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# Gross Receipts Taxes in New Jersey: As Rare as an Uncongested Highway

*By Peter J. Ulrich*

Peter Ulrich provides an overview of a number of taxes imposed by New Jersey, including the Litter Control Fee, the Petroleum Products Gross Receipts Tax, the Cosmetic Medical Procedures Gross Receipts Tax, and the Public Utility Gross Receipts Tax.

Traditionally, New Jersey has not relied on gross receipts taxes to raise a significant part of its tax revenues. Of total annual collections of somewhat under \$30 billion, the largest gross receipts tax, the Petroleum Products Tax, raises only about \$230 million annually, less than 1% of the total collections. This compares to the annual tax revenues raised by the Gross Income Tax of about \$10 to \$12 billion, the Sales Tax of about \$7 to \$9 billion, and the Corporation Business Tax (CBT) of about \$3 billion.<sup>1</sup>

But of course there are a number of New Jersey gross receipts taxes, and, in this era of frightening governmental budget deficits, there is always the possibility of new ones.<sup>2</sup> This article outlines a number of taxes imposed by New Jersey that are best described as gross receipts taxes and points out a number of statutory adoptions and changes, as well as a few recent cases relating to these New Jersey gross receipts taxes.

## **The Litter Control Fee**

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As part of the Clean Communities and Recycling Grant Act adopted in 2002, New Jersey imposes a Litter Control Fee on gross receipts from the sales of "litter-generating products" (defined below) sold within or into New Jersey by manufacturers, wholesalers, distributors, and retailers of such products.<sup>3</sup> Retailers with less than \$500,000 of annual retail sales of litter-generating products are exempt. A restaurant is exempt if more than 50% of its food and beverages consists of meals and food to be consumed on the premises.<sup>4</sup>

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Manufacturers, wholesalers, and distributors of litter-generating products are subject to a fee of 0.03% of the gross receipts from the sales of litter-generating products within New Jersey. Retailers of litter-generating products are subject to a fee of 0.0225% of all gross receipts from retail sales of litter-generating products.<sup>5</sup> Sales by wholesalers or distributors to another wholesaler or distributor, sales by a company to another company owned wholly by the same individuals or companies, and sales by a wholesaler or distributor owned cooperatively by retailers to those retailers are not subject to the fee.<sup>6</sup> The Litter Control Fee is payable annually on March 15 for the prior calendar year utilizing Form LF-5.

“Litter-generating products” include the following items “which are produced, distributed, or purchased in disposable containers, packages or wrappings; or which are not usually sold in packages, containers, or wrappings but which are commonly discarded in public places . . . :” beer and other malt beverages, cigarettes and tobacco products, cleaning agents and toiletries, distilled spirits, food for human or pet consumption, glass containers, groceries, metal containers, motor vehicle tires, newsprint and magazine paper stock, non-drug drugstore sundry products, paper products and household paper (but not roll stock and wood pulp), plastic or fiber containers, soft drinks and carbonated waters, and wine.<sup>7</sup>

Although technically it ruled with respect to the predecessor Litter Control Tax,<sup>8</sup> in 2006, the state’s Appellate Division affirmed a New Jersey Tax Court decision holding that books did not constitute “litter-generating products” under the Litter Control Tax even when they had been wrapped in disposable cardboard when they were shipped.<sup>9</sup> J.T.C. Kuskin of the New Jersey Tax Court had also ruled that a publisher was a manufacturer rather than a wholesaler, and that cardboard boxes and packing material were “disposable containers” within the meaning of the Litter Control Tax.<sup>10</sup>

## **The Petroleum Products Gross Receipts Tax**

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The Petroleum Products Gross Receipts Tax imposes a 2.75% tax on the gross receipts from the first sale of petroleum products in New Jersey.<sup>11</sup> With respect to fuel oils, aviation fuels, and motor fuels, the rate is converted to \$0.04 per gallon. The tax imposes the equivalent of a use tax at the same rates on companies that import petroleum products into New Jersey for use or consumption by them within the state.<sup>12</sup> The Petroleum Products

Gross Receipts Tax is paid through monthly remittances with Form PPT-41, together with any quarterly reconciliation returns filed on Form PPT-40.

