

iv. "Domestic subsidiary" means a business entity incorporated under the laws of any state within the United States;

v. "Intangible property" to which intangible expenses and costs relate, means and includes, but is not limited to, patents, patent applications, trade names, trademarks, service marks, copyrights, mask works, trade secrets, film, information technology, and similar types of intangible assets;

vi. "Intangible expenses and costs" means and includes:

(1) Expenses, losses and costs for, related to, or in connection directly or indirectly with the direct or indirect acquisition, use, maintenance or management, ownership, sale, exchange, or any other disposition of intangible property to the extent such amounts are allowed as deductions or costs in determining taxable income before operating loss deduction and special deductions for the taxable year under the Federal Internal Revenue Code of 1986, 26 U.S.C. § 1 et seq.;

(2) Losses related to, or incurred in connection directly or indirectly with, factoring transactions or discounting transactions;

(3) Royalty, patent, technical and copyright fees;

(4) Licensing fees; and

(5) Other similar expenses and costs;

vii. "Interest expenses and costs" means amounts directly or indirectly allowed as deductions under section 163 of the Federal Internal Revenue Code of 1986, 26 U.S.C. § 163, for purposes of determining taxable income under the code to the extent such expenses and costs are directly or indirectly for, related to, or in connection with the direct or indirect acquisition, maintenance, management, ownership, sale, exchange or disposition of intangible property;

viii. "Related member" means a person that, with respect to the taxpayer during all or any portion of the privilege period, is:

(1) A related entity;

(2) A component member as defined in subsection (b) of section 1563 of the Federal Internal Revenue Code of 1986, 26 U.S.C. § 1563;

(3) A person to or from whom there is attribution of stock ownership in accordance with subsection (e) of section 1563 of the Federal Internal Revenue Code of 1986, 26 U.S.C. § 1563; or

(4) A person that, notwithstanding its form of organization, bears the same relationship to the taxpayer as a person described in (b)5viii(1) through (3) above of this definition;

ix. "Related entity" means a stockholder who is an individual, or a member of the stockholder's family enumerated in section 318 of the Federal Internal Revenue Code of 1986, 26 U.S.C. § 318, if the stockholder and the members of the stockholder's family own, directly, indirectly, beneficially or constructively, in the aggregate, at least 50 percent of the value of the taxpayer's outstanding stock; a stockholder, or a stockholder's partnership, limited liability company, estate, trust or corporation, if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts and corporations own directly, indirectly, beneficially or constructively, in the aggregate, at least 50 percent of the value of the taxpayer's outstanding stock; or a corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of the Federal Internal Revenue Code of 1986, 26 U.S.C. § 318, if the taxpayer owns, directly, indirectly, beneficially or constructively, at least 50 percent of the value of the corporation's outstanding stock. The attribution rules of the Federal Internal Revenue Code of 1986, 26 U.S.C. § 318, shall apply for purposes of determining whether the ownership requirements of this definition have been met;

x. The disclosure requirement for interest paid to a related member shall be deemed to be satisfied if the taxpayer provides a schedule of:

(1) The name of the related member;

(2) The country of domicile of the related member;

(3) The amount paid to the related member; and

(4) The nature of payment or, alternatively, by providing a copy of Federal form 5472 or its equivalent as an attachment to form NJ CBT-100;

6. Examples:

Example 1: Large Co. A.G., a foreign corporation, domiciled in a jurisdiction that has entered into a comprehensive tax treaty with the United States of America, owns directly or indirectly 100 percent of the outstanding shares of three U.S. domestic subsidiaries (Red Corp., White Corp. and Blue Corp.) and 100 percent of the outstanding shares of Funding, N.V., a foreign subsidiary. Red Corp. and White Corp. utilize certain technology developed by Large Co. A.G. in their daily operations of manufacturing products for resale. Blue Corp. was formed to hold and does hold the U.S. rights to certain technologies developed by Large Co. A.G., Red Corp. and White Corp. pay a royalty to Blue Corp. for the ability to use the technology developed by Large Co. A.G. in its daily operations. Blue Corp. pays an annual royalty to Large Co. A.G. based on the amount of royalties it receives from Red Corp. and White Corp. Amounts paid to Blue Corp. by

Red Corp. and White Corp. would not be subject to disallowance. Also the amounts paid by Blue Corp. to Large Co. A.G. would not be subject to disallowance.

Example 2: Same facts as Example 1 except that Large Co. A.G. has entered into an agreement to securitize certain financial assets. Red Corp. sells its receivables to White Corp., a bankruptcy remote, special purpose company, at a discount. White Corp. pledges the receivables to a lending institution that issues commercial paper backed by those receivables. Large Co. A.G. and Red Corp. have guaranteed that 100 percent of any receivable pledged is collectible. The discount on the sale of the receivables by Red Corp. to White Corp. is not subject to disallowance.

Example 3: A limited partner receives guaranteed payments for its investment in a limited partnership. The payment is similar to a payment on preferred stock. The related member rules apply if the guaranteed payment is above market/arm's length values.

