2018-2019 NEW YORK STATE BUDGET BILL: WHAT'S IN, WHAT'S OUT & WHAT IT ALL MEANS

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State Tax Outline for the Summer Meeting of the Tax Section of the NYSBA

I. Federal Conformity -- Corporations

A. Federal Changes:

1. Deemed Repatriation / "Toll Charge" under IRC § 965

Requires certain U.S. shareholders to include as Subpart F income a pro rata share of accumulated earnings and profits of foreign subsidiaries. This is a one-time event.

2. Global Intangible Low-Taxed Income (GILTI)

Annual inclusion of a U.S. shareholder's pro rata share of a controlled foreign corporation's "global low taxed income." I.R.C. § 951A. Includes a rate-effecting deduction under § 250.

3. Full Expensing of Purchases and Business Interest Expense Limitation

Companies can elect to fully expense, rather than depreciate, certain purchases placed into service after September 27, 2017 and before January 1, 2023. A corresponding limitation was enacted that limits the benefit of interest expenses (such as interest that finances purchases that are fully depreciated). Certain business interest deductions are limited to 30% adjusted gross income.

B. New York's Response to the Federal Changes:

1. Proposals: See Response to the Federal Tax Cuts and Jobs Act, NYS Department of Taxation and Finance, https://www.tax.ny.gov/research/stats/stat_pit/preliminary-report-tcja-2017.htm.

2. On April 12, 2018, the Governor signed the 2019 Budget Legislation. The Budge Legislation address the Repatriation Issue (by treating any repatriation income was "other exempt income." However, GILTI was not addressed. The draft legislation purported to address it, however, the enacted legislation did not.

II. Federal Mitigation – New York's Legislative Response to the TCJA

A. Federal Changes:

1. Federal Changes: The TCJA eliminated many itemized deductions and reduced the personal itemized Schedule A deduction for State and Local Taxes to $10,000 for 2018 and subsequent years.

2. For 2017 and prior tax years, the deduction had been unlimited, and it had been in the Federal Tax Code since the Revenue Act of 1916, which was made possible by the February, 1913 ratification of the Sixteenth Amendment to the US Constitution.

3. Studies showed that more than 88% of the deduction benefited high income taxpayers who itemized their deductions and with income over $100,000. New York and California received more than 1/3 of the total benefit. Six states, California, New York, New Jersey, Illinois, Texas and Pennsylvania, claimed more than half of the total benefit. *See* Tax Foundation, The State and Local Tax Deduction: A Primer (March 15, 2017).

4. The TCJA was designed to lower rates, increase the standard deduction, reduce the number of taxpayers claiming the itemized deduction, and produce a net tax decrease for most taxpayers. But it also seemed to punish "Blue" states, resulting in a backlash and protective steps by New York, CT, California, New Jersey and some other states.

5. The IRS, in turn, has announced that it will closely watch steps by states to circumvent the SALT deduction limits of the new law.

B. New York's Response to the Federal Changes:

1. Proposals: See Response to the Federal Tax Cuts and Jobs Act, NYS Department of Taxation and Finance, https://www.tax.ny.gov/research/stats/stat_pit/preliminary-report-tcja-2017.htm.

2. On April 12, 2018 The Governor signed the 2019 Budget Legislation, which included ways to reduce the limitation on itemized and SALT deductions.

3. Retention of Certain Itemized Deductions. At the state level, alimony, moving expenses, mortgage interest and real estate taxes remain deductible as if the federal law did not change, and taxpayers can itemize even if they take the standard deduction on their federal return.

4. Payroll Tax and Charitable Contribution as Substitutes for the SALT Taxes. To avoid the harsh impact of the $10,000 limit on deductible state and local taxes, the Budget Legislation includes two alternatives:

(a) The first is via a payroll tax deduction in lieu of a state income tax. Under new Article 24 of the NY Tax Law, employers may make an annual election to pay a new state payroll tax applicable in the tax year following the year of the election. 2019 will be the first year when the new tax could apply, and it only applies to income over $40,000.

-- The rate of the tax is only 1.5% for 2019, 3% for 2020, and 5% after 2020. Employers would deduct the tax as a business expense. Presumably employers would pay this tax and reduce the income taxes payable by their employees, and would reimburse themselves by reducing a wage increase that might have been awarded. Employees would then pay federal income taxes on their reduced compensation, and employers would deduct as taxes amount they might have otherwise awarded as a wage increase.

-- Employers might have employees in two companies, one for those who would benefit from this tax (mainly highly-compensated employees who live and work in NYS) and one for those not eligible (with income below $40,000) or not viewing this as a benefit (such as a Vermont or California resident who might not get a credit for taxes paid by their employer).

-- Potential tax savings? When the tax is at the 5% level, federal and state tax saving should be about $18,000 per million in taxable income.

(b) Under the second alternative, real estate or income taxes can be paid to new charitable gift trusts set up by a state or a school district or municipality. The taxpayer makes contributions in one year and gets an 85% credit against their income or 95% against their real estate taxes in the next year. The qualified state charities include Health Research, Inc., the SUNY Impact Foundation, and the Research Foundation of the City University of New York.

-- For income taxes, the credit is 85%, meaning the remaining 15% of state income taxes is payable. The net benefit at the highest state tax rate of 8.82% seems to be about $14,000 per million of income.

(c) Other States: CT, NJ, NY and Oregon are among the states that have passed similar legislation.

5. The New York State Department of Taxation and Finance released for comment a draft bill to enact a new unincorporated business tax whose stated purpose is to provide relief to individual New York State taxpayers who would be subject to the $10,000 limitation on deductible state and local income taxes. *See* Mayer Brown, Using a Sledgehammer to Kill a Fly: New York State Considers Unincorporated Business Tax and Seeks Comments (May 18, 2018).

6. *See*, The Business Council, FY 2019 Budget Summary – Taxation.

7. *See*, Noonan's Notes Blog, Highlights from the 2019 Budget Bill (April 11, 2018).

C. The IRS Response to New York's Response:

1. Announcements by the Treasury or the IRS: On May 23, 2018 Treasury and the IRS issued a Notice that they intend to propose regulations to attack or curtail the charitable contribution technique, applying substance over form principles. Notice 2018-54, I.R.B. 2018-24, May 23, 20018. *See* Mayer Brown, IRS to Propose Regulations on Certain States' SALT Deduction Charitable Contribution Workaround (May 23, 2018).

2. Congress was aware that states might attempt these methods to soften the impact of the Federal changes, but did not legislatively address them. For years the IRS has characterized "donations" to private school vouchers, a state wildlife fund, etc. as charitable contributions, even when accompanied by a credit against state taxes. But now the stakes are higher. Some question whether the Treasury or IRS can successfully challenge these techniques, or whether Congress needs to weigh in on specific approaches.

3. *See* Institute on Taxation and Economic Policy, SALT/Charitable Workaround Credits Require a Broad Fix, Not a Narrow One (May 23, 2018):

"While these workaround credits have attracted significant attention in recent months, this type of abuse of the charitable giving deduction has been occurring for many years. Taxpayers have long claimed federal charitable deductions on so-called "charitable gifts" for which the taxpayer received a reimbursement from their state government via a tax credit."

"The closest parallel to these workaround credits in existing tax law is a policy typically favored by conservatives: tax credits that steer funding to private K-12 school vouchers. Tax accountants, private schools, and others in states with such credits have long marketed these programs as tools for exploiting the federal charitable deduction, and in the wake of the new federal tax law they are now using language that mirrors that used by proponents of the new workaround credits. While blue-state efforts to circumvent the SALT cap have attracted more attention, financial advisors in deep-red Alabama and elsewhere are touting the ability of their existing charitable tax credits to help their residents "avoid losing" their SALT deductions. And the sales pitch has proven persuasive. Alabama's entire allotment of private school tax credits was claimed more quickly this year than ever before."

III. Qualified New York Manufacturer

a. The benefit

For tax years beginning on or after January 1, 2015, New York provided a benefit for corporations "primarily engaged" in certain manufacturing or similar activities (*e.g.*, assembly, processing, etc) that also met a $1MM New York property threshold. N.Y. Tax Law § 210.1(a)(vi). A corporation or combined group of corporations is "primarily engaged" if greater than 50% of the gross receipts of the corporation or combined group of corporations for a taxable year was from the sale of goods produced by such activities. *Id.* The property value threshold is measured by reference to adjusted basis for federal income tax purposes. *Id.* If both the "primarily engaged" and property thresholds are met—or an alternative test related to employees and property is met—the corporation (or combined group of corporations) qualify as a "qualified New York manufacturer," which results in 0% business income base tax rate, a reduced capital base tax rate and capital base tax maximum, and a reduced fixed dollar minimum tax. N.Y. Tax Law §§ 210.1(a)(vi), (b)(1), (d)(1)(C). A corresponding real estate benefit also is available.

b. Impact of Federal Reform

The TCJA did not directly impact the QNYM provision. However, because some corporations may chose to fully expense new assets, rather than depreciate them, a corporation's computation of its adjusted basis in qualifying property could be impacted. This would not impact the computation of adjusted basis for property already placed in service. But as new property is placed in service, it would have a basis of zero (if fully expenses) and therefore not count toward the $1MM threshold.

c. **New York Response**—None yet.

If the Department wants to fulfill the Legislature's intent and make the benefit readily available to those who had sufficient property in the state using the federal measurement in effect when the New York Legislature enacted the provision (i.e., pre-TCJA), it could promulgate a regulation indicating that *for purposes of this provision only*, the reference to the I.R.C. was a reference to the I.R.C. "in effect on 1/1/2015." *See, e.g.*, Idaho Admin. Code r. 35.01.01.716.01 (interpreting Idaho incentive statute's reference to I.R.C. § 46(c) as meaning I.R.C. § 46(c) as it existed before it was later deleted by Congress).

IV. Procedural

1. See NY LEGIS 59 (Part H) (extension of statute of limitations for amended returns)

2. The general period of limitations for assessment of tax is three years after the filing of a return. *See* Tax Law §§ 683(c), 1083(c), and City of New York Administrative Code § 11-1783(c). There are numerous exceptions, but previously, the filing of an amended return was not one of them.[1]

3. New legislation has amended each of these statutes to extend the statute of limitations for assessment by one year after the filing of an amended return. For example, New York Tax Law § 683(c) now provides:

> (12) Except as otherwise provided in paragraph three of this subsection, or as otherwise provided in this section where a longer period of time may apply, if a taxpayer files an amended return, an assessment of tax (if not deemed to have been made upon the filing of the amended return), including recovery of a previously paid refund, attributable to a change or correction on the amended return from a prior return may be made at any time within one year after such amended return is filed.

4. The stated purpose for this extension of the statute of limitations was to limit refund abuse:

> The Executive Budget will reduce refund abuse by extending the statute of limitations to three years after the filing date of the amended return, rather than three years after the original return filing date. Currently, taxpayers can file an amended return containing a refund request close to three years after the due date of their initial return, hampering the possibility of an audit and assessment by DTF. FY 2019 Executive Budget Briefing Book, at 18.

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[1] Under the Internal Revenue Code, for amended returns filed within the 60-day period ending on the day on which the statute of limitations would otherwise expire, the IRS has an additional 60 days to assess additional tax. IRC § 6501(c)(7). New York Tax Law did not have a similar provision.

5. Note, however, the legislature only enacted a one year, and not a three-year (as proposed), extension of the statute of limitations after the filing of an amended return.

6. The new statute of limitations provisions state that the extended period will be "attributable to a change or correction on the amended return from a prior return." Accordingly, the filing of an amended return should only extend the statute of limitations with respect to the adjustments and new items on the amended return. However, this may not turn out to be the case, as the New York State Department of Taxation and Finance and the New York City Department of Finance often review and examine all aspects of the return when an amended return is filed. *See e.g. Bankers Trust Corp. v. New York City Dept. of Finance*, 750 N.Y.S.2d 29, 35-36 (1st Dep't 2002).

V. Sales Tax

1. See NY LEGIS 59 (Part X) (Provide Responsible Person Sales Tax Relief for Minority LLC Owners)

2. Previously, Tax Law § 1131(1) imposed absolute liability on partners of partnerships (and members of LLC's) for unpaid sales taxes of the entity.

3. The Department of Taxation had an administrative policy, described in Technical Memorandum TSB-M-11(17) S (Sept. 19, 2011) (the "TSB"), to provide partial relief from absolute liability. The TSB stated that a limited partner with less than a 50% ownership interest who did not have a "duty to act" in assuring compliance with the sales tax laws, would be liable only for the amount of sales tax allocable to the percentage of ownership in the business, plus interest at the statutory rate (but not penalties). For example, under the TSB, a limited partner with a 20% ownership interest in the entity and no duty to act, would only be required to pay 20% of the entity's sales tax liability, plus interest.

4. The meaning of "duty to act" is described in case law as where the person "possessed all the indicia of control that would impose liability upon an officer, director or employee of a corporation." *Matter of Ianniello v. New York Tax Appeals Trib.,* 209 A.D.2d 740, 741 (1994). Some of the facts and circumstances are the person's status, the authority to hire and fire employees, and responsibility for the entity's management. *Luongo v. New York Tax Appeals Trib.*, 987 N.Y.S.2d 114, 116 (3 Dept. 2014)

5. The TSB was recently codified in Tax Law § 1133(a)(2). The reason for the codification was that "[t]he existing language of the state law that creates personal liability in passive investors is not just grossly unfair, it could deter investment in New York State businesses." *See* "Justification" of Assembly Bill 1983. New York Tax Law § 1133(a)(2) now states as follows:

(2) Notwithstanding any other provision of this article:

> (i) The commissioner shall grant the relief described in subparagraph (iii) of this paragraph to a **limited partner of a limited partnership** (but not a partner of a limited liability partnership) **or a member of a limited liability company if such limited partner or member demonstrates to the satisfaction of the commissioner that such limited partner's or member's ownership interest and the percentage of the distributive share**

of the profits and losses of such limited partnership or limited liability company are each less than fifty percent, and such limited partner or member was not under a duty to act for such limited partnership or limited liability company in complying with any requirement of this article. Provided, however, the commissioner **may deny** an application for relief to any such limited partner or member who the commissioner finds **has acted on behalf of such limited partnership or limited liability company in complying with any requirement of this article or has been convicted of a crime provided in this chapter or who has a past-due liability**, as such term is defined in section one hundred seventy-one-v of this chapter.

(ii) Such limited partner or member **must submit an application for relief**, on a form prescribed by the commissioner, and the information provided in such application must be true and complete in all material respects. Providing materially false or fraudulent information on such application shall disqualify such limited partner or member for the relief described in subparagraph (iii) of this paragraph, shall void any agreement with the commissioner with respect to such relief, and shall result in such limited partner or member bearing strict liability for the total amount of tax, interest and penalty owed by their respective limited partnership or limited liability company pursuant to this subdivision.

(iii) A limited partner of a limited partnership or member of a limited liability company, who meets the requirements set forth in this paragraph and whose application for relief is approved by the commissioner, **shall be liable for the percentage of the original sales and use tax liability of their respective limited partnership or limited liability company that reflects such limited partner's or member's ownership interest of distributive share of the profits and losses of such limited partnership or limited liability company, whichever is higher**. Such original liability shall include any interest accrued thereon up to and including the date of payment by such limited partner or member at the underpayment rate set by the commissioner pursuant to section eleven hundred forty-two of this part, and shall be reduced by the sum of any payments made by (A) the limited partnership or limited liability company; (B) any person required to collect tax not eligible for relief; and (C) any person required to collect tax who was eligible for relief but had not been approved for relief by the commissioner at the time such payment was made. Provided, however, such limited partner or member shall not be liable for any penalty owed by such limited partnership or limited

> liability company or any other partner or member of such limited partnership or limited liability company. Any payment made by a limited partner or member pursuant to the provisions of this paragraph shall not be credited against the liability of other limited partners or members of their respective limited partnership or limited liability company who are eligible for the same relief; provided, however that the sum of the amounts owed by all of the persons required to collect tax of a limited partnership or limited liability company shall not exceed the total liability of such limited partnership or limited liability company. New York Tax Law § 1133(a)(2) (emphasis added).

6. As can be seen from the above, the statute excludes from relief persons who have:

- acted on behalf of such limited partnership or limited liability company in complying with any requirement of this article
- been convicted of a tax crime; or
- a past due liability.

7. It is not entirely clear what "has acted on behalf of such limited partnership or limited liability company in complying with any requirement of this article" means, but we hope that this means that persons who try to intervene in the management of the business to get the company into compliance or make arrangements to pay *will not* be barred from relief, but that this exception is for persons who somehow tried to thwart collection and payment of a liability.

8. "Past due liability" is defined in Tax Law § 171-v (the provision that allows for enforcement of delinquent tax liability through suspension of driver's licenses), as "any tax liability or liabilities which have become fixed and final such that the taxpayer no longer has any right to administrative or judicial review."

9. It is not clear from the statute whether the requirement for driver's license suspension that the amount of the liability must be "equal to or in excess of $10,000" or whether a smaller amount will disqualify the person from relief. It is also not clear whether a taxpayer who is in compliance with an installment payment agreement would be barred from relief. Either way, taxpayers should try to clear up any delinquencies before applying for relief under § 1133(a)(2).

VI. Personal Income Tax Legislation – The Sobotka Repeal and 457A Guidance

A. Sobotka Legislation:

1. For personal income tax purposes, New York defines a resident as an individual who is either a domiciliary or a statutory resident. Tax Law §605(b). Generally, for tax years before 2019, a statutory resident is a person who is **not domiciled** in the State (or in New York City for City income tax purposes) but who maintains a permanent place of abode in NY for substantially all of the calendar year and who spends in the aggregate more than 183 full or part days in NY in that calendar year. Tax Law §605(b)(2).

2. In *David and Karen Sobotka* (ALJ Order DTA NO. 826286 August 20, 2015), the taxpayers were in NY for more than 183 full or part days but were domiciled in NY for a portion of the year. The NYS DTF argued that they were statutory residents for the full calendar year, but the taxpayers, citing the "not domiciled" language of the statute, argued that the statutory residency test could only be applied to the portion of the year when they were not domiciled in NY.

3. As support for this argument, the taxpayers examined the history of the "statutory resident" definition. The provision was added originally in 1922 (Article 16, §350(7), and at that time it covered a person who had an abode and spent in the aggregate more than 183 days of the taxable year within the state, **"whether or not domiciled in the state during any portion of said period...".**

4. By contrast, the law applicable to the Sobotka tax years contained an additional requirement. When the law was amended in 1987, it added the domicile limitation, and said that a person **not domiciled** in NY could be taxed as a statutory resident. Laws of 1987 (Ch. 267, § 10, effective July 20, 1987). The amendment did not include the "whether or not domiciled …" language of the prior law.

5. The Judge concluded that "This distinction strongly supports the conclusion that for purposes of determining statutory resident status during a portion of a given year, one may not count days that fall within the domicile-based resident portion of that same year." The taxpayers won, and were taxed as residents for the period they were domiciled in NY, but not taxed as statutory residents for the entire year because, in the nondomiciliary period, they were in NY less than 183 days.

6. Legislative solution: the 2018-19 Budget Bill proposed a reversal of Sobotka, **retroactive for all open years**. See 2018-2019 New York State Executive Budget Part O. Essentially, the Bill wanted to reinsert the language that was deleted in the 1987 amendment, so that a person could be taxed as a statutory resident **"whether or not domiciled in the state during any portion of said period…."**

7. The NYSBA Tax Section Report 1391 dated March 9, 2018 at pages 22-26 read, in part, as follows:

(a) Substantive Argument:

"The Court of Appeals has twice held (in Gaied v. N.Y. Tax Appeals Tribunal and Tamagni v. Tax Appeals Tribunal of the State of New York) that the legislative history of the statutory residency provision was to tax as residents those individuals who "for all intents and purposes" were residents of New York State, but claimed domicile elsewhere. While we take no position on whether the Legislature should amend the Tax Law's statutory residency provisions to reject the analysis of the administrative law judge in Sobotka, we note that the proposed amendment would have the effect of taxing individuals as full-year residents of New York when they are "for all intents and purposes" only part-year residents."

