiveness of X's S corporation election was inadvertent within the meaning of § 1362(f). Therefore, X will be treated as an S corporation effective Date 2 and thereafter, provided X's S election is not otherwise terminated under § 1362(d).

As a condition of this ruling, any shareholder of X that did not sign X's Form 2553 must sign a written statement as described in § 1.1362-6(b)(1) consenting to X's S election effective Date 2. The written statement(s) must be filed with the appropriate service center within 120 days from the date of this letter, indicating that the statement(s) are to be associated with X's originally filed Form 2553.

Except as specifically ruled upon above, we express or imply no opinion concerning the federal tax consequences of the facts of this case under any other provision of the Code. Specifically, we express or imply no opinion regarding X's eligibility to be an S corporation.

This ruling is directed only to the taxpayer who requested it. According to § 6110(k)(3), this ruling may not be used or cited as precedent.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the ruling request, it is subject to verification on examination.

Pursuant to the power of attorney on file with this office, we are sending a copy of this letter to your authorized representative.

Sincerely,

Joy C. Spies
Joy C. Spies
Senior Technician Reviewer, Branch 1
Office of the Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures (2)
Copy of this letter
Copy of this letter for section 6110 purposes

cc:

Internal Revenue Service

Number: **202021006**
Release Date: 5/22/2020

Index Number: 1361.00-00, 1361.03-00, 1361.03-03, 1362.00-00, 1362.02-00, 1362.02-02, 1362.04-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:PSI:01
PLR-119416-19
Date:
February 06, 2020

Legend

X =

Trust =

Date 1 =

Date 2 =

Date 3 =

State =

Dear :

This responds to a letter dated August 20, 2019, requesting relief under section 1362(f) of the Internal Revenue Code (the Code).

Facts

According to the information submitted and representations within, X was incorporated on Date 1, under the laws of State. Effective Date 2, X elected to be taxed as an S corporation.

On Date 3, Trust acquired shares in X. However, a timely election to treat Trust as an Electing Small Business Trust (ESBT) was not made, causing X's S corporation election to terminate effective Date 3.

X represents that Trust has at all times met the requirements of an ESBT within the meaning of section 1361(e), except that the trustee of Trust did not make a timely ESBT election under section 1361(e)(3).

X represents that upon discovering that its S election had terminated, X took corrective action by filing this request for relief. X represents that the circumstances resulting in the inadvertent termination and the failure to make a timely ESBT election were inadvertent and not motivated by tax avoidance or retroactive tax planning. X further represents that X has filed its income tax returns consistent with having a valid S election in effect for all taxable years since X elected to be an S corporation. X represents that other than the failure to make a valid ESBT election on Date 3, X has qualified as a small business corporation at all times since its election on Date 2. Lastly, X and its shareholders agree to make any adjustments required as a condition of obtaining relief under § 1362(f) that may be required by the Secretary.

Law and Analysis

Section 1361(a) provides that an S corporation is a small business corporation for which an election under § 1362(a) is in effect.

Section 1361(a)(1) provides that the term "S corporation" means, with respect to any taxable year, a small business corporation for which an election under § 1362(a) is in effect for the year.

Section 1361(b)(1) provides that the terms "small business corporation" means a domestic corporation which is not an ineligible corporation and which does not (A) have more than 100 shareholders, (B) have as a shareholder a person (other than an estate, a trust described in § 1361(c)(2), or an organization described in § 1361(c)(6)) who is not an individual, (C) have a nonresident alien as a shareholder, and (D) have more than 1 class of stock.

Section 1361(c)(2)(A)(i) provides that for purposes of section 1361(b)(1) a trust all of which is treated (under subpart E of part I of subchapter J of chapter 1) as owned by an individual who is a citizen or resident of the United States may be an S corporation shareholder.

Section 1361(c)(2)(A)(v) provides that for purposes of § 1361(b)(1)(B), an ESBT is a permissible shareholder.

Section 1361(e) provides that an ESBT means any trust if (i) such trust does not have as a beneficiary any person other than (I) an individual, (II) an estate, (III) an organization described in § 170(c)(1) which holds a contingent interest in such trust and is not a potential current beneficiary, (ii) no interest in such trust was acquired by purchase, and (iii) an election under § 1361(e) applies to such trust.

Section 1361(e)(3) provides that an election under § 1361(e) shall be made by the trustee. Any such election shall apply to the taxable year of the trust for which made and all subsequent taxable years of such trust unless revoked with the consent of the Secretary.

Section 1.1361-1(m)(2)(i) provides that the trustee of an ESBT must make the ESBT election by signing and filing, with the service center where the S corporation files its income tax return, a statement that meets the requirements of § 1.1361-1(m)(2)(ii).

Section 1.1361-1(m)(2)(iii) provides that the trustee of an ESBT must file the ESBT election within the time requirements prescribed in § 1.1361-1(j)(6)(iii) for filing a QSST election (generally within the 16-day-and-2-month period beginning on the day that the stock is transferred to the trust).