Special New Rule, R.2003 d.135, effective (to expire August 26, 2003). See: 35 N.J.R. 1573(a).

Adopted concurrent new rule, R.2003 d.370, effective August 22, 2003, with changes effective September 15, 2003.

See: 35 N.J.R. 1573(a), 35 N.J.R. 4310(a).

In (a), inserted "regardless of whether a tax was actually paid on the related member," following "foreign nation" in liii, inserted "except any traced to domestic sources or countries that do not have a comprehensive treaty with the United States," following "White Pine, Inc." in Example 3 of 5, rewrote Example 5, added Example 6 and 7 and deleted Examples 4 and 5 in 6.

SUBCHAPTER 6. (RESERVED)

SUBCHAPTER 7. ALLOCATION

18:7-7.1 General instructions regarding allocation of net income

(a) No corporation, foreign or domestic (other than a corporation entitled and electing to report as an investment company, regulated investment company or real estate investment trust) is entitled to allocate any part of its entire net income outside New Jersey unless during the period covered by the return it maintained a regular place of business outside the State.

(b) In the absence of a regular place of business, 100 percent of its entire net income must be allocated to New Jersey.

(c) The mere ownership of assets outside New Jersey does not constitute a basis for allocating less than 100 percent of the taxpayer's net income to New Jersey.

(d) Where the taxpayer does not maintain a regular place of business outside New Jersey and its allocation factor is 100 percent and the taxpayer in fact pays a tax based on or measured by income to another state, see N.J.A.C. 18:7-8.3 which provides for the eligibility and method in computing a reduction in the tax for such taxpayer.

Amended by R.1985 d.54, effective February 19, 1985.

See: 16 N.J.R. 2999(b), 17 N.J.R. 476(b).

"Corporation" substituted for "taxpayer" and added "or real estate investment trust."

Amended by R.1994 d.186, effective April 18, 1994.

See: 26 N.J.R. 761(a), 26 N.J.R. 1696(b).

Statutory References

See N.J.S.A. 54:10A-6 as to how to determine allocation factor for taxpayer maintaining regular place of business outside New Jersey.

Case Notes

Failure to permit allocation to New Jersey corporation which owned rental property in Connecticut but had no regular employees working outside New Jersey held neither contrary to the scheme of the Business Tax Act, a burden on interstate commerce nor double taxation. *S.M.Z. Corp. v. Director, Div. of Taxation*, 5 N.J.Tax 232 (Tax Ct.1982), reversed and remanded 193 N.J.Super. 305, 473 A.2d 982 (App.Div. 1984).

18:7-7.2 Regular place of business; definition

(a) A regular place of business is any bona fide office (other than a statutory office), factory, warehouse, or other space of the taxpayer which is regularly maintained, occupied and used by the taxpayer in carrying on its business and in which one or more regular employees are in attendance. The following will assist in the determination of what is a regular place of business.

1. Bona fide office: An office in which an employee in attendance performs significant duties related to the business of the taxpayer. A token office, space of the taxpayer or any place where an employee does not actually perform significant duties constituting part of taxpayer's business does not constitute a regular place of business.

2. Space of the taxpayer: The taxpayer must be directly responsible for the expenses incurred in maintaining the regular place of business and must either own or rent the facility in its own name and not through a related person or entity. The regular place of business should be identifiable as belonging to the taxpayer by, for example, reflecting the taxpayer's name on the exterior and interior of the building and being listed in the taxpayer's name in a telephone book.

3. Regularly maintained, occupied and used by the taxpayer in carrying on its business: The taxpayer must regularly maintain, occupy and use the premises by employing one or more regular employees who are in attendance during normal working hours. Premises are not regularly maintained, occupied and used in the event employees are in attendance only on a part time basis and, in their absence, telephone messages are received by an answering service or recording device.

4. Regular employee: A regular employee must be under the control and direction of the taxpayer in transacting the taxpayer's business and/or performing work on behalf of the taxpayer. The officers of the taxpayer are generally deemed to be regular employees of the taxpayer while independent contractors and members of the taxpayer's board of directors are not regular employees of the taxpayer. The method or procedure by which a taxpayer reports the compensation paid to an individual (such as a W-2 form) shall not be conclusive as to whether the individual is a regular employee (See N.J.A.C. 18:7-8.14.):

i. The facilities of a public warehouse located outside New Jersey and utilized to store property of the taxpayer prior to shipment to customers shall not constitute a regular place of business of the taxpayer where the warehouse is not the space of the taxpayer.

ii. The facilities of an independent contractor located outside of New Jersey and used to store, convert, process, finish and/or improve the goods of the taxpayer prior to shipment to customers shall not constitute a regular place of business of the taxpayer.

iii. A job site, field office or other facility which is not regularly maintained, occupied and used in taxpayer's business or where administrative duties, such as performing payroll functions, telephoning, recordkeeping, banking, accounting, the hiring and firing of employees and similar functions are not performed, is not a regular place of business.

iv. The location of inventories outside of New Jersey in the possession of employees in their homes, or in trucks, or in coin-operated machines do not represent space regularly maintained, occupied and used by the taxpayer in carrying on its business.

v. In the event the taxpayer's business is conducted by an independent agent or independent contractor, the place of business of the independent agent or independent contractor shall not be considered a regular place of business of the taxpayer. In addition, any employee of such independent agent or independent contractor shall not be considered a regular employee of the taxpayer.

