

# CPAs and Taxpayers Beware: Employee Telecommuting Is Doing Business In New Jersey For Purposes of Taxation

By James F. McDonough, Jr. on March 12th, 2012

The New Jersey Tax Court has held that a foreign corporation that consistently permits an employee to telecommute from her New Jersey residence is doing business in New Jersey and is subject to the New Jersey Corporation Business Tax. The opinion, released on March 2, 2012, is a warning to taxpayers and their accountants that this type of contact or nexus with New Jersey, thought by some to be negligible or harmless, may no longer be considered as such.

*Telebright Corporation, Inc. v. Director, New Jersey Division of Taxation* (Docket No. A-5096-09T2) is relatively straightforward. Telebright Corporation, Inc. (“Telebright”), incorporated in Delaware, maintained offices in Maryland and none in New Jersey. Telebright’s business consisted of a web application, which permitted employers to track employer-provided cell phones, manage accounts, and pay bills through the use of Telebright’s proprietary product. The employee in question worked in Maryland before moving to New Jersey when her husband changed jobs. Telebright allowed her to telecommute as she was a valued employee. She signed an employment contract with a non-compete provision that restricted her future employment and prohibited her from disclosing Telebright’s proprietary information. The contract permitted Telebright to seek injunctive relief.

The employee wrote software code from her New Jersey home on her laptop. When a task was completed, she would upload the work onto Telebright’s server in Maryland where other employees would deploy it. She was supervised by a manager who tele-commuted from Boston. She would visit the office in Maryland one or two times a year. Telebright withheld New Jersey payroll taxes and paid the withholdings over to the state. [No surprise how the matter was brought to the attention of the state taxing authority.]

The Tax Court agreed with the trial judge that Telebright was doing business in New Jersey because its New Jersey employee carried out the purpose of its organization by writing code that became part of the web-based service. The court went on to state that Telebright could enforce its restrictive covenant against the employee in New Jersey courts and that the employee was entitled to the protections of New Jersey law. This was sufficient for the court to hold that Telebright was doing business.

Suppose the employee was not writing code but worked in human resources or tax compliance. I am curious if a non-revenue producing staff function would result in

different treatment of Telebright. For now, we should be examining telecommuting activity in light of the Telebright holding.