Section 1362(a) provides that a small business corporation may elect to be an S corporation.

Section 1362(d)(2)(A) provides that an election under § 1362(a) shall be terminated whenever (at any time on or after the 1st day of the 1st taxable year for which the corporation is an S corporation) such corporation ceases to be a small business corporation.

Section 1362(f) provides, in relevant part, that if (1) an election under § 1362(a) by any corporation terminated under § 1362(d)(2); (2) the Secretary determines that the circumstances resulting in such termination were inadvertent; (3) no later than a reasonable period of time after discovery of the circumstances resulting in such termination, steps were taken so that the corporation for which the termination occurred is a small business corporation; and (4) the corporation for which the termination occurred, and each person who was a shareholder in such corporation at any time during the period specified pursuant to § 1362(f), agrees to make the adjustments (consistent with the treatment of such corporation as an S corporation) as may be required by the Secretary with respect to such period, then, notwithstanding the circumstances resulting in such termination, such corporation shall be treated as an S corporation during the period specified by the Secretary.

Conclusion

Based solely on the facts submitted and the representations made, we conclude that the failure of Trust to make an ESBT election effective Date 3 caused an inadvertent termination of X's S corporation election within the meaning of § 1362(f). Pursuant to the provisions of § 1362(f), X will be treated as continuing to be an S corporation beginning on and after Date 3, unless X's S corporation election is otherwise terminated under § 1362(d).

This letter ruling is subject to the condition that within 120 days from the date of this letter, an election to treat Trust as an ESBT effective Date 3 must be made with the appropriate service center. A copy of this letter should be attached to the ESBT election. If this condition is not met, then this ruling is null and void. Furthermore, if this condition is not met, X must send notification that its S election has terminated to the service center with which X's S election was filed.

Except as specifically ruled upon above, we express or imply no opinion concerning the federal tax consequences of the facts of this case under any other provision of the Code. Specifically, we express or imply no opinion regarding X's eligibility to be an S corporation or whether Trust was or is otherwise eligible to be an ESBT.

This ruling is directed only to the taxpayer who requested it. According to § 6110(k)(3), this ruling may not be used or cited as precedent.

Pursuant to the power of attorney on file with this office, we are sending a copy of this letter to X's authorized representative.

Sincerely,

Joy Spies
Joy Spies
Senior Technician Reviewer, Branch 1
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures (2):
Copy of this letter
Copy for §6110 purposes

cc:

GENERAL COUNSEL MEMORANDUM

Issue: Sales Tax on Hotel Attrition Fees and Cancellation Fees
Statute Ref: D.C. Official Code § 47-2002(2), Imposition of Sales Tax; D.C. Code § 47-2002.2(1), Tax on Gross Receipts for Transient Lodging; D.C. Code § 47-2001(n)(1)(C), Definitions.
January 4, 2002 [Originally Issued as a Private Letter Ruling]

ISSUES:

(1) Whether the Attrition Fee charged by HOTEL is subject to District sales tax in circumstances where a Convention CLIENT cancels part or all of a block of reserved rooms without proper notice?
(2) Whether the Cancellation Fee charged by HOTEL is subject to District sales tax in circumstances where a Convention CLIENT reserves a meeting room or banquet facility for an event and subsequently cancels that reservation?

CONCLUSION:

(1) The Attrition Fee charged by HOTEL is subject to District sales tax in circumstances where a Convention CLIENT cancels part or all of a block of reserved rooms without proper notice.
(2) The Cancellation Fee charged in the form of a forfeited deposit by HOTEL is not subject to District sales tax.

FACTS:

(1) HOTEL is a large hotel in Washington DC that caters to Convention Clientele. Convention CLIENT entered into a contract with HOTEL for the reservation of ***X*** number of rooms for ***Y*** number of days in the month of ***Z***. HOTEL and Convention CLIENT negotiated a specific rate for the rooms, banquet service and other charges. The contract contained a cancellation clause under which Convention CLIENT agreed to pay for the rooms not used at the special contract room rate plus an additional sum to offset lost banquet food and beverage revenue unless 30 days notice is provided to HOTEL. These fees are called "attrition fees." The contract does not address whether the attrition fee is subject to District sales tax. Convention CLIENT failed to use all the rooms contracted for. HOTEL billed Convention CLIENT for the unused rooms but does not charge District sales tax.

(2) In the event that a meeting room or banquet facility has been reserved for an event and subsequently cancelled, HOTEL retains any previous deposit or charges a fee representing a non-performance penalty.

TAXPAYER ARGUMENT:

The HOTEL asserts that a charge for a guestroom is not taxable unless the room is "furnished" to a "transient." HOTEL states that the attrition fee was for a person who did not occupy the room when contracted to do so. HOTEL states that the fee charged constitutes non-taxable liquidated damages for not using reserved rooms and for failing to give notice of cancellation in time to permit those rooms to be re-sold.

HOTEL asserts that under the definition in Section 47-2001(n)(1)(C), the charge for rental of a public meeting room or banquet facility does not meet the definition of a "retail sale." Therefore, any charge relating to the usage or non-usage, i.e., cancellation, should not be subject to sales tax.