(b) A taxpayer does not have a regular place of business outside New Jersey solely by consigning goods to an independent factor outside New Jersey for sale at the direction of either the consignor or consignee.

(c) The mere fact that a taxpayer is subject to an income or franchise tax in other jurisdictions shall not be determinative as to whether the taxpayer maintains a regular place of business outside of New Jersey where taxable status in that jurisdiction is based on criteria other than a regular place of business.

Amended by R.1985 d.54, effective February 19, 1985.

See: 16 N.J.R. 2999(b), 17 N.J.R. 476(b).

(a)1-2 deleted and new text (a)1-4 substituted; (c) added.

Statutory References

See N.J.S.A. 54:10A-6 as to how to determine allocation factor for taxpayer maintaining regular place of business outside New Jersey.

Case Notes

Apportionment of franchise tax for multi-state corporations which maintain a regular place of business outside New Jersey other than a statutory office is not applicable to a corporation whose out-of-state offices consist of space in corporate engineers' personal homes used for their own convenience in connection with their employment. *Hoegaens Corp. v. Director, Div. of Taxation*, 145 N.J.Super. 352, 367 A.2d 1182 (App.Div.1976) and dissenting opinion.

Corporation which did not pay rent out of state did not maintain regular place of business out of state. *Hess Realty Corp. v. Director, Div. of Taxation*, New Jersey Dept. of Treasury, 10 N.J.Tax 63 (1988).

Reduction in corporation business tax based on an allocation of tax basis due to maintenance of a regular place of business outside of the State denied because New York office was not a "regular place of business", since it was leased in the name of the parent corporation, the taxpayer paid no rent and did not maintain control over the premises, and because the full time employees at the office were all employees of the parent corporation. *Shelter Development Corp. v. Taxation Div. Director*, 6 N.J.Tax 547 (Tax Ct.1984).

Failure to permit allocation to New Jersey corporation which owned rental property in Connecticut but had no regular employees working outside New Jersey held neither contrary to the scheme of the Business Tax Act, a burden on interstate commerce nor double taxation. *S.M.Z. Corp. v. Director, Div. of Taxation*, 5 N.J.Tax 232 (Tax Ct.1982), reversed and remanded 193 N.J.Super. 305, 473 A.2d 982 (App.Div.1984).

Corporation held not entitled to apportion part of its net income to other states because it did not maintain a regular place of business in other states; "regular place of business" test held not to violate commerce clause. *Rocappi Inc. v. Taxation Div. Director*, 3 N.J.Tax 311, 182 N.J.Super. 163, 440 A.2d 96 (Tax Ct.1981).

18:7-7.3 "Allocating" and "non-allocating" companies; definition

(a) A taxpayer which allocates a portion of its entire net income outside this State is referred to as an "allocating" taxpayer.

(b) A taxpayer which does not allocate any part of its entire net income outside this State is referred to as a "non-allocating" taxpayer.

(c) A taxpayer that maintains a regular place of business outside New Jersey for less than 50 percent of the period of time covered by a return is referred to as a "part year allocating" taxpayer.

Amended by R.1994 d.186, effective April 18, 1994.

See: 26 N.J.R. 761(a), 26 N.J.R. 1696(b).

Amended by R.2004 d.367, effective October 4, 2004.

See: 36 N.J.R. 1680(a), 36 N.J.R. 4484(a).

Added (c).

Statutory References

See N.J.S.A. 54:10A-4(b) as to definition of "allocation factor," and 54:10A-6 as to how to determine allocation factor for a taxpayer who maintains a regular place of business outside New Jersey.

Case Notes

Failure to permit allocation to New Jersey corporation which owned rental property in Connecticut but had no regular employees working outside New Jersey held neither contrary to the scheme of the Business Tax Act, a burden on interstate commerce nor double taxation. *S.M.Z. Corp. v. Director, Div. of Taxation*, 5 N.J.Tax 232 (Tax Ct.1982), reversed and remanded 193 N.J.Super. 305, 473 A.2d 982 (App.Div. 1984).

18:7-7.4 Allocation factor; definition

"Allocation factor" means the proportionate part of a taxpayer's entire net income used to determine a measure of its tax under the Act.

Amended by R.1994 d.186, effective April 18, 1994.
See: 26 N.J.R. 761(a), 26 N.J.R. 1696(b).

Statutory References

See N.J.S.A. 54:10A-4(b) as to definition of "allocation factor."

18:7-7.5 Allocation factor; application

(a) If the taxpayer had a regular place of business outside New Jersey during the period covered by the return, its tax liability under the New Jersey Corporation Business Tax Act is measured by that part of its entire net income allocated to New Jersey according to a formula called the business allocation factor.

