



**NEW JERSEY LAW REVISION COMMISSION**  
**Draft Tentative Report Regarding the Use of the Phrase**  
**“Misrepresentation of a Material Fact” in the**  
**New Jersey Gross Income Tax Act (N.J.S. 54A:9-4).**

**October 10, 2022**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language, and eliminate redundant provisions.” *N.J.S. 1:12A-8.*

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **December 09, 2022.**

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## Project Summary<sup>1</sup>

The New Jersey Gross Income Tax Act (the “Act”) specifies the statute of limitations for tax assessments.<sup>2</sup> The Act requires the Division of Taxation (the “Division”) to assess any tax within three years after a taxpayer has filed a tax return unless the taxpayer has filed a false or fraudulent return.<sup>3</sup> The Division is also authorized to issue an assessment for a deficiency arising out of an erroneous refund within three years from the issuance of such a refund.<sup>4</sup> This statute of limitations is extended to five years where “it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.”<sup>5</sup>

In *Malhotra v. Director, Division of Taxation*, the Tax Court considered the meaning of the term “misrepresentation” as used in N.J.S. 54A:9-4(c)(4).<sup>6</sup> The Court questioned “whether the statute treats misrepresentation of material fact as having a standard that is different than fraud for purposes of an extended statute of limitations.”<sup>7</sup> In the absence of a statutory definition and given the lack of legislative history regarding the level of intent, the Court determined that “[f]raud requires a high level<sup>8</sup> of intent to defraud, but misrepresentation must include some level of intent that is above a mistake.”<sup>9</sup>

Staff’s examination of N.J.S. 54A:9-4 identified a conflict between the two fraud exceptions contained in the statute. The Division, pursuant to N.J.S. 54A:9-4(c)(1)(B), is authorized to issue a deficiency assessment *at any time* if a taxpayer files a false or fraudulent return with the intent to evade tax.<sup>10</sup> If, however, a fraudulent return yields a refund to the taxpayer the Division is required to make its deficiency assessment within five-years from the issuance of that refund.<sup>11</sup> Neither a plain reading of the statute nor the *Malhotra Court’s* decision provides an explanation for what appears to be a disparity in treatment.

The Commission Staff recommends several modifications to N.J.S. 54A:9-4: (1) using contemporary statutory drafting practices to make the statute more accessible; (2) removing the five-year statute of limitations on assessments for erroneous refunds induced by fraud to eliminate the apparent conflict between the two fraud exceptions contained in this statutory section; and (3) eliminating the phrase “misrepresentation of a material fact” from subsection (c)(4) to remove the ambiguity created by this undefined term, substituting a reference to “false or fraudulent return” since that phrase is used elsewhere in the statute.

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<sup>1</sup> Preliminary work on this subject was performed by James Finnegan, Legislative Law Clerk, during his time with the New Jersey Law Revision Comm’n, Summer 2022.

<sup>2</sup> N.J. STAT. ANN. § 54A:9-4(a) (West 2022).

<sup>3</sup> *Id.* § 54A:9-4(1)(b).

<sup>4</sup> *Id.* § 54A:9-4(c)(4).

<sup>5</sup> *Id.* (Emphasis added).

<sup>6</sup> *Malhotra v. Dir., Div. of Tax’n*, 32 N.J. Tax 443, 454 (N.J. Tax 2021).

<sup>7</sup> *Id.* at 455.

<sup>8</sup> The *Malhotra Court* neither explained nor defined what is meant by “high level of intent” and did not address whether a “low level of intent to defraud” is sufficient to constitute a fraud.

<sup>9</sup> *Id.*

<sup>10</sup> N.J. STAT. ANN. § 54A:9-4(c)(1)(B).

<sup>11</sup> *Id.* § 54A:9-4(c)(4).

## Statute Considered

**N.J.S. 54A:9-4**, entitled “Limitations on assessment” provides, in relevant part:

(a) General. Except as otherwise provided in this section, any tax under this act shall be assessed within **3 years** after the return was filed (whether or not such return was filed on or after the date prescribed).

\* \* \*

(c) Exceptions.

(1) Assessment at any time. The tax may be assessed **at any time** if—

(B) A **false or fraudulent** return is filed with intent to evade tax

\* \* \*

(4) Recovery of erroneous refund. An erroneous refund shall be considered an underpayment of tax on the date made, and an assessment of a deficiency arising out of an erroneous refund may be made at any time within **3 years** from the making of the refund, except that the assessment may be made within **5 years** from the making of the refund if it appears that any part of the refund was induced by **fraud or misrepresentation** of a material fact.<sup>12</sup>

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## Background

The 2013 tax year was the first year that Punish and Indu Malhotra (“Taxpayers”) were required to file a New Jersey Gross Income Tax resident return (“New Jersey return”).<sup>13</sup> The Taxpayers claimed a credit of \$3,751 for taxes paid to New York State.<sup>14</sup> They also erroneously reported \$5,522 of New Jersey income tax withholding, which represented the amount of their New York State income tax withholding.<sup>15</sup> As a result of these credits, the New Jersey Division of Taxation (“Division”) issued the Taxpayers a refund of \$5,203 on March 11, 2014.<sup>16</sup>

The Director of the Division of Taxation (the “Director”) subsequently reviewed the return and corrected the Taxpayer’s erroneous withholding.<sup>17</sup> On May 9, 2018, the Director issued the Taxpayer an underpayment billing notice in the amount of \$5,706.28 to cover the underpayment of tax that was the result of the erroneous refund along with penalty and interest charges.<sup>18</sup> The deficiency notice was sent more than four years after the issuance of the erroneous refund and fell

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<sup>12</sup> § 54A:9-4. (Emphasis added).

<sup>13</sup> *Malhotra*, 32 N.J. Tax at 445.

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

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

<sup>16</sup> *Id.* at 445–446.

<sup>17</sup> *Id.* at 446.