(b) Effective Date Argument:

Originally, the Budget Bill proposed a retroactive change. “The changes proposed in Part O of the Budget Bill take effect immediately and apply to all tax years for which a statute of limitations for seeking a refund or assessing additional tax is still open.”

Our Tax Section Report took issue with retroactivity. We argued that this was a change, not just a clarification.

“Absent compelling circumstances, changes to longstanding statutes should not be made retroactively applicable. Here, the only rationale for retroactive application would seem to be generating additional tax revenue, which is not, alone, a compelling justification. We appreciate the goal of revenue protection. But, retroactively effective legislation, in addition to being susceptible to Constitutional challenges, is almost never good policy. Inasmuch as the current law fully comports with the legislative history of the current law, and the specific provision in question was tested by an August 2015 Division of Tax Appeals case that the Department chose not to appeal, retroactive application would not be good policy in this instance.”

8. Legislative Change: The statutory change was enacted, but is only effective for tax years beginning after the 2018 date of enactment. So the change is effective in 2019 for calendar year taxpayers.

B. 457 A Guidance:

1. Code Section 457A was enacted in 2008 and required inclusion of certain deferred income no later than December 31, 2017. Generally, it applied to deferrals such as incentive management fees for services rendered to offshore hedge funds.

2. New York was surprisingly silent on the taxation of this income. If a resident received it in 2017, they would be taxed. But what if the recipient was a nonresident at the time of receipt? Would the deferral be treated as New York source income if it was deferred from a year when the person (or partnership or LLC) worked in New York?

3. TSB-M-18(2)C, (3)I was issued on April 6, 2018 and is applicable to resident and nonresident individuals, proprietorships, partnerships, LLC’s, estates and trusts and Article 9-A taxpayers (corporations). Generally, for nonresidents, the income is taxed to the extent the business was carried on in New York. The TSB-M reads, in part, as follows:

“The amount of such nonqualified deferred compensation that must be included in a nonresident’s New York source income is determined as follows: • If the business, trade, profession, or occupation was carried on wholly in New York State in the tax year the services were performed, the entire amount of nonqualified deferred compensation must be included in New York source income. • If the business, trade, profession, or occupation was carried on wholly outside New York State in the tax year the services were performed, none of the nonqualified deferred compensation is included in New York source income. • If the business,

trade, profession, or occupation was carried on partly in and partly outside New York State during the tax year the services were performed, the amount of nonqualified deferred compensation to be included in New York source income is determined using the rules described below for: ◦ an employee, if the nonresident performed the services as an employee; or ◦ a business, if the nonresident was carrying on a business in New York State. For purposes of this memorandum, a business includes sole proprietorships and partnerships (including LLCs and LLPs that are treated as partnerships for federal income tax purposes). For the allocation rules for income earned as a nonresident shareholder of a New York S corporation, see Taxation under Article 9-A below."

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3. NY LEGIS 59 (Part LL, MM, EEE) (Charitable Contributions & Payroll Tax)

4. Mayer Brown, Using a Sledgehammer to Kill a Fly: New York State Considers Unincorporated Business Tax and Seeks Comments (May 18, 2018).

5. The Business Council, FY 2019 Budget Summary – Taxation

6. Noonan's Notes Blog, Highlights from the 2019 Budget Bill (April 11, 2018).

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7. Notice 2018-54, I.R.B. 2018-24, May 23, 20018.

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13. Technical Memorandum TSB-M-11(17) S (Sept. 19, 2011).

14. *Matter of Ianniello v. New York Tax Appeals Trib*., 209 A.D.2d 740 (1994).

15. *Luongo v. New York Tax Appeals Trib*., 987 N.Y.S.2d 114 (3 Dept. 2014).

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18. Tax Law §605(b).

19. *David and Karen Sobotka* (ALJ Order DTA NO. 826286 August 20, 2015).

20. NY LEGIS 59 (Part X) (Provide Responsible Person Sales Tax Relief for Minority LLC Owners).

21. NYSBA Tax Section Report 1391 dated March 9, 2018.

B. 457 A Guidance:

22. TSB-M-18(2)C, (3)I (April 6, 2018).

FISCAL FACT
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The State and Local Tax Deduction: A Primer

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Key Findings

- Taxpayers who itemize deductions on their federal income tax are permitted to deduct certain taxes paid to state and local governments from their gross income for federal income tax liability purposes.
- State and local tax deductibility would be repealed under the House Republican Blueprint, and capped—along with other itemized deductions—under the campaign plan put forward by President Donald Trump.
- The state and local tax deduction disproportionately benefits high-income taxpayers, with more than 88 percent of the benefit flowing to those with incomes in excess of $100,000.
- The deduction favors high-income, high-tax states like California and New York, which together receive nearly one-third of the deduction's total value nationwide. Six states—California, New York, New Jersey, Illinois, Texas, and Pennsylvania—claim more than half of the value of the deduction.
- The state and local tax deduction in New York and California represents 9.1 and 7.9 percent of adjusted gross income respectively, compared to a median of 4.5 percent.
- The deduction reduces the cost of state and local government expenditures, particularly in high-income areas, with lower-income states and regions subsidizing higher-income, higher-tax jurisdictions.

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Introduction

For Ronald Reagan, it was "the most sacred of cows."[1] To Donald Regan, his Secretary of the Treasury, it was a "dragon" to be slayed.[2] Whatever its taxonomy, the state and local tax deduction has proved resilient, warding off foes for decades. It has withstood the accusation that it is regressive, rewarding high-income taxpayers. It has persevered despite being labeled a subsidy of wealthy, high-tax states funded by the rest of the country. It has endured economists' suspicion that it distorts state and local government expenditures. Thanks to the tenacious support it enjoys in some quarters, it has survived parries from the left and from the right. Again imperiled by the House Republican tax reform plan, which would eliminate all itemized deductions save those for mortgage interest and charitable contributions, its long-heralded demise might actually be in sight.

Applicability of the Deduction

Under current law, taxpayers who itemize are permitted to deduct certain nonbusiness tax payments to state and local governments from their taxable income. An individual may choose to deduct either state individual income taxes or general sales taxes, but not both, and may also deduct any real or personal property taxes.[3] Most filers elect to deduct their state and local income taxes rather than sales taxes, because income tax payments tend to be larger, but those who reside in states which forego an income tax, or who have uncommonly high consumption expenditures in a given year, may opt to deduct sales taxes instead. The sales tax deduction may be taken either by documenting actual expenses or through the use of an optional sales tax table based on personal income.[4]

In tax year 2014, more than 95 percent of all itemizers, and 28 percent of all federal income tax filers, took a deduction for state and local taxes. Roughly 21.8 percent of filers deducted income taxes, while 6.5 percent elected to deduct sales taxes instead. Most itemizers are homeowners, so 25.1 percent of filers (representing 84.7 percent of itemizers) also took the deduction for real property taxes.[5] Taken together, deductions for state and local taxes represent the sixth largest individual income tax expenditure, estimated to be worth more than $100 billion per year by fiscal year 2018[6] even though most filers do not itemize.[7]

1 Sarah F. Liebschutz & Irene Lurie, "The Deductibility of State and Local Taxes," *Publius* 16, no. 3 (Summer 1986): 51.

2 Jeffrey Birnbaum & Alan Murray, *Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform* (New York: Random House, Inc., 1987), 48.

3 Internal Revenue Service, "Topic 503 – Deductible Taxes," https://www.irs.gov/taxtopics/tc503.html.

4 Yuri Shandusky, "State and Local Tax Deductions," *Tax Notes* (July 1, 2013): 87.

5 Internal Revenue Service, *Statistics of Income*, Historical Table 2, 2014, https://www.irs.gov/uac/soi-tax-stats-historic-table-2.

6 U.S. Department of the Treasury, "Tax Expenditures [FY 2018]," Department of Tax Analysis, Sept. 28, 2016, https://www.treasury.gov/resource-center/tax-policy/Documents/Tax-Expenditures-FY2018.pdf, 34. For purposes of rankings, we combine defined contribution and defined benefit employer pension plans into one larger expenditure, as we do with the components of state and local tax deductibility. With all expenditures considered separately, deductibility of state and local taxes other than those on owner-occupied homes currently ranks seventh, while deductibility for taxes paid on owner-occupied homes ranks twelfth.

7 Internal Revenue Service, *Statistics of Income*.

The value of the deduction is lessened for some payers by the Pease limitation, which reduces itemized deductions by 3 percent of the amount that a taxpayer's adjusted gross income exceeds an indexed threshold,[8] and by the alternative minimum tax. The House Republican tax plan, like several before it, would repeal the deductibility of state and local taxes outright (along with most other itemized deductions) in favor of significantly lower rates.[9]

History of State and Local Tax Deductibility

The deductibility of state and local taxes is older than the current federal income tax itself. The provision has its origin in the nation's first effort at income taxation (eventually found unconstitutional) under the Civil War-financing Revenue Act of 1862, and was carried over into the Revenue Act of 1913, the post-Sixteenth Amendment legislation creating the modern individual income tax. The rationale for the original provision only comes down to us in fragments, though a fear that high levels of federal taxation might "absorb all [the states'] taxable resources," a concern first addressed in the *Federalist Papers*, appears to have held sway.[10] Lawmakers sought a bulwark against the possibility that "all the resources of taxation might by degrees become the subjects of federal monopoly, to the entire exclusion and destruction of state governments,"[11] and found it in a federal deduction for state and local taxes.

This caution would appear prescient as top marginal rates soared from 7 percent in 1913 to 77 percent by 1918 as American doughboys took to European fields, and in 1944, when the top rate skyrocketed to 94 percent at the height of the Second World War. Even in the postwar era, the top marginal rate would remain at 91 or 92 percent every year from 1951 until 1964, when it declined with the implementation of the Kennedy tax cuts.[12] During this era, the state and local tax deduction prevented combined federal, state, and local income tax rates from exceeding 100 percent.[13]

In time, however, the prudence of the provision would be called into question. Neglecting some modest tinkering—the exclusion of license fees and excise taxes on alcohol and cigarettes in 1964, and later the exclusion of motor fuel excise taxes—the state and local tax deduction went largely unchallenged until the U.S. Department of the Treasury, under the direction of Secretary William E. Simon, issued *Blueprints for Basic Tax Reform* in the waning days of the Ford administration. The report, issued in January 1977, recommended the retention of state and local income tax deductibility while jettisoning the deduction for sales and property taxes.[14]

8 Kyle Pomerleau, "The Pease Limitation on Itemized Deductions Is Really a Surtax," Tax Foundation Tax Policy Blog, Oct. 16, 2014, http://taxfoundation.org/blog/pease-limitation-itemized-deductions-really-surtax.

9 *See generally*, Kyle Pomerleau, "Details and Analysis of the 2016 House Republican Tax Reform Plan," Tax Foundation Fiscal Fact No. 516, July 5, 2016, http://taxfoundation.org/article/details-and-analysis-2016-house-republican-tax-reform-plan.

10 Liebschutz & Lurie, 52.

11 Alexander Hamilton, *Federalist* No. 31, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), 189-192.

12 *See generally*, Tax Foundation, "U.S. Federal Individual Income Tax Rates History, 1862-2013 (Nominal and Inflation-Adjusted Brackets)," Oct. 17, 2013, http://taxfoundation.org/article/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets.

13 Liebschutz & Lurie, 54.

14 Department of the Treasury, *Blueprints for Basic Tax Reform*, Jan. 17, 1977, https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Blueprints-1977.pdf, 93.

In 1983, Senator Bill Bradley and Congressman Dick Gephardt teamed up on a Democratic tax reform proposal that sought to proscribe the deduction, limiting it to income and real property taxes. A competing Republican plan introduced by Congressman Jack Kemp and Senator Bob Kasten would have retained it exclusively for real property taxes. Then, in 1984, at the behest of President Ronald Reagan and with Secretary Donald Regan at the helm, the Treasury unveiled a comprehensive tax reform proposal (retrospectively known as Treasury I) which incorporated the complete elimination of state and local tax deductibility.[15] After decades of quiet existence, the deduction was suddenly vulnerable, and the stage was set for it to assume a central role in the debate surrounding the Tax Reform Act of 1986.

"We were slaying a lot of dragons," Secretary Regan would later say, reminiscing about the heady days when, working in secret, a small cadre of Treasury staffers slashed through the tax code to develop a comprehensive tax reform proposal that could be championed by President Reagan.[16] Dragons, however, are not easily slain, and this one had powerful defenders.

A high-income and high-tax state, New York—and particularly New York's wealthy elite—benefited mightily from the deduction, which one congressman from the state termed "a matter of survival." Governor Mario Cuomo, Senator Alfonse D'Amato, and a powerful coalition studded with luminaries the likes of David Rockefeller (chairman of Chase Manhattan Bank), James Robinson III (chairman of American Express), and Laurence Tisch (chairman of Loews Corporation), joined by public sector unions and the Conference of Mayors, went to war. In time, proponents of state and local tax deductibility would forge alliances with other interests threatened by tax reform, and their advocacy very nearly derailed the entire tax reform agenda.[17]

In the end, the Tax Reform Act of 1986 did nothing more than withdraw the general sales tax deduction, which was later restored in part.[18] In 2005, an advisory panel convened by President George W. Bush declared that eliminating the deduction would offer a "cleaner and broader tax base" and a more equitable tax code, though nothing came of it.[19] But if the dragon had not been felled in the 1986 tax reform effort, neither had its foes. Today, the deductibility of state and local taxes again finds itself on the chopping block, recommended for elimination along with most other itemized deductions by the House Republican tax reform "Blueprint" championed by Speaker Paul Ryan and House Ways and Means Committee Chairman Kevin Brady. So too, the old arguments reemerge.

Four decades after the Treasury Department first floated the curtailment of deductibility, it is again necessary to consider the intended purposes of the state and local tax deduction and the arguments advanced for and against its continuation.

15 Louis Kaplow, "Fiscal Federalism and the Deductibility of State and Local Taxes in a Federal Income Tax," *82 Va. L. Rev.* 413 (1996): 416.

16 Birnbaum & Murray, 48.

17 *Id.*, 109-113.

18 Congressional Budget Office, "The Deductibility of State and Local Taxes," Feb. 2008, https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/02-20-state_local_tax.pdf, 4.

19 Gilbert Metcalf, "Assessing the Federal Deduction for State and Local Tax Payments," *National Tax Journal* 64, vol. 2 (June 2011): 565.

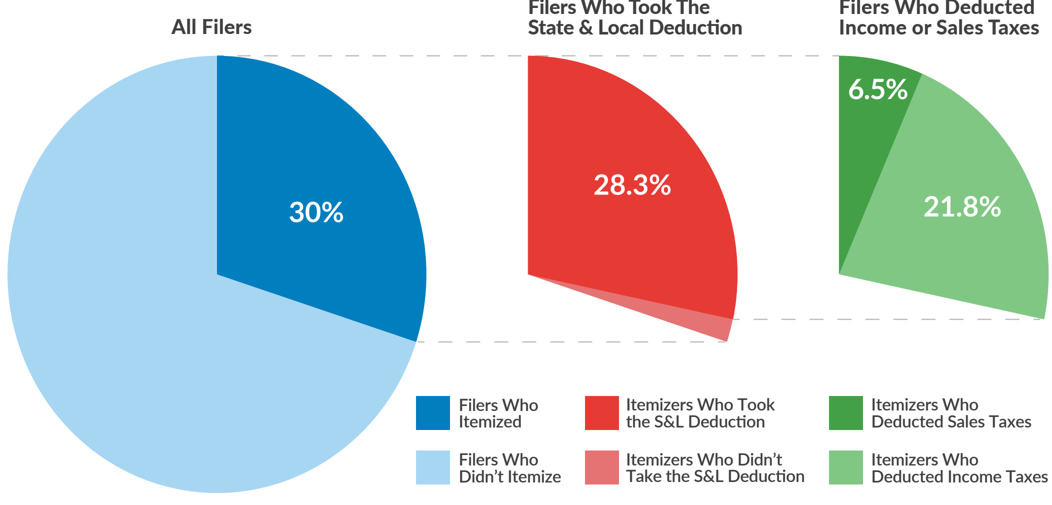
Opponents of the state and local tax deduction point out that it is regressive in that it is largely claimed by wealthier taxpayers, that it subsidizes higher taxes and potentially wasteful state and local spending, that it involves a transfer from lower-income to higher-income states, that it may encourage self-segregation by income groups, and that it favors public over private provision of certain services. Proponents counter that the deduction better aligns taxable income with ability to pay. They also argue that subsidization of local government expenditures offsets a tendency toward providing less than the optimal amount of government services, as determined by local taxpayers, due to what are known as spillover effects. Some local expenditures chiefly or exclusively benefit local residents, while others benefit residents and nonresidents alike. If residents are less willing to pay for government services that benefit nonresidents as well, they may settle on a lower level of service provision than they would prefer absent the spillover. Each of these arguments will be considered in turn.

Benefits for High-Income Taxpayers

The lion's share of state and local tax deductions are claimed by upper-income earners. Only 30 percent of all federal income tax filers itemized rather than claiming the standard deduction in tax year 2014. Of these, over three-quarters reported adjusted gross income (AGI) above $50,000, even though taxpayers with AGIs above $50,000 represent a mere 38 percent of all filers.[20] According to the Joint Committee on Taxation, more than 88 percent of the benefit of state and local tax deductions accrued to those with incomes in excess of $100,000 in 2014, while only 1 percent flowed to taxpayers with incomes below $50,000.[21] In 1984, a Treasury report went so far as to disparage the state and local tax deduction's "distributionally perverse pattern of subsidies."[22]

FIGURE 1.

What Percentage of Taxpayers Take the State & Local Deduction?



20 Internal Revenue Service, *Statistics of Income*.

21 The Joint Committee on Taxation, "Estimates of Federal Tax Expenditures for Fiscal Years 2015-2019," Dec. 7, 2015, https://www.jct.gov/publications.html?func=startdown&id=4857, 45-46.

22 Liebschutz & Lurie, 55.

A similar distribution is evident when comparing the value of the state and local tax deduction as a percentage of AGI for taxpayers in different income strata. Taxpayers with AGIs between $25,000 and $50,000 claim, in aggregate, state and local tax deductions worth 2.1 percent of AGI, whereas taxpayers with incomes above $500,000 claim deductions worth nearly 7.1 percent of AGI.[23] The elimination of deductibility would reduce the cash income of the top decile of income earners by 1.3 percent, but the reduction would be less than 0.1 percent for each of the bottom five deciles.[24]

TABLE 1.

