

February 21, 2020

State of New Jersey  
Department of the Treasury  
Division of Taxation  
Project Enforcement Team  
P.O. Box 195  
Trenton, New Jersey 08695-0195

Re: Licensed Professional Fee  
Tax Year: 2015-2018

Dear Project Enforcement Team,

A number of member dentists have contacted the New Jersey Dental Association to seek clarification regarding the \$150 filing fee which was the subject of your letters dated February 5, 2020 and February 12, 2020.

N.J.S.A. 54:10A-18, cited in your letters, was adopted as part of the Business Tax Reform Act, P.L. 2002, c. 40 (the "Act" or "BTRA"), that was approved July 2, 2002 and became effective for privilege periods beginning on and after January 1, 2002. In the Summary to the rules adopted by the Division to implement the Act, the Division stated as follows: "[T]he respective Assembly and Senate versions of the legislation, include statements that reflect the legislature's general and specific intention in passing the bills." 35 N.J.R. 1573(a), April 7, 2003.

Language explaining legislative intent with respect to the \$150 fee which is the subject of your letters appears on page 7, respectively, of the Statements to A. 2501 and S. 1556 dated June 27, 2002. Both contain identical language which appears to be dispositive of the subject. They both state:

**Pass-through Entities.**

Pass-through entity return processing fee. The bill institutes a \$150 per-owner processing fee on the owners of pass-through entities, having more than two owners. "Pass-through" entities, such as partnerships, limited liability partnerships, and limited liability companies, are not subject to tax themselves, but "pass-through" their income to their owners (partners of partnerships or members of limited liability companies) who

are subject in their separate capacities. Pass-through entities that have New Jersey source income or New Jersey resident owners must annually file a New Jersey K-1 form with the State in which they report their income and must list their owners.

For pass-through entities that have income from New Jersey sources and more than two members, the bill establishes an annual \$150 per owner filing fee, capped at \$250,000 per entity annually. The bill establishes a similar filing fee of \$150 per licensed professional for professional corporations with more than two licensed professionals, also capped at \$250,000 per corporation annually. The bill treats these fees as payments under the State Uniform Tax Procedure Law for purposes of penalties, interest and other administrative functions.

(Bold and emphasis in original)

Subchapter S corporations are "pass-through" entities. In Miller v. Director, Division of Taxation, 19 N.J.Tax 522, 534 (Tax Ct. 2001), rev. other grounds. 352 N.J. Super. 98 (App. Div. 2002), the Court succinctly stated: "The intent of the Legislature in amending the New Jersey Gross Income Tax to allow for subchapter S corporations was to have the subchapter S corporation function as a pass-through entity just like a partnership." Therefore, based upon the Assembly and Senate Statements, which reflect the Legislature's intention in passing the bills, it seems irrefutably clear that the \$150 processing fee applies to those entities. Of course, unlike Subchapter S corporations, Subchapter C corporations are not "pass-through" entities and would be subject to the "similar filing fee of \$150 per licensed professional for professional corporations."

A serious question remains as to whether the filing fee would be "similar" if it is limited only to owners of entities like limited liability companies, but subject to all "licensed professionals" (as distinguished from licensed professionals who are shareholders) in professional corporations and professional associations.

The New Jersey Legislature enacted the Limited Liability Company Act in 1993. It became effective on January 26, 1994. As described by the Assembly Regulatory Oversight and Gaming Committee Statement to A. 1543 dated January 30, 2012 (regarding the bill proposing a Revised Uniform Limited Liability Company Act, now codified at N.J.S.A. 42:2C-1 et seq.),

The limited liability company (LLC) is a relatively new form of unincorporated business organization that provides corporate-style limited liability to its owners, while affording the owners the partnership-like capacity to structure the entity by agreement rather than as prescribed by statute. LLCs began to be widely used after IRS Revenue Ruling 88-76 upheld the taxation of LLCs as partnerships. If the LLC elects to be taxed as a partnership, the LLC does not pay federal income tax on its profits. Rather, its members are taxed on their share of the LLC's income. As a result, LLCs have become the business entity form of choice for new

businesses, and far more New Jersey LLCs have been formed in recent years than corporations and limited partnerships combined.

Pursuant to N.J.A.C. 13:30-8.13, dentists may engage in the practice of dentistry in the format of either a professional service corporation or an LLC. Both types of entities can and do employ dentists to perform services for the respective formats. Shareholders of professional service corporations and members of LLCs are commonly referred to as "owners". In essence, the substantive difference between the two formats is that LLCs provide greater flexibility. Under the circumstances, it does not seem reasonable to construe P.L. 2002, c. 40 as mandating the imposition of a filing fee in the amount of \$150 on both shareholder and non-shareholder licensed professionals in professional corporations and professional associations while limiting the fee solely to members of a limited liability company.

On April 7, 2003, the Division adopted amendments and new rules "to supply guidance to taxpayers and interested members of the public and to assist them in meeting their responsibilities under the BTRA," 35 N.J.R. 1573(a). In pertinent part, it provided: "'Licensed professional' means, and is limited to, persons rendering professional services in the following professional capacities: certified public accountants, architects, optometrists, professional engineers, land surveyors, land planners, chiropractors, physical therapists, registered professional nurses, dentists, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, chiropodists, veterinarians and, subject to the rules of the Supreme Court, attorneys-at-law". N.J.A.C. 18:7-19.1.

Almost 14 years later, on January 3, 2017, the Division proposed a re-adoption of N.J.A.C. 18:7 with amendments. Among other sections, N.J.A.C. 18:7-19.1 was "proposed for amendment to delete a list of 'licensed professions' subject to a professional fee imposed under N.J.S.A. 54:10A-18.c because the list is out of date. This proposed amendment also adds a cross-reference to N.J.S.A. 14A:17-3(1) of the Business Corporation Law, which provides a current list of professional services to which the fee applies." In its amended form, the section was proposed to read as follows: "'Licensed professional' means, and is limited to, persons rendering a professional service as defined in N.J.S.A. 14A:17-3(1)." 49 N.J.R. at 93 (January 3, 2017).

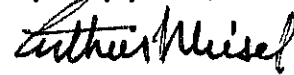
The Division's characterization of a need for the amendment is particularly curious because the "list of professional services to which the fee applies" set forth in N.J.S.A. 14A:17-3 was exactly the same as it was when the original regulation was adopted in 2003: The statutory language remained completely unchanged. With no further explanation or clarification, the proposed language was adopted on June 19, 2017. 49 N.J.R. 1694(a).

Based upon the foregoing observations, the New Jersey Dental Association respectfully requests a meeting with the Division of Taxation to discuss this subject

before further action is taken with respect to the \$150 filing fee imposed by P.L 2002, c. 40.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Arthur Meisel". The signature is fluid and cursive, with the first name "Arthur" and last name "Meisel" clearly distinguishable.

Arthur Meisel  
Executive Director