LAW:

D.C. Code § 47-2002. Imposition of tax *[in pertinent part]*

> A tax is imposed upon all vendors for the privilege of selling at retail certain tangible personal property and for the privilege of selling certain selected services (defined as "retail sale" and "sale at retail" in this chapter).
>
> > * * *
> >
> > (2) The rate of tax shall be 10.05% of the gross receipts from the sale *of or charges for any room or rooms,* lodgings, or accommodations furnished to a transient by any hotel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients; * * * [Emphasis added.]

D.C. Code § 47-2002.2. Tax on gross receipts for transient lodgings or accommodations; * * * *[in pertinent part]*

> A tax, separate from, and in addition to, the tax imposed pursuant to § 47-2002, is imposed on vendors engaging in the business activities listed in paragraphs (1) and (2) of this section for the privilege of selling at retail certain tangible personal property and for the privilege of selling certain selected services (defined as "retail sales" and "sale at retail" pursuant to § 47-2001(n)(1)). The rate of the tax shall be:
>
> > (1) 4.45% of the gross receipts for the sale *or charges for any room or rooms,* lodgings, or accommodations furnished to a transient by any hotel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients; * * * [Emphasis added.]

D.C. Code § 47-2001.-Definitions. *[in pertinent part]*

> (n) (1) "Retail sale" and "sale at retail" means the sale in any quantity or quantities of any tangible personal property or service taxable under the terms of this chapter. Said term shall mean all sales of tangible personal property to any person for any purpose other than those in which the purpose of the purchaser is to resell the property so transferred in the form in which the same is, or is to be, received by him, or to use or incorporate the property so transferred as a material or part of other tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining. For the purpose of the tax imposed by this chapter, these terms shall include, but not be limited to, the following:
>
> > * * *
> > (C) The sale *or charge for any room or rooms,* lodgings, or accommodations furnished to transients by any hotel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients for a consideration. The term "transient" means any person who occupies or who has the right to occupy any room or rooms, lodgings, or accommodations * * * [Emphasis added.]

ANALYSIS:

(1) Attrition Fee. Convention CLIENT's contract with HOTEL required HOTEL to set aside a number of rooms for a specified time frame. HOTEL complied with the terms of the contract by furnishing the number of room agreed upon. Convention CLIENT failed to use the number of rooms set aside. HOTEL billed Convention CLIENT the agreed room rate and sales tax on the room used and charged the agreed room rate on the unused rooms but did not charge sales tax.

For the sale or charge of any room or rooms to be subject to District sale tax, the room must be furnished to a transient by the hotel. D.C. Code § 47-2001(n)(1)(C). The statute does not require that the room be occupied. The statute does require that the person be provided with a room with the right to occupy the room.

When HOTEL furnished or provided the agreed upon number of rooms with the right of Convention CLIENT to occupy the rooms, Convention CLIENT was obligated to pay for the rooms furnished, whether occupied or not and the HOTEL is obligated to collect the District sales tax on the hotels rooms furnished, whether occupied or not. Even though Convention CLIENT did not occupy the complete block of rooms, the attrition fee is subject to tax.

(2) Cancellation Fee. Since the rental charges for meeting and banquet rooms are not subject to District sales tax, the cancellation fee charged for the non-performance of the rental contract relating to meeting and banquet rooms would not be subject to District sales tax.

For further information, please contact Ed Blick, General Counsel Office, at (202) 442-6509.

From: Jennifer Carr <jennifer.carr@taxanalysts.org>
Sent: Friday, May 29, 2020 8:20 AM
To: Aaron Davis <aaron.davis@taxanalysts.org>
Subject: FW: Private Letter Rulings

From: Hashmi, Aaishah (OCFO) <aaishah.hashmi@dc.gov>
Sent: Wednesday, January 28, 2015 4:28 PM
To: Jennifer Carr <jennifer.carr@taxanalysts.org>
Subject: RE: Private Letter Rulings

We sometimes convert PLR to Notices which are then published on our website under "Law & Guidance"

From: Jennifer Carr [mailto:jennifer.carr@taxanalysts.org]
Sent: Wednesday, January 28, 2015 4:27 PM
To: Hashmi, Aaishah (OCFO)
Subject: RE: Private Letter Rulings

Thank you.

From: Hashmi, Aaishah (OCFO) [mailto:aaishah.hashmi@dc.gov]
Sent: Wednesday, January 28, 2015 4:27 PM
To: Jennifer Carr
Subject: RE: Private Letter Rulings

No – we don't publish them.

From: Jennifer Carr [mailto:jennifer.carr@taxanalysts.org]
Sent: Wednesday, January 28, 2015 3:18 PM
To: Hashmi, Aaishah (OCFO)
Subject: RE: Private Letter Rulings

Will get in touch with Alan. Thanks.

Also, are the actual PLRs on the website? I can only find a page explaining what they are and how to request one.

