

AN ALERT FROM THE BDO STATE AND LOCAL TAX PRACTICE

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► SUBJECT

NEW JERSEY TAX DEVELOPMENTS AND REMINDERS

► DETAILS

CORPORATE TAX NEXUS BASED ON TELECOMMUTING EMPLOYEE

On March 2, 2012, the Superior Court of New Jersey held that an employee telecommuting from her New Jersey residence subjected Telebright Corp., Inc., an out-of-state employer with no other physical presence in the state, to the New Jersey Corporation Business Tax ("CBT").¹ The employee worked full-time from her home developing and writing software code on her personal laptop computer. The employee's work product became an integral part of Telebright's Web application product provided to its customers. The employee submitted timesheets by computer from her home in New Jersey, and Telebright withheld New Jersey income tax from the employee's salary.

The court found that Telebright was doing business in New Jersey, noting that a small in-state presence (*i.e.*, one employee) could subject a foreign entity to a state's taxing authority. The court reasoned that this case was analogous to a foreign manufacturer having an employee fabricate parts from a location within New Jersey for a product that is ultimately assembled outside of the state, noting that, just as the foreign manufacturer would be subject to the CBT based on the fabricator's presence in New Jersey, Telebright was similarly subject to the CBT under New Jersey law. The fact that Telebright's full-time employee worked from a home office, rather than one owned by Telebright, was deemed immaterial.

The Telebright decision illustrates the importance of reviewing a company's business activities in a state to determine if the level of activity warrants a filing requirement.

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¹ *Telebright Corp. v. Director, Division of Taxation*, Superior Court of New Jersey, Appellate Division, No. A 509609T2 (Mar. 2, 2012), *aff'g Telebright Corp. v. Director*, 25 N.J. Tax 333 (2010).

E-FILE MANDATE

Beginning with the 2011 taxable year, tax return preparers that reasonably expect to prepare 11 or more individual gross income tax resident returns (including trusts and estates) must use electronic methods to file these returns. Currently, New Jersey cannot process electronically-filed fiduciary tax returns. However, preparers must include the number of fiduciary returns they expect to prepare in a taxable year when determining whether they are required to file all other returns electronically, and may be penalized \$50 for each return that is required to be filed electronically but is not filed in this manner.

INTERCOMPANY TRANSFER PRICING AND ADVANCE PRICING AGREEMENTS

On February 16, 2012, the New Jersey Division of Taxation released a technical advisory memorandum ("TAM") concerning the use of intercompany transfer pricing and advanced pricing agreements in the context of intercompany and related party transactions.²

Because New Jersey is a separate entity reporting state for CBT purposes, business entities report income and deductions on a separate entity basis and not in a group or combined report, even when the entities are related or affiliated. When the Division suspects that a separate entity reporting does not accurately reflect income earned within the state, it has the authority to examine and adjust the entire net income of the taxpayer even when there is no tax evasion or avoidance at issue but rather, when the "true earnings of the taxpayer on its business carried on in this state" are not accurately reported.³

The Division adopted regulations in 1992 defining the term "fair and reasonable tax" as "the tax that would have been payable by a taxpayer reporting the same transaction(s) on a separate entity basis where the parties to the transaction(s) had independent economic interests."⁴ The Division stated in the TAM that the determination of a "fair and reasonable tax" is similar to that with respect to arm's-length pricing requirements under section 482 of the Internal Revenue Code.

As part of an arm's-length analysis in determining a "fair and reasonable tax," the Division has the authority to accept an Advance Pricing Agreement ("APA") with the Internal Revenue Service and any transfer pricing studies performed by independent parties as proper determination and evidence in the evaluation of intercompany transfer pricing. Consequently, the Division has indicated that, in most circumstances, the determinations set forth in APAs will be respected. However, the Division has the authority to challenge the underlying assumptions and interpretations in determining a taxpayer's entire net income if the earnings carried on the state are not reflected by the terms of the APA or advance pricing study at issue. The Division stated that it intends to codify the TAM.

NEW JERSEY INCOME REFUND INFORMATION

The status of a New Jersey income tax refund may be obtained either online or by calling 1-800-323-4400.⁵ The social security number of the taxpayer(s) and the amount of the refund requested must be provided in either case.

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Material discussed in this tax alert is meant to provide general information and should not be acted on without professional advice tailored to your firm's individual needs.

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² See New Jersey Division of Taxation Regulatory Services Branch Technical Advisory Memorandum, TAM - 2012 - 1 (replacing 2011-17) issued February 16, 2012. A copy of the TAM can be found at www.state.nj.us/treasury/taxation/pdf/pubs/tams/tam2012-1.pdf.

³ The statute provides, in pertinent part, that the Director may make "adjustments in any tax report or tax returns as may be necessary to make a fair and reasonable determination of the amount of tax payable under this act." N.J.S.A. 54:10A-10(a).

⁴ N.J.A.C. 18:7-5.10(a).

⁵ The status of a refund may be requested online at www1.state.nj.us/TYTR_TGI_INQ/jsp/prompt.jsp.