(b) If the taxpayer is deemed to be a "part year allocating" taxpayer because it had a regular place of business outside New Jersey for less than 50 percent of the period of time covered by the return, it will determine its overall business allocation factor by prorating the overall business allocation factor computed by the number of months, or part thereof, that a regular place of business was maintained and adding this to 100 percent prorated by the number of months or part thereof a regular place of business was not maintained.

Example: Corporation X establishes its only regular place of business outside New Jersey on November 16 of its 12 month calendar year. The overall business allocation factor computed on Schedule J for the entire period was 62.2424 percent. The prorated allocation factor would be 93.7071 percent computed as follows:

$$(62.2424 \times 2) + (100 \times 10)$$

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Amended by R.1994 d.186, effective April 18, 1994.
See: 26 N.J.R. 761(a), 26 N.J.R. 1696(b).
Amended by R.2004 d.367, effective October 4, 2004.
See: 36 N.J.R. 1680(a), 36 N.J.R. 4484(a).
Designated paragraph as (a), added (b).

Historical Note

Laws of 1968, Chapter 250 eliminated the use of the asset factor for the purpose of allocating net worth, effective with respect to privilege periods commencing after December 31, 1968.

Statutory References

See Laws 1968, Chapter 250 as to elimination of asset factor for purpose of allocating net worth, effective with respect to privilege periods commencing after December 31, 1968. See N.J.S.A. 54:10A-4(b) as to definition of "allocation factor." See N.J.S.A. 54:10A-6 as to how to determine allocation factor for taxpayer maintaining regular place of business outside New Jersey.

18:7-7.6 Corporate partners and partnerships

(a) A foreign corporation that is a general partner in a general or limited partnership or is deemed to be a general partner in a limited partnership doing business in New Jersey satisfies the subjectivity requirements set forth in N.J.S.A. 54:10A-2. A foreign corporation that is a general partner of a general or limited partnership doing business in New Jersey is subject to filing a corporation business tax return in New Jersey and paying the applicable tax under the terms of the corporation business tax to New Jersey. Such a corporation is also deemed to be employing or owning capital or property in New Jersey, or maintaining an office in New Jersey, if the partnership does so.

(b) Subsection (a) above may apply to foreign corporations, otherwise not subject to the New Jersey corporation business tax, whose only connection to this State is restricted to owning one or more limited partnership interests in one or more limited partnerships doing business in New Jersey, provided the taxpayer's connection with this State is sufficient to give this State jurisdiction to impose the tax under the Constitution and statutes of the United States. See N.J.A.C. 18:7-1.6.

(c) A foreign corporate limited partner of a limited partnership doing business in New Jersey is considered exercising its franchise to do business in this State, doing business in this State or employing capital in this State, and, therefore, is subject to tax under N.J.S.A. 54:10A-2 and filing a corporation business tax return, if:

1. The limited partner is also a general partner of the limited partnership;
2. The foreign corporation limited partner, in addition to the exercise of its rights and powers as a limited partner, takes an active part in the control of the partnership business;
3. The foreign corporate limited partner meets the criteria set forth in N.J.A.C. 18:7-1.9 or 1.6; or
4. The business of the partnership is integrally related to the business of the foreign corporation.

(d) Tax filing and payment responsibilities of partnerships are set forth in N.J.A.C. 18:7-17. For the partnership processing fee, see N.J.A.C. 18:35-11.

(e) It shall be the burden of the taxpayer to prove to the Director by clear and cogent evidence that the facts and circumstances surrounding its involvement with the limited partnership or limited liability company do not subject it to tax under the Act.

(f) For purposes of this section, the term "partnership" has the same meaning as is set forth under I.R.C. § 7701(a)(2) and the regulations issued thereunder. Partnerships that are not treated for Federal tax purposes as pass-through entities are also not treated as pass-through entities under this section. The term "partnership" shall include limited liability companies treated as partnerships.

(g) For purposes of apportionment (allocation) of corporate income, where the subject corporation and the partnership are not part of a single unitary business, including a business carried on directly by the foreign corporate partner, separate accounting apportionment should be used to arrive at corporate income. If the New Jersey business of the partnership is part of a single unitary business including a business carried on directly by the foreign corporate partner,

flow through accounting apportionment should be used with respect to the incomes of the two entities.

1. Separate accounting apportionment, for purposes of this section only, means use of the following method: The corporation's distributive share of the partnership's business income would be apportioned to New Jersey by computing the applicable N.J.S.A. 54:10A-6 apportionment factor for that business by only taking into account the corporate partner's share of the receipts, payroll and property of the business that the partnership carries on directly. Second, the corporation's entire net income, excluding its distributive share of the partnership's income is apportioned to New Jersey by computing the applicable N.J.S.A. 54:10A-6 apportionment factor for that business by only taking into account the receipts (excluding receipts from the partnership namely, receipts from inter-company transactions), payroll and property of the business that the corporation carries on directly. Third, these two amounts would be added together to arrive at the corporation's entire net income apportioned to New Jersey.

| | New Jersey Tax Income Base | Duplicated in State Z |
|---|-------------------------------|--------------------------|
| Tax at State Z rate (10 1/2%) on Apportioned duplicated ENI | | <u>\$6,20</u> |
| Reduction—at 9% of Apportioned duplicated ENI (\$59,118) | \$5,321 | |
| New Jersey tax after credit | \$19,429 | |

