

Smart Growth Development Impact

The proposed new rule would not result in a change in the housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. This is because the proposed new rule has nothing to do with housing production, either within Planning Areas 1 or 2, within designated centers, or anywhere in the State of New Jersey. The new rule deals with the relaxation of Division of Taxation rules.

Full text of the proposed new rule follows:

18:1-2.6 Relaxation of rules

(a) The Director of the Division of Taxation may, in his or her discretion, and if consistent with taxation laws, relax the strict application of any administrative or procedural requirements of Title 18 of the New Jersey Administrative Code when necessary and in the public interest, upon a showing of undue hardship, upon a finding that strict adherence to such requirements would result in unfairness or injustice and that the granting of a waiver is not inconsistent with the purposes and objectives of the applicable sections of Title 54 of the New Jersey Statutes Annotated, or with the core missions of the Division.

(b) The Director of the Division of Taxation shall not relax any administrative or procedural requirements if such requirements are imposed by applicable State or Federal statutes or by applicable decision or decree of a court of competent jurisdiction.

(c) A request for a waiver must be submitted in writing to the Director and shall include the following:

1. A statement of the type and degree of hardship that would occur if a waiver is not granted; and
2. All documentation that supports the applicant's request for a waiver.

(a)

DIVISION OF TAXATION

**Corporation Business Tax
Foreign Corporations Subject to Tax**

Proposed Amendment: N.J.A.C. 18:7-1.8

Authorized By: Michael Bryan, Acting Director, Division of Taxation.

Authority: N.J.S.A. 54:10A-27 and 54:50-1.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2011-038.

Submit written comments by April 8, 2011 to:

Mitchell C. Smith
Administrative Practice Officer
Division of Taxation
50 Barrack Street
P.O. Box 269
Trenton, NJ 08695

The agency proposal follows:

Summary

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). Those amendments made clear that the franchise tax is due from foreign corporations "for the privilege of deriving receipts from sources within this State, or for the privilege of engaging in contacts within this State." This change applied to privilege periods and taxable years beginning on or after January 1, 2002.

The Division is proposing amendments to N.J.A.C. 18:7-1.8(a) to make explicit the responsibilities to file and pay tax for certain taxpayers receiving income from New Jersey sources after the law changed effective January 1, 2002. N.J.A.C. 18:7-1.8(a) is further amended to conform to N.J.S.A. 54:10A-2, by requiring that the taxpayer's business activity in New Jersey is sufficient to allow the State to impose a tax under the U.S. Constitution and statutes. New subsection (b) is added to make clear that certain taxpayers performing services and domiciled

outside the State that solicit business with the State or receive gross receipts from sources within the State must file a corporation business tax return and pay the applicable tax to New Jersey.

As noted above the law change embodied in the proposed amendments is applicable for privilege periods beginning on and after January 1, 2002.

Because the Division has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirements pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The social impact of these amendments is to draw clear attention to a specific application of the law changes that came about in 2002. The Business Tax Reform Act, P.L. 2002, c. 40, enacted July 2, 2002 made numerous amendments and supplements to the Corporation Business Tax Act. Important changes, contained in Section 1, 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 this 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 this 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 Corporation 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 (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 (1987), citing *Avco* in determining that N.J.S.A. 14A:13-15, requiring foreign corporations which were not certified to do business in State and which had not filed timely tax returns to file business activities report with the Director of the Division of Taxation, did not violate commerce clause).

Several important judicial opinions were issued subsequent to the enactment of the BTRA in 2002. The Division takes note, for example, of the opinion and outcome in *Tax Commissioner of the State of W. Va. v. MBNA America Bank, N.A.*, 640 S.E2d 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 based on solicitation and receipts derived from sources within the taxing jurisdiction but received by an out of state taxpayer. 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 (App. Div. 2005), 188 N.J. 380 (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 this State. As noted above, the

principles explained in the proposed amendments are applicable for privilege periods beginning on and after January 1, 2002.

The proposed amendments are published to provide the general public, corporate taxpayers and their advisers with information and guidance about their responsibilities under the Corporation Business Tax Act. By including an example of a particular situation creating tax subjectivity under the Corporation Business Tax Reform Act, the proposed amendments are intended to limit unnecessary confusion.

Economic Impact

The Business Tax Reform Act repealed the former New Jersey Corporation Income Tax law, N.J.S.A. 54:10E-1 et seq. and established new subjectivity and imposition standards under the Act. In the absence of precise data, it is not possible to quantify the economic impact of the proposed amendments on business activity in New Jersey.