Value of the State and Local Tax Deduction as a Percentage of AGI

Adjusted Gross Income	S+L Deduction Value as % of AGI	Percentage of Filers Itemizing
$0 - $24,999	2.06%	5.53%
$25,000 - $49,999	2.10%	19.77%
$50,000 - $99,999	3.95%	45.63%
$100,000 - $499,999	6.55%	80.55%
$500,000 +	7.07%	92.16%

Source: IRS Statistics of Income (2014)

Proponents sometimes posit that the elimination of deductibility would particularly disadvantage wealthy people who live in low-income communities, which could incentivize high-income earners to self-segregate in wealthier neighborhoods.[25] Studies, however, suggest that this effect would be quite modest, if it exists at all,[26] and that in many cases, the effect may run in the opposite direction. High-income earners who congregate in a single community, for instance, may support locally-funded amenities like golf courses and tennis courts, or more stately government buildings and costly public infrastructure—expenditures less likely to earn the support of high earners in mixed-income communities—while exporting some of the resulting tax burden to others.[27]

Subsidization of High-Income, High-Tax States

Just as the state and local tax deduction disproportionately favors wealthier taxpayers, it also benefits states which combine high incomes and high-tax environments. Reliance on the deduction varies widely: the average value of the state and local deduction as a percentage of AGI in the ten states with the highest reliance on the deductions is 6.09 percent, whereas it is only 3.81 percent in the bottom ten states. In New York, the deduction is worth 9.1 percent of AGI; the median across all states is just under 4.5 percent. More staggering, though, is the fact that just six states—California, New York, New Jersey, Illinois, Texas, and Pennsylvania—claim more than half of the value of all state and local tax deductions nationwide, with California alone responsible for 19.6 percent of the national tax expenditure cost.[28]

23 Internal Revenue Service, *Statistics of Income*.

24 Metcalf, 575.

25 Edward M. Gramlich, “The Deductibility of State and Local Taxes,” *National Tax Journal* 38, no. 4 (Dec. 1985): 448.

26 *Id.*, 463.

27 Bruce Bartlett, “The Case for Eliminating Deductibility of State and Local Taxes,” *Tax Notes* (Sept. 2, 1985): 1122

28 Internal Revenue Service, *Statistics of Income*.

TABLE 2.

State and Local Tax Deduction Shares and Value by State

State	AGI Per Filer	% of Itemizers	Deduction as % of AGI	State Share
Alabama	$52,741	26.0%	2.8%	0.6%
Alaska	$67,212	22.2%	1.5%	0.1%
Arizona	$56,903	28.3%	3.5%	1.1%
Arkansas	$53,186	22.7%	3.7%	0.5%
California	$73,938	33.9%	7.9%	19.6%
Colorado	$70,342	32.6%	4.0%	1.4%
Connecticut	$93,806	41.2%	8.3%	2.6%
Delaware	$61,998	32.0%	4.5%	0.2%
Florida	$60,676	22.9%	2.6%	2.8%
Georgia	$57,899	32.7%	4.9%	2.4%
Hawaii	$58,209	29.2%	4.5%	0.3%
Idaho	$52,703	27.9%	4.4%	0.3%
Illinois	$69,186	32.4%	6.0%	5.0%
Indiana	$54,125	23.1%	3.5%	1.1%
Iowa	$59,559	29.2%	4.7%	0.8%
Kansas	$62,299	25.7%	3.8%	0.6%
Kentucky	$51,977	26.0%	4.7%	0.9%
Louisiana	$57,560	22.8%	2.6%	0.6%
Maine	$53,519	27.6%	5.6%	0.4%
Maryland	$72,746	45.2%	7.7%	3.2%
Massachusetts	$85,408	36.8%	6.3%	3.5%
Michigan	$56,937	26.5%	4.3%	2.2%
Minnesota	$68,649	35.0%	6.2%	2.2%
Mississippi	$46,639	22.9%	3.0%	0.3%
Missouri	$56,634	26.1%	4.3%	1.3%
Montana	$55,240	28.2%	4.5%	0.2%
Nebraska	$61,711	27.8%	4.8%	0.5%
Nevada	$58,745	24.6%	2.4%	0.4%
New Hampshire	$69,498	31.5%	4.3%	0.4%
New Jersey	$81,344	41.1%	8.7%	5.9%
New Mexico	$50,743	22.7%	3.1%	0.3%
New York	$79,268	34.2%	9.1%	13.3%
North Carolina	$56,385	29.1%	4.7%	2.2%
North Dakota	$73,499	17.7%	1.6%	0.1%
Ohio	$56,322	26.5%	4.7%	2.9%
Oklahoma	$59,450	24.0%	3.2%	0.6%
Oregon	$59,845	36.0%	7.0%	1.5%
Pennsylvania	$63,037	28.8%	4.9%	3.7%
Rhode Island	$62,296	32.9%	6.4%	0.4%
South Carolina	$52,434	27.0%	4.2%	0.9%
South Dakota	$60,690	17.3%	1.6%	0.1%
Tennessee	$54,997	20.0%	1.9%	0.6%
Texas	$67,253	23.0%	2.5%	3.9%
Utah	$60,792	35.4%	4.5%	0.7%
Vermont	$57,573	27.5%	5.6%	0.2%
Virginia	$72,151	37.2%	5.5%	3.0%
Washington	$73,010	30.4%	2.9%	1.4%
West Virginia	$50,401	17.1%	3.0%	0.2%
Wisconsin	$59,596	31.6%	6.0%	1.9%
Wyoming	$77,370	21.9%	1.6%	0.1%
District of Columbia	$88,430	39.4%	6.8%	0.4%

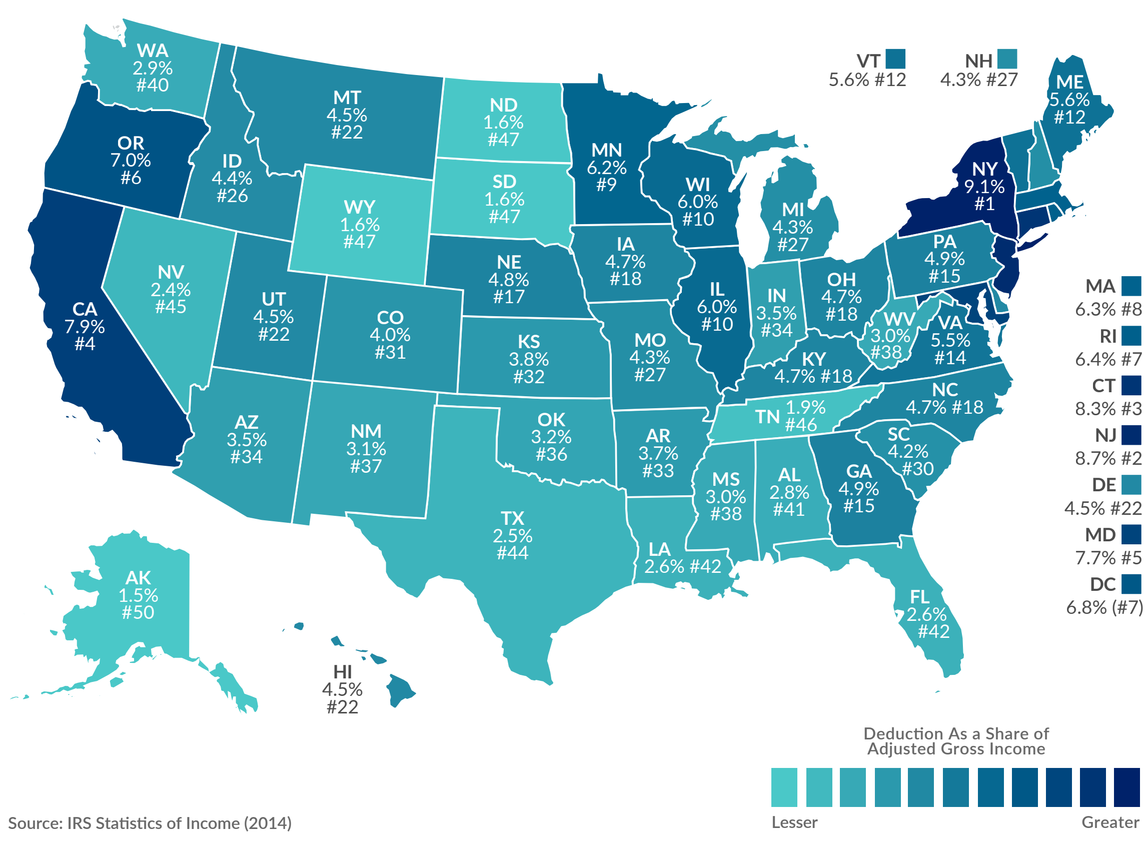
Source: IRS Statistics of Income (2014)

To some degree, this is a function of population. Any tax provision, no matter how neutral its application, will flow more to states with higher populations. The state and local tax deduction, however, expressly favors higher-income earners and state and local governments which impose above-average tax burdens. The deduction's effect is for lower- and middle-income taxpayers to subsidize more generous spending in wealthier states like California, New York, and New Jersey, reducing the felt cost of higher taxes in those states. As the Urban-Brookings Tax Policy Center has observed, state and local governments "are able to raise revenues from deductible state and local taxes that exceed the net cost to taxpayers of paying those taxes, in effect allowing those jurisdictions to export a portion of their tax burden to the rest of the nation."[29]

To the extent that the more generous spending is financed through progressive taxation at the state level—which might be imposed at higher rates and on more progressive schedules than would have been viable in the absence of the deduction—some of the regressive effect of the deduction at the federal level may be offset at the state level.[30] This is, however, an inefficient and convoluted approach to promoting state tax progressivity, and whatever greater progressivity may exist in a high-income, high-tax state is countered by a federal transfer away from residents of lower-income, lower-tax states.

FIGURE 2.

State & Local Tax Deduction As a Share of Adjusted Gross Income by State



Source: IRS Statistics of Income (2014)

29 Frank Sammartino & Kim Rueben, "Revisiting the State and Local Tax Deduction," Tax Policy Center, March 31, 2016, http://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/2000693-Revisiting-the-State-and-Local-Tax-Deduction.pdf, 1.

30 Shandunsky, 87.

Advocates of progressive taxation typically prefer progressivity at the federal level to progressivity at the state level, as "higher-income taxpayers can avoid progressive state and local taxes either by shifting income or physically moving to a lower-tax state."[31] The state and local tax deduction flips this preference on its head, sacrificing progressivity at the federal level in hopes of inducing more progressive state tax structures.

Effect on State and Local Government Finances

Deductibility of state and local taxes increases state and local government expenditures by reducing the cost of that spending, but estimates differ on the magnitude of the effect. During the 1986 tax reform debate, the Congressional Research Service estimated that the deduction increased state and local spending by as much as 20.5 percent, while the now-defunct U.S. Advisory Commission on Intergovernmental Affairs concluded that the increase was on the order of 7 percent[32] and the National League of Cities arrived at an estimate of only 2 percent.[33] Other studies have found little evidence of any significant effect on state and local government expenditure levels.[34] Furthermore, any reductions in local expenditures "would appear to be concentrated in high income communities where most itemizers now live," according to one such study.[35]

By decreasing the cost of state and local government spending, the federal government provides a subsidy for such expenditures. Because not all forms of state and local revenue are deductible, moreover, the deduction's availability can promote greater reliance on deductible income and property taxes to the disadvantage of other possible sources of revenue, including user fees, which might otherwise be favored.[36] Using federal tax revenue to subsidize state and local governments—and particularly higher-income taxpayers—has critics on both the left and right, with the chief argument advanced in favor of the *status quo* predicated on the postulate that local government spending, in particular, is suboptimal.

All levels of government must strike a balance between demand for government-provided services and the desire to keep taxes and spending in check, and the democratically chosen balance will vary from place to place. The residents of some localities are willing to accept higher levels of taxation in exchange for greater government service provision; others prefer a smaller government which necessitates lower rates of taxation. Taxpayers may be supportive of increased levels of spending if part of the cost is borne by others; conversely, they may reduce expenditures if they believe that some of the benefit of that spending will be conferred on others. Federal subsidies thus place a thumb on the scale, distorting local decision-making.[37]

31 Sammartino & Rueben, 7-8.
32 Bartlett, 1123.
33 Liebschutz & Lurie, 64.
34 Metcalf, 568.
35 Gramlich, 462-463.
36 *Id*., 568. See, e.g., Feldstein and Metcalf (1987), Holtz-Eakin & Rosen (1986), Metcalf (1993), and Gade & Adkins (1990).
37 Congressional Budget Office, "The Deductibility of State and Local Taxes," 7.

Some municipal services are inherently excludable; only residents, for instance, stand to benefit from municipal trash collection. Other amenities, however, like city parks, public parking, bike trails, community centers, and municipal athletic facilities, are utilized both by residents (who pay local taxes) and nonresidents (who do not) alike. This "spillover" theoretically reduces the amount that local residents are willing to pay in taxes for certain services to a level below what they would favor if the benefits accrued only to them.[38] A federal subsidy, regressive though it may be, might then be rationalized as a way to restore expenditure decisions to equilibrium rather than artificially inflating demand.

Several objections to this model quickly emerge. As the economist Helen Ladd argues, "Positive spillovers from public sector spending are more likely in low-income or heterogeneous cities than in higher-income communities where itemizing is more common,"[39] which is one reason why, under the current regime of tax deductibility, high-income individuals may find it even more advantageous to live together in the same communities. Moreover, the deduction is a blunt instrument, applying no matter what the possible spillover effect of an expenditure is, and without regard to the mix of services that exist in a community.[40] Many public expenditures have little or no spillover, yet they receive the same subsidy as those easily enjoyed by nonresidents. Specifically, it is highly unlikely that much spillover exists from high-income to low-income communities, yet it is high-income areas and taxpayers who benefit disproportionately from the deduction.

The argument particularly suffers if local government revenues hew closely to the benefit test, where tax (and fee) liability closely tracks benefits received—and this, it emerges, is frequently the case. Charles McLure, one of the architects of Treasury I, put it this way:

> If … the financing of state and local public services reflected more accurately the benefit of such services, the case for reducing tax competition via federal subsidies would be weak and perhaps vanish. Indeed, in a world of user charges and benefit taxes the existence of such subsidies would worsen the allocation of resources, rather than improving it, by reducing the cost of such services to state and local beneficiaries/taxpayers and causing over-production of the subsidized activity.[41]

Whereas the federal government engages in a broad array of cash transfers, social insurance, and social welfare spending, such expenditures are responsible for a modest portion of state, and particularly local, budgets. Social services comprise 11.3 percent of local budgets, and general expenditures—which would include many of the amenities which might benefit nonresidents—only account for 5.6 percent of local government budgets nationwide.[42] This suggests that, unlike federal taxes, state and especially local taxes function hew closer to the benefit principle, and that federal subsidization of these levels of government will tend to favor taxpaying residents, not free-riding nonresidents.[43]

38 Helen Ladd, as cited in Bartlett, 1123.

39 *Id*.

40 Charles McLure, "Tax Competition: Is What's Good for the Private Goose Also Good for the Public Gander?" *National Tax Journal* 39, no. 3 (Sept. 1986): 344.

41 *Id.*, 342.

42 U.S. Census Bureau, "State and Local Government Finances," 2014, https://www.census.gov/govs/local/.

43 Bartlett, 1124

A more generalized case of suboptimal state and local budgeting is that of "fiscal imbalance," where state and local expenditures are assumed to be suboptimal across the board, thus justifying federal subsidies designed to encourage higher levels of spending across all inferior governmental units.[44] To the extent that this concern is valid, however, the state and local deduction is a blunt instrument poorly suited to the task, as it flows most generously to those states and localities with the highest innate revenue capacity. Better calibration is possible with almost any other form of aid to states and localities.

TABLE 3.

State and Local Expenditures by Spending Category

Expenditure	State & Local	State	Local
Education Services	28.1%	18.3%	37.0%
Social Services	24.7%	39.3%	11.3%
Insurance Trust Expenditure	10.0%	17.9%	2.7%
Public Safety	7.2%	4.6%	9.6%
Utilities	6.7%	1.7%	11.3%
Transportation	5.9%	6.5%	5.4%
Environment & Housing	5.8%	2.2%	9.1%
General Expenditures	4.4%	3.1%	5.6%
Government Administration	3.9%	3.4%	4.4%
Interest on Debt	3.3%	2.9%	3.6%

Source: U.S. Census Bureau, "State and Local Government Finances" (2014)

A Congressional Budget Office (CBO) analysis summarized the effect of the deduction by noting that it "may spur state and local governments to provide services that are neither federal in nature nor targeted toward areas of national concern" and thus "interfere with the sorting mechanism that otherwise helps keep local public services at levels appropriate to their value to local taxpayers."[45] One of the virtues of federalism is the ability for state and local governments to experiment with different models of taxation and service provisions, with the recognition that what is appropriate or desirable for one population may be disfavored by another. Whatever balance communities might otherwise adopt, however, may be skewed by deductibility. As the CBO notes, "Because of the subsidy, too many of those services may be supplied, and state and local governments may be bigger as a result."[46]

44 Liebschutz & Lurie, 55.

45 Congressional Budget Office, "The Deductibility of State and Local Taxes," 7.

46 *Id*.

Additionally, the existence of the deduction can incentivize government provision of municipal services that might be provided more efficiently by the private sector, not because of some advantage or preference for government provision of the service, but because the cost, for instance, of municipal trash collection receives the benefit of the state and local tax deduction, whereas the economically equivalent private provision of waste management services would receive no such tax advantage.[47] From the start, local taxes remitted in exchange for local benefits (like license taxes) were not deductible.[48] In part because the deduction gives an advantage to general taxes over fees, any principle of excluding "consumption" argues against the deduction more broadly.

The Double Taxation Argument

The coexistence of federal and state income taxes absent deductibility is sometimes characterized as a tax upon a tax, as federal taxes are paid on the share of income foregone to state (and potentially local) governments. Most taxes imposed by different levels of government are susceptible to some variation of this argument, but the crux of the case for deductibility is the taxpayer's ability to pay. As noted previously, at times when the top marginal federal individual income tax rate exceeded 90 percent, it would have been possible for some income to be taxed at combined rates in excess of 100 percent in the absence of deductibility.

It is, of course, fairly implausible to conclude that rates would have stood as high in the absence of the deduction, or that earning a marginal dollar above some threshold would actually expose the taxpayer to more than a dollar's worth of taxes. Even if such fears were warranted, however, they have little relevance under today's rate schedule, or any rates which might emerge from a tax reform package which includes the repeal of the state and local tax deduction.

This argument for the deduction also depends on the extent that higher levels of state and local taxation represent, at least in part, a choice about the consumption of government services. If state and local tax rates are largely invariant to service provision or fund services not utilized by many taxpayers, then these state and local taxes may be seen as reducing capacity to pay federal taxes. If, however, these taxes correlate strongly with services provided—and such a correlation is far stronger at the state and local level than it is at the federal level—then arguments about double taxation are less salient,[49] particularly when variations in local government taxation can be explained in part by consumption that might otherwise have been supplied by the private sector.

47 Jeremy Horpedahl and Harrison Searles, "The Deduction of State and Local Taxes from Federal Income Taxes," Mercatus Center at George Mason University, 3.

48 Sammartino & Rueben, 7.

49 Congressional Budget Office, "Option 6: Eliminate the Deduction for State and Local Taxes," Options for Reducing the Deficit: 2014 to 2023, Nov. 13, 2013, https://www.cbo.gov/budget-options/2013/44799.

In a federal system, moreover, individuals receive services from federal, state, and municipal governments. Each layer of government can be viewed as providing its own package of services, which one would expect to be "priced" separately. When two taxes levied by a single government, or similar types of governments (for instance, multiple states), fall disproportionately upon the same income or economic activity, this represents a clear case of double taxation. When different levels of governments levy taxes for discrete sets of services, the rationale for a deduction for taxes paid is far weaker.

A closely related argument holds that a large proportion of local government expenditures—schools, roads, police and fire protection, and the like—can be understood as investments in human and physical capital, and thus would be deductible as capital expenditures under an ideal tax code. Of course, not all local government spending can be reasonably construed as capital investment. States government budgets, moreover, tend to include far more welfare spending and transfers that clearly do not constitute capital expenditures.

The strength of this argument for local, if not for state, governments, turns at least in part on whether it is appropriate to consider a mandatory tax payment a capital expenditure even if the return to capital is accrued by other people or entities. When individuals and businesses purchase capital goods, they are—or at least they can designate—the intended beneficiary of any return on investment. When governments levy taxes, the payors have little control over either the investment or its beneficiaries.