From: Hashmi, Aaishah (OCFO) [mailto:aaishah.hashmi@dc.gov]
Sent: Wednesday, January 28, 2015 3:06 PM
To: Jennifer Carr
Subject: RE: Private Letter Rulings

Plaintiffs' Exhibit 10

Alan would be a good person to talk about the dec. orders. Our PLR guidance is on our website.

From: Jennifer Carr [mailto:jennifer.carr@taxanalysts.org]
Sent: Wednesday, January 28, 2015 3:05 PM
To: Hashmi, Aaishah (OCFO)
Subject: Private Letter Rulings

Ms. Hashmi,

I am writing a story about the OTR's provision of guidance -- particularly private letter rulings and declaratory orders. Could you answer a few questions about this? If not, can you direct me to the proper person? It would probably be easier for me to submit the questions in writing with maybe a follow up call if necessary.

Thank you,

Jennifer Carr
Deputy Editor
State Tax Notes
703-533-4423 (O)
571-239-6220 (C)
jennifer.carr@taxanalysts.org

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CHIEF FINANCIAL OFFICER
OFFICE OF TAX AND REVENUE

DO 2013-01
March 22, 2013

District of Columbia Declaratory Order
Regarding District of Columbia Qualified High Technology Company Status

This Declaratory Order is issued pursuant to Title 9, chapter 42 of the District of Columbia Municipal Regulations.

ISSUE

Whether the Petitioner, considering its sales and services and its proposed DC office, would meet the eligibility requirements for a Qualified High Technology Company under D.C. Code Ann. §47-1817.01(5)(A) entitling the Petitioner to the benefits outlined in D.C. Code Ann. §47-2001 (n)(2)(G) and D.C. Code Ann. §47-1817.06(a)(1).

FACTS

The Petitioner provides information technology infrastructure services via the internet to customers. The Petitioner is a for profit entity. The services allow customers to access applications, platforms, server bandwidth, and storage capacity through the internet without having to spend capital purchasing their own servers, employing their own information technology support staff, or buying real estate to house their own servers.

The Petitioner's flagship services are the Service A and the Service B. Both services are accessed via the internet. The Service A service allows customers to store their information in data centers located across the globe, both uploading and retrieving data securely via the internet. The Service B service allows customers to remotely access the computing power of data centers to do any computing action an on-premises server could do. Customers use the computing power to run applications, process data, host websites, and perform many other functions. The Petitioner also offers a variety of other internet-based services with similar functionality to Service A and Service B. These other services allow customers to create and manage, through the internet, databases of information, their email infrastructure, their software applications, and to efficiently distribute content over the web. The Petitioner derives over 51% of its revenue from the sale of Service B, Service A, and all other internet-based services.

The Petitioner is headquartered and also has offices outside the District. While the Petitioner does not own any data centers, it does utilize large and small data centers to provide its services. Those data centers are owned by affiliated entities and are also located outside of the District of Columbia.

The Petitioner is proposing to establish a sales office in the District of Columbia. The office would be leased by an affiliated entity which is likely not a QHTC, but would be staffed by the Petitioner personnel. At a minimum, the sales office would employ two or more sales team members and support staff.

Employees of the proposed office would engage in sales and marketing related tasks such as phoning or visiting businesses, creating marketing collateral, showing prospective customers how they can use the Petitioner, and negotiating special pricing or terms and conditions that may differ from the standard online customer agreement. The goal of the sales team is to have customers sign up for an account whereby they can start requesting services on an as-needed basis in the future. No specific services would be requested from the sales office employees as those requests are sent to data centers through the internet after a customer has signed up for an account.

ANALYSIS

In order for an entity to qualify as a DC QHTC, it must meet the following requirements as provided in D.C. Code Ann. §47-1817.01(5):

- Be an individual or entity organized for profit and maintaining an office, headquarters, or base of operations in the District of Columbia;
- Have 2 or more employees in the District; and
- Derive at least 51% of its gross revenues earned in the District from:

(I) Internet-related services and sales, including website design, maintenance, hosting, or operation; Internet-related training, consulting, advertising, or promotion services; the development, rental, lease, or sale of Internet-related applications, connectivity, or digital content; or products and services that may be considered e-commerce;

(II) Information and communication technologies, equipment and systems that involve advanced computer software and hardware, data processing, visualization technologies, or human interface technologies, whether deployed on the Internet or other electronic or digital media. Such technologies shall include operating and applications software; Internet-related services, including design, strategic planning, deployment, and management services and artificial intelligence; computer modeling and simulation; high-level software languages; neural networks; processor architecture; animation and full-motion video; graphics hardware and software; speech and optical character recognition; high-volume information storage and retrieval; data compression; and multiplexing, digital signal processing, and spectrum technologies;

(III) Advanced materials and processing technologies that involve the development, modification, or improvement of one or more materials or methods to produce devices and structures with improved performance characteristics or special functional attributes, or to activate, speed up, or otherwise alter chemical, biochemical, or medical processes. Such materials and technologies shall include metal alloys; metal matrix and ceramic composites; advanced polymers; thin films; membranes; superconductors; electronic and photonic materials; bioactive materials; bioprocessing; genetic engineering; catalysts; waste emissions reduction; pharmaceuticals; and waste processing technologies;