Corporation B computed the apportionment on its State Z return as follows:

| | <u>State Z</u> | <u>Every- where</u> | <u>Portion in State Z</u> |
|--|------------------|-------------------------|-------------------------------|
| Property Fraction | | | |
| Owned (Valued under State Z law and regulation) | \$140,000 | \$ 500,000 | |
| Leased (at 8 times annual rentals) | <u>\$ 40,000</u> | <u>\$ 100,000</u> | |
| Total Property Fraction | \$180,000 | \$ 600,000 | 0.300000 |
| Receipts Fraction | \$200,000 | \$1,000,000 | 0.200000 |
| Double Weighting of Receipts Fraction | | | 0.200000 |
| Payroll Fraction | \$ 90,000 | \$ 300,000 | 0.300000 |
| Total of Fractions | | | 1.000000 |
| Allocation Factor using State Z Law and Regulation (Total divided by four) | | | 0.250000 |

For accounting periods beginning before July 1, 1996, if the formula apportionment had been determined in State Z consistent with the N.J. Corporation Business Tax Act, it would have been:

| | | | |
|---|------------------|-------------------|----------|
| Property Fraction | | | |
| Owned (Valued under N.J.C.B.T. Act) | \$100,000 | \$ 400,000 | |
| Leased (at 8 times rentals) | <u>\$ 40,000</u> | <u>\$ 100,000</u> | |
| Total Property Fraction | \$140,000 | \$ 500,000 | 0.280000 |
| Receipts Fraction | \$200,000 | \$1,000,000 | 0.200000 |
| Payroll Fraction | \$ 90,000 | \$ 300,000 | 0.300000 |
| Total of Fractions | | | 0.780000 |
| Allocation Factor using N.J.C.B.T. Act (Total divided by three) | | | 0.260000 |

For accounting periods beginning on or after July 1, 1996, if the formula apportionment has been determined in State Z consistent with the N.J. Corporation Business Tax Act, it would have been:

| | | | |
|--|------------------|-------------------|----------|
| Property Fraction | | | |
| Owned (Valued under N.J.C.B.T. Act) | \$100,000 | \$ 400,000 | |
| Leased (at 8 times rentals) | <u>\$ 40,000</u> | <u>\$ 100,000</u> | |
| Total Property Fraction | \$140,000 | \$ 500,000 | 0.280000 |
| Receipts Fraction | \$200,000 | \$1,000,000 | 0.200000 |
| Double Weighting of Receipts Fraction | | | 0.200000 |
| Payroll Fraction | \$ 90,000 | \$ 300,000 | 0.300000 |
| Total of Fractions | | | 0.980000 |
| Allocation Factor using N.J.C.B.T. Act (Total divided by four) | | | 0.245000 |

For the period beginning prior to July 1, 1996, since the apportionment fraction (.250000) used in State Z does not exceed the Business Allocation Factor as it would have been determined under the Act and this subchapter, it is used for purposes of determining the reduction.

For the period beginning on or after July 1, 1996, since the apportionment fraction (.250000) used in state Z exceeds the Business Allocation Factor as it would have been determined under the Act and this subchapter, the New Jersey Factor (.245000) would be used for purposes of determining the reduction.

Amended by R.1984 d.594, effective January 7, 1985.

See: 16 N.J.R. 3001(a), 17 N.J.R. 115(c).

(b) added.

Amended by R.1997 d.429, effective October 6, 1997.

See: 29 N.J.R. 3426(a), 29 N.J.R. 4324(a).
Rewrote tables in (b)2i(3).

Statutory References

See N.J.S.A. 54:10A-8 as to right of Director to independently adjust a taxpayer's allocation factor.

Law Review and Journal Commentaries

Tax Law. Robert J. Alter, Jay Soled, 135 N.J.L.J. S53 (1993).

Case Notes

Corporate taxpayer was entitled to credit for income tax paid in another state. *Kettler Realty Corp. v. Director, Div. of Taxation*, 12 N.J.Tax 470 (1992), affirmed 14 N.J.Tax 165.

Redetermination of net worth tax which was not unreasonable or unfair would not be disturbed. *Kettler Realty Corp. v. Director, Div. of Taxation*, 12 N.J.Tax 470 (1992), affirmed 14 N.J.Tax 165.

Statutory three-factor was appropriate for corporate taxpayer that had paid taxes in another state. *Hess Realty Corp. v. Director, Div. of Taxation*, New Jersey Dept. of Treasury, 10 N.J.Tax 63 (1988).

18:7-8.4 Property fraction; "tangible personal property"; definition and scope; special situations

(a) The term "tangible personal property" shall mean corporeal personal property, such as machinery, fixtures, tools, implements, goods, wares and merchandise, and does not mean money, deposits in banks, shares of stock, bonds, notes, credits or evidence of an interest in property and evidences of debt.

(b) Tangible personal property within New Jersey.

