

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DIVISION M

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LA STATE REVENUE DEPARTMENT .
V. . SUIT NO. 550514
EARTHLINK INC OF DELAWARE .
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MONDAY, APRIL 26, 2010

ORAL REASONS FOR JUDGMENT ON MOTION FOR SUMMARY JUDGMENT
FILED ON BEHALF OF EARTHLINK INC. OF DELAWARE

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THE HONORABLE KAY BATES, JUDGE PRESIDING

APPEARANCES	FOR
DONALD BOWMAN	PLAINTIFFS
DAVID KELLY & DAVID BERTONI	DEFENDANTS

REPORTED BY: KRISTINE M. FERACHI, CCR #87173

MONDAY, APRIL 26, 2010

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THE COURT: THIS MATTER COMES BEFORE THE COURT ON A MOTION FOR SUMMARY JUDGMENT FILED BY EARTHLINK, INCORPORATED, OF DELAWARE.

THIS SUIT BEGAN AS A PETITION TO COLLECT TAXES FILED BY THE LOUISIANA DEPARTMENT OF REVENUE. EARTHLINK SOLD INTERNET ACCESS SERVICES TO RESIDENTS OF THE STATE OF LOUISIANA FROM LOCATIONS ENTIRELY OUTSIDE OF LOUISIANA. TODAY EARTHLINK HAS FILED THIS MOTION ASKING THE COURT TO DECIDE WHETHER THE DEPARTMENT OF REVENUE HAD THE RIGHT UNDER THE LOUISIANA STATUTE AND CONGRESS CLAUSE OF THE UNITED STATES CONSTITUTION TO IMPOSE SALES AND USE TAXES IN ANY AMOUNT ON EARTHLINK FOR THE SERVICES IT SOLD TO LOUISIANA RESIDENTS DURING THE PERIOD OF JANUARY 1ST OF 2000 THROUGH DECEMBER 31ST OF 2003.

IN ORDER FOR THE COURT TO DECIDE THIS ISSUE, IT MUST DECIDE WHETHER EARTHLINK WAS A DEALER AND WAS ENGAGED IN BUSINESS IN LOUISIANA WITHIN THE MEANING OF LA R.S. 47:301(4)(H), WHETHER EARTHLINK LACKED SUBSTANTIAL NEXUS IN LOUISIANA NECESSARY TO PERMIT THE STATE TO IMPOSE SALES AND USE TAX OBLIGATIONS ON THE COMPANY, AND WHETHER EARTHLINK'S SALES WERE LIMITED TO DIAL-UP AND D.S.L. INTERNET ACCESS, WIRELESS INTERNET ACCESS, DOMAIN NAME REGISTRATION AND HOSTING WEB SERVICES.

LA C.C.P. ART. 966(B) STATES THAT SUMMARY JUDGMENT SHALL BE RENDERED IF THE PLEADINGS, DEPOSITIONS, ANSWERS TO INTERROGATORIES AND ADMISSIONS ON FILE, TOGETHER WITH THE AFFIDAVITS,

IF ANY, SHOW THAT THERE IS NO GENUINE ISSUE AS TO A MATERIAL FACT, AND THAT MOVER IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

THE DEPARTMENT OF REVENUE HAS OPPOSED THIS MOTION, BUT ONLY STATES THAT DISCOVERY IS NOT YET COMPLETE, AND THAT EARTHLINK HAS FAILED TO PRODUCE CERTAIN DOCUMENTS THAT THE DEPARTMENT REQUESTED. THE COURT NOTES THAT THERE WAS AN 11-MONTH LAPSE BETWEEN THE LAST LETTER THAT COUNSEL FOR EARTHLINK SENT TO THE DEPARTMENT OF REVENUE ASKING IF THEY NEEDED FURTHER INFORMATION AND THE FILING OF THIS MOTION FOR SUMMARY JUDGMENT.

THE COURT HAS CAREFULLY REVIEWED AND ANALYZED THE PLEADINGS, MEMORANDA, AFFIDAVITS AND THE EXHIBITS AND HEREBY CONCLUDES THAT EARTHLINK DID NOT EVER MAINTAIN DIRECTLY OR INDIRECTLY ANY PLACE OF BUSINESS IN LOUISIANA, HAVE ANY AGENT IN LOUISIANA OR OTHERWISE MAINTAIN ANY PRESENCE IN LOUISIANA THAT WOULD BE SUFFICIENT TO SATISFY THE REQUIREMENT THAT EARTHLINK BE ENGAGED IN BUSINESS IN LOUISIANA. THUS, THE DEPARTMENT OF REVENUE'S CLAIM MAY FAIL.

FURTHERMORE, THE DEPARTMENT HAS NOT SHOWN THAT EARTHLINK POSSESSED THE REQUIRED SUBSTANTIAL NEXUS, AND THEIR SALES WERE LIMITED TO SERVICES THAT WERE NOT SUBJECT TO SALES AND USE TAXES PURSUANT TO LA R.S. 47:301, SUBSECTION 14. THIS IS SUPPORTED BY THE AFFIDAVIT OF CLAY ROBINSON, DIRECTOR OF TAX OF EARTHLINK, INCORPORATED, AND THE DEPARTMENT OF REVENUE HAS PRODUCED NOTHING TO DISPUTE THESE FINDINGS BY THE COURT.

THEREFORE, THE MOTION FOR SUMMARY JUDGMENT IS

HEREBY GRANTED AS THE COURT FINDS THAT THERE IS NO GENUINE ISSUE AS TO A MATERIAL FACT REMAINING AS THE DEPARTMENT OF REVENUE DID NOT HAVE THE RIGHT UNDER THE LOUISIANA STATUTE AND THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION TO IMPOSE SALES AND USE TAXES IN ANY AMOUNT ON EARTHLINK FOR THE SERVICES IT SOLD TO LOUISIANA RESIDENTS DURING THE PERIOD OF JANUARY 1ST, 2000 THROUGH DECEMBER 31ST, 2003. ACCORDINGLY, EARTHLINK, INCORPORATED, IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

ALL COSTS OF THE MOTION ARE ASSESSED TO THE DEPARTMENT OF REVENUE. I AM INSTRUCTING COUNSEL FOR EARTHLINK TO PREPARE A JUDGMENT CONSISTENT WITH THESE ORAL REASONS, CIRCULATE IT AND SUBMIT IT TO THE COURT FOR SIGNATURE. JUDGMENT TO BE SIGNED ACCORDINGLY.

C E R T I F I C A T E

I, KRISTINE M. FERACHI, CCR, OFFICIAL COURT REPORTER, NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, DO HEREBY CERTIFY THAT THE FOREGOING PAGES CONSTITUTE A TRUE AND ACCURATE TRANSCRIPT OF THE AFORESAID MATTER AS TAKEN BY ME ON THE STENOTYPE MACHINE, TO THE BEST OF MY KNOWLEDGE AND ABILITY.

WITNESS MY HAND THIS 26TH DAY OF APRIL, 2010.



KRISTINE M. FERACHI
OFFICIAL COURT REPORTER
19TH JUDICIAL DISTRICT COURT
CCR #87173