<sup>18</sup> *Id.*

outside of the three-year statute of limitations for such assessments as set forth in N.J.S. 54A:9-4(c)(4).<sup>19</sup>

On June 3, 2018, the Taxpayers filed a complaint and disputed the set-off of their 2017 tax year refund.<sup>20</sup> The Director filed a motion for summary judgment on September 10, 2020 – which was opposed by the Taxpayers.<sup>21</sup> The Taxpayers also filed a cross-motion for summary judgment.<sup>22</sup> The Director argued, in part, that the five-year statute of limitations applied, and that the deficiency assessment was timely.<sup>23</sup>

The Director did not argue, and the record did not suggest, that the refund had been induced by fraud or any intentional act to evade tax.<sup>24</sup> The five-year statute of limitations could only have applied under N.J.S. 54A:9-4 if the Taxpayers misrepresented a material fact.<sup>25</sup> Both parties agreed that the Taxpayers did not act intentionally, and instead simply made a mistake.<sup>26</sup>

The Director argued that any false statement of a material fact, regardless of intent, constituted a misrepresentation and permitted him to make an assessment within the five-year statute of limitations set forth in N.J.S. 54A:9-4(c)(4).<sup>27</sup> Taxpayers argued, in opposition, that an innocent mistake does not qualify as a misrepresentation, which requires intent.<sup>28</sup>

### Analysis

The Court considered whether the term misrepresentation, as used in N.J.S. 54A:9-4(c)(4), required a deliberate act by the taxpayer or whether a mistake or omission was sufficient to constitute a misrepresentation.<sup>29</sup> The Court noted that the statute did not define misrepresentation, and its plain language did not clearly convey the requisite level of intent necessary to make such a finding.<sup>30</sup> The legislative history of the statute did not provide the Court with any guidance regarding the definition of this term. The Court therefore turned to an examination of extrinsic sources.<sup>31</sup>

#### • *Extrinsic Sources*

The Court considered the use of the term “misrepresentation” in other legal contexts in an attempt to ascertain its meaning.<sup>32</sup> In contract law, “legal fraud or misrepresentation consists of [1] a material misrepresentation of a presently existing or past fact, [2] made with knowledge of

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<sup>19</sup> *Id.* at 451.

<sup>20</sup> *Id.* at 446.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 447.

<sup>24</sup> *Id.* at 453.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 450.

<sup>27</sup> *Id.* at 453–454.

<sup>28</sup> *Id.* at 448.

<sup>29</sup> *Id.* at 454.

<sup>30</sup> *Id.* at 455.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

its falsity, [3] with the intention that the other party rely thereon, and [4] that [they do] so rely to [their] damage.”<sup>33</sup> By contrast, knowledge is not a necessary element of equitable fraud, but the other four elements are essential.<sup>34</sup>

The phrase “misrepresentation of material fact” is used frequently in the context of insurance contracts.<sup>35</sup> Insurance coverage under an insurance policy may be voided by the insurer because of a post-loss misrepresentation made by the insured only if the misrepresentation is “knowing and material.”<sup>36</sup> Only a “willful” lie constitutes a misrepresentation in this context, “[a] mere oversight or honest mistake” cannot justify an insurer voiding an insured’s policy.<sup>37</sup> The deceit need not be rooted in “an intent to recover proceeds to which he or she was not entitled” to qualify as a misrepresentation.<sup>38</sup>

The Court also considered the Black’s Law Dictionary definitions of both “misrepresentation” and “material misrepresentation.”<sup>39</sup> This secondary source provides that misrepresentation may be “understood to mean a statement *made to deceive or mislead.*”<sup>40</sup> A material misrepresentation is defined as a “*deliberate* hiding or falsification of a material fact” which directly affects the viability or terms of a contract, deal, or transaction between two parties.<sup>41</sup>

The Court noted that the case law and dictionary definition of the word misrepresentation all share a common thread.<sup>42</sup> In each context, the definition of misrepresentation employed words and phrases, such as “knowing,” “intent that others rely,” “lying,” “deliberate,” and “concealment,” and indicated that “misrepresentation requires a level of intent that does not rise to the level of fraud, but cannot be done accidentally.”<sup>43</sup> Distinguishing fraud from misrepresentation, the Court concluded that “[f]raud requires a high level<sup>44</sup> of intent to defraud, but misrepresentation must include some level of intent that is above a mistake.”<sup>45</sup>

In its present form, N.J.S. 54A:9-4(c)(4) delineates two different periods of limitations when dealing with erroneous refunds. The structure of the statute provides that erroneous refunds predicated upon either fraud or the misrepresentation of a material fact are subject to the same statute of limitations. The Court reasoned that the statute’s differentiation between a three-year

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<sup>33</sup> *Id.* at 456 (citing *Berman v. Gurwicz*, 189 N.J. Super. 89, 92 (Ch. Div. 1981) (quoting *Foont-Freedensfeld v. Electro-Protective*, 126 N.J. Super. 254, 257, 314 A.2d 69 (App. Div. 1973), *aff’d*, 64 N.J. 197 (1974)).

<sup>34</sup> *Id.* (recognizing that in the absence of an affirmative misrepresentation “the suppression of truth, the withholding of truth when it should be disclosed is the equivalent to the expression of falsehood.”).

<sup>35</sup> *Id.* at 455.

<sup>36</sup> *Id.* at 455 (quoting *Longobardi v. Chubb Ins. Co.*, 121 N.J. 530, 540, 582 A.2d 1257 (1990) (citing N.J. STAT. ANN. § 17:33A-4a(1)).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 457.

<sup>40</sup> *Id.* (quoting *Black’s Law Dictionary*, 903 (5th ed. 1979)) (emphasis added).

<sup>41</sup> *Id.* (quoting *Black’s Law Dictionary*, 881 (5th ed. 1979)) (emphasis added).

<sup>42</sup> *Id.* at 456.

<sup>43</sup> *Id.* at 457.

<sup>44</sup> The *Malhotra Court* neither explained nor defined what is meant by “high level of intent.” The court did not address whether a “low level of intent to defraud” is sufficient to constitute a fraud.

<sup>45</sup> *Id.*

statute of limitations for acting on some errors, and a five-year statute of limitations for errors involving fraud or misrepresentation is justifiable only if there are “assessable errors that are not misrepresentations of material facts.”<sup>46</sup>

The Court concluded that the statute’s two-tiered construction “implies that not every error rises to the level of a misrepresentation of material fact.”<sup>47</sup> While any mistake prompting action by the Director must be material in nature, “that does not mean that all material mistakes are misrepresentations.”<sup>48</sup> A finding that “every mistake is a misrepresentation would render the distinction between the five-year and three-year statutes of limitations meaningless.”<sup>49</sup>

Without elaborating on the definition to be employed or the standard to be used, the Court stated that “[a] misrepresentation of material fact must be more than an innocent mistake....”<sup>50</sup> The Taxpayers’ motion for summary judgment was granted and the Director’s motion for summary judgment was denied.<sup>51</sup>

### **Additional Research<sup>52</sup>**

In the absence of a definitive definition for the term misrepresentation, the Commission Staff conducted additional research to clarify the meaning of the term misrepresentation, to ascertain the necessity of retaining the term in N.J.S. 54A:9-4, and to resolve the internal conflict between the two fraud exceptions set forth in the statute.