Federal Revenue Implications

According to the Tax Foundation's Taxes and Growth Model, eliminating the state and local tax deduction would raise an additional $1.8 trillion in federal revenues over a ten-year window on a static basis, and $1.7 trillion on a dynamic basis which takes changes in economic activity into account.[50] The adverse economic impact is estimated at a modest 0.4 percent reduction in gross domestic product (GDP),[51] which would be more than counterbalanced by any offsetting rate reductions. The small impact on economic growth makes it an enticing offset for more growth-oriented revenue-reducing reforms elsewhere in the system.

Distributionally, the lower four quintiles of households would see their after-tax income decrease by 0 to 0.7 percent on a static basis under the deduction's repeal. Households in the highest quintile would experience a tax increase of 2.2 percent on their income.[52] Dynamic effects, which take into account changes in behavior associated with taxes, are slightly larger.

50 Tax Foundation, *Options for Reforming America's Tax Code*, http://taxfoundation.org/sites/taxfoundation.org/files/docs/TF_Options_for_Reforming_Americas_Tax_Code.pdf, 49.

51 *Id.*

52 *Id.*

TABLE 4.

After-Tax Income Change by Quintile

Income Quintile	Static % Change in After-Tax Income	Dynamic % Change in After-Tax Income
0% to 20%	0.0%	-0.3%
20% to 40%	-0.1%	-0.4%
40% to 60%	-0.3%	-0.6%
60% to 80%	-0.7%	-1.0%
80% to 100%	-2.2%	-2.5%

Source: Tax Foundation, *Options for Reforming America's Tax Code*.

Conclusion

Increasingly a costly anachronism which favors high-income earners in wealthy states, the state and local tax deduction has long outlived its usefulness. As such, it is an attractive "pay-for" to provide a revenue offset to rate reductions or other reforms. The House Republican tax plan would repeal the provision outright, while the campaign proposals of President Donald Trump promote caps on itemized deductions, which would limit the value of the deduction.

Whether as part of a plan emerging from one of these proposals, or as part of a tax reform plan still on the horizon, the end of the deduction for state and local taxes paid offers a rare convergence of the goals of both the left and the right, offering the opportunity to roll back a regressive element of the tax code to offset the cost of pro-growth reform. Forty years after the first rumblings of discontent in the Treasury's *Blueprints for Basic Tax Reform*, the repeal of the state and local tax deduction may be an idea whose time has come.

Response to the federal Tax Cuts and Jobs Act

The passage of the federal Tax Cuts and Jobs Act (TCJA) will have a significant impact on the economy and tax system of New York State. New York State has taken several actions in response to the passage of the federal bill, which are outlined below.

Preliminary report on the Tax Cuts and Jobs Act of 2017

In January, the Tax Department released a preliminary report to the Governor to outline options for New York State tax reform in response to the TCJA. The report is divided into four sections.

- Part I outlines a proposal to increase charitable giving in New York State;
- Part II discusses various options for reducing the New York State's reliance on the personal income tax and adopting an employer compensation expense tax, including the possibility of a voluntary employer opt-in system;
- Part III outlines options for consideration of an unincorporated business tax; and
- Part IV discusses the impacts of the TCJA on New York State's tax system and potential responses.

Actions taken in the FY 2019 Enacted Budget

The Division of the Budget released a summary of certain actions contained in the Enacted Budget (Chapter 59 of 2018). The FY 2019 Budget:

- creates a new state-operated Charitable Gifts Trust Fund to accept donations for the purposes of improving health care and public education in New York State;
- authorizes local governments to establish charitable gift reserve funds and to offer real property tax credits to incentivize contributions; and
- allows employers to opt-in to a new Employer Compensation Expense Program (ECEP).

Discussion draft of an unincorporated business tax (UBT)

Following up on the options outlined in Part III of the preliminary report, the Tax Department has released a discussion draft of legislation imposing an unincorporated business tax (UBT), including a summary document highlighting key provisions of the draft.

This discussion draft puts forward a statewide UBT for public consideration and comment. The draft would apply a new business tax on partnerships doing business in New York State, while creating a corresponding tax credit for individual and corporate partners of those partnerships.

The purpose of this discussion draft is to allow interested parties the opportunity to provide feedback on both the general concept of a statewide UBT and the specific details involved in the design and implementation of such a tax. To that end, the discussion draft is annotated to note areas for potential comment.

The Tax Department welcomes your input on the draft, and respectfully asks for responses by July 16, 2018. Please send comments to federal.tax.response.comments@tax.ny.gov.

UBT discussion resources

- Discussion draft
- Summary document

Updated: May 16, 2018

STATE OF NEW YORK

S. 7509--C A. 9509--C

SENATE - ASSEMBLY

January 18, 2018

IN SENATE -- A BUDGET BILL, submitted by the Governor pursuant to article seven of the Constitution -- read twice and ordered printed, and when printed to be committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

IN ASSEMBLY -- A BUDGET BILL, submitted by the Governor pursuant to article seven of the Constitution -- read once and referred to the Committee on Ways and Means -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee -- again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee

AN ACT intentionally omitted (Part A); to amend the real property tax law, in relation to making the STAR income verification program mandatory; to amend the tax law, in relation to the calculation of income for basic STAR purposes; to repeal subparagraphs (v) and (vi) of paragraph (b) of subdivision 4, paragraphs (b) and (c) of subdivision 5 and paragraph (c) of subdivision 6 of section 425 of the real property tax law relating to the school tax relief (STAR) exemption; and to repeal section 171-o of the tax law relating to income verification for a city with a population of one million or more (Part B); intentionally omitted (Part C); intentionally omitted (Part D); to amend the general municipal law, the education law, the state finance law, the real property tax law and the tax law, in relation to making technical corrections to various statutes impacting property taxes; and to repeal subsection (bbb) of section 606 of the tax law, section 3-d of the general municipal law and section 2023-b of the education law, relating thereto (Part E); intentionally omitted (Part F); to amend the real property tax law, in relation to assessment ceilings; and to amend chapter 475 of the laws of 2013, amending the real property tax law relating to assessment ceilings for local public utility mass real property, in relation to the effectiveness thereof (Part G); to amend

EXPLANATION--Matter in ***italics*** (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD12674-08-8

1 § 4-d. Subparagraph (B) of paragraph 2 of subdivision (b) of section
2 1503 of the tax law, as added by chapter 649 of the laws of 1974, is
3 amended to read as follows:
4 (B) any part of any income from dividends or interest on any kind of
5 stock, securities or indebtedness, except as provided in subparagraphs
6 (A) [and], (B) and (S) of paragraph one hereof;
7 § 4-e. Subparagraph (H) of paragraph 2 of subdivision (b) of section
8 1503 of the tax law, as amended by section 13 of part FF1 of chapter 57
9 of the laws of 2008, is amended to read as follows:
10 (H) in the discretion of the commissioner, any amount of interest
11 directly or indirectly and any other amount directly attributable as a
12 carrying charge or otherwise to subsidiary capital or to income, gains
13 or losses from subsidiary capital, or to the income described in subpar-
14 agraph (S) of paragraph one of this subdivision;
15 § 4-f. Paragraph 2 of subdivision (b) of section 1503 of the tax law
16 is amended by adding new subparagraphs (W) and (X) to read as follows:
17 (W) The amount of any federal deduction allowed pursuant to subsection
18 (c) of section 965 of the internal revenue code.
19 (X) The amount of any federal deduction allowed pursuant to section
20 250(a)(1)(A) of the internal revenue code.
21 § 5. This act shall take effect immediately and shall apply to taxable
22 years beginning on or after January 1, 2017.

23 PART LL

24 Section 1. The state finance law is amended by adding a new section
25 92-gg to read as follows:
26 § 92-gg. Charitable gifts trust fund. 1. There is hereby established
27 in the joint custody of the commissioner of taxation and finance and the
28 state comptroller a special fund pursuant to section eleven of this
29 chapter to be known as the "charitable gifts trust fund".
30 2. Moneys in the charitable gifts trust fund shall be kept separate
31 from and shall not be commingled with any other moneys in the custody of
32 the comptroller or the commissioner of taxation and finance. Provided,
33 however that any moneys of the fund not required for immediate use may,
34 at the discretion of the comptroller, in consultation with the director
35 of the budget, be invested by the comptroller in obligations of the
36 United States or the state. The proceeds of any such investment shall be
37 retained by the fund as assets to be used for purposes of the fund.
38 3. Except as set forth in subdivisions two and four of this section,
39 no moneys from the charitable gifts trust fund shall be transferred to
40 any other fund, nor shall moneys from the fund be used to make payments
41 for any purpose other than the purposes set forth in subdivisions two
42 and four of this section.
43 4. The charitable gifts trust fund shall have two separate and
44 distinct accounts, as set forth in paragraphs a and b of this subdivi-
45 sion. Moneys in each of the accounts shall be kept separate from and
46 shall not be commingled with any other moneys of any other account with-
47 in the fund.
48 a. The "health charitable account" shall consist of monetary grants,
49 gifts or bequests received by the state, and all other moneys credited
50 or transferred thereto from any other fund or source. Moneys of such
51 account shall only be expended for the support of services relating to
52 primary, preventive, and inpatient health care, dental and vision care,
53 hunger prevention and nutritional assistance, and other services for New
54 York state residents with the overall goal of ensuring that New York

state residents have access to quality health care and other related services.

b. The "elementary and secondary education charitable account" shall consist of monetary grants, gifts or bequests received by the state for the support of elementary and secondary education of children enrolled in public school districts in the state and all other moneys credited or transferred thereto from any other fund or source. Moneys of such account shall only be expended for the provision of elementary and secondary education of children in the state.

§ 2. Credits for certain charitable contributions to Health Research, Inc. 1. Charitable monetary contributions to Health Research, Inc. (hereinafter "the corporation") that conform to the provisions of this subdivision shall be considered qualified contributions for purposes of the tax credit available pursuant to subsection (iii) of section 606 of the tax law.

(a) Applications for contribution authorization certificates. Contributors seeking to make a qualified contribution to the corporation shall apply to the corporation for a contribution authorization certificate for such contribution. Such application shall be in the form and manner prescribed by the corporation. The corporation may allow contributors to make multiple applications on the same form, provided that each contribution listed on such application shall be treated as a separate application and that the corporation shall issue separate contribution authorization certificates for each such application.

(b) Contribution authorization and receipt certificates. (i) Issuance of certificates. The president of the corporation shall issue contribution authorization certificates in two phases. In phase one, which begins on the first day of January and ends on the thirtieth day of September, the president of the corporation shall accept applications for contribution authorization certificates, but shall not issue any such certificates. Commencing after the first day of October, the president of the corporation shall issue contribution authorization certificates for applications received during phase one, provided that if the aggregate total of the contributions for which applications have been received during phase one exceeds the amount of the contribution cap in paragraph (e) of this subdivision, the authorized contribution amount listed on each contribution authorization certificate shall equal the pro-rata share of the contribution cap. If the contribution cap is not exceeded, phase two commences on October first and ends on November fifteenth, during which period the president of the corporation shall issue contribution authorization certificates on a first-come first-served basis based upon the date the corporation received the contributor's application for such certificate; provided, however, that if on any day the corporation receives applications requesting contribution authorization certificates for contributions that in the aggregate exceed the amount of the remaining available contribution cap on such day, the authorized contribution amount listed in each contribution authorization certificate shall be the contributor's pro-rata share of the remaining available contribution cap. For purposes of determining a contributor's pro-rata share of remaining available contribution cap, the head of the corporation shall multiply the amount of remaining available contribution cap by a fraction, the numerator of which equals the total contribution amount listed on the contributor's application and the denominator of which equals the aggregate amount of contributions listed on the applications for contribution authorization certificates received on such day. Contribution authorization certificates

1 for applications received during phase one shall be mailed no later than
2 the fifteenth day of October. Contribution authorization certificates
3 for applications received during phase two shall be mailed within twenty
4 days of receipt of such applications. Provided, however, that no
5 contribution authorization certificates for applications received during
6 phase two shall be issued until all of the contribution authorization
7 certificates for applications received during phase one have been
8 issued.
9 (ii) Contribution authorization certificate contents. Each contrib-
10 ution authorization certificate shall state: (A) the date such certif-
11 icate was issued; (B) the date by which the authorized contributions
12 listed in the certificate must be made, which shall be no later than
13 November thirtieth of the year for which the contribution authorization
14 certificate was issued; (C) the contributor's name and address; (D) the
15 amount of authorized contributions; (E) the contribution authorization
16 certificate's certificate number; and (F) any other information that the
17 president of the corporation or the commissioner of taxation and finance
18 deems necessary.
19 (c) Certificate of receipt. If a contributor makes an authorized
20 contribution to the corporation no later than the date by which such
21 authorized contribution is required to be made, the corporation shall,
22 within 30 days of receipt of the authorized contribution, issue to the
23 contributor a written certificate of receipt. Each certificate of
24 receipt shall state: (i) the name and address of the corporation; (ii)
25 the contributor's name and address; (iii) the date for each contrib-
26 ution; (iv) the amount of each contribution and the corresponding
27 contribution authorization certificate number; (v) the total amount of
28 contributions; and (vi) any other information that the commissioner of
29 taxation and finance deems necessary.
30 (d) Notification to the department of the issuance of a certificate of
31 receipt. Upon the issuance of a certificate of receipt, the corporation
32 shall, within thirty days of issuing the certificate of receipt, provide
33 the department of taxation and finance with notification of the issuance
34 of such certificate in the form and manner prescribed by the department
35 of taxation and finance.
36 (e) Contribution cap. The maximum permitted contributions under this
37 section available annually for calendar year two thousand eighteen and
38 all following years shall be ten million dollars.
39 2. Use of authorized contributions. The corporation shall develop
40 policies and procedures to ensure that all contributions for which
41 certificates of receipt have been issued are expended only for one or
42 more of the following charitable health purposes: to support and supple-
43 ment laboratory facilities and programs, including, but not limited to,
44 laboratory testing and scientific research; to support and supplement
45 bioinformatics programs, including, but not limited to, developing
46 public health data analytical strategies; and to support and supplement
47 other public health activities.
48 § 3. Credits for certain charitable contributions to University Foun-
49 dations. 1. Charitable monetary contributions to the State University
50 of New York Impact Foundation (hereinafter "the SUNY foundation") or the
51 Research Foundation of the City University of New York (hereinafter "the
52 CUNY foundation") that conform to the provisions of this subdivision
53 shall be considered qualified contributions for purposes of the tax
54 credit available pursuant to subsection (iii) of section 606 of the tax
55 law.

1 (a) Applications for contribution authorization certificates.
2 Contributors seeking to make a qualified contribution to the SUNY foun-
3 dation or the CUNY foundation shall apply to such foundation for a
4 contribution authorization certificate for such contribution. Such
5 application shall be in the form and manner prescribed by the corpo-
6 ration. Each foundation may allow contributors to make multiple applica-
7 tions on the same form, provided that each contribution listed on such
8 application shall be treated as a separate application and that the
9 foundation shall issue separate contribution authorization certificates
10 for each such application.
11 (b) Contribution authorization and receipt certificates. (i) Issuance
12 of certificates. The head of each foundation shall issue contribution
13 authorization certificates in two phases. In phase one, which begins on
14 the first day of January and ends on the thirtieth day of September, the
15 head of each foundation shall accept applications for contribution
16 authorization certificates, but shall not issue any such certificates.
17 Commencing after the first day of October, the head of each foundation
18 shall issue contribution authorization certificates for applications
19 received during phase one, provided that if the aggregate total of the
20 contributions for which applications have been received during phase one
21 exceeds the amount of the contribution cap in paragraph (e) of this
22 subdivision, the authorized contribution amount listed on each contrib-
23 ution authorization certificate shall equal the pro-rata share of the
24 contribution cap. If the contribution cap is not exceeded, phase two
25 commences on October first and ends on November fifteenth, during which
26 period the head of each foundation shall issue contribution authori-
27 zation certificates on a first-come first-served basis based upon the
28 date the foundation received the contributor's application for such
29 certificate; provided, however, that if on any day the SUNY foundation
30 or the CUNY foundation receives applications requesting contribution
31 authorization certificates for contributions that in the aggregate
32 exceed the amount of the remaining available contribution cap on such
33 day, the authorized contribution amount listed in each contribution
34 authorization certificate shall be the contributor's pro-rata share of
35 the remaining available contribution cap. For purposes of determining a
36 contributor's pro-rata share of remaining available contribution cap,
37 the head of each foundation shall multiply the amount of remaining
38 available contribution cap by a fraction, the numerator of which equals
39 the total contribution amount listed on the contributor's application
40 and the denominator of which equals the aggregate amount of contrib-
41 utions listed on the applications for contribution authorization certif-
42 icates received on such day. Contribution authorization certificates for
43 applications received during phase one shall be mailed no later than the
44 fifteenth day of October. Contribution authorization certificates for
45 applications received during phase two shall be mailed within twenty
46 days of receipt of such applications. Provided, however, that no
47 contribution authorization certificates for applications received during
48 phase two shall be issued until all of the contribution authorization
49 certificates for applications received during phase one have been
50 issued.
51 (ii) Contribution authorization certificate contents. Each contrib-
52 ution authorization certificate shall state: (A) the date such certif-
53 icate was issued; (B) the date by which the authorized contributions
54 listed in the certificate must be made, which shall be no later than
55 November thirtieth of the year for which the contribution authorization
56 certificate was issued; (C) the contributor's name and address; (D) the

amount of authorized contributions; (E) the contribution authorization certificate's certificate number; and (F) any other information that the head of the respective foundation or the commissioner of taxation and finance deems necessary.

(c) Certificate of receipt. If a contributor makes an authorized contribution to the SUNY foundation or the CUNY foundation no later than the date by which such authorized contribution is required to be made, such foundation shall, within thirty days of receipt of the authorized contribution, issue to the contributor a written certificate of receipt. Each certificate of receipt shall state: (i) the name and address of the foundation; (ii) the contributor's name and address; (iii) the date for each contribution; (iv) the amount of each contribution and the corresponding contribution authorization certificate number; (v) the total amount of contributions; and (vi) any other information that the commissioner of taxation and finance deems necessary.

(d) Notification to the department of the issuance of a certificate of receipt. Upon the issuance of a certificate of receipt, the respective foundation shall, within thirty days of issuing the certificate of receipt, provide the department of taxation and finance with notification of the issuance of such certificate in the form and manner prescribed by the department of taxation and finance.

(e) Contribution cap. The maximum permitted contributions under this section available annually for calendar year two thousand eighteen and all following years shall be ten million dollars for the SUNY foundation and ten million dollars for the CUNY foundation.

2. Use of authorized contributions. The SUNY foundation and the CUNY foundation shall develop policies and procedures to ensure that all contributions for which certificates of receipt have been issued are expended only to support programs benefiting students enrolled at the state university of New York and the city university of New York, respectively. Provided however, contributions may not be used for scholarships or tuition assistance.

§ 4. Section 606 of the tax law is amended by adding a new subsection (iii) to read as follows:

(iii) Credit for contributions to certain funds. For taxable years beginning on or after January first, two thousand nineteen, an individual taxpayer shall be allowed a credit against the tax imposed under this article for an amount equal to eighty-five percent of the sum of: (1) the amount contributed by the taxpayer during the immediately preceding taxable year to any or all of the following accounts within the charitable gifts trust fund set forth in section ninety-two-gg of the state finance law: the health charitable account established by paragraph a of subdivision four of section ninety-two-gg of the state finance law, or the elementary and secondary education charitable account established by paragraph b of subdivision four of section ninety-two-gg of the state finance law; (2) the amount of qualified contributions made by the taxpayer to Health Research, Inc. in accordance with section two of the chapter of the laws of two thousand eighteen that added this subsection; and (3) the amount of qualified contributions made by the taxpayer to the State University of New York Impact Foundation and/or the Research Foundation of the City University of New York in accordance with section three of the chapter of the laws of two thousand eighteen that added this subsection.

