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April 8, 2011

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

RE: PRN 2011-038

Dear Mr. Smith:

In response to the Notice of Proposed Amendment published in the New Jersey Register on February 7, the New York Bankers Association is submitting these comments on foreign corporations subject to tax in N.J.A.C. 18:7-1.8. Our Association believes that the proposal is contrary to New Jersey law and would be unfair as applied retroactively to 2002. The New York Bankers Association is comprised of the community, regional and money center commercial banks and thrift institutions doing business in New York State, many of which also do business in New Jersey.

Current New Jersey regulations subject to tax every "foreign" (non-New Jersey) corporation "which 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." N.J.A.C. Section 18:7-1.8. This proposal would amend this section of the regulations to add to these contacts every corporation "that derives receipts from sources within New Jersey or engages in contacts within 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." The proposal would then add a new subdivision (b) stating that "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.” The new subdivision (b) does not contain the Constitutional limitation applicable to subdivision (a).

New Jersey has two separate “subjectivity” statutes, defining which corporations have sufficient nexus with the State to be subject to tax therein. The first, applicable to General Corporations, subjects such corporations to tax for the privilege of having or exercising its corporate franchise in the State or for the privilege of deriving receipts from sources with the State or for the privilege of engaging in contacts within the State or for the privilege of doing business, owning capital or property, or maintaining an office, in the State. It then contains the proviso requiring that a corporation have sufficient business activity to give the State jurisdiction to impose tax under the United States Constitution and laws. N.J. Permanent Statutes Section 54:10A-2. Banking corporations are subject to a decidedly different subjectivity statute, providing a franchise tax “for the privilege of having or exercising its corporate franchise in this State or for the privilege of doing business, employing or owning capital or property, or maintaining an office in this State.” N.J. Permanent Statutes section 54:10A-34. The banking corporation subjectivity statute does not contain the key language “or for the privilege of deriving receipts from sources within this State or for the privilege of engaging in contacts within the State,” just as it does not contain the limitation requiring sufficient business activity to give the State jurisdiction under the U.S. Constitution or statutes.

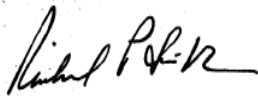
The New Jersey Legislature has made it clear in statute law that banks are different from other business corporations in the extent to which the State can subject them to tax. Banking corporations must do business, employ or own capital or property or maintain an office in the State. This proposal is attempting to bootstrap the subjectivity provisions of the franchise tax applicable to General Corporations and apply it to banking corporations, including credit card banks. Because section 54:10A-34 does not contain the critical triggers of deriving receipts from within the State or of engaging in contacts within the State, we believe that the proposed expansion of the State’s nexus regulation would be in violation of New Jersey law. This conclusion is reinforced by the fact that the Legislature chose not to include the limitation of subjectivity to business activity that would justify nexus under the U.S. Constitution and U.S. law in section 54: 10A-34, apparently deeming it unnecessary since bank nexus language is narrower. We would therefore strongly urge the Division to eliminate subdivision (b) from the proposal and to make clear that the expansive language in subdivision (a) applies only to general corporations.

In addition, we believe that the Division’s intent to apply the newly expanded regulatory interpretation of the State’s subjectivity statute to tax years beginning on or after January 1, 2002 is unfair, uncompetitive, and extremely burdensome. Businesses have the right to plan their tax payments on the basis of settled law. So long as the State has in place a regulation interpreting the subjectivity rules for corporations, businesses should be able to rely on it. Applying taxation

retroactively for nine years defies all principles of fair taxation and makes it impossible for a business selling its products or services to New Jersey residents from outside the State to do so with any sense of settled law. Moreover, for many businesses operating on thin profit margins, retroactive taxation, when not planned for in advance, can make a sale that was profitable at the time, a loser. Businesses located close to the New Jersey border could even see entire financial reporting periods turned from profit to loss because of the magnitude of this retroactive application of State taxes. Finally, as a practical matter, records from nine years ago may not exist, making reporting and filing returns in compliance with this revised regulation virtually impossible.

The proposal raises serious questions of legality, fairness, applicability and competitiveness. We urge that the proposal be amended so as not to apply to any type of banking corporations, including credit card banks, and that its retroactive applicability be dropped.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael P. Smith". The signature is fluid and cursive, with a prominent initial "M" and a long, sweeping tail.

Michael P. Smith