#### **• *By the Numbers***

Some form of the word “misrepresent,” appears in 250 New Jersey statutes, across 39 statutory titles.<sup>53</sup> Within these 250 statutes, the term “misrepresented” is used 14 times; “misrepresents,” 24 times; “misrepresenting,” 28 times; “misrepresent,” 34 times; and “misrepresentation,” 268 times.

The *Malhotra Court* noted that the phrase “misrepresentation of material fact” is used frequently in the context of insurance contracts.<sup>54</sup> This phrase is used in five insurance statutes without being defined.<sup>55</sup> The phrase “misrepresentation of a material fact” that is used in four tax

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<sup>46</sup> *Id.* See discussion *infra* regarding N.J. ADMIN. CODE § 18:2-2.9(e).

<sup>47</sup> *Id.* at 458.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 459.

<sup>52</sup> N.J. LAW REVISION COMM’N, ‘Misrepresentation,’ *Minutes of NJLRC Meeting 21 Jul. 2022*, at \*6, held virtually, (authorizing Staff to engage in further research and outreach on this subject), [www.njlrc.org](http://www.njlrc.org), (last visited Aug. 16, 2022).

<sup>53</sup> A Westlaw search using the parameter TE(misrepresent!) yielded 263 results, 250 involved New Jersey statutes.

<sup>54</sup> *Malhotra*, 32 N.J. Tax at 455.

<sup>55</sup> N.J. STAT. ANN. § 17:30D-19 (West 2022); N.J. STAT. ANN. § 17B:27-66 (West 2022); N.J. STAT. ANN. § 17B:27A-6 (West 2022); N.J. STAT. ANN. § 17B:27A-23 (West 2022); and N.J. STAT. ANN. § 17B:27A-25.5 (West 2022). See also discussion *supra* at 4.

statutes includes the use of the indefinite article “a” before the words material fact.<sup>56</sup> A taxpayer who *intentionally* misrepresents a material fact, will be disqualified from the benefits set forth in two of the four statutes in which the phrase appears.<sup>57</sup> Similar to the insurance statutes, the phrase “misrepresentation of a material fact” is not defined in Title 54 - Taxation.

#### • ***Misrepresentation Defined***

Despite the frequency with which the term misrepresentation is used throughout the New Jersey statutes, the term is only defined in two statutes. In 1968, the New Jersey Legislature defined the term misrepresentation in two New Jersey statutes found in Title 51 - Standards, Weights, Measures and Containers.<sup>58</sup> In the context of the lumber and the soil amendments, misrepresentation is defined as “any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.”<sup>59</sup>

When the Legislature enacted N.J.S. 54A:9-4 in 1976 it did not incorporate the 1968 definition of misrepresentation found in both the soil amendment and lumber products statutes. That may militate against incorporating it half a century later. Next, a plain reading of the definition raises a question about the meaning of the phrase “any manifestation.” To this time, no case has interpreted either Title 51 definition of misrepresentation.<sup>60</sup> A broad reading of this phrase might include behavior that is considered fraudulent thereby rendering any distinction between fraud and misrepresentation moot and the latter surplusage. Finally, the incorporation of that definition of misrepresentation might, as the *Malhotra Court* reasoned, render the distinction between the five-year and three-year statutes of limitations meaningless.

#### • ***The New Jersey Administrative Code – Fraud***

An examination of the New Jersey Administrative Code (“NJAC”) provides insight into use of the terms “fraud” and “misrepresentation” in the context of tax filings. The NJAC provides that “civil fraud is characterized by a taxpayer’s intent to evade or avoid the payment of taxes known to be due to the State by conduct intended to conceal, mislead, or otherwise prevent the

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<sup>56</sup> N.J. STAT. ANN. § 54:4-8.66 (West 2022) (intentional misrepresentation); N.J. STAT. ANN. § 54:8A-43 (West 2022) (authorizing writing agreement between Division and taxpayer except upon showing of fraud, malfeasance, or misrepresentation of a material fact); N.J. STAT. ANN. § 54:32B-17 (West 2022) (permitting director to make assessments for uncollected or unpaid sales or use tax where seller engages in fraud or intentional misrepresentation of a material fact); and N.J. STAT. ANN. § 54A:9-4 (West 2022) (extending the three year statute of limitations to five years where any part of the refund was induced by fraud or misrepresentation of a material fact).

<sup>57</sup> N.J. STAT. ANN. § 54:4-8.66 (West 2022) (providing that an intentional misrepresentation of a material fact by taxpayer will result in the repayment of the homestead rebate or credit in addition to a penalty); and N.J. STAT. ANN. § 54:32B-17 (West 2022) (permitting director to make assessments for uncollected or unpaid sales or use tax where seller engages in fraud or intentional misrepresentation of a material fact).

<sup>58</sup> N.J. STAT. ANN. § 51:4-23 (West 2022); N.J. STAT. ANN. § 51:11-1 (West 2022).

<sup>59</sup> *Id.*

<sup>60</sup> The *Malhotra Court* did not analyze the definition of misrepresentation in either N.J. STAT. ANN. § 51:4-23 (West 2022) or N.J. STAT. ANN. § 51:11-1 (West 2022).

administration and collection of the taxes imposed by the laws of this State.”<sup>61</sup> The imposition of a penalty is reserved for those instances in which it was the intent of the taxpayer to commit a fraud.<sup>62</sup> To find clear and convincing evidence of the taxpayer’s intent, the Division will investigate the actions of the taxpayer.<sup>63</sup>

To determine whether an assessment is appropriate, the Division is authorized to consider indicia of fraud.<sup>64</sup> Adopted in 2014,<sup>65</sup> N.J.A.C. 18:2-2.9(e), enumerates thirteen behaviors indicative of a taxpayer’s intent to commit a civil fraud<sup>66</sup>:

1. A pattern of substantially understating income (or sales, in the case of sales tax);
2. A history of failing to maintain adequate books and records;
3. Implausible or inconsistent explanations of behavior;
4. Concealing or transferring assets;
5. Repeated or continuing failure to cooperate meaningfully and fully with the Division of Taxation;
6. Collecting and/or withholding any trust fund tax and failing to remit the tax funds collected to the Division of Taxation;
7. A pattern of failing to file tax returns, remit taxes, or report income or sales;
8. Destruction of records;
- 9. Making misrepresentations of material facts;**
10. Accounting irregularities (two sets of books, false entries on documents);
11. Taking fictitious or improper deductions (for example, overstatement of deductions, personal items deducted as business expenses);
12. Engaging in illegal activities; and/or
13. Maintaining or presenting false or altered documents.<sup>67</sup>

A finding of fraud will depend upon the facts of each case and “the existence of one or more indicia of civil fraud, or other indicia not listed therein, may be sufficient to establish that any part of an assessment is due to civil fraud. . . .”<sup>68</sup> The N.J.A.C.’s inclusion of “misrepresentations of material facts” in a list of behavior that can constitute fraud may call into question the utility of its presence in N.J.S. 54A:9-4(c)(4).