1. Tangible personal property is within New Jersey if and so long as it is physically situated or located here, even though it may be stored in a bonded warehouse in this State.

2. Property of the taxpayer held in New Jersey by an agent, consignee or factor is (and property held outside New Jersey by an agent, consignee or factor is not) situated or located within New Jersey.

3. Mobile or movable property, such as construction equipment or trucks, is within New Jersey based on the ratio of time the property is used within the state to the time the property is used everywhere during the period covered by the return.

4. Ships are within New Jersey based on the ratio of time the vessels are in operation in New Jersey to the time the vessels are in operation everywhere, and including all sailing days, days in port for loading, unloading, ordinary repairs, refueling or provisioning as operation.

5. Aircraft used by airlines are within New Jersey based on the ratio of takeoffs in regular scheduled or charter flights that occur during revenue service from points in New Jersey to the total of all such takeoffs everywhere. Aircraft used other than by airlines in revenue service are within New Jersey based on the ratio of takeoffs from points in New Jersey to the total of all takeoffs everywhere when the aircraft are in use.

6. Consistent with N.J.S.A. 54:10A-6(b), satellites used in the communications industry are included in the denominator of the property fraction but the numerator shall include a portion of such property based upon the ratio of ground stations serviced in New Jersey to the number of all such ground stations.

(c) Tangible personal property in transit.

1. Property in transit from a point in New Jersey to another point in New Jersey is situated or located in New Jersey.

2. Property in transit from a point outside New Jersey to another point outside New Jersey is situated or located without New Jersey.

3. Property, while in transit from a point outside New Jersey to a point in New Jersey or vice-versa does not have a fixed situs either within or without the State and, therefore, will not be deemed to be "situated" or "located" either within or without New Jersey and accordingly, such property while so in transit should be omitted from both the numerator and the denominator of the property fraction.

4. Property ceases to be in transit when it is delivered to or becomes subject to actual possession by the owner at the point of destination.

Amended by R.1987 d.137, effective March 16, 1987.

See: 18 N.J.R. 627(a), 19 N.J.R. 464(a).

(b)3.-6. added.

Amended by R.1997 d.429, effective October 6, 1997.

See: 29 N.J.R. 3426(a), 29 N.J.R. 4324(a).

Changed section name.

Statutory References

See: N.J.S.A. 54:10A-6(A) as to computation of the property fraction.

Case Notes

Tax benefits obtained through safe harbor leases do not constitute "real intangible personal property" for purposes of Corporation Business Tax Act which permits corporation to include only its real and tangible personal property in the property fraction of the formula used for determining that portion of the corporation's net income and net worth attributable to its activity within the state. *Reuben H. Donnelley Corp. v. Director, Div. of Taxation*, 128 N.J. 218, 607 A.2d 1281 (1992).

18:7-8.5 Business allocation factor; property fraction derived from average values

(a) The percentage of the taxpayer's real and tangible personal property within New Jersey is determined by dividing the average value of such property within New Jersey by the average value of real and tangible personal property within and without New Jersey.

1. Average values in both the numerator and denominator shall be determined without deduction of any encumbrance.

(b) The term "taxpayer's real and tangible personal property" shall include property owned, leased, rented or used by the taxpayer during the period covered by the return and shall exclude property not yet in service or removed from service during that period. Property or equipment under construction (exclusive of inventory work in progress) is excluded from the property fraction until it is completed.

(b) Generally, the relationship of employer and employee exists when the taxpayer has the right to control and direct the individual not only as to the result to be accomplished by him but also as to the means by which such result is to be accomplished. If the relationship of employer and employee exists, the designation or description of the relationship, and the measure, method or designation of the compensation, are immaterial.

(c) Compensation paid to officers, such as the Chairman, President, Vice-President, Secretary, Assistant Secretary, Treasurer, Assistant Treasurer, Comptroller, and any other officer charged with and performing general executive duties of the corporation must also be included.

(d) A director of a corporation is not an employee; therefor compensation paid to directors for acting as such should not be included in either the numerator or denominator in computing the payroll fraction.

Statutory References

See N.J.S.A. 54:10A-6(c) as to includibility of wages, salaries, and other personal service compensation of officers of taxpayer, and 54:10A-7 as to definition and scope of "compensation" of officers and employees.

18:7-8.15 Compensation of officers and employees within New Jersey

(a) Compensation of officers and employees within this State shall include the entire amount of wages, salaries and other personal service compensation for services performed within or both within and without this State if:

1. The service is performed entirely within this State; or
2. The service is performed both within and without this State, but the service performed without the State is incidental to the individual's service within the State. For example, service which is temporary or transitory in nature or which consists of isolated transactions;
3. The service is not performed entirely in any state but some of the service is performed in this State; and
 - i. The base of operations, or, if there is no base of operations, then the place from which the service is directed or controlled, is in this State; or
 - ii. The base of operations or place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State;
4. Contributions are not required or paid with respect to such service under an unemployment compensation law of any other state.

Statutory References

See N.J.S.A. 54:10A-6(C) as to includibility of compensation of officers of taxpayer, and 54:10A-7 as to definition and scope of "compensation" of officers.