(IV) Engineering, production, biotechnology and defense technologies that involve knowledge-based control systems and architectures; advanced fabrication and design processes, equipment, and tools; or propulsion, navigation, guidance, nautical, aeronautical and astronautical ground and airborne systems, instruments, and equipment. Such technologies shall include: computer-aided design and engineering; computer-integrated manufacturing; robotics and automated equipment; integrated circuit fabrication and test equipment; sensors; biosensors; signal and image processing; medical and scientific instruments; precision machining and forming; biological and genetic research equipment; environmental analysis, remediation, control, and prevention equipment; defense command and control equipment; avionics and controls; guided missile and space vehicle propulsion units; military aircraft; space vehicles; and surveillance, tracking, and defense warning systems; or

(V) Electronic and photonic devices and components for use in producing electronic, optoelectronic, mechanical equipment and products of electronic distribution with interactive media content. Such technologies shall include microprocessors; logic chips; memory chips; lasers; printed circuit board technology; electroluminescent, liquid crystal, plasma, and vacuum fluorescent displays; optical fibers; magnetic and optical information storage; optical instruments, lenses, and filters; simplex and duplex data bases; and solar cells.

The Petitioner is an entity organized for profit and proposes to open an office in the District employing at least 2 employees in the DC office to gain a larger customer base in the District. The Petitioner's proposed sales office and staffing plan meet the criteria of D.C. Code Ann. §47-1817.01(5)(A)(i)&(ii).

The Petitioner purports that more than 51% of its DC revenues will derive from information technology infrastructure services via the internet to customers using their Service A, Service B and other services. the Petitioner's sales of Service A, Service B, and other services qualify as internet-related services and/or information technologies for purposes of meeting the 51% threshold provided for in D.C. Code Ann. §47-1817.01(5)(A)(iii).

Additionally a QHTC cannot be:

- an individual or entity that derives 51% or more of its gross revenues from the operation in the District of:

  (I) A retail store; or

(II) An electronic equipment facility that is primarily occupied, or intended to be occupied, by electronic and computer equipment that provides electronic data switching, transmission, or telecommunication functions between computers, both inside and outside the facility;

- A professional athletic team, as defined in D.C. Code Ann. § 47-2002.05(a)(3); or
- A business entity located in the DC Ballpark TIF Area, as defined in D.C. Code Ann. § 2-1217.12a(a).

The Petitioner provides that they are not deriving 51% of their sales from a retail store nor an electronic equipment facility primarily occupied by data switching, transmission or telecommunication electronic and computer equipment. Nor are they a profession athletic team or a business entity in the Ballpark TIF area.

The Petitioner purports that they would be earning more than 51% of its income from qualifying activities and that 51% of its DC income will be earned from QHTC qualifying activities. If it meets these requirements in operation, the Petitioner will be a QHTC certified after January 1, 2012. Thus, under D.C. Code Ann. § 47-1817.06(a)(2)(A)(ii), it will not be subject to the franchise tax for the lesser of $15million or for the first five years that the QHTC has taxable income. It will also be exempt from collecting DC sales tax under D.C. Code Ann. § 47-2001(n)(2)(G) and from paying DC sales tax on purchases under D.C. Code Ann. § 47-2005(29).

This DO is based on the proposed facts provided in your request. This order shall be binding between the Chief Financial Officer and the petitioner on the stated facts alleged unless such order is altered or set aside by a court. The declaratory order shall be binding as to a transaction in reliance upon the declaratory order, unless a change in the legal basis of the declaratory order is made by statute, regulation, or judicial decision after the issuance of the declaratory order and before any affected transaction.

No opinion is expressed or implied concerning the tax treatment of any item discussed in this declaratory order except as expressly stated herein. This DO does not have the force and effect of law and can be relied on only by the taxpayer who requested it.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CHIEF FINANCIAL OFFICER
OFFICE OF TAX AND REVENUE

DO 2015-2
District of Columbia Declaratory Order
Regarding District of Columbia Qualified High Technology Company (QHTC) Status

This Declaratory Order is issued pursuant to Title 9, chapter 42 of the District of Columbia Municipal Regulations.

I. ISSUE

Whether Petitioner ("Petitioner" or "Company" or "Taxpayer" or "Platform") is eligible to claim benefits as a Qualified High Technology Company ("QHTC").

II. CONCLUSION

Petitioner, considering its sales and services and its proposed DC office, would meet the eligibility requirements for a Qualified High Technology Company under D.C. Code Ann. §47-2001(n)(2)(G) and D.C. Code Ann. §47-1817.06(a)(1).