§ 5. Section 1604 of the education law is amended by adding a new subdivision 44 to read as follows:

1 **44. To establish a charitable fund, by resolution of the trustees, to**
2 **receive unrestricted charitable monetary donations made to such fund for**
3 **use by the district for public educational purposes. The monies of such**
4 **charitable fund shall be deposited and secured in the manner provided by**
5 **section ten of the general municipal law. The monies of such charitable**
6 **fund may be invested in the manner provided by section eleven of the**
7 **general municipal law. Any interest earned or capital gain realized on**
8 **the money so invested shall accrue to and become part of such fund. At**
9 **such time and in such amounts as determined by the trustees, the monies**
10 **of such charitable fund shall be transferred to the school district's**
11 **general fund for expenditure consistent with the charitable purposes of**
12 **the fund, provided that the amount of taxes to be levied by the school**
13 **district for any school year shall be determined without regard to any**
14 **such transfer. The school district shall maintain an accounting of all**
15 **such deposits, interest or capital gain, transfers, and expenditures.**
16 § 6. Section 1709 of the education law is amended by adding a new
17 subdivision 12-b to read as follows:
18 **12-b. To establish a charitable fund, by resolution of the board, to**
19 **receive unrestricted charitable monetary donations made to such fund for**
20 **use by the district for public educational purposes. The monies of such**
21 **charitable fund shall be deposited and secured in the manner provided by**
22 **section ten of the general municipal law. The monies of such charitable**
23 **fund may be invested in the manner provided by section eleven of the**
24 **general municipal law. Any interest earned or capital gain realized on**
25 **the money so invested shall accrue to and become part of such fund. At**
26 **such time and in such amounts as determined by the board, the monies of**
27 **such charitable fund shall be transferred to the school district's**
28 **general fund for expenditure consistent with the charitable purposes of**
29 **the fund, provided that the amount of taxes to be levied by the school**
30 **district for any school year shall be determined without regard to any**
31 **such transfer. The school district shall maintain an accounting of all**
32 **such deposits, interest or capital gain, transfers, and expenditures.**
33 § 7. Section 2590-h of the education law is amended by adding a new
34 subdivision 54 to read as follows:
35 **54. To establish a charitable fund to receive unrestricted charitable**
36 **monetary donations made to such fund for use by the city school district**
37 **for public educational purposes. The monies of such charitable fund**
38 **shall be deposited and secured in the manner provided by section ten of**
39 **the general municipal law. The monies of such charitable fund may be**
40 **invested in the manner provided by section eleven of the general munici-**
41 **pal law. Any interest earned or capital gain realized on the money so**
42 **invested shall accrue to and become part of such fund. At such time and**
43 **in such amounts as determined by the chancellor, the monies of such**
44 **charitable fund shall be transferred to the city school district's**
45 **general fund for expenditure consistent with the charitable purposes of**
46 **the fund, provided that the amount of taxes to be levied by the city for**
47 **any school year shall be determined without regard to any such transfer.**
48 **The city school district shall maintain an accounting of all such depos-**
49 **its, interest or capital gain, transfers, and expenditures.**
50 § 8. The general municipal law is amended by adding two new sections
51 6-t and 6-u to read as follows:
52 **§ 6-t. Charitable gifts reserve fund. 1. The governing board of any**
53 **county or New York city may establish a reserve fund to be known as a**
54 **charitable gifts reserve fund.**
55 **2. Such fund may receive unrestricted charitable monetary contrib-**
56 **utions and the moneys in such fund shall be deposited and secured in the**

1 manner provided by section ten of this article. The governing board, or
2 the chief fiscal officer of such county, or New York city, if the
3 governing board shall delegate such duty to him or her, may invest the
4 moneys in such fund in the manner provided by section eleven of this
5 article. Any interest earned or capital gain realized on the money so
6 deposited or invested shall accrue to and become part of such fund. The
7 separate identity of such fund shall be maintained whether its assets
8 consist of cash or investments or both.
9 3. At the end of the fiscal year, the governing board of the county or
10 New York city, within sixty days of the close of the fiscal year, shall
11 transfer the funds to the general fund or other fund of the municipal
12 corporation, so that the funds may be used for charitable purposes.
13 4. The governing board shall establish a procedure for contributions
14 to the charitable gifts reserve fund, which shall include the provision
15 of a written acknowledgment of the gift to the contributor.
16 § 6-u. Charitable gifts reserve fund. 1. The governing board of any
17 city with a population less than one million, town or village may estab-
18 lish a reserve fund to be known as a charitable gifts reserve fund.
19 2. Such fund may receive unrestricted charitable monetary contrib-
20 utions and the moneys in such fund shall be deposited and secured in the
21 manner provided by section ten of this article. The governing board, or
22 the chief fiscal officer of such town, village or city, if the governing
23 board shall delegate such duty to him or her, may invest the moneys in
24 such fund in the manner provided by section eleven of this article. Any
25 interest earned or capital gain realized on the money so deposited or
26 invested shall accrue to and become part of such fund. The separate
27 identity of such fund shall be maintained whether its assets consist of
28 cash or investments or both.
29 3. At the end of the fiscal year, the governing board of the town,
30 village or city, within sixty days of the close of the fiscal year, may
31 transfer the funds to the general fund or other fund of the municipal
32 corporation, so that the funds may be used for charitable purposes.
33 4. The governing board shall establish a procedure for contributions
34 to the charitable gifts reserve fund, which shall include the provision
35 of a written acknowledgment of the gift to the contributor.
36 § 9. The real property tax law is amended by adding a new section
37 980-a to read as follows:
38 § 980-a. Tax credits for contributions to certain funds. 1. (a) A
39 municipal corporation that has established a fund pursuant to subdivi-
40 sion forty-four of section sixteen hundred four of the education law,
41 subdivision twelve-b of section seventeen hundred nine of the education
42 law, subdivision fifty-four of section twenty-five hundred ninety-h of
43 the education law, or section six-t or six-u of the general municipal
44 law, may adopt a local law, or in the case of a school district, a
45 resolution, authorizing a tax credit to be provided pursuant to this
46 section for contributions to such fund. For purposes of this section, a
47 municipal corporation that has established such a fund and authorized
48 such a credit shall be referred to as a "participating" municipal corpo-
49 ration.
50 (b) On and after a date specified in the local law or resolution
51 adopted by a participating municipal corporation pursuant to paragraph
52 (a) of this subdivision, the owner or owners of real property shall be
53 allowed a credit against the real property taxes of a participating
54 municipal corporation that have been imposed upon such property. The
55 amount of such credit shall equal ninety-five percent, or such lesser
56 allowable percentage credit as may have been established pursuant to

paragraph (c) of this subdivision, of the amount contributed by one or more of the owners of such property during the "associated credit year" as defined in this section, to any or all of the funds established by such municipal corporation, subject to the limit established pursuant to paragraph (c) of this subdivision, if any.

(c) The participating municipal corporation may establish a limit upon the amount or percentage of such credit to be allowed in any given fiscal year, in which case the amount of such credit shall not exceed any limit so established. Any such limit shall be adopted by local law, or in the case of a school district, by resolution, which local law or resolution may either be the same as or separate from the local law or resolution that initially authorized the credit. Once such a limit has been adopted, it may be amended or repealed thereafter by local law, or in the case of a school district, by resolution, provided that any such amendment or repeal shall only apply to taxes of the participating municipal corporation for fiscal years commencing after the adoption of such local law or resolution. A copy of any local law or resolution establishing, amending or repealing such a limit shall be provided to the collecting officer who collects the taxes of the participating municipal corporation.

2. For purposes of this section, the "associated credit year" shall be the twelve-month period during which the owner of the property has made a contribution described in subdivision one of this section that ends on the last day prescribed by law on which the taxes of the participating municipal corporation may be paid without interest or penalties, subject to the following:

(a) Where such taxes are payable in installments, such twelve-month period shall end on the last day prescribed by law on which the first installment of such taxes may be paid without interest or penalties.

(b) Where a participating municipal corporation is a city school district that is subject to article fifty-two of the education law, such twelve-month period shall end on the last day prescribed by law on which city taxes may be paid without interest or penalties, or if applicable, on the last day prescribed by law on which the first installment of such taxes may be paid without interest or penalties.

(c) Each such twelve-month period shall be determined without regard to the possibility that the period prescribed by law for paying such taxes without interest or penalties may be extended due to a delay in the first publication of the collecting officer's notice as provided by sections thirteen hundred twenty-two or thirteen hundred twenty-four of this chapter or a comparable law, or due to an executive order issued in connection with a state disaster emergency as provided by subdivision two of section nine hundred twenty-five-a of this chapter.

3. The credit authorized by this section shall be administered as follows:

(a) The administrator of the fund or its designated agent shall, upon receiving a contribution to the fund specified in subdivision one of this section during a credit year, furnish the property owner with an acknowledgement in duplicate. Such acknowledgement shall be provided on a form prescribed by the commissioner and shall specify the amount of the contribution, the name and address of the donor, the date the contribution was received, the authorized signature of the administrator or agent, and such other information as the commissioner shall require.

(b) After receiving such an acknowledgement, the property owner may present it to the appropriate collecting officer on or before the last day prescribed by law on which taxes may be paid without interest or

penalty, together with a credit claim on a form prescribed by the commissioner. Such credit claim form shall contain the name of the property owner or owners, the date and amount of the contributions made to the account during the associated credit year, the address of the property to which the credit claim relates, and such other information as the commissioner shall require. Notwithstanding any provision of law to the contrary, the collecting officer shall thereupon be authorized and directed to grant the property owner a tax credit equal to ninety-five percent, or such lesser allowable percentage credit as may have been established pursuant to paragraph (c) of subdivision one of this section, of the amount of the contributions made during the associated credit year as specified on the acknowledgement, and to reduce the tax liability on the parcel accordingly, provided that such credit may not exceed any percentage credit or other limit established by the participating municipal corporation pursuant to paragraph (c) of subdivision one of this section, if such a limit has been established, and may not exceed the property taxes due or paid that are attributable to the participating municipal corporation. Where taxes are payable in installments, if the credit exceeds the amount of the first installment, the excess shall be applied to future installments until exhausted. The participating municipal corporation may adopt a local law, or in the case of a school district, a resolution, providing that where a property owner submits a credit claim form to the collecting officer prior to the collecting officer's receipt of the tax warrant, or such other date as may be specified in such local law or resolution, the associated property tax bill shall reflect a reduction in the tax liability equal to the credit authorized by this section; provided however that if the collecting officer is not employed by the participating municipal corporation, such local law or resolution shall not take effect unless and until the governing body of the municipal corporation that employs the collecting officer has adopted a resolution agreeing thereto. The department of financial services, in consultation with the department, shall promulgate regulations related to the adjustment of mortgage escrow accounts to reflect the credits provided pursuant to this section.

(c) If the property owner fails to present the acknowledgment and credit claim form to the collecting officer on or before the last day prescribed by law on which taxes may be paid without interest or penalty, he or she may present the same to the chief fiscal officer or chief financial officer of the participating municipal corporation, or to a member of his or her staff. Such officer shall thereupon be authorized and directed to grant the property owner a refund of property taxes in the amount of the credit, which amount shall be equal to ninety-five percent, or such lesser allowable percentage credit as may have been established pursuant to paragraph (c) of subdivision one of this section, of the total contributions made during the associated credit year, provided that such refund shall not exceed the property taxes that have been paid on the property or any percentage credit or other limit established pursuant to paragraph (c) of subdivision one of this section, if any, and may not exceed the property taxes due or paid that are attributable to the participating municipal corporation. Provided further, that no interest shall be payable on such refund if paid within forty-five days of the receipt of the acknowledgment and credit claim form. The owner of the property may file such refund claim with the authorized officer at any time during the three year period beginning immediately after the last day such taxes were payable without interest or penalty.

4. The amount of the itemized deduction that may be claimed by a taxpayer under section six hundred fifteen of the tax law with respect to the taxes paid on such property may not exceed the amount of the taxes of a participating municipal corporation that have been imposed upon such property minus the amount of the credit provided pursuant to this section.

§ 10. This act shall take effect immediately; provided, however, that the amendments to section 2590-h of the education law made by section seven of this act shall not affect the expiration and reversion of such section and shall expire and be deemed repealed therewith; and provided further that if section 2590-h of the education law expires or is repealed and is reverted prior to the effective date of this act, section seven of this act shall not take effect.

PART MM

Section 1. The tax law is amended by adding a new article 24 to read as follows:

ARTICLE 24
EMPLOYER COMPENSATION EXPENSE PROGRAM

Section 850. Definitions.
851. Employer election.
852. Imposition and rate of tax.
853. Pass through of tax.
854. Payment of tax.
855. Employee credit.
856. Deposit and disposition of revenue.
857. Procedural provisions.

§ 850. Definitions. For purposes of this article:

(a) Employer. Employer means an employer that is required by section six hundred seventy-one of this chapter to deduct and withhold tax from wages.

(b) Electing employer. Electing employer is an employer that has made the election provided for in section eight hundred fifty-one of this article.

(c) Payroll expense. Payroll expense means wages and compensation as defined in sections 3121 and 3231 of the internal revenue code (without regard to section 3121(a)(1) and section 3231(e)(2)(A)(i)), paid to all covered employees.

(d) Covered employee. Covered employee means an employee of an electing employer who is required to have amounts withheld under section six hundred seventy-one of this chapter and receives annual wages and compensation from his or her employer of more than forty thousand dollars annually.

§ 851. Employer election. (a) Any employer who employs covered employees in the state shall be allowed to make an annual election to be taxed under this article.

(b) In order to be effective, the annual election must be made by (1) if the employer is not a corporation, by any member, owner, or other individual with authority to bind the entity or sign returns required pursuant to section six hundred fifty-three of this chapter; or (2) if the employer is a for-profit or not-for-profit corporation, by any officer or manager of the employer who is authorized under the law of the state where the corporation is incorporated or under the employer's organizational documents to make the election and who represents to having such authorization under penalty of perjury; or (3) if the

1 employer is a trust, by the unanimous consent of all trustees; or (4) if
2 the employer is a governmental entity, by the chief executive officer of
3 such governmental entity.
4 (c) The annual election must be made by December first of each calen-
5 dar year and will take effect for the immediately succeeding calendar
6 year. If an election is made after December first of a calendar year, it
7 will first take effect in the second succeeding calendar year.
8 § 852. Imposition and rate of tax. A tax is hereby imposed on the
9 payroll expense paid by electing employers to covered employees. For two
10 thousand nineteen, the tax shall be equal to one and one-half percent of
11 the payroll expense paid by electing employers to covered employees
12 during the calendar quarter. For two thousand twenty, the tax shall be
13 equal to three percent of the payroll expense paid by electing employers
14 to covered employees during the calendar quarter. For two thousand twen-
15 ty-one and thereafter, the tax shall be equal to five percent of the
16 payroll expense paid by electing employers to covered employees during
17 the calendar quarter. An electing employer shall only be subject to the
18 tax imposed under this article on the payroll expense paid to any
19 covered employee during the calendar year in excess of forty thousand
20 dollars.
21 § 853. Pass through of tax. An employer cannot deduct from the wages
22 or compensation of an employee any amount that represents all or any
23 portion of the tax imposed on the employer under this article.
24 § 854. Payment of tax. Employers with payroll expense. The tax imposed
25 on the payroll expense of electing employers under section eight hundred
26 fifty-two of this article must be paid at the same time the electing
27 employer is required to remit payments under section six hundred seven-
28 ty-four of this chapter; provided however, that electing employers
29 subject to the provisions in section nine of this chapter must pay the
30 tax on the payroll expense at the same time as the withholding tax
31 remitted under the electronic payment reporting system and the electron-
32 ic funds transfer system authorized by section nine of this chapter.
33 § 855. Employee credit. A covered employee shall be allowed a credit
34 against the tax imposed under article twenty-two of this chapter,
35 computed pursuant to the provisions of subsection (ccc) of section six
36 hundred six of this chapter.
37 § 856. Deposit and disposition of revenue. All taxes, interest, penal-
38 ties, and fees collected or received by the commissioner under this
39 article shall be deposited and disposed of pursuant to the provisions of
40 section one hundred seventy-one-a of this chapter.
41 § 857. Procedural provisions. (a) General. All provisions of article
42 twenty-two of this chapter will apply to the provisions of this article
43 in the same manner and with the same force and effect as if the language
44 of article twenty-two of this chapter had been incorporated in full into
45 this article and had been specifically adjusted for and expressly
46 referred to the tax imposed by this article, except to the extent that
47 any provision is either inconsistent with a provision of this article or
48 is not relevant to this article. Notwithstanding the preceding
49 sentence, no credit against tax in article twenty-two of this chapter
50 can be used to offset the tax due under this article.
51 (b) Notwithstanding the provisions of section six hundred ninety-seven
52 of this chapter, if the commissioner determines that a person is liable
53 for any tax, penalty or interest under this article pursuant to
54 subsection (b) of section eight hundred fifty-four of this article, upon
55 request in writing of such person, the commissioner shall disclose in
56 writing to such person (1) the name of any other person the commissioner

has determined to be liable for such tax, penalty or interest under this article for the electing employer, and (2) whether the commissioner has attempted to collect such tax, penalty or interest from such other person or electing employer, the general nature of such collection activities, and the amount collected.

(c) Notwithstanding any other law to the contrary, the commissioner may require that all filings of forms or returns under this article must be filed electronically and all payments of tax must be paid electronically. The commissioner may prescribe the methods for quarterly filings by electing employers, including but not limited to, the inclusion of specific employee-level detail.

§ 2. Section 606 of the tax law is amended by adding a new subsection (ccc) to read as follows:

(ccc) Article twenty-four employee credit. A covered employee of an electing employer shall be entitled to a credit against the tax imposed by this article as provided in this subsection. For purposes of this subsection the terms "covered employee" and "electing employer" shall have the same meanings as under section eight hundred fifty of this chapter. (1) For two thousand nineteen, the credit shall be equal to the product of (i) the covered employee's wages and compensation in excess of forty thousand dollars received during the tax year from the electing employer that are subject to tax under this article and (ii) one and one-half percent and (iii) the result of one minus a fraction, the numerator of which shall be the tax imposed on the covered employee as determined pursuant to section six hundred one of this article before the application of any credits for the applicable tax year and the denominator of which shall be the covered employee's taxable income as determined pursuant to this article for the applicable tax year. (2) For two thousand twenty, the credit shall be equal to the product of (i) the covered employee's wages and compensation in excess of forty thousand dollars received during the tax year from the electing employer that are subject to tax under this article and (ii) three percent and (iii) the result of one minus a fraction, the numerator of which shall be the tax imposed on the covered employee as determined pursuant to section six hundred one of this article before the application of any credits for the applicable tax year and the denominator of which shall be the covered employee's taxable income as determined pursuant to this article for the applicable tax year. (3) For two thousand twenty-one and thereafter, the credit shall be equal to the product of (i) the covered employee's wages and compensation in excess of forty thousand dollars received during the tax year from the electing employer that are subject to tax under this article and (ii) five percent and (iii) the result of one minus a fraction, the numerator of which shall be the tax imposed on the covered employee as determined pursuant to section six hundred one of this article before the application of any credits for the applicable tax year and the denominator of which shall be the covered employee's taxable income as determined pursuant to this article for the applicable tax year. If the amount of the credit allowable under this subsection for any taxable year shall exceed the taxpayer's tax for such year, the excess allowed for a taxable year may be carried over to the following year or years and may be deducted from the taxpayer's tax for such year or years.