The types of assessable errors that do not constitute fraud are not specified in subsection (c)(4) of N.J.S. 54A:9-4. The NJAC, however, distinguishes between fraudulent intent and errors that result from other types of behavior, explaining that a taxpayer’s “[i]ntent [to commit fraud] is distinguished from **inadvertence, reliance on incorrect technical advice, honest difference of opinion, negligence, or carelessness.**”<sup>69</sup>

### • *Internal Revenue Code and Manual*

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<sup>61</sup> N.J. ADMIN. CODE § 18:2-2.9(b). *Compare* N.J. STAT. ANN. § 54:52-10 (making it a crime of the third degree to file a false or fraudulent return “with the intent to evade, avoid or otherwise not make timely payment of any tax, fee, penalty or interest, or any part thereof.”).

<sup>62</sup> *Id.* at § d.

<sup>63</sup> *Id.* at § e.

<sup>64</sup> *Id.*

<sup>65</sup> 46 N.J.R. 595(a), 46 N.J.R. 1974(c).

<sup>66</sup> N.J. ADMIN. CODE § 18:2-2.9(e).

<sup>67</sup> *Id.* (Emphasis added).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at § d. (Emphasis added).



The Internal Revenue Code (IRC) authorizes the federal government to institute a suit for the recovery of erroneous refunds.<sup>70</sup> The IRC permits the recovery of such a refund “only if the suit is begun within 2 years after the making of such refund....”<sup>71</sup> The statute of limitation is extended to five years when the taxpayer has engaged in fraud or misrepresented a material fact that results in a refund.<sup>72</sup>

The language of the New Jersey statute and the federal statute is similar in both substance and structure. The federal government is permitted to bring such suit “at any time within 5 years from the making of the [erroneous] refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.”<sup>73</sup> The New Jersey statute provides, in relevant part, that “the assessment [for an erroneous refund] may be made within 5 years from the making of the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.”<sup>74</sup>

Neither “fraud” nor “misrepresentation” is defined in the Internal Revenue Code. The Internal Revenue Manual (IRM), however, defines fraud as “deception by *misrepresentation of material facts*, or silence when good faith requires expression, which results in material damage to one who relies on it and has the right to rely on it.”<sup>75</sup> Both the IRM and the NJAC require an intent to evade tax that is known or believed to be owing, and enumerate misrepresentations of material facts as one possible element of tax fraud.<sup>76</sup>

In a matter involving civil fraud, the federal government must provide “clear and convincing evidence to prove that some part of the underpayment of tax was due to fraud.”<sup>77</sup> The IRS acknowledges that “direct proof of fraudulent intent is rarely available, [therefore] fraud must be proven by circumstantial evidence and reasonable inferences.”<sup>78</sup> According to the IRM, the elements of fraud include one or more of the following: deception; *misrepresentation of material facts*; false or altered documents; or evasion.<sup>79</sup>

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<sup>70</sup> 26 U.S.C. § 6532(b) (2022); N.J. STAT. ANN. § 54A:9-4(c)(4).

<sup>71</sup> 26 U.S.C. § 6532(b) (2022). *Compare* N.J. STAT. ANN. § 54A:9-4(c)(4) (providing the State with three years from the date of the refund within which to make a deficiency assessment).

<sup>72</sup> 26 U.S.C. § 6532(b) (2022); *Compare* N.J. STAT. ANN. § 54A:9-4(c)(4) (permitting an “assessment to be made within 5 years from the making of the refund if it appears that any part of the refund was induced by fraud or misrepresentation.”).

<sup>73</sup> *Id.*

<sup>74</sup> N.J. STAT. ANN. § 54A:9-4(c)(4).

<sup>75</sup> The IRM is a manual that is prepared and utilized by the IRS. Pursuant to IRM § 25.1.1.1(1), Section 1 “provides an overview of fraud, defines the elements of fraud, and provides information for potential fraud examinations and procedures....” *See*, IRM § 25.1.1.3(1). (Emphasis added).

<sup>76</sup> IRM § 25.1.6.2(3). N.J. ADMIN. CODE § 18:2-2.9(e)(9). *See* discussion *supra* p. 8.

<sup>77</sup> IRM § 25.1.6.2(3).

<sup>78</sup> IRM § 25.1.6.4(1).

<sup>79</sup> *Id.* (Emphasis added).

To find clear and convincing evidence of the taxpayer’s fraudulent intent, the IRS will investigate the taxpayer’s entire course of conduct.<sup>80</sup> The IRM enumerates ten badges, or indicia, of fraud:

understatement of income;<sup>81</sup> fictitious or improper deductions;<sup>82</sup> accounting irregularities;<sup>83</sup> obstructive actions of the taxpayer;<sup>84</sup> a consistent pattern over several years of underreporting taxable income;<sup>85</sup> implausible or inconsistent explanations of behavior;<sup>86</sup> engaging in illegal activities;<sup>87</sup> inadequate records;<sup>88</sup> dealing in cash; failing to file returns.<sup>89</sup>

Each is “given the weight appropriate to a particular case.”<sup>90</sup> The IRM provides that “[a]n evaluation of fraud is based on the weight of the evidence rather than the quantity of the factors.”<sup>91</sup>

The IRC does not identify types of behavior that the IRS does not consider to be fraudulent. The IRM provides that a taxpayer’s “[i]ntent [to commit fraud] is distinguished from inadvertence, reliance on incorrect technical advice, sincerely-held difference of opinion, negligence, or carelessness.”<sup>92</sup>

#### • 50-State Surveys

Commission Staff reviewed of the federal statute of limitations on tax assessments and the limitation in each state and the District of Columbia. The analysis began with an examination of each general statute of limitations on assessments. Next, a review was conducted to determine the impact of a false or fraudulent return upon statute of limitations. Finally, an examination was made of those statutes with a fraud exception that also contained a separate provision for dealing with refunds induced by the taxpayer’s fraudulent return.

