

MEMO# 19125

August 29, 2005

NEW JERSEY APPELLATE COURT REJECTS "PHYSICAL PRESENCE" TEST AND REVERSES LANCO "ECONOMIC NEXUS" CASE

©2005 Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice. [19125] August 29, 2005 TO: ADVISER DISTRIBUTOR TAX ISSUES TASK FORCE No. 7-05 TAX MEMBERS No. 23-05 RE: NEW JERSEY APPELLATE COURT REJECTS "PHYSICAL PRESENCE" TEST AND REVERSES LANCO "ECONOMIC NEXUS" CASE The New Jersey Appellate Court has reversed a 2003 decision of the New Jersey Tax Court in the attached opinion *Lanco, Inc. v. Director, Division of Taxation* ("Lanco II")¹ and ruled that New Jersey may apply its corporation business tax to a nonresident entity with no physical presence in New Jersey.² In the lower court decision of *Lanco, Inc. v. Director, Division of Taxation*, 21 N.J. Tax 200 (2003) ("Lanco I"), the New Jersey Tax Court ruled that a jurisdiction cannot impose an income tax on a taxpayer unless there is physical presence within the jurisdiction of the taxpayer, its employees, agents or personal property. The New Jersey Tax Court concluded that a taxpayer must have some kind of physical presence in a jurisdiction to create the substantial nexus required by the Commerce Clause of the United States Constitution, as applied in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), which held that physical presence was necessary in the context of a sales and use tax. The New Jersey Appellate Court reversed Lanco I's decision by applying a narrow reading of *Quill*, holding that the physical presence test applies only to sales and use taxes and not to income taxes. The Appellate Court viewed as more persuasive authority the South Carolina Supreme Court's decision in *Geoffrey Inc. v. South Carolina Tax Comm'n*, 437 S.E. 2d 13, cert. denied, 510 U.S. 992 (1993). In *Geoffrey*, the South Carolina Supreme Court concluded "it is well settled that the taxpayer need not have a tangible, physical presence in a state for 1 N.J. App. Div., No. A-3285-03T1 (August 24, 2005). The Institute filed a brief supporting the taxpayer's position as amicus curiae in Lanco II. See Institute Memorandum (17890) to Tax Members No. 38-04 and Advisor Distributor Tax Issues Task Force No. 9-04, dated August 11, 2004. 2 The taxpayer in Lanco II is a Delaware corporation that owns certain intangible property, including trademarks, trade names and service marks. The taxpayer has no offices, employees, real or tangible property in New Jersey. It licenses the right to use its intangible property to an affiliated retailer that conducts retail operations in New Jersey. 2 income to be taxable there. The presence of intangible property alone is sufficient to establish nexus."3 Lisa Robinson Associate Counsel Attachment (in .pdf format) Note: Not all recipients receive the attachment. To obtain a copy of the attachment, please visit our members website

(<http://members.ici.org>) and search for memo 19125, or call the ICI Library at (202) 326-8304 and request the attachment for memo 19125. 3 Geoffrey, 437 S.E. 2d, 13, 18 cited in Lanco II.

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