§ 3. Subdivision 1 of section 171-a of the tax law, as amended by section 15 of part AAA of chapter 59 of the laws of 2017, is amended to read as follows:

1. All taxes, interest, penalties and fees collected or received by the commissioner or the commissioner's duly authorized agent under articles nine (except section one hundred eighty-two-a thereof and except as otherwise provided in section two hundred five thereof), nine-A, twelve-A (except as otherwise provided in section two hundred eighty-four-d thereof), thirteen, thirteen-A (except as otherwise provided in section three hundred twelve thereof), eighteen, nineteen, twenty (except as otherwise provided in section four hundred eighty-two thereof), twenty-B, twenty-one, twenty-two, **twenty-four,** twenty-six, twenty-eight (except as otherwise provided in section eleven hundred two or eleven hundred three thereof), twenty-eight-A, twenty-nine-B, thirty-one (except as otherwise provided in section fourteen hundred twenty-one thereof), thirty-three and thirty-three-A of this chapter shall be deposited daily in one account with such responsible banks, banking houses or trust companies as may be designated by the comptroller, to the credit of the comptroller. Such an account may be established in one or more of such depositories. Such deposits shall be kept separate and apart from all other money in the possession of the comptroller. The comptroller shall require adequate security from all such depositories. Of the total revenue collected or received under such articles of this chapter, the comptroller shall retain in the comptroller's hands such amount as the commissioner may determine to be necessary for refunds or reimbursements under such articles of this chapter out of which amount the comptroller shall pay any refunds or reimbursements to which taxpayers shall be entitled under the provisions of such articles of this chapter. The commissioner and the comptroller shall maintain a system of accounts showing the amount of revenue collected or received from each of the taxes imposed by such articles. The comptroller, after reserving the amount to pay such refunds or reimbursements, shall, on or before the tenth day of each month, pay into the state treasury to the credit of the general fund all revenue deposited under this section during the preceding calendar month and remaining to the comptroller's credit on the last day of such preceding month, (i) except that the comptroller shall pay to the state department of social services that amount of overpayments of tax imposed by article twenty-two of this chapter and the interest on such amount which is certified to the comptroller by the commissioner as the amount to be credited against past-due support pursuant to subdivision six of section one hundred seventy-one-c of this article, (ii) and except that the comptroller shall pay to the New York state higher education services corporation and the state university of New York or the city university of New York respectively that amount of overpayments of tax imposed by article twenty-two of this chapter and the interest on such amount which is certified to the comptroller by the commissioner as the amount to be credited against the amount of defaults in repayment of guaranteed student loans and state university loans or city university loans pursuant to subdivision five of section one hundred seventy-one-d and subdivision six of section one hundred seventy-one-e of this article, (iii) and except further that, notwithstanding any law, the comptroller shall credit to the revenue arrearage account, pursuant to section ninety-one-a of the state finance law, that amount of overpayment of tax imposed by article nine, nine-A, twenty-two, thirty, thirty-A, thirty-B or thirty-three of this chapter, and any interest thereon, which is certified to the comptroller by the commissioner as the amount to be credited against a past-due legally enforceable debt owed to a state agency pursuant to paragraph (a) of subdivision six of section one hundred seventy-one-f of this article, provided, however, he

1 shall credit to the special offset fiduciary account, pursuant to
2 section ninety-one-c of the state finance law, any such amount credita-
3 ble as a liability as set forth in paragraph (b) of subdivision six of
4 section one hundred seventy-one-f of this article, (iv) and except
5 further that the comptroller shall pay to the city of New York that
6 amount of overpayment of tax imposed by article nine, nine-A, twenty-
7 two, thirty, thirty-A, thirty-B or thirty-three of this chapter and any
8 interest thereon that is certified to the comptroller by the commission-
9 er as the amount to be credited against city of New York tax warrant
10 judgment debt pursuant to section one hundred seventy-one-l of this
11 article, (v) and except further that the comptroller shall pay to a
12 non-obligated spouse that amount of overpayment of tax imposed by arti-
13 cle twenty-two of this chapter and the interest on such amount which has
14 been credited pursuant to section one hundred seventy-one-c, one hundred
15 seventy-one-d, one hundred seventy-one-e, one hundred seventy-one-f or
16 one hundred seventy-one-l of this article and which is certified to the
17 comptroller by the commissioner as the amount due such non-obligated
18 spouse pursuant to paragraph six of subsection (b) of section six
19 hundred fifty-one of this chapter; and (vi) the comptroller shall deduct
20 a like amount which the comptroller shall pay into the treasury to the
21 credit of the general fund from amounts subsequently payable to the
22 department of social services, the state university of New York, the
23 city university of New York, or the higher education services corpo-
24 ration, or the revenue arrearage account or special offset fiduciary
25 account pursuant to section ninety-one-a or ninety-one-c of the state
26 finance law, as the case may be, whichever had been credited the amount
27 originally withheld from such overpayment, and (vii) with respect to
28 amounts originally withheld from such overpayment pursuant to section
29 one hundred seventy-one-l of this article and paid to the city of New
30 York, the comptroller shall collect a like amount from the city of New
31 York.
32 § 4. Subdivision 1 of section 171-a of the tax law, as amended by
33 section 16 of part AAA of chapter 59 of the laws of 2017, is amended to
34 read as follows:
35 1. All taxes, interest, penalties and fees collected or received by
36 the commissioner or the commissioner's duly authorized agent under arti-
37 cles nine (except section one hundred eighty-two-a thereof and except as
38 otherwise provided in section two hundred five thereof), nine-A,
39 twelve-A (except as otherwise provided in section two hundred eighty-
40 four-d thereof), thirteen, thirteen-A (except as otherwise provided in
41 section three hundred twelve thereof), eighteen, nineteen, twenty
42 (except as otherwise provided in section four hundred eighty-two there-
43 of), twenty-one, twenty-two, **twenty-four,** twenty-six, twenty-eight
44 (except as otherwise provided in section eleven hundred two or eleven
45 hundred three thereof), twenty-eight-A, twenty-nine-B, thirty-one
46 (except as otherwise provided in section fourteen hundred twenty-one
47 thereof), thirty-three and thirty-three-A of this chapter shall be
48 deposited daily in one account with such responsible banks, banking
49 houses or trust companies as may be designated by the comptroller, to
50 the credit of the comptroller. Such an account may be established in one
51 or more of such depositories. Such deposits shall be kept separate and
52 apart from all other money in the possession of the comptroller. The
53 comptroller shall require adequate security from all such depositories.
54 Of the total revenue collected or received under such articles of this
55 chapter, the comptroller shall retain in the comptroller's hands such
56 amount as the commissioner may determine to be necessary for refunds or

1 reimbursements under such articles of this chapter out of which amount
2 the comptroller shall pay any refunds or reimbursements to which taxpay-
3 ers shall be entitled under the provisions of such articles of this
4 chapter. The commissioner and the comptroller shall maintain a system of
5 accounts showing the amount of revenue collected or received from each
6 of the taxes imposed by such articles. The comptroller, after reserving
7 the amount to pay such refunds or reimbursements, shall, on or before
8 the tenth day of each month, pay into the state treasury to the credit
9 of the general fund all revenue deposited under this section during the
10 preceding calendar month and remaining to the comptroller's credit on
11 the last day of such preceding month, (i) except that the comptroller
12 shall pay to the state department of social services that amount of
13 overpayments of tax imposed by article twenty-two of this chapter and
14 the interest on such amount which is certified to the comptroller by the
15 commissioner as the amount to be credited against past-due support
16 pursuant to subdivision six of section one hundred seventy-one-c of this
17 article, (ii) and except that the comptroller shall pay to the New York
18 state higher education services corporation and the state university of
19 New York or the city university of New York respectively that amount of
20 overpayments of tax imposed by article twenty-two of this chapter and
21 the interest on such amount which is certified to the comptroller by the
22 commissioner as the amount to be credited against the amount of defaults
23 in repayment of guaranteed student loans and state university loans or
24 city university loans pursuant to subdivision five of section one
25 hundred seventy-one-d and subdivision six of section one hundred seven-
26 ty-one-e of this article, (iii) and except further that, notwithstanding
27 any law, the comptroller shall credit to the revenue arrearage account,
28 pursuant to section ninety-one-a of the state finance law, that amount
29 of overpayment of tax imposed by article nine, nine-A, twenty-two, thir-
30 ty, thirty-A, thirty-B or thirty-three of this chapter, and any interest
31 thereon, which is certified to the comptroller by the commissioner as
32 the amount to be credited against a past-due legally enforceable debt
33 owed to a state agency pursuant to paragraph (a) of subdivision six of
34 section one hundred seventy-one-f of this article, provided, however, he
35 shall credit to the special offset fiduciary account, pursuant to
36 section ninety-one-c of the state finance law, any such amount credita-
37 ble as a liability as set forth in paragraph (b) of subdivision six of
38 section one hundred seventy-one-f of this article, (iv) and except
39 further that the comptroller shall pay to the city of New York that
40 amount of overpayment of tax imposed by article nine, nine-A, twenty-
41 two, thirty, thirty-A, thirty-B or thirty-three of this chapter and any
42 interest thereon that is certified to the comptroller by the commission-
43 er as the amount to be credited against city of New York tax warrant
44 judgment debt pursuant to section one hundred seventy-one-l of this
45 article, (v) and except further that the comptroller shall pay to a
46 non-obligated spouse that amount of overpayment of tax imposed by arti-
47 cle twenty-two of this chapter and the interest on such amount which has
48 been credited pursuant to section one hundred seventy-one-c, one hundred
49 seventy-one-d, one hundred seventy-one-e, one hundred seventy-one-f or
50 one hundred seventy-one-l of this article and which is certified to the
51 comptroller by the commissioner as the amount due such non-obligated
52 spouse pursuant to paragraph six of subsection (b) of section six
53 hundred fifty-one of this chapter; and (vi) the comptroller shall deduct
54 a like amount which the comptroller shall pay into the treasury to the
55 credit of the general fund from amounts subsequently payable to the
56 department of social services, the state university of New York, the

1 city university of New York, or the higher education services corpo-
2 ration, or the revenue arrearage account or special offset fiduciary
3 account pursuant to section ninety-one-a or ninety-one-c of the state
4 finance law, as the case may be, whichever had been credited the amount
5 originally withheld from such overpayment, and (vii) with respect to
6 amounts originally withheld from such overpayment pursuant to section
7 one hundred seventy-one-l of this article and paid to the city of New
8 York, the comptroller shall collect a like amount from the city of New
9 York.
10 § 5. Subdivisions 2, 3 and paragraph (a) of subdivision 5 of section
11 92-z of the state finance law, subdivision 2 as amended by section 30 of
12 part T of chapter 57 of the laws of 2007, and subdivision 3 and para-
13 graph (a) of subdivision 5 as added by section 1 of part I of chapter
14 383 of the laws of 2001, are amended to read as follows:
15 2. Such fund shall consist of [~~twenty-five~~] **(a) fifty** percent of
16 receipts from the imposition of personal income taxes pursuant to arti-
17 cle twenty-two of the tax law, less such amounts as the commissioner of
18 taxation and finance may determine to be necessary for refunds**, and (b)**
19 **fifty percent of receipts from the imposition of employer compensation**
20 **expense taxes pursuant to article twenty-four of the tax law, less such**
21 **amounts as the commissioner of taxation and finance may determine to be**
22 **necessary for refunds**.
23 3. **(a)** Beginning on the first day of each month, the comptroller shall
24 deposit all of the receipts collected pursuant to section six hundred
25 seventy-one of the tax law in the revenue bond tax fund until the amount
26 of monthly receipts anticipated to be deposited pursuant to the certif-
27 icate required in paragraph (b) of subdivision five of this section are
28 met. On or before the twelfth day of each month, the commissioner of
29 taxation and finance shall certify to the state comptroller the amounts
30 specified in **paragraph (a) of** subdivision two of this section relating
31 to the preceding month and, in addition, no later than March thirty-
32 first of each fiscal year the commissioner of taxation and finance shall
33 certify such amounts relating to the last month of such fiscal year. The
34 amounts so certified shall be deposited by the state comptroller in the
35 revenue bond tax fund.
36 **(b) Beginning on the first day of each month, the comptroller shall**
37 **deposit all of the receipts collected pursuant to section eight hundred**
38 **fifty-four of the tax law in the revenue bond tax fund until the amount**
39 **of monthly receipts anticipated to be deposited pursuant to the certif-**
40 **icate required in paragraph (b) of subdivision five of this section are**
41 **met. On or before the twelfth day of each month, the commissioner of**
42 **taxation and finance shall certify to the state comptroller the amounts**
43 **specified in paragraph (b) of subdivision two of this section relating**
44 **to the preceding month and, in addition, no later than March thirty-**
45 **first of each fiscal year the commissioner of taxation and finance shall**
46 **certify such amounts relating to the last month of such fiscal year. The**
47 **amounts so certified shall be deposited by the state comptroller in the**
48 **revenue bond tax fund.**
49 (a) The state comptroller shall from time to time, but in no event
50 later than the fifteenth day of each month (other than the last month of
51 the fiscal year) and no later than the thirty-first day of the last
52 month of each fiscal year, pay over and distribute to the credit of the
53 general fund of the state treasury all moneys in the revenue bond tax
54 fund, if any, in excess of the aggregate amount required to be set aside
55 for the payment of cash requirements pursuant to paragraph (b) of this
56 subdivision, provided that an appropriation has been made to pay all

amounts specified in any certificate or certificates delivered by the director of the budget pursuant to paragraph (b) of this subdivision as being required by each authorized issuer as such term is defined in section sixty-eight-a of this chapter for the payment of cash requirements of such issuers for such fiscal year. Subject to the rights of holders of debt of the state, in no event shall the state comptroller pay over and distribute any moneys on deposit in the revenue bond tax fund to any person other than an authorized issuer pursuant to such certificate or certificates (i) unless and until the aggregate of all cash requirements certified to the state comptroller as required by such authorized issuers to be set aside pursuant to paragraph (b) of this subdivision for such fiscal year shall have been appropriated to such authorized issuers in accordance with the schedule specified in the certificate or certificates filed by the director of the budget or (ii) if, after having been so certified and appropriated, any payment required to be made pursuant to paragraph (b) of this subdivision has not been made to the authorized issuers which was required to have been made pursuant to such certificate or certificates; provided, however, that no person, including such authorized issuers or the holders of revenue bonds, shall have any lien on moneys on deposit in the revenue bond tax fund. Any agreement entered into pursuant to section sixty-eight-c of this chapter related to any payment authorized by this section shall be executory only to the extent of such revenues available to the state in such fund. Notwithstanding subdivisions two and three of this section, in the event the aggregate of all cash requirements certified to the state comptroller as required by such authorized issuers to be set aside pursuant to paragraph (b) of this subdivision for the fiscal year beginning on April first shall not have been appropriated to such authorized issuers in accordance with the schedule specified in the certificate or certificates filed by the director of the budget or, (ii) if, having been so certified and appropriated, any payment required to be made pursuant to paragraph (b) of this subdivision has not been made pursuant to such certificate or certificates, all receipts collected pursuant to section six hundred seventy-one of the tax law **and section eight hundred fifty-four of the tax law** shall be deposited in the revenue bond tax fund until the greater of [~~twenty-five~~] **forty** percent of the **aggregate of the** receipts from the imposition of **(A)** the personal income tax imposed by article twenty-two of the tax law **and (B) the employer compensation expense tax imposed by article twenty-four of the tax law** for the fiscal year beginning on April first and as specified in the certificate or certificates filed by the director of the budget pursuant to this paragraph or [~~six~~] **a total of twelve** billion dollars has been deposited in the revenue bond tax fund. Notwithstanding any other provision of law, if the state has appropriated and paid to the authorized issuers the amounts necessary for the authorized issuers to meet their requirements for the current fiscal year pursuant to the certificate or certificates submitted by the director of the budget pursuant to paragraph (b) of this section, the state comptroller shall, on the last day of each fiscal year, pay to the general fund of the state all sums remaining in the revenue bond tax fund on such date except such amounts as the director of the budget may certify are needed to meet the cash requirements of authorized issuers during the subsequent fiscal year.

§ 6. Subdivision 5 of section 68-c of the state finance law, as added by section 2 of part I of chapter 383 of the laws of 2001, is amended to read as follows:

5. Nothing contained in this article shall be deemed to restrict the right of the state to amend, repeal, modify or otherwise alter statutes imposing or relating to the taxes imposed pursuant to article twenty-two **and article twenty-four** of the tax law. The authorized issuers shall not include within any resolution, contract or agreement with holders of the revenue bonds issued under this article any provision which provides that a default occurs as a result of the state exercising its right to amend, repeal, modify or otherwise alter the taxes imposed pursuant to article twenty-two **and article twenty-four** of the tax law.

§ 7. This act shall take effect immediately; provided, however, that the amendments to subdivision 1 of section 171-a of the tax law made by section three of this act shall not affect the expiration of such subdivision and shall expire therewith, when upon such date the provisions of section four of this act shall take effect.

PART NN

Section 1. The opening paragraph of subdivision 7 of section 221 of the racing, pari-mutuel wagering and breeding law, as amended by section 2 of part SS of chapter 59 of the laws of 2017, is amended to read as follows:

In order to pay the costs of the insurance required by this section and by the workers' compensation law and to carry out its other powers and duties and to pay for any of its liabilities under section fourteen-a of the workers' compensation law, the New York Jockey Injury Compensation Fund, Inc. shall ascertain the total funding necessary and establish the sums that are to be paid by all owners and trainers licensed or required to be licensed under section two hundred twenty of this article, to obtain the total funding amount required annually. In order to provide that any sum required to be paid by an owner or trainer is equitable, the fund shall establish payment schedules which reflect such factors as are appropriate, including where applicable, the geographic location of the racing corporation at which the owner or trainer participates, the duration of such participation, the amount of any purse earnings, the number of horses involved, or such other factors as the fund shall determine to be fair, equitable and in the best interests of racing. In no event shall the amount deducted from an owner's share of purses exceed two per centum; provided, however, for two thousand [~~seventeen~~] **eighteen** the New York Jockey Injury Compensation Fund, Inc. may use up to two million dollars from the account established pursuant to subdivision nine of section two hundred eight of this article to pay the annual costs required by this section and the funds from such account shall not count against the two per centum of purses deducted from an owner's share of purses. The amount deducted from an owner's share of purses shall not exceed one per centum after April first, two thousand twenty. In the cases of multiple ownerships and limited racing appearances, the fund shall equitably adjust the sum required.

§ 2. Paragraph (a) of subdivision 9 of section 208 of the racing, pari-mutuel wagering and breeding law, as amended by section 2 of part PP of chapter 60 of the laws of 2016, is amended to read as follows:

(a) The franchised corporation shall maintain a separate account for all funds held on deposit in trust by the corporation for individual horsemen's accounts. Purse funds shall be paid by the corporation as required to meet its purse payment obligations. Funds held in horsemen's accounts shall only be released or applied as requested and directed by

subdivision shall be equivalent to, and shall not be more restrictive than, those established by the New York State Urban Development Corporation, doing business as the Empire State Development Corporation, in the grant programs it administered pursuant to part H of chapter 56 of the laws of 2011. In providing assistance pursuant to this subdivision, the New York state urban development corporation shall give preference to applicants that demonstrate the greatest need, based on available flood damage data provided by applicable state and/or federal agencies.