The federal government and every state except Wyoming sets forth a limitation beyond which the government may not impose a tax assessment against a taxpayer.<sup>93</sup> Like the general

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<sup>80</sup> IRM § 25.1.6.4(2).

<sup>81</sup> IRM § 25.1.6.4(2). *Cf.* N.J. ADMIN. CODE § 18:2-2.9(e)(1).

<sup>82</sup> IRM § 25.1.6.4(2). *Cf.* N.J. ADMIN. CODE § 18:2-2.9(e)(11).

<sup>83</sup> IRM § 25.1.6.4(2). *Cf.* N.J. ADMIN. CODE § 18:2-2.9(e)(10).

<sup>84</sup> IRM § 25.1.6.4(2). *Cf.* N.J. ADMIN. CODE § 18:2-2.9(e)(5).

<sup>85</sup> IRM § 25.1.6.4(2). *Cf.* N.J. ADMIN. CODE § 18:2-2.9(e)(1).

<sup>86</sup> IRM § 25.1.6.4(2). *Cf.* N.J. ADMIN. CODE § 18:2-2.9(e)(3).

<sup>87</sup> IRM § 25.1.6.4(2). *Cf.* N.J. ADMIN. CODE § 18:2-2.9(e)(12).

<sup>88</sup> IRM § 25.1.6.4(2). *Cf.* N.J. ADMIN. CODE § 18:2-2.9(e)(2).

<sup>89</sup> IRM § 25.1.6.4(2). *Cf.* N.J. ADMIN. CODE § 18:2-2.9(e)(7).

<sup>90</sup> IRM § 25.1.6.4(2) (referring to indicia of fraud are referred to as “indicators or badges”).

<sup>91</sup> *Id.*

<sup>92</sup> IRM § 25.1.6.2(3). *Compare* N.J. ADMIN. CODE § 18:2-2.9(d) (utilizing virtually identical language with the exception of “honest difference of opinion” rather than the Code’s “sincerely-held difference of opinion”).

<sup>93</sup> 26 U.S.C. § 650(a); (3 years); ALA. CODE § 40-2A-7(b)(2) (West 2022) (3 years); ALASKA STAT. ANN. § 43.05.260 (a) (West 2022) (3 years); ARIZ. REV. STAT. ANN. § 42-1104(A) (West 2022) (4 years); ARK. CODE ANN. § 26-18-306(a)(1) (West 2022) (3 years); CAL. REV. & TAX. CODE § 19057(a) (West 2022) (4 years); COLO. REV. STAT. ANN. § 39-10-101(2)(b)(I) (6 years); CONN. GEN. STAT. ANN. § 12-733(a) (West 2022) (3 years); DEL. CODE ANN. TIT. 30, § 531 (a) (West 2022) (3 years); D.C. CODE ANN. § 47-4301(a) (West 2022) (3 years); FLA. STAT. ANN. §

three-year statute of limitations on tax assessments enacted by Congress, forty states and the District of Columbia proscribe the same three-year period of limitations.<sup>94</sup> In the remaining nine jurisdictions, the statute of limitations on tax assessments ranges between three and a half years to ten years.<sup>95</sup>

• *False or Fraudulent Tax Returns*

When a taxpayer has filed a false or fraudulent tax return, virtually every state statute provides an exception to general statute of limitations on assessments. In New Jersey, and forty-seven other states, an assessment may be made *at any time* where the taxpayer has filed a false or fraudulent tax return.<sup>96</sup>

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95.091(3)(a)(1)(b) (West 2022) (3 years); GA. CODE ANN. § 48-2-49(b) (West 2022) (3 years); HAW. REV. STAT. ANN. § 235-111(a) (West 2022) (3 years); IDAHO CODE ANN. § 63-3068(a) (West 2022) (3 years); 35 ILL. COMP. STAT. ANN. 5/905(a) (West 2022) (3 years); IND. CODE ANN. § 6-8.1-5-2(a) (West 2022) (3 years); IOWA CODE ANN. § 422.25(b) (West 2022) (3 years); KAN. STAT. ANN. § 79-3230(a) (West 2022) (3 years); KY ST § 141.210 (2)(a)(1) (West 2022) (4 years); LA. CONST. ANN. ART. VII, § 16 (3 years); ME. REV. STAT. TIT. 36, § 141 (West 2022) (3 years); MD. CODE ANN., TAX-GEN. § 13-1101 (West 2022) (3 years); MASS. GEN. LAWS ANN. CH. 62C, § 28(b)(1) (West 2022) (3 years); MICH. COMP. LAWS ANN. § 141.1172 Sec. 12 (West 2022); MINN. STAT. ANN. § 289A.38 (West 2022) (3 ½ years); MISS. CODE. ANN. § 27-7-49 (West 2022) (3 years); MO. ANN. STAT. § 143.711(1) (West 2022) (3 years); MONT. CODE ANN. § 15-30-2605 (West 2022) (3 years); NEB. REV. STAT. ANN. § 77-2786(1) (West 2022) (3 years); NEV. REV. STAT. ANN. § 360.355 (West 2022) (3 years); N.H. REV. STAT. ANN. § 21-J:29(I)(a) (West 2022) (3 years); **N.J. STAT. ANN. § 54A:9-4(a) (3 years)**; N.M. STAT. ANN. § 7-1-78(A) (3 years); N.Y. TAX LAW § 683(a) (2022) (3 years); N.C. GEN. STAT. ANN. § 105-241.8(a) (West 2022) (3 years); N.D. CENT. CODE ANN. § 57-38-38(1) (2022) (3 years); OHIO REV. CODE ANN. § 5703.58(A) (West 2022) (10 years); OKLA. STAT. ANN. TIT. 68, § 223 (A) (West 2022) (3 years); OR. REV. STAT. ANN. § 314.410(1) (West 2022) (3 years); 53 PA. STAT. ANN. § 6924.509(h)(1) (West 2022) (3 years); 44 R.I. GEN. LAWS ANN. § 44-30-83(a) (West 2022) (3 years); S.C. CODE ANN. § 12-54-85(A) (West 2022) (3 years); S.D. CODIFIED LAWS § 10-59-16 (West 2022) (3 years); TENN. CODE ANN. § 67-1-1501(b) (West 2022) (3 years); TEX. TAX CODE ANN. § 111.201 (West 2022) (4 years); UTAH CODE ANN. § 59-10-536(2)(b)(i) (West 2022) (3 years); VT. STAT. ANN. TIT. 32, § 5882(a) (West 2022) (3 years); VA. CODE ANN. § 58.1-104 (West 2022) (3 years); WASH. REV. CODE ANN. § 82.32.050 (West 2022) (4 years); W. VA. CODE ANN. § 11-10-15(a) (West 2022) (3 years); WIS. STAT. ANN. § 71.77(2) (West 2022) (4 years); and WYO. STAT. ANN. § 39-11-110 (West 2022) (none specified). *See also* Fig. 1.