The proposed amendments make plain the recordkeeping, return preparation, payment and filing responsibilities and requirements applicable to certain taxpayers located outside New Jersey. The guidance provided should enable taxpayers to have their returns prepared in an efficient and hence less costly manner. The proposed amendments may help to reduce the costs of tax administration of the Division and compliance costs to taxpayers since the guidance may limit the need for professional fees in certain cases. The economic impact is likely to be felt in the form of taxes paid to New Jersey by businesses outside the State that are deriving benefits from their connections with the State and their exploitation of the New Jersey marketplace. An economic benefit to the State Treasury should also occur in the form of increased revenue.

Federal Standards Statement

A Federal standards analysis is not required because there are no Federal standards or requirements applicable to the proposed amendments.

Jobs Impact

The proposed amendments will have no impact on jobs in New Jersey. The Division does not anticipate an increase or decrease in jobs as a result of the proposed amendments.

Agriculture Industry Impact

The proposed amendments will not have an impact on the agriculture industry.

Regulatory Flexibility Analysis

The Division of Taxation, consistent with its mission, reviews its rule proposals with a view to minimizing the impact of its rules on small businesses to the extent possible. The mission of the Division of Taxation is to administer the State's tax laws uniformly, equitably and efficiently to maximize State revenues to support public services; and, to ensure that voluntary compliance within the taxing statutes is achieved without being an impediment to economic growth.

The proposed amendments apply to any company, including those which may be considered a small business as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Because the Division applies the tax rules uniformly and equitably, the Division does not develop and apply special rules for small businesses that would be different from the rules applied to other parties. In this respect, the Division strives to maintain a "level playing field."

The proposed amendments apply to small businesses, as well as to businesses employing more than 100 people full-time. The Division anticipates that the proposed amendments will not increase capital costs of small businesses. However, there may be some additional costs or accountants' fees for professional services related to the need to file tax returns and the need to monitor the applicability of the proposed amendments to certain contemplated or actual transactions. No exemptions from, or differentiation in, these requirements on large or small businesses was provided, since to do so would not have been in compliance with the applicable statutes.

Smart Growth Impact

The Division of Taxation anticipates that the proposed amendments will have no impact on smart growth in New Jersey or on the implementation of the New Jersey State Development and Redevelopment Plan.

Housing Affordability Impact

The proposed amendments would not result in a change in the average costs associated with housing. The proposed amendments would have no impact on any aspect of housing because the proposed amendments deal with subjectivity of foreign corporations to the Corporation Business Tax.

Smart Growth Development Impact

The proposed amendments would not result in a change in the housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. This is because the proposed amendments have nothing to do with housing production, either within Planning Areas 1 or 2, within designated centers, or anywhere in the State of New Jersey. The proposed amendments deal with subjectivity of foreign corporations to the Corporation Business Tax.

Full text of the proposal follows: (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

18:7-1.8 Foreign corporations subject to tax

(a) Qualifications for subject corporations. The tax is imposed on every foreign corporation subject to tax as described in N.J.A.C. 18:7-1.6, and includes every corporation [which] **that derives receipts from sources within New Jersey or engages in contacts within New Jersey** or does business, employs or owns capital or property[,] or maintains an office in New Jersey in a corporate or organized capacity, regardless of whether it has formally qualified or is authorized to do business 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.**

Example 1-3 (No change.)

(b) 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 this State.

[(b)] (c) (No change in text.)

(a)

DIVISION OF TAXATION

Luxury Tax

Proposed Readoption with Amendments: N.J.A.C. 18:25

Authorized By: Michael Bryan, Acting Director, Division of Taxation.

Authority: N.J.S.A. 54:32B-24 and 54:32B-24.1.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2011-028.

Submit comments by April 8, 2011 to:

Mitchell Smith
 Assistant Chief, Regulatory Services Branch
 Division of Taxation
 50 Barrack St.
 PO Box 269
 Trenton, NJ 08695-0269

The agency proposal follows:

Summary

Pursuant to N.J.S.A. 52:14B-5.1c, N.J.A.C. 18:25 expires on July 23, 2011. The Division of Taxation has reviewed the rules and has determined them to be necessary, reasonable and proper for the purposes for which they were originally promulgated. The rules proposed for readoption are proposed with changes to take account of recent statutory increases in sales tax rates. The statutes setting forth the general powers of municipalities have, since 1947, authorized cities of the fourth class to enact ordinances to increase their revenue by levying and collecting taxes on certain retail sales. N.J.S.A. 40:48-8.15 et seq. To date, Atlantic City