§ 2. Paragraph (c) of subdivision 3 of section 1 of part A of chapter 85 of the laws of 2017, relating to creating the Lake Ontario-St. Lawrence Seaway flood recovery and International Joint Commission Plan 2014 mitigation grant program, as amended by section 2 of part J of chapter 61 of the laws of 2017, is amended to read as follows:

(c) The affordable housing corporation shall administer this grant program, which shall not exceed in the aggregate $15,000,000 **plus any funds directed from the programs authorized in subdivisions 2 and 4 of this section**. Such corporation and other relevant state agency or state authorities are hereby empowered to establish grant guidelines and additional eligibility criteria as deemed necessary to effectuate the administration of this program. Any grant guidelines and eligibility criteria established by the corporation pursuant to this subdivision shall be equivalent to, and shall not be more restrictive than, those established by the New York State Urban Development Corporation, doing business as the Empire State Development Corporation, in the grant programs it administered pursuant to part H of chapter 56 of the laws of 2011. In providing assistance pursuant to this subdivision, the affordable housing corporation shall give preference to applicants that demonstrate the greatest need, based on available flood damage data provided by applicable state and/or federal agencies.

§ 3. Paragraph (c) of subdivision 4 of section 1 of part A of chapter 85 of the laws of 2017, relating to creating the Lake Ontario-St. Lawrence Seaway flood recovery and International Joint Commission Plan 2014 mitigation grant program, as amended by section 2 of part J of chapter 61 of the laws of 2017, is amended to read as follows:

(c) The housing trust fund corporation shall administer this grant program, which shall not exceed in the aggregate $15,000,000 **plus any funds directed from the programs authorized in subdivisions 2 and 3 of this section**. Such corporation, and other relevant state agencies or state authorities, is hereby empowered to establish grant guidelines and additional eligibility criteria, based on available flood damage data provided by applicable state and/or federal agencies, as it deems necessary to effectuate the administration of this program. Any grant guidelines and eligibility criteria established by the corporation pursuant to this subdivision shall be equivalent to, and shall not be more restrictive than, those established by the New York State Urban Development Corporation, doing business as the Empire State Development Corporation, in the grant programs it administered pursuant to part H of chapter 56 of the laws of 2011. In providing assistance pursuant to this subdivision, the corporation shall give preference to applicants that demonstrate the greatest need, based on available flood damage data provided by applicable state and/or federal agencies.

§ 4. This act shall take effect immediately.

PART EEE

Section 1. The tax department shall be required to set up an online application system for taxpayers to submit claims for reimbursements of payments of interest on fixed and final determinations of underpayments of federal tax liability for the 2019, 2020 and 2021 tax year that arise from the taxpayers' reliance on amendments to the tax law enacted in the year 2018. In order to receive such reimbursement, taxpayers shall be required to submit their reimbursement claims to the department of taxation and finance within 60 days of making their payments of interest to the internal revenue service.

§ 2. This act shall take effect immediately.

PART FFF

Section 1. This Part enacts into law major components of legislation relating to the conversion of certain entities that have been issued certificates of authority pursuant to article forty-four of the public health law. Each component is wholly contained within a Subpart identified as Subparts A and B. The effective date for each particular provision contained within such Subpart is set forth in the last section of such Subpart. Any provision in any section contained within a Subpart, including the effective date of the Subpart, which makes a reference to a section "of this act", when used in connection with that particular component, shall be deemed to mean and refer to the corresponding section of the Subpart in which it is found. Section three of this Part sets forth the general effective date of this Part.

SUBPART A

Section 1. The state finance law is amended by adding a new section 92-hh to read as follows:

§ 92-hh. Health care transformation fund. 1. There is hereby established in the joint custody of the state comptroller and the commissioner of taxation and finance a fund to be known as the "health care transformation fund".

2. Such fund shall consist of moneys paid thereto from (a) contingent reserves redeployed pursuant to section forty-four hundred sixteen of the public health law, (b) moneys transferred to such fund pursuant to law, and (c) contributions, consisting of grants of any money, including grants or other financial assistance from any agency of government or any other source, to be paid into this fund.

3. Moneys in the health care transformation fund shall be kept separate and shall not be commingled with any other moneys in the custody of the state comptroller and the commissioner of taxation and finance.

4. Notwithstanding any provision of law to the contrary, moneys of the health care transformation fund shall be available for transfer to any other fund of the state as authorized and directed by the director of the budget to support health care delivery, including for capital investment, debt retirement or restructuring, housing and other social determinants of health, or transitional operating support to health care providers.

5. Within fifteen days after executing or modifying an allocation, transfer, distribution or other use of the health care transformation fund, the commissioner shall provide written notice to the chairs of the senate finance committee, the assembly ways and means committee, the senate and assembly insurance committees, and the senate and assembly health committees. Such notice shall include, but shall not be limited

MAYER • BROWN

Mayer Brown Legal Update
18 May 2018

Using a Sledgehammer to Kill a Fly: New York State Considers Unincorporated Business Tax and Seeks Comments

The New York State Department of Taxation and Finance (Department) just released for comment a draft bill to enact a new unincorporated business tax (UBT). The Department's stated purpose for the new UBT is to provide relief to individual New York State (State) taxpayers who would be subject to the new federal $10,000 state tax deduction limitation, part of the federal Tax Cuts and Jobs Act of 2017. While that is a laudable goal, the proposal as currently drafted appears to generate substantially more revenue for the State—at the expense of partnerships doing business in New York—than the benefit to individual partners would seem to justify. In other words, enactment of the proposed UBT appears to be a revenue raiser, and a substantial one at that. If the goal of the State's UBT proposal is to provide the same type of relief as it provided to wage earners via its recently enacted voluntary employer payroll tax, then the State's UBT should likewise allow companies to opt in rather than be mandatory.

We applaud the Department for releasing a draft of the UBT proposal and seeking comments from interested parties. This is consistent with the open, collaborative relationship between the Department, taxpayers and practitioners that existed during New York State's 2014 tax reform. To that end, Mayer Brown will be submitting comments on its own behalf and for clients and would be happy to discuss possible additional comments or submissions.

Current regime

Currently, the State does not directly impose tax on partnerships and multi-member limited liability companies doing business in the State.[1] However, New York State previously had a UBT. The State's original UBT was enacted in 1935 as a "temporary" tax, making it permanent in 1960 as Article 23 of the Tax Law. The State's stated goal in enacting the original UBT was to impose a tax on noncorporate enterprises that competed with corporations subject to the State's franchise tax. The State's UBT was repealed in 1978 effective for taxable years beginning after December 31, 1981, and was phased out via rate reductions during the interim period. New York City also enacted its own UBT (City UBT) in 1966, which was patterned after the State's original UBT. The City UBT is imposed on partnerships and multi-member limited liability companies doing business in New York City, with long-standing exemptions for certain self-trading and real estate management activities.

After our overview of the current proposal, we consider how the proposed State UBT would handle some of the issues that we regularly encounter in City UBT audits.

Overview of the State's UBT proposal

The proposed UBT would apply to entities treated as partnerships for federal purposes. As currently drafted, that includes partnerships and multi-member limited liability companies but not single-member limited liability companies, which would continue to be disregarded into their members.

A 5% tax would be imposed on those partnerships "doing business" in New York State. The term "doing business" is not defined, but as proposed, the personal income tax provisions in Article 22 would apply. New York State's Article 9-A was recently changed to an economic nexus standard from a physical presence nexus standard, but that change was not made for insurance companies or utilities and—most importantly—Article 22's personal income tax. Coupled with the apportionment provision—which assigns gross income in connection with activities occurring in New York State—a physical presence would likely be required before a partnership would have apportionable income.

The City UBT excludes companies engaged in self-trading activities and those whose activities are limited to managing real estate from the tax. The State UBT proposal does not *explicitly* carve out those activities from "doing business" or eliminate the resulting income from the tax base. However, as discussed in the next paragraph, such income may not be included in the State UBT tax base at all. In addition, there is a possibility the State's UBT will be voluntary—which would create an opportunity for those entities not to opt in. If self-trading and real estate partnerships are taxable under the proposed regime, this would be a major shift in policy and one that could cause New York City to reconsider its exemptions as it continues its efforts to reform the City UBT.

The Department is expressly seeking comments on what should be treated as unincorporated taxable income. As currently proposed, the tax base would be federal ordinary business income with an addback for UBT tax and an addback for guaranteed payments to partners. The reference to federal ordinary business income includes a reference to I.R.C. § 702(a)(8), which describes taxable income that is not separately stated under other provisions of § 702(a). Rental income and portfolio income may fall outside of (a)(8) because they may require separate computation in (a)(1) through (7). This suggests that self-trading and real estate managing partnerships would not include such income in their State UBT tax base. We look forward to clarification on this point and hope that any clarification offered recognizes the long-standing non-taxability of partnerships engaged in those activities and the ease of moving investment activities out-of-state.

The tax base portion of the proposed UBT is notably silent on some of the more contentious income-affecting provisions found in federal tax reform, including the section 163(j) interest expense deduction limitation, section 951A GILTI inclusion, and section 965 repatriation toll charge. Given that the stated purpose for the proposed UBT is to help New York taxpayers address unfavorable aspects of federal tax reform, we would urge the Department to address these aspects of the federal reform similarly (i.e., by providing relief).

Under Article 9-A, prior to apportionment, corporate income is divided into several buckets, some of which are exempt; under the City UBT, income is divided into investment income and business income, and each is apportioned separately. Here, with the State UBT, a lump sum of income would be apportioned by a single formula. If the reference to federal ordinary business income excludes investment income, then the regime would be consistent with New York's "headquarter's favorable" regime. Otherwise, this would be a departure from New York's historic approach to treating certain types of income more favorably than other income.

The proposal includes equally weighted three-factor apportionment, comprising property, payroll and gross income percentages. The proposal is short on details as to how each would be computed, and we assume regulations would flesh that out at a later date. The gross income factor, interestingly, could be read to include only sales of services and assigns those services to the office where the sales are negotiated, consummated or performed. However, the proposed statutory language is identical to the Article 22 regulation on "gross income percentage," 20 NYCRR 132.15(f), which the Department views as including receipts from all sales and not just those related to sales of services.

Partnerships will compute their tax on an entity-level basis, adding the already apportioned income of lower-tier partnerships to their own already apportioned income and receiving credits for the State UBT paid by lower-tier entities.

The proposed State UBT contains a credit for partners filing other New York returns. Recall that the purpose for restoring the State UBT is to generate a credit that can be applied against a partner's New York personal income tax liability. For partnerships whose partners are not New York taxpayers (e.g., where a partnership is doing business but its corporate or individual partners are not themselves New York taxpayers), the credit is of little to no value. For corporate and individual partners in an overall loss position, the credit is not refundable, but it can be carried forward indefinitely.

Two preliminary items should be explained before getting to the credit computations. First, for purposes of the credits, a partner's "ownership percentage" is not its technical actual ownership percentage. Rather, it is the partner's relative portion of distributed income, gain, loss and deductions, and guaranteed payments. This means that special allocations and other income distribution agreements could result in a 50/50 partnership—based on capital ownership— having a different "ownership percentage" for UBT purposes. Because the economics of many partnerships were designed without a State UBT in mind, perhaps the New York State Legislature should consider allowing partners to elect to allocate the credit consistent with the overall economics of the partnership rather than just based on proportionate distributions.

Second, a partnership that is itself a partner in a lower-tier partnership must compute its own unincorporated business credit (UBC) before its partners compute their credits. A partnership's UBC is the partnership's ownership percentage (i.e., relative distribution percentage) multiplied by the greater of the lower-tier partnership's UBT or the lower-tier partnership's UBC. In computing the UBC for determining various upstream entities' credits, there is no limitation applied to the UBC. However, when determining the UBC that a particular partner can actually take, the limitation discussed below is applied.

For partners who are partnerships, the UBC will be the taxpayer-partnership's ownership percentage multiplied by the greater of the UBT of the partnership or the partnership's UBC. For this computation, the limitation in proposed § 862(a)(3), which prevents the partnership from reducing tax below zero and prevents any carryforward of unused credit, applies.

For partners who are individuals, a credit against New York State Personal Income Tax is available. The credit would be the taxpayer-partner's ownership percentage in the partnership multiplied by 93% multiplied by the greater of the partnership's UBT or its UBC. Credit from multiple partnerships can be added together. If the credit exceeds the taxpayer-partner's tax, the excess can be carried indefinitely. For New York State residents, the value of the credit seems readily identifiable. But for nonresidents, receiving a credit against New York State tax may not provide any relief in the nonresident individual's home state resident tax return. For example, depending on how the state of residence determines what counts toward that state's credit for taxes paid to other jurisdictions, the nonresident may not receive any economic benefit at all. If that is the case, then the entire State UBT regime's purported benefit—to provide relief to those taxpayers impacted by the federal SALT deduction limitation—would be meaningless to nonresident partners.

For partners that are corporations, the credit would be the taxpayer's ownership percentage in the partnership multiplied by 93% multiplied by the greater of the partnership's UBT or its UBC. Credit from multiple partnerships can be added together. If the credit exceeds the taxpayer's tax in excess of the taxpayer's fixed dollar minimum tax, such excess can be carried forward indefinitely.

Finally, something that will likely be a relief to partners, but may be less of a relief to some partnerships: Under the proposal, the Department will have the authority to share partnership returns and "information" with the partners. A lack of partnership data was a significant concern for some corporate partners attempting to determine whether partnerships—the actions of which were not visible to those partners—had done certain things that are required under Article 9-A for income to qualify as investment income.

Does the proposed State UBT resolve the murky issues that partners and partnerships regularly face under the City UBT?

Yes, no, and maybe.

Some of the issues we see regularly are addressed here. For example, expense attribution takes a leading role in some City UBT audits; however, that would not appear to an issue here as only a limited set of expenses would be disallowed (UBT tax and guaranteed payments). Questions regularly arise regarding apportionment of flow-through income, particularly if the lower-tier entity has a full or partial exemption from the City UBT. Here, the entity-level apportionment is black-and-white (though we think the City's rules are clear on this point). Similarly, the State's UBT proposal addresses the implications of a change in accounting method (under I.R.C. § 481) more cleanly than do the City UBT's provisions.

However, the State UBT's silence on whether self-trading and real estate management are exempt may cause some consternation (though the reference to federal ordinary business income and I.R.C. § 702(a)(8) should alleviate that concern). Similarly, the rather limited apportionment guidance will be a problem. Then again, we expect that both of these issues will be addressed prior to enactment. The question, of course, is *how* they will be addressed. Deductibility of certain payments to partners is a common audit issue in the City; here it is clear that whatever payments are treated as guaranteed payments are not deductible, whereas other payments to partners would not be added back.

Comments requested

As mentioned earlier, the Department has asked for comments on its draft proposal. Our hope is that commentary will aid the Department in honing the UBT proposal to better address its stated purpose of swatting the federal SALT deduction limitation for New York taxpayers.

The deadline for submitting comments to the Department is July 16, 2018. The resulting UBT may be as game-changing as another event on that day in history, the July 16, 1969 launch of Apollo 11, carrying the first men to land on the moon.

[1] Although nonpayment can result in the partnership having liability, any "withholding tax" payments made by the partnership on behalf of nonresident partners is not considered a tax imposed on the partnership for this discussion.

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Highlights from the 2019 Budget Bill

By Timothy P. Noonan on April 11, 2018

Yesterday we put out an "Alert" the Governor's final 2019 budget bill. It contains everything you need to know about what tax provisions passed in the budget (and what did not pass).

Here at the Noonan's Notes Blog, we've been following the process closely (see my prior report on the proposed budget here). Here's my take on how everything shook out:

The New ECET System. The new "payroll tax" passed! I'll admit that I was skeptical of this. I didn't think that the Legislature would actually pass the payroll tax bill, which essentially is one of the countermeasures set forth by Governor Cuomo to combat the negative effects felt by New Yorkers from the loss of the SALT deduction. More on that proposal here. But, alas, the Legislature passed the bill, and now there is a new "Employer Compensation Expense Tax" system on the books. This is not a mandatory tax; an employer would have to elect into the program. Will anyone do so? At this point it's hard to tell. The ECET system appears pretty complicated, and will affect different employers and employees in significantly different ways.

About This Blog

Noonan's Notes Blog is written by a team of Hodgson Russ tax attorneys led by the blog's namesake, Tim Noonan. Noonan's Notes Blog regularly provides analysis of and commentary on developments in the world of New York and multistate tax law. Noonan's Notes Blog is a winner of CreditDonkey's Best Tax Blogs Award 2017.

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Topics

"Charitable" Tax Payments. The charitable deduction thing passed too! This was part two of the Governor's SALT deduction countermeasure, essentially allowing taxpayers to substitute charitable contributions for tax payments. Details are in our Alert, and at this point it's unclear whether the IRS would actually allow the claimed charitable deduction that this New York tax provision contemplates. Overall, good for New York for giving it a try. It will be interesting to see if it works.

New statute of limitations rule for amended tax returns. Under prior law, if I filed an amended return a couple days before the expiration of the normal three year statute of limitations, this didn't reopen the statute of limitations for the entire tax return. Instead, the Tax Department could audit my amended return and challenge my refund claim. They could even look to other areas of my tax return to offset any potential refund. But they could not assess me any additional taxes if they found problems on my amended return. Well, that's now changed. Now the tax department has an extra year to find additional tax liabilities for taxpayers who file amended returns. We're not wild about the approach here (see commentary from the infamous TiNY blogger here), in part because it's unnecessary, and in part because it seems to be a clear way to discourage the filing of amended returns seeking refunds. Whatever the case, this is now something additional that taxpayers will have to consider before filing amended returns.

***Sobotka* Reversed.** A couple years ago we won the Sobotka case, where an administrative law judge in New York's Division of Tax Appeals held that the "183-day rule" under New York's statutory residency rule did not apply to taxpayers who had a change of domicile during the tax year. More specifically, the judge held that the only days that counted for the 183-day rule test were days in the non-resident portion of the taxpayer's tax year. The tax department did not like this decision, and legislation was proposed to reverse the result. But the proposal was styled as a "clarification," meaning that the change was supposed to apply to all open tax years. Well, the change went through it, but it was not retroactive! Instead, this is a prospective change only, beginning for tax years in 2019. That means that for tax years prior to 2019, the *Sobotka* issue is very much alive!

Responsible Person Relief: This is just a codification of current tax department policy set forth in a 2011 technical memorandum (that apparently no longer exists; the tax department pulled in from their website). Basically, the idea is to limit the harshness of New York's *per*

se liability rule for members of limited liability companies and limited partners. Again, the tax department has been applying this policy for years, but arguably the policy was inconsistent with the statute. This change just codifies that policy. Kudos to the tax department for doing this; it is sensible to put this policy into law.

What didn't pass? The somewhat goofy law to subjecting carried interest to an additional seventeen percent (17%) tax didn't pass. Also—and thankfully as far as I'm concerned—the proposal to allow the tax department to appeal adverse Tax Appeals Tribunal decisions didn't make it. Finally, the tax department's effort to impose nexus obligations on "marketplace providers" like Amazon sellers also didn't pass. Of course, this whole nexus discussion may all be moot if the U.S. Supreme Court overturns the *Quill* physical presence rule in the upcoming *Wayfair* case. Oral arguments in that case are set for this month, so we'll be following it closely.

Topics: Tax Reform

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Guidance on Certain Payments Made in Exchange for State and Local Tax Credits

NOTICE 2018-54

SECTION 1. PURPOSE

This notice informs taxpayers that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to propose regulations addressing the federal income tax treatment of certain payments made by taxpayers for which taxpayers receive a credit against their state and local taxes.