The definition of “petroleum products” excludes numbers 2, 4, and 6 home heating oils, and kerosene and propane gas to be used exclusively for residential gas (not commercial use).<sup>13</sup> Receipts from the sales of asphalt and polymer grade propylene used in the manufacture of polypropylene are excluded from the definition of “gross receipts.”<sup>14</sup> Receipts from sales to certain nonprofit entities (generally, Internal Revenue Code Section 501(c)(3) organizations) and to the United States or the State of New Jersey are also exempt.<sup>15</sup> Sales of petroleum products for use by a utility, a cogeneration facility, or a wholesale generation facility to generate electricity for resale are also exempt.<sup>16</sup>

In 2005, the New Jersey Tax Court addressed whether the Petroleum Products Gross Receipts Tax needed to be added back to a taxpayer’s income to calculate the entire net income for purposes of calculating the New Jersey CBT.<sup>17</sup> The state’s Tax Court concluded that a 1993 amendment to the CBT only required the add-back of the CBT itself, as well as any taxes paid to another state. The court also concluded that the Petroleum Products Gross Receipts Tax was not a tax measured by profits or income, and was not a tax on “business presence or business activity” for purposes of the 1993 CBT add-back amendment.<sup>18</sup>

## **The Cosmetic Medical Procedures Gross Receipts Tax**

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Effective September 1, 2004, New Jersey imposed a tax of 6% on the gross receipts from “cosmetic medical procedures,”<sup>19</sup> which are defined as “all amounts paid for services, property or occupancy required for or associated with the performance of a cosmetic medical procedure and billed to the procedure subject’s account.” In turn, “cosmetic medical procedures” mean any medical procedure performed on an individual which is directed at improving the subject’s appearance and which does not meaningfully promote the proper function of the body or prevent or treat illness or disease. Cosmetic medical procedures include, but are not limited to, “cosmetic surgery,” hair transplants, cosmetic injections, cosmetic soft tissue fillers, laser hair removal, and cosmetic dentistry. “Cosmetic surgery” is defined to be the surgical reshaping of normal structures on the body to improve the body image, self-esteem, or appearance of an individual.

Cosmetic medical procedures do not include reconstructive surgery or dentistry, which includes “any surgery or dentistry performed on abnormal structures caused by or related to congenital defects, developmental abnormalities, trauma, infection, tumors or disease, including procedures to improve function or to give a more normal appearance.”<sup>20</sup>

The Cosmetic Medical Procedures Gross Receipts Tax is arguably more like a traditional sales tax than a gross receipts tax. The tax must be collected by the person billing for the cosmetic medical procedure when collecting payment for the procedure and “shall” be paid by the subject of the cosmetic medical procedure.<sup>21</sup> In 2007, the law was supplemented to provide for personal liability for the person billing the gross receipts from a cosmetic medical procedure, just like the trust fund provisions of most sales taxes.<sup>22</sup> A “responsible person” is defined to include an individual, partnership, corporation, or an officer, director, stockholder, partner, member, or employee who is under the duty to collect the tax.

Note that the Cosmetic Medical Procedures Gross Receipts Tax is not solely on services; it also applies to the sales of foods or facility occupancies, such as a hospital or clinic stay, that are required or directly associated with a taxable cosmetic medical procedure.

The taxes must be submitted on the 20th day of the month following the end of each quarter, and taxpayers must file quarterly Cosmetic Medical Procedures Gross Receipts Tax returns on Form CMPT-100 either electronically or by telephone.<sup>23</sup>

## **The Public Utility Gross Receipts Tax**

The Public Utility Gross Receipts Tax is in addition to a related Public Utility Franchise Tax and is imposed on sewerage and water companies at a rate of 7.5% of their gross receipts for the preceding calendar year.<sup>24</sup> These taxes are in lieu of local taxes other than the real property tax.<sup>25</sup>