III. FACTS

Company, through its online platform, provides promotion and marketing services for Sellers who sell admittance to various events ("Licenses") to Purchasers. Sellers can use the Company's website tools to facilitate the sale of Licenses to Purchasers. In some situations, the Company leases tangible property to the Seller for Seller's use. The Company also sells a credit card swiper ("Swiper") to the Seller for a nominal fee. The Swiper is used by the Seller for processing in person credit card sales to the Purchasers. Finally, the Company sometimes sends consultants and staff to the Seller's location to assist Sellers. Compensation for leased property, Swipers, and the provision of consultants makes up a small minority of the Company's revenue.

The Seller's Purchasers can purchase Licenses through the Company's website or the Company's mobile phone application. If the Seller utilizes the Swiper, Purchasers can make purchases of Licenses at the Seller's location.

The bulk of the Company's revenue comes from the following 2 streams:

1. Service Fee = The service fee is earned only when the Purchaser purchases Licenses through the Company's online platform. The service fee is a percentage of the selling price, which is set by the Sellers.

2. Credit Card Processing Fee = The Company charges a credit card processing fee for all credit card transactions which are processed by the Company.

The Company currently has an employee in DC working from a home office and is proposing to hire additional employee(s) in the District, who may also work from home. The potential employee(s) would be qualified consultant(s) to help the Sellers coordinate events, or engineer(s) to assist in the development and maintenance of the Company's platform. In addition, the Company is considering acquiring an office location within the District.

IV. LAW

In order for an entity to qualify as a QHTC in the District of Columbia (the "District"), the entity must meet the following requirements as provided in D.C. Code Ann. §47-1817.01(5)(A):

> (i) Be an individual or entity organized for profit and maintaining an office, headquarters, or base of operations in the District of Columbia;
>
> (ii) Have 2 or more employees; and
>
> (iii) Derive at least 51% of its gross revenues earned in the District from:
>
>> (I) Internet-related services and sales, including website design, maintenance, hosting, or operation; Internet-related training, consulting, advertising, or promotion services; the development, rental, lease, or sale of Internet-related applications, connectivity, or digital content; or products and services that may be considered e-commerce;
>>
>> (II) Information and communication technologies, equipment and systems that involve advanced computer software and hardware, data processing, visualization technologies, or human interface technologies, whether deployed on the Internet or other electronic or digital media. Such technologies shall include operating and applications software; Internet-related services, including design, strategic planning, deployment, and management services and artificial intelligence; computer modeling and simulation; high-level software languages; neural networks; processor architecture; animation and full-motion video; graphics hardware and software; speech and optical character recognition; high-volume information storage and retrieval; data compression; and multiplexing, digital signal processing, and spectrum technologies;
>>
>> (III) Advanced materials and processing technologies that involve the development, modification, or improvement of one or more materials or methods to produce devices and structures with improved performance characteristics or

> special functional attributes, or to activate, speed up, or otherwise alter chemical, biochemical, or medical processes. Such materials and technologies shall include metal alloys; metal matrix and ceramic composites; advanced polymers; thin films; membranes; superconductors; electronic and photonic materials; bioactive materials; bioprocessing; genetic engineering; catalysts; waste emissions reduction; pharmaceuticals; and waste processing technologies;
>
> (IV) Engineering, production, biotechnology and defense technologies that involve knowledge-based control systems and architectures; advanced fabrication and design processes, equipment, and tools; or propulsion, navigation, guidance, nautical, aeronautical and astronautical ground and airborne systems, instruments, and equipment. Such technologies shall include: computer-aided design and engineering; computer-integrated manufacturing; robotics and automated equipment; integrated circuit fabrication and test equipment; sensors; biosensors; signal and image processing; medical and scientific instruments; precision machining and forming; biological and genetic research equipment; environmental analysis, remediation, control, and prevention equipment; defense command and control equipment; avionics and controls; guided missile and space vehicle propulsion units; military aircraft; space vehicles; and surveillance, tracking, and defense warning systems; or
>
> (V) Electronic and photonic devices and components for use in producing electronic, optoelectronic, mechanical equipment and products of electronic distribution with interactive media content. Such technologies shall include microprocessors; logic chips; memory chips; lasers; printed circuit board technology; electroluminescent, liquid crystal, plasma, and vacuum fluorescent displays; optical fibers; magnetic and optical information storage; optical instruments, lenses, and filters; simplex and duplex data bases; and solar cells.

According to the opinion in *NBC Subsidiary WRC-TV, LLC v. District of Columbia Office of Tax and Revenue*, OAH Case No. 2013-0TR-00017 (D.C. O.A.H. Jan. 17, 2014), appeal docketed, No. 14-AA-174 (D.C. Feb. 21, 2014), for purposes of the D.C. Code Ann. §47-1817.01(5)(A)(iii) requirement that a company derive 51% of its revenue from an enumerated activity, "derive" is properly defined to mean "to take, receive, or obtain especially from a specified source." In *NBC Subsidiary WRC-TV, LLC*, an Administrative Law Judge held that a broadcast television station was not a QHTC, even when using a variety of high technology equipment in its business, where its revenue was primarily derived from advertising.