18:7-8.16 Allocation: International Banking Facilities

Any banking corporation, having an international banking facility, which maintains a regular place of business (other than a statutory office) outside of New Jersey, which elects to take the deduction from entire net income provided by N.J.A.C. 18:7-5.2(a)2vii, shall complete the allocation factor under this subchapter in the usual way. For the purpose of allocation, however, all amounts attributable, directly or indirectly, to the production of the eligible net income of an international banking facility as defined in N.J.A.C. 18:7-16.1, shall be included in both the numerator and denominator of the fractions described in this subchapter, whether or not such international banking facility income amounts are otherwise attributable to New Jersey.

(See: N.J.A.C. 18:7-16 regarding international banking facilities.)

R.1984 d.453, effective October 15, 1984.
See: 16 N.J.R. 1327(a), 16 N.J.R. 2827(a).
Amended by R.1994 d.186, effective April 18, 1994.
See: 26 N.J.R. 761(a), 26 N.J.R. 1696(b).

18:7-8.17 Non-operational income

Non-operational income of taxpayers is not subject to allocation but shall be specifically assigned. One hundred percent of non-operational income from taxpayers having their principal place from which the trade or business of the taxpayer is directed or managed in this State shall be specifically assigned to this State, unless another state has nexus to all of the income.

New Rule. R.1994 d.186, effective April 18, 1994.
See: 26 N.J.R. 761(a), 26 N.J.R. 1696(b).
Special amendment, R.2003 d.135, effective February 27, 2003 (to expire August 26, 2003).
See: 35 N.J.R. 1573(a).
Rewrote the section.
Adopted concurrent amendment, R.2003 d.370, effective August 22, 2003.
See: 35 N.J.R. 1573(a), 35 N.J.R. 4310(a).
Provisions of R.2003 d.135 adopted without change.

Law Reviews and Journal Commentaries

Unitary Taxation in New Jersey. John Mackay Metzger, 28 Seton Hall L. Rev. 162 (1997).

18:7-8.18 (Reserved)

SUBCHAPTER 9. (RESERVED)

SUBCHAPTER 10. SECTION 8 ADJUSTMENTS

18:7-10.1 Discretionary adjustments of business allocation factor by Director

(a) Generally, the allocation formula described in this chapter will result in a fair apportionment of the taxpayer's

net worth and net income within and without New Jersey. However, experience in this and other states which impose similar franchise taxes has shown that due to the nature of certain businesses the formula may work hardships in some cases, and not do justice either to the taxpayer or the State. Accordingly, provision is made in such cases for the Director to use some other formula which will more accurately reflect the business activity within New Jersey.

(b) Section 8 of the Act provides that where it shall appear to the Director that the business allocation factor, determined pursuant to Section 6 of the Act, does not properly reflect the activity, business, receipts, capital, entire net worth or entire net income of a taxpayer reasonably attributable to New Jersey, he may in his discretion adjust the business allocation factor by:

1. Excluding one or more of the fractions therein;
2. Including one or more other elements, such as expenses, purchases, contract values (minus subcontract values);
3. Excluding one or more assets in computing entire net worth;
4. Excluding one or more assets in computing an allocation factor; or
5. Applying any other similar or different method calculated to effect a fair and proper allocation of the entire net income and the entire net worth reasonably attributable to the State.

(c) Adjustment of the business allocation factor may be made by the Director upon his own initiative or upon request of a taxpayer.

1. No taxpayer may vary the regular statutory formula without the prior consent of the Director.
2. A taxpayer making application for an adjustment of its business allocation factor must file its return and compute and pay its tax in accordance with the regular statutory formula.
3. The taxpayer must also attach a rider to the return with a Form A-3730 setting forth in full the data on which its application is based, together with a computation of the amount of tax which would be due under the proposed method.

Amended by R.1989 d.508, effective October 2, 1989.
See: 21 N.J.R. 1503(b), 21 N.J.R. 3177(a).
Addition of form number to requirements at (c)3.

Statutory References

See N.J.S.A. 54:10A-8 as to right of Director to readjust taxpayer's business allocation factor when he believes it to be inaccurate.

Case Notes

Three-factor formula would be used in determining fairness of Director's adjustment of allocation of corporate income. *Hess Realty Corp. v. Director, Div. of Taxation, New Jersey Dept. of Treasury, 10 N.J.Tax 63 (1988).*

Statutory three-factor formula was applicable when evaluating allocation where corporation received partial credit for taxes paid to other states. *Hess Realty Corp. v. Director, Div. of Taxation, New Jersey Dept. of Treasury, 10 N.J.Tax 63 (1988).*

Failure to permit allocation to New Jersey corporation which owned rental property in Connecticut but had no regular employees working outside New Jersey held neither contrary to the scheme of the Business Tax Act, a burden on interstate commerce nor double taxation. *S.M.Z. Corp. v. Director, Div. of Taxation, 5 N.J.Tax 232 (Tax Ct.1982), reversed and remanded 193 N.J.Super. 305, 473 A.2d 982 (App.Div. 1984).*

18:7-10.2 through 18:7-10.3 (Reserved)

SUBCHAPTER 11. RETURNS

18:7-11.1 Returns; corporations required to file

(a) Returns are required to be filed annually by the following:

1. Every corporation subject to tax, regardless of the amount of its entire net income. (See N.J.A.C. 18:7-1.6, Taxable status; how created.)
2. Every receiver, referee, trustee, assignee or other fiduciary, or any officer or agent appointed by any court to conduct the business or conserve the assets of any corporation subject to tax under the Act.