<sup>94</sup> *See* sources cited *supra* note 93.

<sup>95</sup> *Id.*

<sup>96</sup> ALA. CODE § 40-2A-7(b)(2)(a) (West 2022); ALASKA STAT. ANN. § 43.05.260 (c)(1) (West 2022); ARIZ. REV. STAT. ANN. § 42-1104(B)(1)(a) (West 2022); ARK. CODE ANN. § 26-18-306(f) (West 2022); CAL. REV. & TAX. CODE § 19057(a) (West 2022); COLO. REV. STAT. ANN. § 39-10-101(2)(c); CONN. GEN. STAT. ANN. § 12-733(c)(1) (West 2022); DEL. CODE ANN. TIT. 30, § 531 (c) (West 2022); D.C. CODE ANN. § 47-4301(d)(1) (West 2022); FLA. STAT. ANN. § 95.091(b)(5) (West 2022); GA. CODE ANN. § 48-2-49(c) (West 2022); HAW. REV. STAT. ANN. § 235-111(c) (West 2022); IDAHO CODE ANN. § 63-3068(c) (West 2022); 35 ILL. COMP. STAT. ANN. 5/905(c) (West 2022); IND. CODE ANN. § 6-8.1-5-2(g) (West 2022); IOWA CODE ANN. § 422.25(c) (West 2022); KAN. STAT. ANN. § 79-3230(b) (West 2022); KY ST § 141.210 (2)(a)(2) (West 2022); LA. STAT. ANN. § 47:1580(A)(4) (West 2022); ME. REV. STAT. TIT. 36, § 141(2)(B) (West 2022); MD. CODE ANN., TAX-GEN. § 13-1101(b) (West 2022); MASS. GEN. LAWS ANN. CH. 62C, § 28(d) (West 2022); MICH. COMP. LAWS ANN. § 141.1172 Sec. 12 (West 2022); MINN. STAT. ANN. § 289A.38, Subd. 5 (West 2022); MISS. CODE. ANN. § 27-7-49(2)(b) (West 2022); MO. ANN. STAT. § 143.711(3) (West 2022); MONT. CODE ANN. § 15-30-2605(4) (West 2022); NEB. REV. STAT. ANN. § 77-2786(3) (West 2022); NEV. REV. STAT. ANN. § 360.355(4) (West 2022); N.H. REV. STAT. ANN. § 21-J:29(II)(b) (West 2022); **N.J. STAT. ANN. § 54A:9-4(c)(1)**; N.Y. TAX LAW § 683(c)(1) (2022); N.C. GEN. STAT. ANN. § 105-241.8(b)(2) (West 2022); N.D. CENT. CODE ANN. § 57-38-38(5) (West 2022); OHIO REV. CODE ANN. § 5703.58(C)(2) (West 2022); OKLA. STAT. ANN. TIT. 68, § 223 (C) (West 2022); OR. REV. STAT. ANN. § 314.410(4)(a) (West 2022); 53 PA. STAT. ANN. § 6924.509(h)(4)(ii)

By contrast, in New Mexico, “the amount thereof may be assessed at any time within ten years from the end of the calendar year in which the tax was due...” when the taxpayer has filed a false or fraudulent tax return with the intent to evade tax.<sup>97</sup> In Virginia, “[i]n the case of a false or fraudulent return with the intent to evade payment of any tax imposed by this subtitle. . . the taxes may be assessed. . . at any time within six years from the last day prescribed by law for the timely filing of the return.”<sup>98</sup> In Utah, the time within which the Tax Commission may assess and collect any outstanding balances does not start until a return has been filed.<sup>99</sup>

• *Erroneous Refunds and Those Obtained via Fraud*

There are instances in which the taxpayer is issued an erroneous refund by the taxing authority. An erroneous refund may occur as a result of a mistake made by either the taxpayer or the taxing authority.<sup>100</sup> By contrast, the filing of a false or fraudulent return by the taxpayer may also induce the government to issue a refund.

The IRC, 26 U.S.C. 6532(b) provides, in relevant part:

Recovery of an erroneous refund by suit... shall be allowed only if such suit is brought within **2 years** after the making of such refund... except that such suit may be brought at any time within **5 years** from the making of the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.<sup>101</sup>

There are fifteen state statutes that contain an explicit reference to the recovery of an erroneous refund, similar to the one contained in 26 U.S.C. 6532(b).<sup>102</sup> Ten of the fifteen statutes utilize a

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(West 2022); 44 R.I. GEN. LAWS ANN. § 44-30-83(b)(1)(ii) (West 2022); S.C. CODE ANN. § 12-54-85(C)(1) (West 2022); S.D. CODIFIED LAWS § 10-59-16(2) (West 2022); TENN. CODE ANN. § 67-1-1501(b)(2) (West 2022); TEX. TAX CODE ANN. § 111.205(a)(1) (West 2022); UTAH CODE ANN. § 59-10-536(2)(b)(i) (West 2022); VT. STAT. ANN. TIT. 32, § 5882(b)(2) (West 2022); VA. CODE ANN. § 58.1-312(A)(2) (West 2022); WASH. REV. CODE ANN. § 82.32.050(b) (West 2022); W. VA. CODE ANN. § 11-10-15(a) (West 2022); and WIS. STAT. ANN. § 71.77(3) (West 2022). *See also* Fig. 1.

<sup>97</sup> N.M. STAT. ANN. § 7-1-78(B) (West 2022). *See also* Fig. 1.