Additionally, under D.C. Code Ann. § 47-1817.01(5)(B) a QHTC cannot be:

> (i) An individual or entity that derives 51% or more of its gross revenues from the operation in the District of:
>
> > (I) An on-line or brick and mortar retail store; or
> >
> > (II) An electronic equipment facility that is primarily occupied, or intended to be occupied, by electronic and computer equipment that provides electronic data switching, transmission, or telecommunication functions between computers, both inside and outside the facility;
>
> (ii) A professional athletic team, as defined in § 47-2002.05(a)(3); or
>
> (iii) A business entity located in the DC Ballpark TIF Area, as defined in [§ 2-1217.12a(a)].

V. ANALYSIS

A. District QHTC Qualifications: Office and Employees

Petitioner is an entity organized for profit. Petitioner proposes to establish an office in the District with 2 or more employees and/or employ more than 2 employees in the District at home offices. Petitioner's proposed office and/or staffing plan meet the criteria of D.C. Code Ann. §47-1817.01(5)(A)(i)&(ii).

B. District QHTC Qualifications: Gross Revenue

To qualify as a QHTC, a company must derive at least 51% of its gross revenue from any of the enumerated activities listed under D.C. Code Ann. §47-1817.01(5)(A)(iii). In this context, "derive" means to take, receive, or obtain especially from a specified source. *NBC Subsidiary WRC-TV, LLC v. District of Columbia Office of Tax and Revenue*, OAH Case No. 2013-0TR-00017 (D.C. O.A.H. Jan. 17, 2014), appeal docketed, No. No. 14-AA-174 (D.C. Feb. 21, 2014). Thus, in order to qualify as a QHTC, Petitioner must demonstrate that at least 51% of its District gross revenue comes directly from one of the activities enumerated in D.C. Code Ann. §47-1817.01(5)(A)(iii).

Petitioner has asserted that it derives revenue from "internet-related services and sales" as defined in D.C. Code Ann. §47-1817.01(5)(A)(iii)(I). Under D.C. Code Ann. §47-1817.01(5)(A)(iii)(I), qualified QHTC activities are defined to include:

> Internet-related services and sales, including website design, maintenance, hosting, or operation; Internet-related training, consulting, advertising, or promotion services; the development, rental, lease, or sale of Internet-related applications, connectivity,

or digital content; or products and services that may be considered e-commerce.

Based on a review of the facts presented, Petitioner's gross revenue is derived from two sources: service fees upon third party Sellers sales Licenses, and credit card processing fees. These fees are triggered only when Licenses are sold through the Company's platform.

Petitioner's contract with Sellers provides that the service fees charged are for the sale of Licenses to the Purchasers via the online platform. Only actual sales of Licenses by third party Sellers generate revenue for the Company—the promotion and marketing services do not generate revenue for the Company. Accordingly, it is clear that the Company "derives" its District gross revenue not from promotional or marketing services, but rather from sales of Licenses.

While the term "internet-related services and sales" is broad on its face, the context of the statute makes it clear that the term "internet-related" refers to services and sales performed with regard to the internet, not simply over the internet. The examples of "internet-related services and sales" in the statute are website design, maintenance, hosting, and operation—each of the activities described requires more than that a transaction simply occur via the internet.

However, gross revenues from "products and services that may be considered e-commerce" are also eligible for QHTC qualification. "E-commerce" is defined as activities that relate to the buying and selling of goods and services over the Internet. "E-commerce." Merriam-Webster.com. Merriam-Webster, n.d. Web. 25 June 2015. <http://www.merriam-webster.com/dictionary/e-commerce>. Company is deriving its District gross revenue from service fees for sales of Licenses over the internet. Given the broad definition of "e-commerce," it is clear that the revenues of the Company are derived from a qualified QHTC activity. Company does meet the gross revenue requirement under D.C. Code Ann. § 47-1817.01(5)(A)(iii)(I) for QHTC status.

C. <u>District QHTC Qualification: Online Retailer Exclusion</u>

D.C. Code Ann. § 47-1817.01(5)(B) states that 51% of the income of a QHTC must not be derived from the operation of an "on-line or brick and mortar retail store." Under the specific facts and relevant contractual relationships, the Company is not an on-line retail store.

VI. CONCLUSION

Company is eligible to receive the benefits of qualification as a QHTC because all the requirements of QHTC qualification will be met.

CAVEAT

This DO is based on the facts provided in the initial request and subsequently. This declaratory order shall be binding between the Chief Financial Officer and the petitioner on the stated facts alleged unless such order is altered or set aside by a court. Should the facts change, the QHTC qualification can be reevaluated. The declaratory order shall be binding as to a transaction in reliance upon the declaratory order, unless a change in the legal basis of the declaratory order or of any of the issues discussed above is made by statute, regulation, or judicial decision after the issuance of the declaratory order and before any affected transaction.

