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New Jersey Law Journal

May 9, 2005

LENGTH: 641 words

HEADLINE: The Truck Stops Here;
Commentary;
Special tax investigators are stopping trucks on N.J. highways

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BODY:

Companies that deliver goods into New Jersey on their own trucks, beware. The state Division of Taxation's special projects investigators (SPIs) are waiting for you at New Jersey highway truck stops. Trucks, and the companies that deliver using their trucks, are their targets.

SPIs stop trucks, detain drivers, and impound trucks - including the contents - of companies that are suspected of not filing N.J. Corporation Business Tax returns. If a SPI stops your truck, payment is demanded on the spot under law enforcement-type threats of impounding the truck and its contents - regardless of who owns the contents. Do not expect any due process before your truck is released.

SPIs comb the lines of trucks that are waiting at weigh stations, and have State Police in tow to back up their threats to impound trucks. They demand payment on the spot for not impounding the truck and its contents. The payment demanded is derived by a secret "field formula" that leaves much discretion in the SPIs. In fact, there is so much discretion vested in the SPIs that argument over the amount will likely result in an increase in the demand.

If payment is not made, the truck is impounded and the driver is left stranded at the weigh station. The companies are given no chance to argue. Your choice is whether to pay the demand or lose your truck. Companies must pay first, then challenge the assessment - contrary to the normal procedure in New Jersey that protects the right to challenge before payment is made.

New Jersey is relying on a long-existing law designed to prevent tax cheats from leaving the state and taking their money out of reach of state. That law, N.J.S.A. 54:49-7, permits the Director to make a jeopardy assessment - in effect a spot assessment, demand and warrant execution rolled into one. However, that law permits such a jeopardy assessment only against a taxpayer that intends to quickly leave New Jersey or to remove its property from the state.

When trucks enter New Jersey, they carry identifying names and numbers. Moreover, truck drivers carry bills of lading that indicate the owner of the goods and the destination. Often, the goods in the trucks are the property of a third party, and that property is being seized without any notice to its owner. The SPIs could copy the identifying information and record the date and time of the stop. That information could be used to contact the destinations to determine the frequency of trips into New Jersey and whether the companies do more than merely deliver their goods into New Jersey. Mere delivery is a protected activity under P.L. 86-272 - the federal law that exempts solicitation and delivery activity against State net income taxes. 15 U.S.C. 381.

With the information from the bill of lading and investigation of the destination, a nexus questionnaire could be sent to the company to determine whether the company is subject to the Corporation Business Tax. Nexus questionnaires have been in use by the Division of Taxation for years but, as the SPIs may mention, they are issued by a different section of the division.

New Jersey has chosen an aggressive path of demanding immediate payment, rather than simply asking for information regarding the frequency and nature of trips into New Jersey and pursuing the usual avenue of assessment allowing prepayment remedies.

We hope that the Division of Taxation will go back to its kinder, gentler past. Use of a secret "field formula," spot demands for payment and threats of impounding trucks are not the New Jersey way.

What is next for the SPIs - waiting on airport tarmacs?

The authors are partners at **Morrison & Foerster** in New York. The article first appeared in the Dec. 20, 2004, issue of State Tax Notes, and is reprinted with permission. (c)2004 by Paul Frankel, Hollis Hyans and Mitchell Newmark. All rights reserved.

LOAD-DATE: May 9, 2005