

(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; therefore 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 Review 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

Statutory References

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.

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

Apportionment of 100 percent of a taxpayer's income to New Jersey under N.J.S.A. 54:10A-8, and allowance for a credit for taxes actually paid to other states, instead of applying the more favorable formula under N.J.S.A. 54:10A-6, was constitutional under both the Due Process and Commerce Clauses; the Corporation Business Tax (CBT) applied to the taxpayer was internally and externally consistent since it did not lead to a grossly distorted result. Based on various apportionment factors, there was a sufficient nexus between the taxpayer's business activities and New Jersey such that the CBT passed Due Process analysis, and the 100 percent apportionment with regulatory credits given for taxes paid to other states was rationally related to the taxpayer's activities conducted in New Jersey. *N.J. Natural Gas Co. v. Director, Div. of Taxation*, 24 N.J. Tax 59, 2008 N.J. Tax LEXIS 9 (Tax Ct. 2008).

Taxpayer was denied a refund of taxes paid, pursuant to New Jersey's Corporation Business Tax, N.J.S.A. 54:10A-1 through 54:10A-32, as the taxpayer failed to meet its burden of proving that it maintained a regular place of business outside of New Jersey, based on an employee's home office in the State of Connecticut, to entitle it to apportion its income under the more favorable formula set forth in N.J.S.A. 54:10A-6. Instead, the Director of the New Jersey Division of Taxation properly apportioned 100 percent of the taxpayer's income to New Jersey under N.J.S.A. 54:10A-8 and allowed for a credit for taxes actually paid to other states. *N.J. Natural Gas Co. v. Director, Div. of Taxation*, 24 N.J. Tax 59, 2008 N.J. Tax LEXIS 9 (Tax Ct. 2008).

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.