No opinion is expressed or implied concerning the tax treatment of any item discussed in this declaratory order except as expressly stated herein. This declaratory order does not have the force and effect of law and can be relied on only by the taxpayer who requested it.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CHIEF FINANCIAL OFFICER
OFFICE OF TAX AND REVENUE

OTR REVENUE RULING 2007-02

Subject: Presidential Appointee Exception

Advice has been requested as to whether an officer of the executive branch of the U.S. government who was appointed by the President of the United States is subject to District of Columbia ("District") income taxes under the following facts:

FACTS

Taxpayer is an officer of the executive branch of the U.S. government who was appointed by the President of the United States. The officer's appointment was confirmed by the Senate. According to the federal act which governs the officer, the officer holds office for the designated term, unless removed before the end of the term *for cause* by the President. The officer resides in the District for 183 days or more during the taxable year.

ISSUE

Does an officer of the executive branch of the U.S. government under the above facts serve at the pleasure of the President of the United States, so that the officer is not considered a District resident for income tax purposes under D.C. Official Code § 47-1801.04 (17)?

CONCLUSION

An officer of the executive branch of the U.S. government under the above facts does not serve at the pleasure of the President of the United States because the officer can only be terminated for cause; therefore, the officer would be considered a resident of the District and subject to District income tax.

LEGAL ANALYSIS

Under D.C. Official Code § 47-1801.04(17), individuals who ". . . maintain a place of abode within the District for an aggregate of 183 days or more during the taxable year, whether or not such other individual is domiciled in the District," are subject to District income taxes.

However, D.C. Official Code § 47-1801.04(17) provides an exception for:

> [A]ny officer of the executive branch of such government whose appointment to the office held by him was by the President of the United States and subject to confirmation by the Senate of the United States and *whose tenure of office is at the pleasure of the President of the United States,* or any Justice of the Supreme Court of the United States, unless such officers or Justices are domiciled within the District at any time during the taxable year. In determining whether an individual is a "resident", such individual's absence from the District for temporary or transitory purposes shall not be regarded as changing his domicile or place of abode. (emphasis added).

The federal act which governs the officer in the instant case provides that the officer holds office for the designated term, unless removed before the end of the term *for cause* by the President. Case law, in effect, interprets the phrase "at the pleasure of the President" as serving at the appointed position on an "at-will" basis. *See generally, SEC v. Blinder*, 855 F.2d 677, 682 (10th Cir. 1988). In *Blinder,* the court analyzed the constitutionality of the Securities and Exchange Commission's ("SEC") power to commence a civil enforcement action in federal court. According to the Securities Exchange Act of 1934, the SEC consists of five members who are appointed by the President with the advice and consent of the Senate. *Id.* at 681. The act does not provide for the appointment of a chairman; however, following the Reorganization Act of 1949, the President could designate the chairman. The act does not contain language which expressly allows the President to remove the commissioners. However, for the purposes of the case, the *Blinder* court, accepted appellant's argument that "the President may remove a commissioner only for efficiency, neglect or duty or malfeasance in office" (internal quotations omitted). *Id.* The court concluded that "as the President has the power to choose the chairman of the SEC to serve an indefinite term, it follows that the chairman serves at the pleasure of the President." *Id.* Contrarily, "the President has the power to remove a commissioner [only] for inefficiency, neglect of duty, or malfeasance in office." *Id.* The court in *SEC v. Blinder* clearly outlines the distinction between appointees who serve at the President's pleasure (SEC chairman) and those who can only be terminated for cause (SEC commissioners).

US v. Wilson, 290 F.3d 347, 350 (D.C. Cir. 2002), further illustrates the contrast between appointees who serve at the pleasure of the President and those who can only be terminated for cause. In *U.S. v. Wilson*, former President Clinton appointed appellee to the United States Commission on Civil Rights expressly stating that the appointment was "for the remainder of the term expiring November 29, 2001." *Id.* at 350. Under 42 U.S.C.S. § 1975(c), all commissioners were required to be appointed for six years, irrespective of whether their predecessors had completed their terms or not. President Bush appointed another commissioner to succeed appellee following November 29, 2001. The court held that appellee's term had in fact expired on November 29, 2001 and "that the fixed terms of six years for members of the Commission ran with the calendar regardless of delay in appointment or the filling of mid-term vacancies." *Id.* at. 361.

Although *U.S. v. Wilson* primarily analyzes the distinction between appointment terms which run with the person and those which run with the calendar, the court noted that:

> The US Commission was first created in 1957, and as originally established was composed of six members serving open-ended terms at the pleasure of the President. Congress reauthorized and reorganized the Commission in 1983 by (. . .) dividing the appointment power between the President and Congress [and] establishing that the President could only remove members for neglect of duty or malfeasance.

Id. at 350.

Congress clearly sought to differentiate between appointments where members served at the will or pleasure of the President and those that could only be removed for cause.

Similarly, here, the governing federal act divides the appointment power between the President and Congress by requiring that the President establish cause before removing an officer. As the officer can only be removed from office for cause, the officer is ineligible to benefit from the Presidential appointee exception, which requires that the appointee serves at the pleasure of the President. Thus the appointee would be considered a resident and subject to District taxes.