## **The Fur Clothing Retail Gross Receipts Tax (Repealed)**

In 2006, New Jersey imposed a 6% tax on the gross receipts from the retail sale of fur clothing in New Jersey.<sup>26</sup> “Fur clothing” was defined to mean “an article exempt from tax imposed pursuant to the ‘Sales and Use Tax Act’ . . . that is made of fur on the hide or pelt

of an animal or animals and that fur is the component material of chief value of the article.”<sup>27</sup>

The tax on fur clothing soon met opposition from retailers on the ground that it violated the Streamlined Sales and Use Tax Agreement (SSUTA), of which New Jersey has been a member since October 1, 2005. As seen in the very definition of fur clothing for purposes of the gross receipts tax, fur clothing has traditionally been exempt from New Jersey’s sales and use taxes. The gross receipts tax included a use tax provision. As a practical matter, the tax looked and functioned like a sales tax on fur clothing.

In proceedings before the SSUTA’s Compliance Review and Interpretations Committee in the summer of 2008, objectors argued that the tax on fur clothing violated the SSUTA on three grounds. First, it allowed New Jersey to maintain a product-based exemption (clothing) for sales tax purposes that is not applied to all products within that category because of the “gross receipts tax” on fur clothing. Second, because the New Jersey sales and use tax rate is imposed at 7%, and the gross receipts tax was imposed at a 6% rate, it allowed New Jersey to impose taxes at different rates in violation of the SSUTA. Finally, the gross receipts tax did not establish a definition of “fur” as was required by the SSUTA.<sup>28</sup>

Despite these fairly persuasive arguments, the Compliance Review and Interpretations Committee unanimously ruled on July 17, 2008, that New Jersey’s gross receipts tax on fur clothing did not violate the SSUTA, perhaps because the tax was similar to a Minnesota tax that was deemed to be in compliance with the SSUTA, or perhaps because the New Jersey legislature was considering a bill that was to address the situation.<sup>29</sup>

In any case, the tax was repealed in 2008, effective January 1, 2009,<sup>30</sup> pursuant to enacted legislation that made a number of changes to the New Jersey Sales and Use Tax Act to conform that Act with the SSUTA. Section 8 of the enacted legislation also amended the Sales and Use Tax Act, specifically, N.J.S.A. 54:32B-8.4, to make “fur clothing,” as defined in the SSUTA, taxable at 7% for sales tax purposes, thus eliminating the fiscal purpose of this gross receipts tax in the first place.

## **The Alternative Minimum Assessment and P.L. 86-272 Exempt Corporations**

P.L. 2002, Ch. 40, effective July 2, 2002, adopted the most extensive changes to the New Jersey CBT since 1945. Many of these provisions were intended to close

so-called “loopholes” and to increase equity among various business taxpayers.<sup>31</sup> The law also adopted an Alternative Minimum Assessment (AMA) that was intended to measure a company’s economic activity in New Jersey through a taxable base other than “taxable income.”

The AMA, codified at N.J.S.A. 54:10A-5a, was adopted with a sunset provision such that there is no AMA for privilege periods beginning after June 30, 2006.<sup>32</sup> Critically, however, the AMA is still imposed on corporations exempt from net income taxation pursuant to 15 U.S.C. §381 (P. L. 86-272). Taxpayers subject to the AMA because they would otherwise be protected by P. L. 86-272 have the choice of filing consents to be subject to the CBT for a privilege period and thus avoid the AMA for that year.<sup>33</sup>

The reason why the AMA is even mentioned in this article is that taxpayers that are still subject to the AMA have a one-time choice to select whether to calculate the tax based on gross receipts or on gross profits.<sup>34</sup> (The state’s Division of Taxation has taken the position that taxpayers that have historically calculated their federal net income without a cost of goods sold, such as service businesses, must calculate the AMA based on gross receipts.)

