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Taxes and Telecommuting: Companies Must Pay Taxes for New Jersey Telecommuters

By Gregory B. Gilmore, Esq.

For many employers, having employees telecommute from home is standard practice. But what if your company only has one telecommuting employee in a particular state, and your company otherwise has no ties to that state whatsoever? Must you still file a corporate business tax return in that state? If that state is New Jersey, a recent court decision clarifies that the answer is a resounding "Yes."

On March 2, 2012, in a case of first impression, the Superior Court of New Jersey, Appellate Division, issued an opinion that will impact any out-of-state corporation that has employees who, on a full-time basis, telecommute from New Jersey. In *Telebright Corporation, Inc. v. Director, New Jersey Division of Taxation*, 2012 WL 669964, the Appellate Division held that if a corporation has even one employee telecommuting from New Jersey on a full-time basis, then that out-of-state corporation is subject to New Jersey's Corporation Business Tax and must file a corporation business tax return.

Telebright Corporation is a Delaware corporation, with its principal place of business in Maryland. In 2004, a Telebright employee moved from Maryland to New Jersey after her husband obtained employment in New Jersey. To keep the services of the employee, who was a developer and writer of software code, Telebright permitted the employee to telecommute from her home in New Jersey on a full-time basis. From the time the employee began working from New Jersey in 2004, Telebright had withheld

New Jersey income tax from the employee's salary and remitted it to the New Jersey Division of Taxation.

In October 2006, in response to the New Jersey Department of Taxation's inquiry into Telebright's connections with New Jersey, Telebright responded that it had one full-time employee working from her home since 2004. The Division of Taxation then informed Telebright that it was required to file New Jersey Corporation Business Tax returns for the period beginning January 2004.

In 2008, the Division of Taxation reached a final determination and found that Telebright was subject to New Jersey's corporate business tax because Telebright was doing business in New Jersey by having an employee telecommute from the state. Telebright challenged the final determination, arguing that it was not doing business in New Jersey and that applying New Jersey's Corporation Business Tax to it based on the presence of one telecommuting employee would violate the Due Process and Commerce Clauses of the United States Constitution.

The Tax Court framed the issue as "whether a Delaware corporation with offices in Maryland is subject to the New Jersey Corporation Business Tax Act . . . by virtue of the fact that a New Jersey resident employed by the company 'telecommutes' by receiving and performing her assignments each business day at her New Jersey home via computer and telephone." *Telebright Corporation, Inc. v. Director, Division of Taxation*, 25 N.J.Tax 333, 339 (2010). The Tax Court held that "a foreign corporation that regularly and consistently permits its employee to work each business day at a New Jersey residence is doing business in this State and must file Corporation Business Tax returns." *Id.* at 340. The Tax Court further concluded that the imposition of corporate business tax on a foreign corporation in these circumstances did not violate the Due Process and Commerce Clauses of the United States Constitution.

The Superior Court of the State of New Jersey, Appellate Division, affirmed the Tax Court's decision on March 2, 2012. The Appellate Division agreed that Telebright was subject to New Jersey's Corporation Business Tax because Telebright was, in fact, doing business in New Jersey by virtue of the one telecommuting, full-time employee. The Appellate Division also held that, given the particular circumstances of the case, subjecting Telebright to the New Jersey Corporation Business Tax would not violate either the Due Process or Commerce Clauses. In discussing the Commerce Clause argument, the court noted that because the employee was "producing a portion of [Telebright's] web-based product [in New Jersey] . . . [Telebright] benefits from all of the protections New Jersey Law affords [the] employee," and that the minimal effort associated with calculating and remitting the corporate business tax would not amount to an undue burden on Telebright's conduct of interstate commerce.

In light of the Appellate Division's holding in *Telebright*, any out-of-state corporation that has at least one full-time, telecommuting employee based in New Jersey should be aware that the presence of that employee in the state triggers the corporation's

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obligation to file a New Jersey Corporation Business Tax return and pay New Jersey's Corporate Business Tax.

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