<sup>98</sup> VA. CODE ANN. § 58.1-104 (West 2022). *Contra* VA. CODE ANN. § 58.1-312(A)(2) (West 2022) (providing that “[t]he tax imposed... may be assessed at any time if ... a false or fraudulent return is filed with the intent to evade tax....”).

<sup>99</sup> <https://tax.utah.gov/info/statute-of-limitations>. (Providing no statute of limitations for assessing and collecting the tax if no return has been filed).

<sup>100</sup> *See* discussion *supra* p. 9 for a discussion of tax filing errors that may also result in a refund that do not rise to the level of fraud. *See also* N.J. ADMIN. CODE § 18:2-2.9(d).

<sup>101</sup> 26 U.S.C. § 6532(b).

<sup>102</sup> DEL. CODE ANN. TIT. 30, § 532(a)-(b) (West 2022) (2 years); FLA. STAT. ANN. § 95.091(3)(a)(5)-(6) (West 2022) (3 years); 35 ILL. COMP. STAT. ANN. 5/905(g) (West 2022) (2 years); IND. CODE ANN. § 6-8.1-5-2(h) (West 2022) (2 years); MASS. GEN. LAWS ANN. CH. 62C, § 36A (West 2022) (3 years); MINN. STAT. ANN. § 289A.37(c) (West 2022) (2 years); MO. ANN. STAT. § 143.721 (West 2022) (2 years); NEB. REV. STAT. ANN. § 77-2787 (West 2022) (2 years); **N.J. STAT. ANN. § 54A:9-4(c)(4) (West 2022) (3 years)**; N.Y. TAX LAW § 683(c)(5) (West 2022) (2 years); 53 PA. STAT. ANN. § 6924.509(h)(3)(i)-(ii) (West 2022) (2 years); 44 R.I. GEN. LAWS ANN. § 44-30-83(b)(5) (West 2022) (3 years); UTAH CODE ANN. § 59-10-536(5)(a)-(b) (West 2022) (3 years); VA. CODE ANN. § 58.1-312(E) (West 2022) (2 years); W. VA. CODE ANN. § 11-10-14(k) (West 2022) (2 years).

two-year statute of limitations, like the one in 26 U.S.C. 6532(b).<sup>103</sup> There are five state statutes that provide the taxing authority with three years within which to issue an assessment when an erroneous refund has been issued to the taxpayer.<sup>104</sup>

There are nine state statutes that – like the federal counterpart – provide the government with five years within which to make an assessment to recover a refund issued as a result of the taxpayer’s fraud or misrepresentation of fact.<sup>105</sup> It is not clear why one section of these statutes provides the government with the ability to make an assessment *at any time* when a taxpayer files false or fraudulent return that does not result in a tax refund, and another section narrows the statute of limitations to five years when a fraudulent return induces a tax refund.<sup>106</sup>

Of the fifteen state statutes with an explicit reference to erroneous refunds, there are four states that permit the government to make an assessment *at any time* if the erroneous refund was induced by fraud or misrepresentation of a material fact.<sup>107</sup> In these states, the filing of a fraudulent return serves as an exception to the statute of limitations regardless of whether the filing of the return results in a refund.<sup>108</sup>

The focus of these statutes of limitation is the taxpayer’s fraudulent behavior and the limitation period is not shortened merely because the taxpayer received a refund. These statutes uniformly address the issue of fraud by permitting the government to seek redress any time it discovers that a fraud has been committed against the State.

### Pending Bills

Currently, there is one bill pending that concerns N.J.S. 54A:9-4, but it does not address the definition of the term misrepresentation as raised in *Malhotra v. Director, Division of Taxation*.<sup>109</sup>

### Conclusion

Commission Staff recommends that N.J.S. 54A:9-4 be modified to incorporate gender neutral language and contemporary statutory drafting practices to make the statute more accessible. To eliminate the apparent conflict between the two fraud exceptions in subsection c., the Commission recommends the removal of the five-year statute of limitations on assessments for

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<sup>103</sup> See sources cited *supra* note 102. See also Fig. 1.

<sup>104</sup> *Id.*

<sup>105</sup> 35 ILL. COMP. STAT. ANN. 5/905(g); IND. CODE ANN. § 6-8.1-5-2(h); MO. ANN. STAT. § 143.721; NEB. REV. STAT. ANN. § 77-2787; N.J. STAT. ANN. § 54A:9-4(c)(4); N.Y. TAX LAW § 683(c)(5) (West 2022) (2 years); 53 PA. STAT. ANN. § 6924.509(h)(3)(i)-(ii); UTAH CODE ANN. § 59-10-536(5)(a)-(b); and VA. CODE ANN. § 58.1-312(E). Compare the five-year statute of limitations in these statutes with the two-year statute of limitation set forth in W. VA. CODE ANN. § 11-10-14(k).

<sup>106</sup> Compare sources cited *supra* note 96 with sources cited *supra* note 105. See also Fig. 1.

<sup>107</sup> DEL. CODE ANN. TIT. 30, § 532(b); FLA. STAT. ANN. § 95.091(6); MINN. STAT. ANN. § 289A.37(c); 44 R.I. Gen. Laws Ann. § 44-30-83(b)(5).

<sup>108</sup> *Id.*

<sup>109</sup> A.B. 4295, 220th Leg., 2022 Sess. (N.J. 2022) and S.B. 2876, 220th Leg., 2022 Sess. (N.J. 2022) (“Adapts new federal partnership audit regime under gross income tax, ends COVID-related State tax extensions, and eliminates requirement to affirmatively elect New Jersey S Corporation status”).

erroneous refunds that are induced by fraud. Finally, the proposed elimination of the phrase “misrepresentation of a material fact” from subsection (c)(4) is intended to remove the ambiguity created by using this undefined term, which is replaced with a reference to “false or fraudulent return” since that phrase is used elsewhere in the statute.

## Appendix

The proposed modifications to N.J.S. 54A:9-4 are shown with ~~strikethrough~~ and underlining. The proposed language in bold and brackets is emphasized since Staff seeks Commission guidance regarding its possible inclusion:

(a) General. Except as otherwise provided in this section, any tax under this act shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed).

\* \* \*

(c) Exceptions.

(1) Assessment at any time. The tax may be assessed at any time if—

(A) ~~N~~no return is filed,

(B) ~~A~~ a false or fraudulent return is filed with intent to evade tax, **[regardless of whether the filed return results in a refund to the taxpayer,]** or

(C) ~~T~~the taxpayer fails to comply with section 54:A8-7, ~~in~~ by not:

(i) reporting a change or correction increasing ~~his~~ the taxpayer's Federal taxable income as reported on ~~his~~ their Federal income tax return, ~~or in not~~

(ii) reporting a change or correction which is treated in the same manner as if it were a deficiency for Federal income tax purposes, or

(iii) ~~in not~~ filing an amended return.