Amended by R.1994 d.186, effective April 18, 1994.
See: 26 N.J.R. 761(a), 26 N.J.R. 1696(b).

Statutory References

See N.J.S.A. 54:10A-2 as to those corporations deemed liable to tax under the Act; 54:10A-4 as to definition of "corporation" and of "taxpayer", and 54:10A-11 as to receivers and others conducting the business of a corporate taxpayer who are subject to tax under the Act.

18:7-11.2 Returns where Federal net income is changed

If the amount of the Federal net income of any taxpayer is changed or corrected by a final determination of the Commissioner of Internal Revenue or other officer of the United States or other competent authority, or if a renegotiation of a contract or subcontract with the United States results in a change in said net income, or where a recovery of a war loss results in a computation or recomputation of any tax imposed by the United States, the taxpayer is required to report its changed or corrected net income or the results of renegotiation and to concede its accuracy or state where it is erroneous.

Statutory References

See N.J.S.A. 54:10A-13 taxpayer report any change correction, or recomputation of its amount of Federally taxable income to New Jersey Corporation Tax Bureau.

18:7-11.3 Effect of deficiency notice

(a) Any deficiency notice (including a notice issued pursuant to a waiver filed by a taxpayer) pursuant to the provisions of the Internal Revenue Code is a final determination unless a timely petition to redetermine the deficiency is filed in the Tax Court of the United States, in which event the judgment of the court of last resort affirming the deficiency, or the redetermination of the deficiency pursuant to the judgment of the court of last resort, is the final determination.

(b) The allowance by the Commissioner of Internal Revenue of a refund of any part of the tax shown on the taxpayer's return or of any deficiency thereafter assessed, whether the refund is made on the Commissioner's own motion or pursuant to judgment of a court, is also a final determination.

(c) A taxpayer who for any reason accepts any portion of a deficiency (including a notice issued pursuant to a waiver filed by a taxpayer) made pursuant to the provisions of the Internal Revenue Code is required to report that portion of the deficiency accepted within 90 days in accordance with N.J.A.C. 18:7-11.8 and N.J.S.A. 54:10A-13.

(d) Only the portion of any deficiency (including a notice issued pursuant to a waiver filed by a taxpayer) made pursuant to the provisions of the Internal Revenue Code that is the subject of a timely petition for redetermination in the Tax Court of the United States may delay the reporting requirements set forth in N.J.A.C. 18:7-11.8 and then only to the extent permitted by (a) above.

Example: The Internal Revenue Service redetermined the net income of a taxpayer's 1983 tax return based on three separate issues, A, B and C. These three issues resulted in increases in net income for New Jersey purposes of \$5,000, \$30,000 and \$110,000 respectively. The taxpayer accepted Issue A resulting in a \$5,000 increase in income for

New Jersey purposes and requested a hearing before the IRS on Issues B and C. The taxpayer has 90 days from the issuance of the deficiency to report Issue A to the Division of Taxation.

Six months later, the IRS issues a determination that it intends to hold to the entire amount represented by Issues B and C. The taxpayer accepts the determination on Issue B, but appeals Issue C to the Tax Court of the United States. The taxpayer has 90 days from the issuance of the IRS determination to report the \$30,000 increase in net income represented by Issue B to the Division.

One year later, the Tax Court issues an unfavorable decision to the taxpayer on Issue C. The taxpayer accepts the verdict and decides not to appeal the issue any further. The \$110,000 represented by Issue C must be reported to the Division within 90 days of the court decision.

Amended by R.1979 d.45, effective February 6, 1979.
See: 11 N.J.R. 40(d), 11 N.J.R. 150(b).
Amended by R.1990 d.102, effective February 5, 1990.
See: 21 N.J.R. 3079(a), 22 N.J.R. 363(b).

Added subsections (c) and (d) and example.

Statutory References

See N.J.S.A. 54:10A-13 as to requirement that taxpayer report any change of amendment in his federally taxed net income to Division of Taxation.

18:7-11.4 Amended return

Any taxpayer filing an amended return with the United States Treasury Department shall also file an amended return with the Division of Taxation. See N.J.A.C. 18:7-11.8.

Amended by R.1979 d.45, effective February 6, 1979.
See: 11 N.J.R. 40(d), 11 N.J.R. 150(b).
Amended by R.1994 d.186, effective April 18, 1994.
See: 26 N.J.R. 761(a), 26 N.J.R. 1696(b).

Statutory References

See N.J.S.A. 54:10A-13 to requirement that taxpayer report any amended return for his Federally taxable net income to New Jersey Division of Taxation.