



Foreign Corporations Subject to Tax

TAM 2011-6(R) – Revised July 25, 2023
Tax: Corporate Business Tax

The Business Tax Reform Act, P.L. 2002, c.40, enacted July 2, 2002 ("BTRA") made numerous amendments and supplements to the Corporation Business Tax Act ("Act"). Important changes, contained in Section I, amended N.J.S.A. 54:10A-2. Those amendments made clear that the franchise tax is due from foreign corporations "for the privilege of deriving receipts from sources within the State, or for the privilege of engaging in contacts within this State."

The amendments mandated that a taxpayer's exercise of its franchise in this state is subject to taxation in this state if the taxpayer's business activity in New Jersey is sufficient to give the state jurisdiction to impose the tax under the constitution and statutes of the United States. This change applied to privilege periods and taxable years beginning on or after January 1, 2002.

Accordingly, after the law changed effective January 2, 2002, corporations that derive receipts from sources within New Jersey or engage in contacts within New Jersey are subject to tax in New Jersey, provided that the taxpayer's business activity in New Jersey is sufficient to give this State jurisdiction to impose the tax under the constitution and statutes of the United States.

In establishing new subjectivity standards under the Corporation Business Tax Act, N.J.S.A. 54:10A-1 et seq., the Business Tax Reform Act repealed the former Corporation Income Tax Act, N.J.S.A. 54:10E-1 et seq. and incorporated expansive language regarding subjectivity from the Corporations Income Tax Act into the Corporation Business Tax Act.

The New Jersey Supreme Court upheld the application of the Corporation Income Tax Act in *Avco Financial Services Consumer Discount Company One, Inc. v. Director, Division of Taxation*, 100 N.J. 27, 494 A.2d 788 (1985). (See also *First Family Mortgage Corporation of Florida v. Linda A. Durham and Mr. Linda Durham, and Attorney General of New Jersey, Intervenor-Respondent*, 108 N.J. 277, 528 A.2d 1288 (1987), citing *Avco* in determining that N.J.S.A. 14A:13-15, requiring foreign corporations which were not certified to do business in the State and which had not filed timely tax returns to file business activities reports with the Director of the Division of Taxation, did not violate the commerce clause).

Several important judicial opinions were issued subsequent to the enactment of the BTRA in 2002. The Division takes note of the opinion and outcome in *Tax Commissioner of the State of W. Va. v. MBNA America Bank, N.A.* 640 S.E.2d 226 (W.Va. 2006), cert. denied *sub nom FIA Card Services, N.A. v. Tax Commissioner of West Virginia*, 127 S.Ct. 2997 (2007). The opinion of the highest court of West Virginia upheld against a U.S. Constitutional challenge the tax subjectivity and imposition of tax based on solicitation and receipts derived from sources within the taxing jurisdiction but received by an out of state credit card company. The New Jersey Supreme Court also upheld the imposition of Corporation Business Tax against a similar challenge by a foreign trademark holding company. *Lanco, Inc. v. Director*, 21 N.J. Tax 200 (2003), 379 N.J. Super 562, 879 A.2d 1234 (App. Div. 2005), 188 N.J. 380, 980 A.2d 176 (2006), cert. denied, 127 S.Ct. 2974 (2007).

Applying the principles of the statute as amended and the above-referenced court decisions, taxpayers performing services and domiciled outside the State that solicit business within the

State or derive receipts from sources within the State must file a Corporation Business Tax return and pay the applicable tax to New Jersey. This principle applies to all corporations, including financial corporations. A financial business corporation, a banking corporation, a credit card company or similar business that has its commercial domicile in another state is subject to tax in this State if during any year it obtains or solicits business or receives gross receipts from sources within the State. As noted above, the principles explained in this notice are applicable for privilege periods beginning on and after January 1, 2002.

It should be noted that taxpayers may continue to request an adjustment under N.J.S.A. 54:10A-8. Pursuant to N.J.S.A. 54:10A-8 and N.J.A.C. 18:7-8.3, if it appears that the business allocation factor computed on the basis of all or any of the property-receipts payroll fractions does not properly reflect the activity, business, receipts, capital, entire net worth or entire net income of the taxpayer in New Jersey, the Director may adjust or taxpayer may request an adjustment of the business allocation factor.

The Division codified these policies in N.J.A.C. 18:7-6 and N.J.A.C. 18:7-1.8. The Division intends on providing additional examples and further guidance in subsequent regulatory proposals.

Note: A Technical Advisory Memorandum (“TAM”) is an informational statement of the law, regulations, or Division policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions or changes in Division policies could affect the validity of the information presented in a TAM.