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New Jersey Governor Supports Repeal of Throwout and Regular Place of Business Requirement, Extension of Loss Carryovers to 20 Years, and a Switch to Single Sales Factor

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SALT Update, October 17, 2008

In an address to a joint session of the New Jersey Legislature on October 16, 2008, New Jersey's Governor Jon S. Corzine announced his support for the repeal of both the throwout and regular place of business provisions, as well as an extension of the net operating loss carryover period to 20 years and a switch to a single sales factor for apportionment. These initiatives are part of his plan to provide "statewide long-term economic growth options to coax the state out of the current national economic recession."[1] Further, although no specific legislation has been proposed, the Governor has expressed his desire to move towards unitary combined reporting.

Throwout. Companion bills Assembly Bill 2722 (about which we reported in our Legal Update on May 16, 2008) and Senate Bill 1874 would delete the language in the sales fraction section of the apportionment statute, N.J. Stat. Ann. Sec. 54:10A-6, which results in the throwout provision. That is, they would delete the language that removes receipts from the denominator of the receipts fraction when those receipts are not subject to tax in another jurisdiction. Those bills would also, necessarily, delete the language that limits the effect of the throwout provision to $5,000,000 per year, which is found in N.J. Stat. Ann. Sec. 54:10A-5(i). It is unclear whether the repeal will be retroactive.

We requested that the New Jersey appeals courts review the Tax Court of New Jersey's May 29, 2008 decision finding that the throwout is constitutional on its face. (The Tax Court's decision leaves for another day whether the throwout is constitutional as applied and other issues raised in the Complaints.) Our request is pending in the New Jersey Supreme Court.

Regular Place of Business. Assembly Bill 1449 would delete the regular place of business language in the apportionment statute, N.J. Stat. Ann. Sec. 54:10A-6. That language prevents a corporation with New Jersey presence from apportioning its income if it does not maintain a regular place of business outside of New Jersey, regardless of its non-New Jersey activities. As a result, such a corporation is required to allocate 100% of its income to New Jersey.

Single Sales Factor. Assembly Bill 1449 also would phase in a single sales factor for all corporate taxpayers (and establish a separate apportionment factor for airlines that until now was accomplished by regulation). Companion bills Assembly Bill 2626 and Senate Bill 2136 would apply the single sales factor only to manufacturers.

Net Operating Losses. Finally, companion bills Assembly Bill 3124 (First Reprint) and Senate Bill 2130 would extend the carryover period for net operating losses from the current seven years to twenty years for losses for any privilege period ending after June 30, 2009.

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Footnotes:

[1] Press Release, Jon S. Corzine, Governor (Oct. 16, 2008).