(2) Extension by agreement. Where, before the expiration of the time prescribed in this section for the assessment of tax, both the director and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(3) Report of changed or corrected Federal income. If the taxpayer shall, pursuant to section 54A:8-7, report a change or correction or file an amended return increasing ~~his~~ the taxpayer's Federal taxable income or report a change or correction which is treated in the same manner as if it were a deficiency for Federal income tax purposes, the assessment (if not deemed to have been made upon the filing of the report or amended return) may be made at any time within 2 years after such report or amended return was filed. The amount

of such assessment of tax shall not exceed the amount of the increase in New Jersey tax attributable to such Federal change or correction. The provisions of this paragraph shall not affect the time within which or the amount for which an assessment may otherwise be made.

### **Option #1**

(4) Recovery of erroneous refund. An erroneous refund shall be considered an underpayment of tax on the date made, and an assessment of a deficiency arising out of an erroneous refund may be made:

~~(A) at any time~~ within 3 years from the making of the refund, ~~except that the assessment may be made or~~

~~(B) within 5 years from the making of the refund~~ at any time if it appears that any part of the refund was induced by the filing of a false or fraudulent return or misrepresentation of a material fact.

### **Option #2**

(4) Recovery of erroneous refund. An erroneous refund shall be considered an underpayment of tax on the date made, and an assessment of a deficiency arising out of an erroneous refund may be made at any time within 3 years from the making of the refund except as otherwise provided in subsection (c)(1)(B) of this section.~~except that the assessment may be made within 5 years from the making of the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.~~

(5) Request for prompt assessment. If a return is required for a decedent or for ~~his~~ the decedent's estate during the period of administration, the tax shall be assessed within 18 months after written request therefor (made after the return is filed) by the executor, administrator or other person representing the estate of such decedent, but not more than 3 years after the return was filed, except as otherwise provided in this subsection and subsection (d).

(6) For the purposes of this subsection a taxpayer's inadvertence, reliance on incorrect technical advice, honest difference of opinion, negligence, or carelessness shall not constitute false or fraudulent conduct.<sup>110</sup>

(d) Omission of income on return. The tax may be assessed at any time within 6 years after the return was filed if--

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<sup>110</sup> N.J. ADMIN. CODE § 18:2-2.9(d).



(1) An individual omits from ~~his~~their New Jersey income an amount properly includible therein which is in excess of 25% of the amount of New Jersey income stated in the return; or

(2) An estate or trust omits income from its return in an amount in excess of 25% of its income determined as if it were an individual, computing ~~his~~their New Jersey income under this act.

For purposes of this subsection there shall not be taken into account any amount which is omitted in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the director of the nature and amount of such item.

(e) Suspension of running of period of limitation. The running of the period of limitations on assessment or collection of tax or other amount (or of a transferee's liability) shall, after the mailing of a notice of deficiency, be suspended for the period during which the director is prohibited under subsection (c) of section 54A:9-2 from making the assessment or from collecting by levy.

#### Comments

The Commission recommends that the statute be updated to reflect gender-neutral language throughout.<sup>111</sup>

##### *Subsection a.*

Subsection a. establishes the three-year statute of limitations on assessments. There are no proposed modifications for this subsection. This section has been included in the Appendix for reference.

##### *Subsection c.*

This subsection sets forth the exceptions to the limitations on assessments. The Commission recommends the removal of the capital letters used at the beginning of subsections (c)(1)(A) – (c) to improve the readability of this subsection. In addition, the Commission recommends dividing subsection (c)(1)(C) into additional subsections and the removal of extraneous language to improve the accessibility and readability of this subsection.

Proposed language appears in subsection (c)(1)(B) to address instances in which the taxpayer files a false or fraudulent return with the intent to evade tax and that filing results in the issuance of a refund. Staff seeks the direction of the Commission regarding the necessity of including this language in the statute.

There are no modifications recommended to subsection (c)(2).

With the exception of the inclusion of gender-neutral language, there are no proposed modifications to the substance of subsection (c)(3).

Subsection (c)(4) sets forth the erroneous refund exception to limitation on assessments. The introductory language of this subsection establish that an erroneous refund is considered an underpayment of tax on the date that it

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<sup>111</sup> See N.J. STAT. ANN. § 54A:9-4(c)(1)(C), (c)(3), (c)(5), (d)(1) - (2),

is made. The balance of the subsection sets forth the conditions under which the taxing authority may issue an assessment.

Staff seeks the direction of the Commission regarding the structure of subsection (c)(4).

### ***Option #1***

Option number one divides this subsection into additional subsections and recommends the removal of seemingly superfluous language to improve the accessibility and readability. This option retains the bifurcated structure contained in the original statute. Subsection (c)(4)(A) maintains the reference to the three-year statute of limitations as discussed in *Malhotra*.

In the newly proposed subsection (c)(4)(B) the reference to the five-year statute of limitations has been removed along with the language relative to the “misrepresentation of a material fact.” The language regarding the five-year statute of limitations would be replaced with language consistent with the language set forth in (c)(1)(B) – involving the filing of a “false or fraudulent” return. This would allow the taxing authority to issue an assessment *at any time* when they have determined that the taxpayer has filed a false or fraudulent tax return.

### ***Option #2***

Option number two retains the structure of the subsection as enacted. In this option, the proposed modifications eliminate, as seeming surplusage, the reference to fraud because the concept of fraud is addressed in subsection (c)(1). The proposed language, bracketed in subsection (c)(1) sets forth a reference to fraud that results in a refund should the Commission wish to retain such a reference.

Other than language to render the subsection gender-neutral, no modifications are recommended in subsection (c)(5).

The language from the New Jersey Administrative Code, N.J.A.C. 18:2-2.9(d) is set forth in subsection (c)(6). The proposed language clarifies that inadvertence, reliance on incorrect technical advice, honest difference of opinion, negligence, or carelessness do not constitute an intent to commit fraud.

### ***Subsection d.***

Other than language to render the subsection gender-neutral, no modifications are recommended in subsection (d).

### ***Subsection e.***

There are no proposed modifications for this subsection. This section has been included in the Appendix for reference.