Taxpayers using gross receipts to calculate the AMA on Part I of Schedule AM of Form CBT-100 are

required to combine their sales of tangible personal property made to points within New Jersey, services performed within the state, rentals from property situated within the state, royalties from the use of patents or copyrights within the state, and all other business receipts earned within the state.<sup>35</sup>

The AMA is imposed pursuant to a progressive rate schedule. Taxpayers with more than \$75 million of gross receipts are taxable at a rate of 0.004 times the gross receipts. If gross receipts are not more than \$2 million, then no amount is assessed. The AMA cannot exceed \$5 million for any one year.

## Conclusion

Although New Jersey has not enacted a general gross receipts tax, there are a number of specific New Jersey gross receipts taxes that can present a trap for the unwary for new businesses or multi-state businesses conducting activity in New Jersey for the first time. A careful reading and completion of the Division of Taxation’s business registration form, Form NJ-REG, and the related instructions, are good places to start so as to identify which of these specific taxes might apply to such potential taxpayers.

## ENDNOTES

<sup>1</sup> 2008 Annual Report of the Division of Taxation, Department of the Treasury, State of New Jersey; [www.state.nj.us/treasury/taxation/pdf/annual/2008.pdf](http://www.state.nj.us/treasury/taxation/pdf/annual/2008.pdf).

<sup>2</sup> But New Jersey’s recently elected Governor, Chris Christie, has made numerous public statements that there will be no new taxes adopted by the state. See his February 11, 2010 Remarks to the Special Session of the New Jersey Legislature Regarding the Budget for Fiscal Year 2010 ([www.state.nj.us/governor/news/addresses/2010211.html](http://www.state.nj.us/governor/news/addresses/2010211.html)).

<sup>3</sup> N.J.S.A. 13:1E-213 - 1E-223, adopted by P.L. 2002, c. 128. The Litter Control Fee replaced the Litter Control Tax of N.J.S.A. 13:1E-99.1 *et seq.* which had expired.

<sup>4</sup> N.J.S.A. 13:1E-216a.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> N.J.S.A. 13:1E-215e.

<sup>8</sup> See note 3, *supra*.

<sup>9</sup> *Random House, Inc. v. Director*, 23 N.J. Tax 291 (App. Div. 2006), *affirming*, 22 N.J. Tax 485 (Tax 2005).

<sup>10</sup> *Random House, Inc. v. Director*, 22 N.J. Tax 485 (Tax 2005).

<sup>11</sup> N.J.S.A. 54:15B-3a, adopted pursuant to P.L. 1990, c. 42.

<sup>12</sup> N.J.S.A. 54:15B-3b.

<sup>13</sup> N.J.S.A. 54:15B-2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> N.J.S.A. 54:15B-2.2.

<sup>17</sup> *Ross Fogg Fuel Oil Co. v. Director*, 22 N.J. Tax 372 (Tax 2005).

<sup>18</sup> *Id.*, addressing N.J.S.A. 54:10A-4(k)(2)(C).

<sup>19</sup> N.J.S.A. 54:32E-1, adopted by P.L. 2004, c. 53.

<sup>20</sup> N.J.S.A. 54:32E-1b.

<sup>21</sup> N.J.S.A. 54:32E-1a.

<sup>22</sup> N.J.S.A. 54:32E-1c(2), adopted by P.L. 2007, c. 102.

<sup>23</sup> Division of Taxation Pub. REG-3, p. 4.

<sup>24</sup> N.J.S.A. 54:30A-49 *et seq.*

<sup>25</sup> N.J.S.A. 54:30A-51.

<sup>26</sup> P.L. 2006, c. 41, codified at N.J.S.A. 54:32G-1, effective July 15, 2006.

<sup>27</sup> N.J.S.A. 54:32G-1c.

<sup>28</sup> See Daily Tax Report, July 18, 2008 and June 19, 2008.

<sup>29</sup> *Id.*

<sup>30</sup> P.L. 2008, Ch. 123, Section 18.

<sup>31</sup> Assembly Budget Committee Statement to A. 2501 (June 27, 2002).

<sup>32</sup> N.J.S.A. 54:10A-5a e.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at Section b.

N.J.S.A. 54:10A-5a c.

<sup>35</sup> N.J.S.A. 54:10A-5a a.

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