Gillis, Diana L.

From: Gillis, Diana L.
Sent: Monday, September 28, 2015 11:38 AM
To: [redacted]; Walsh, Kathryn E.
Subject: RE: Question re: sales in or into the US

The sales should be attributed to the US assets.

We use a bright line on pass through revenues, and it must be clearly stated.

From: [redacted]
Sent: Monday, September 28, 2015 10:29 AM
To: Gillis, Diana L.; Walsh, Kathryn E.
Subject: RE: Question re: sales in or into the US

The question regarding Parent B's side is whether Company A's US sales should be attributed to its US assets, or its foreign assets, for purposes of 802.50(a).

Regarding the annual statement of income, while Company A's Consolidated Profit and Loss Account (essentially, its income statement) does not explicitly spell out what is included in "Cost of Sales", the figure associated with that line item includes only payments to contractors and associated costs, such as medical benefits, etc. There is a separate line item for administrative expenses.

Happy to discuss over the phone if you need further clarity.

[redacted]

From: Gillis, Diana L. [mailto:dgillis@ftc.gov]
Sent: Monday, September 28, 2015 10:07 AM
To: [redacted]; Walsh, Kathryn E.
Subject: RE: Question re: sales in or into the US

[redacted],

We agree with your analysis regarding Parent A's side of the formation.
For Parent B, because the services are provided in the US, they count as US sales.
In the case of staffing companies, we have, in limited circumstances, allowed the use of gross revenue minus pass through revenue for purposes of determining SOP, but this was only where the regularly prepared annual statement of income showed the calculation (e.g., Gross Revenue $100MM, Pass through Revenue $80 MM, Net Revenue $20MM). It does not sound like your statement provides sufficient detail, as it only says Cost of Sales, which is broader. So, without more granularity on the Cost of Sales, you can't exclude the salaries of contractors and related expenses.

-Diana

From: [redacted]
Sent: Friday, September 25, 2015 1:29 PM
To: Walsh, Kathryn E.; Gillis, Diana L.
Subject: Question re: sales in or into the US

Kate, Diana:

I am looking into a JV formation transaction which I believe should be exempt under 802.4/802.50. Company A and Company B are each non-US entities engaged in the staffing business that are being contributed by their respective parent entities (Parent A and Parent B, respectively) to a newly-formed corporation (C).

Company A is based in foreign country X. Contractors that are assigned to work for Company A's customers in the US are employed by Company A's US subsidiary, which has some employees but minimal assets. Company A invoices from Country X and is paid by. its customers. Company A is then billed by its US subsidiary, which then pays its contractors' salaries and other expenses. The US subsidiary does not bill the external customers.

Company B is also based in foreign country X. Unlike Company A, Company B's US business operates for the most part independently from its non-US assets, and any US sales attributable to Company B's foreign assets would be well under $76.3 million.

Assume that the formation of C satisfies the size-of-parties thresholds with respect to Parent A and Parent B and that Parent A and Parent B will each receive voting securities of C valued in excess of $76.3 million.

Also assume that for each of Company A and Company B, the fair market value of the US assets (excluding cash) is less than $76.3 million.

It appears to me that Parent A's side of the formation should be exempt under 802.4 because the assets of C will consist of:
(1) all of Company A's underlying assets, which it contributed to the formation (exempt under 802.30),
(2) Company B's non-US assets that generated less than $76.3 million in sales in or into the US (exempt under 802.50(a)), and
(3) Company B's US assets valued at less than $76.3 million (not including cash).

Parent B's side of the formation is complicated by whether Company A's sales to US customers should be attributable to its foreign assets. Any agreements with US customers are made with Company A outside the US (as they tend to be global contracts), but the parts of the services are provided in the US by personnel from the US subsidiary. **Should such sales be attributed to foreign or US assets for purposes of 802.50(a)? If such sales are to attributed to the foreign assets, since it is a staffing business can the cost of sales (primarily, salaries of the contractors and related expenses) be excluded, as per interpretation #9905016?** The consolidated financial statements for Company A show separate line items for "Turnover" (i.e., gross revenues), "Cost of Sales", and the resulting "Gross Profit".

If Company A's sales to US customers should be either (i) attributed to US assets, or (ii) calculated based on gross profit, then Parent B's side of the formation should also be exempt under 802.4, since:
(1) all of Company B's underlying assets, which it contributed to the formation (exempt under 802.30),
(2) Company A's non-US assets that generated less than $76.3 million in sales in or into the US (exempt under 802.50(a)), and
(3) Company A's US assets valued at less than $76.3 million (not including cash).

Thanks in advance,