SECTION 2. BACKGROUND

Section 11042 of "The Tax Cuts and Jobs Act," Pub. L. No. 115-97, limits an individual's deduction under § 164 for the aggregate amount of state and local taxes paid during the calendar year to $10,000 ($5,000 in the case of a married individual filing a separate return). State and local tax payments in excess of those amounts are not deductible. This new limitation applies to taxable years beginning after December 31, 2017, and before January 1, 2026.

In response to this new limitation, some state legislatures are considering or have adopted legislative proposals that would allow taxpayers to make transfers to funds controlled by state or local governments, or other transferees specified by the state, in exchange for credits against the state or local taxes that the taxpayer is required to pay. The aim of these proposals is to allow taxpayers to characterize such

transfers as fully deductible charitable contributions for federal income tax purposes, while using the same transfers to satisfy state or local tax liabilities.

Despite these state efforts to circumvent the new statutory limitation on state and local tax deductions, taxpayers should be mindful that federal law controls the proper characterization of payments for federal income tax purposes.

SECTION 3. GUIDANCE TO BE ISSUED

The Treasury Department and the IRS intend to propose regulations addressing the federal income tax treatment of transfers to funds controlled by state and local governments (or other state-specified transferees) that the transferor can treat in whole or in part as satisfying state and local tax obligations. The proposed regulations will make clear that the requirements of the Internal Revenue Code, informed by substance-over-form principles, govern the federal income tax treatment of such transfers. The proposed regulations will assist taxpayers in understanding the relationship between the federal charitable contribution deduction and the new statutory limitation on the deduction for state and local tax payments.

SECTION 4. DRAFTING INFORMATION

The principal authors of this notice are Mon Lam and Merrill Feldstein of the Office of Associate Chief Counsel (Income Tax & Accounting). Other personnel from the Treasury Department and the IRS participated in its development. For further information regarding this notice, contact Ms. Lam or Ms. Feldstein at (202) 317-5100 (not a toll-free call).

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Mayer Brown Legal Update
23 May 2018

IRS to Propose Regulations on Certain States' SALT Deduction Charitable Contribution Workaround

The US Internal Revenue Service (IRS) issued Notice 2018-54 (Notice) announcing its intention to propose regulations that could impact the viability of the charitable contribution workaround to the state and local tax deduction limitation enacted in the Tax Cuts and Jobs Act (the "Tax Act"). The annual $10,000 limitation ($5,000 for individuals) hit taxpayers in certain states particularly hard and several states such as New York, California, Illinois, Rhode Island and Vermont quickly responded by proposing legislation that would allow their citizens to make charitable contributions to state-created funds and receive credits that could be applied against their state tax liabilities. On April 12, 2018, New York became the first state to sign into law provisions that would allow individuals to deduct 85% of the donations they make to certain newly created funds and charitable organizations.

The Notice reminds taxpayers to "be mindful that federal law controls the proper characterization of payments for federal income tax purposes" and warns that the " proposed regulations will make clear that the requirements of the Internal Revenue Code, informed by substance-over-form principles, govern the federal income tax treatment of such transfers."

The tenor of the Notice strongly suggests that the IRS will distinguish Chief Counsel Advice Memorandum 201105010 (CCA), released February 4, 2011, which addressed whether a payment to a state agency is considered a charitable contribution if the payment entitles the taxpayer to a state tax credit and concluded that a reduction in tax liability attributable to a charitable contribution of cash and appreciated stock is not consideration that might constitute a quid pro quo for purposes of the charitable deduction. However, the CCA cautioned that "there may be unusual circumstances in which it would be appropriate to recharacterize a payment of cash or property that was, in form, a charitable contribution as, in substance, a satisfaction of tax liability."

Given the reference in the Notice to substance-over-form principles, we expect that the proposed regulations will view the states' charitable deduction workaround as an appropriate circumstance to warrant recharacterization of the charitable deductions as state tax payments subject to the Tax Act's limitation.

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May 23, 2018

SALT/Charitable Workaround Credits Require a Broad Fix, Not a Narrow One

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Narrow Federal Action Would be Unfair, Arbitrary, and Ineffective

EXECUTIVE SUMMARY

The federal Tax Cuts and Jobs Act (TCJA) enacted last year temporarily capped deductions for state and local tax (SALT) payments at $10,000 per year. The cap, which expires at the end of 2025, disproportionately impacts taxpayers in higher-income states and in states and localities more reliant on income or property taxes, as opposed to sales taxes. Increasingly, lawmakers in those states who feel their residents were unfairly targeted by the

federal law are debating and enacting tax credits that can help some of their residents circumvent this cap—a policy this report will refer to as “workaround credits.” Specifically, states are offering sizeable tax credits in return for making so-called charitable gifts, rather than ordinary SALT payments, to support public services. This is advantageous to some taxpayers because charitable gifts are treated much more favorably than SALT payments under the new federal tax code.

For taxpayers, using these credits will result in a somewhat higher payment to their state governments (or in some cases, local governments) because the credits only offset part of the cost of donating. In New York, for instance, 85 percent of the donation is returned to the donor with tax credits. But for high-income taxpayers able to itemize at the federal level, the added benefits of the federal charitable deduction will often be large enough to both offset that higher state payment and return a net financial benefit to the taxpayer. Notably, most of the high-income taxpayers likely to benefit from these credits already received significant federal tax cuts under the TCJA.

One unusual result of this arrangement is that for state governments, the “tax cut” associated with the credits will produce an overall revenue gain because the donations expected to flow into state coffers will be larger than the credits flowing out (as noted above, every dollar received by New York’s government only triggers 85 cents of state tax credit payouts). More fundamentally, these credits shift state funding streams away from partly deductible tax payments and toward fully deductible payments that the federal government considers to be charitable gifts. The magnitude of this shift remains to be seen, however, as it will depend on how many taxpayers choose to take advantage of these credits.

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Now that a critical mass of states has adopted these credits (including New York, New Jersey, Connecticut, and Oregon as of this writing), the focus of the debate will shift toward the federal level and whether the Internal Revenue Service (IRS), Treasury Department, and/or Congress will allow these workaround credits to proceed as state lawmakers have planned. This report makes the following findings about potential federal responses to these new workaround credits, and to state charitable tax credits more broadly:

- **During last year's rushed debate over the TCJA, Congress was informed that states and localities were likely to respond to the SALT cap with these types of tax credit schemes, but it ultimately did nothing to prevent them.** Much of the debate around this topic has now shifted to whether the IRS has the authority to clean up the mess that Congress left behind, or whether legislation will be needed to address this issue.
- **Many observers have responded to these workaround credits with skepticism and shock, and understandably so.** The gifts being made under these schemes are not truly "charitable" according to any commonsense definition of that word, since the taxpayers are made financially better off by their gifts.
- **But fixing this problem will be more difficult than many observers have recognized, as it runs much deeper than these new workaround credits.** While these workaround credits have attracted significant attention in recent months, this type of abuse of the charitable giving deduction has been occurring for many years. Taxpayers have long claimed federal charitable deductions on so-called "charitable gifts" for which the taxpayer received a reimbursement from their state government via a tax credit.
- **The closest parallel to these workaround credits in existing tax law is a policy typically favored by conservatives: tax credits that steer funding to**

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private K-12 school vouchers. Tax accountants, private schools, and others in states with such credits have long marketed these programs as tools for exploiting the federal charitable deduction, and in the wake of the new federal tax law they are now using language that mirrors that used by proponents of the new workaround credits. While blue-state efforts to circumvent the SALT cap have attracted more attention, financial advisors in deep-red Alabama and elsewhere are touting the ability of their existing charitable tax credits to help their residents "avoid losing" their SALT deductions. And the sales pitch has proven persuasive. Alabama's entire allotment of private school tax credits was claimed more quickly this year than ever before.

- **Some observers have suggested that the IRS or Treasury Department could intervene with narrowly targeted guidance or a regulation affecting these new workaround credits, but not other pre-existing state charitable credits.** This approach would be highly problematic because the new workaround credits have much more in common with existing charitable tax credits than is commonly understood.
- **Narrow federal action would be unfair because it would treat similarly situated taxpayers differently depending on the types of causes to which they donate.** For example, narrow federal action would likely involve denying tax-credit-reimbursed deductions on donations to public schools, but not private schools, even if the impact of those two types of donations on taxpayers and state coffers was identical.
- **Narrow federal action would require making arbitrary distinctions between different types of organizations receiving donations.** Existing state charitable tax credits steer donations to a wide range

of entities, including government agencies, public institutions, other levels of government, public-private partnerships, and private nonprofits providing services very similar to what a state government might otherwise provide. There is no way to draw a defensible line between the various types of organizations within this broad spectrum.

- **Narrow federal action would be ineffective because limiting the federal charitable deduction only for gifts to certain types of organizations would inevitably cause state and local leaders to become more creative in their tax credit designs, tweaking them so that they fall just outside of whatever restrictions the federal government might create.** For example, states could replace much of their direct aid to public universities or local governments with tax credit schemes that steer donations to those entities. Or if even those schemes were shut down (a policy change that would affect not just the new workaround credits, but many pre-existing credits as well), states could devise sophisticated programs routing donations through private nonprofits.
- **A better approach would address not just the new breed of workaround credits, but other state charitable tax credit schemes as well.** Rather than denying the federal charitable deduction for donations to some entities but not others, this approach would focus on the real economic impact of so-called "charitable gifts" from the perspective of the donor, and would reserve the deduction only for gifts that involve a genuine financial sacrifice. This approach would be simpler, fairer, and more effective.
- **While the IRS or Treasury Department may have the authority to take some action on this issue with new guidance or a regulation, Congress is far better suited to resolve this in a fair and administratively simple fashion.** There appears to

be no basis in existing law for reducing the federal charitable deduction when some types of tax benefits are received (e.g., large state tax credits, including the new workaround credits) but not others (e.g., small state tax credits, state tax deductions, or even the federal deduction itself). This makes IRS or Treasury action an all-or-nothing proposition: either all types of tax benefits impact the size of the federal charitable deduction (an administratively complex outcome) or none of them do (that is, the problem remains unresolved). Congress, of course, faces no such limitations in rewriting the charitable deduction laws. It could either craft a more tailored law reducing the deduction when large state tax credits are received, or it could revisit its decision to cap the SALT deduction. If the SALT cap were replaced with a broader reform that did not preference charitable giving over SALT payments, the benefits of attempting to recast tax payments as charitable gifts would be eliminated entirely.

INTRODUCTION

The federal Tax Cuts and Jobs Act (TCJA) enacted last year temporarily capped deductions for state and local tax (SALT) payments at $10,000 per year, through 2025. Prior to the bill's enactment, numerous tax experts warned Congress that the bill was "riddled with problems" and that the SALT cap could be circumvented by state and local lawmakers using a variety of techniques.[1] Congress chose to ignore those warnings, and in the months following the bill's enactment state and local lawmakers responded as predicted. A growing number of states have implemented tax credit schemes that allow their residents to pay much less in (partly- or non-deductible) state and local tax if they make (deductible) charitable gifts to the same types of public institutions or public services that their taxes might have otherwise funded. As of this writing New York, New

Jersey, Connecticut, and Oregon have enacted workaround credits while other states such as California, Illinois, and Rhode Island continue to debate similar proposals.

In New York, for instance, a new law allows taxpayers donating to state funds supporting education or health care to receive up to 85 percent of their donation back from the state via a tax credit. Assuming that donation is fully deductible at the federal level, New York taxpayers will also receive a federal deduction worth up to 37 percent of the amount donated.[2] Summing these two breaks (85 and 37 percent) yields tax cuts of up to 122 percent of the amount donated—meaning that the taxpayer comes out ahead by making the gift.

Many observers have responded to these tax credits with disbelief, using words like “silly” and “ridiculous.”[3] And rightfully so. It is illogical for a taxpayer to receive a charitable deduction in return for doing something that satisfies nobody’s commonsense definition of charity. The hypothetical taxpayer described in Figure 1, for example, is $22,000 richer *after* donating than before. This is a far cry from genuine philanthropy.

Some observers have suggested that the Internal Revenue Service (IRS) or the Treasury Department can, and should, intervene to shut down these tax credit schemes in the wake of Congress’s failure to address them in the TCJA. But this will be more difficult than is commonly understood, as this general type of scheme is neither new nor unique. The federal government has allowed similar abuses of the charitable deduction to persist for many years, and as this report will show, it is impossible to shut down these new tax credit schemes in a fair and effective manner without also impacting a wide range of existing state tax credits. Put another way, a partial fix aimed just at stopping the most recent flurry of state tax credits would be highly problematic. These new tax credits have much in common with existing state tax policies, and their proliferation

should spur Congress, or perhaps the IRS or Treasury Department, to take a long-overdue look at this broad issue, not a narrow one focused only on the newest types of credits.

Figure 1: Illustrating the Impacts of a SALT/Charitable Workaround Credit for a Hypothetical High-Income Taxpayer

	Prior to Workaround Credit	After New Workaround Credit	*Change*
State Level			
State Income Tax Bill, Before Credits	$95,000	$95,000	*No change*
"Charitable Gift" to State-Approved Fund or Organization	N/A	$100,000	*+$100,000*
State Tax Savings from Workaround Credit (85% of Gift Amount)	N/A	($85,000)	*($85,000)*
State Income Tax Bill, After Credits	**$95,000**	**$10,000**	***($85,000)***
Combined Payments (Taxes and Charitable Gifts)	**$95,000**	**$110,000**	***+$15,000***
Federal Level			
Federal SALT Deduction (capped)	$10,000	$10,000	*No change*
Federal Charitable Deduction	N/A	$100,000	*+$100,000*
Total Relevant Deductions (SALT + Charitable)	$10,000	$110,000	*+$100,000*
Federal Tax Savings from Relevant Deductions @ 37% Rate	**($3,700)**	**($40,700)**	***($37,000)***

Summary of Impacts	
Charitable Gift	*$100,000*
Total State Tax Cut (85% credit) + Federal Tax Cut (37% deduction)	*($122,000)*
Financial Profit: Tax Cuts in Excess of Amount Donated	***$22,000***

Source: Institute on Taxation and Economic Policy (ITEP), May 2018

(http://itep.org/wp-content/uploads/Figure1-SALT.jpg)

WHAT ARE THESE NEW WORKAROUND CREDITS?

This report uses the term “workaround credits” as a shorthand for a broad group of state charitable tax credits that have been debated or enacted this year because of the new cap on the SALT deduction. As this report will show, this categorization is made difficult by the fact that the new credits are often not much different from existing state charitable tax credits.

New York’s workaround credits have received the bulk of the attention thus far and offer a useful illustration of the variety of approaches available to states and localities. [4] The New York law allows taxpayers to donate to a new state fund with separate accounts for education and health care expenditures, and to receive an 85 percent tax credit in

return. Alternatively, taxpayers can now receive an 85 percent credit for donating to private nonprofits supporting either the State University of New York (SUNY) or the City University of New York (CUNY)—a policy that bears close resemblance to an existing tax credit program in Indiana. [5] Finally, the law also gives localities the option to create property tax credits worth up to 95 percent of the amount donated to new funds called Charitable Gift Reserve Funds.

The local tax credit approach is similar to one enacted by New Jersey lawmakers this year, which allows localities to establish "charitable funds for specific public purposes" that "shall be kept separate from the other accounts of the local unit," and to distribute tax credits in return for such donations.[6]

Connecticut enacted a variation on the local tax credit option that will allow localities to offer credits of up to 85 percent of the amount donated to nonprofit "community supporting organizations" that are "organized solely to support municipal expenditures for public programs and services, including public education."[7]

And Oregon also enacted a program this year that, while less widely reported in the media, was described as a SALT cap workaround by its author, State Sen. Mark Hass.[8] The new law allows for large tax credits to be paid out in return for donations to the state's Opportunity Grant Fund, which is used by the state's Higher Education Coordinating Commission to provide financial aid to help students attend college. [9] This credit is very similar to an existing California credit that funds student financial aid.[10]

As of this writing, states such as California, Illinois, and Rhode Island are continuing to debate new tax credits that could fit the definition of "workaround credits."

But these new credits are not the only ones being marketed to taxpayers as SALT cap workarounds. Alabama, for instance, has offered its taxpayers a 100 percent tax

credit since 2013 in return for donations to organizations that provide vouchers to families that send their children to private K-12 schools. And Pennsylvania has offered a variety of similar credits since 2001 worth 75, 90, or 100 percent of the amount donated.[11]

In both states, tax accountants, financial advisors, and the organizations benefiting from these credits have been eager to point out to potential donors that the credits can be used to get around the new federal cap on SALT deductions. A sampling of statements along these lines is available in Figure 2.

Figure 2: Voucher Tax Credits Are SALT Cap Workarounds, Too

- An article written for, and promoted by, the Medical Association of the State of Alabama advises the association's members (high-income physicians) that donating to the state's private school voucher program is "an opportunity to preserve your state tax deduction."[i]
- A Pennsylvania accountant refers to the state's voucher tax credit as a tool for "bypassing the $10k state and local tax deduction limitation."[ii]
- An economist with Iowa's Department of Revenue expects that a newly increased voucher tax credit may be claimed by "higher-income taxpayers attempting to get around the federal SALT cap."[iii]
- An Alabama accountant is advertising the credit as "one way to mitigate the impact of this adverse tax change," meaning the federal SALT cap.[iv]
- The Gwynedd Mercy Academy High School in Pennsylvania explains to prospective donors that, under the new SALT cap, the state's voucher tax credit can be used such that "participants can effectively turn limited state tax deductions into less limited charitable contribution deductions."[v]
- An accounting firm in Alabama says that making a private school voucher donation is "the best strategy" and "moves your federal deduction from a state taxes deduction (which are now limited to $10,000 annually – that's income and property taxes) to a charitable deduction."[vi]
- A financial advisor in Alabama writes that the voucher tax credit is "a way to avoid losing" a portion of the taxpayer's SALT deduction. He goes on to elaborate that "you are basically converting a State of Alabama income tax deduction (limited to $10,000) to a charitable deduction (which has no limit under the new tax law)."[vii]
- The Alabama Opportunity Scholarship Fund, one of the state's largest organizations accepting tax credit voucher donations, explains on its "Donors" page that "with the new tax laws … taxpayers now have even more incentive to donate."[viii]

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[i] Evans, Sae, Maddox Casey, and Jim Stroud. "Tips for Preserving Tax Deductions in 2018." Feb. 16, 2018. Available at: http://alabamamedicine.org/tips-preserving-tax-deductions-2018/.

[ii] Moyseyenko, Irina. "Bypassing the $10K State and Local Tax Deduction Limitation." Feb. 6, 2018. Available at: http://www.taxwarriors.com/blog/bypassing-the-10k-state-and-local-tax-deduction-limitation.

[iii] Harris, Amy Rehder. Iowa Department of Revenue, Research and Analysis Division. Letter to Jeff Robison, Legislative Services Agency. May 2, 2018.

[iv] Pearce, Bevill, Leesburg, Moore, P.C. "New Tax Deduction Limitations." Jan. 17, 2018. Available at: https://www.pearcebevill.com/new-tax-deduction-limitations/.

[v] Gwynedd Mercy Academy High School. "EITC and OSTC." Accessed Apr. 18, 2018. Available at: https://www.gmahs.org/support/eitc.

[vi] Bragg, Bobby M. "Using Alabama Accountability Act to Maximize Your State and Local Tax Deduction." Jamison Money Farmer PC. Feb. 28, 2018. Accessed Apr. 18, 2018. Available at: https://jmf.com/2018/02/using-alabama-accountability-act-to-maximize-your-state-and-local-tax-deduction/.

[vii] Welch, Stewart. "This tax strategy…going, going, GONE!" AL.com Feb. 23, 2018. Available at: http://www.al.com/business/index.ssf/2018/02/this_tax_strategygoing_going_g.html.

[viii] Alabama Opportunity Scholarship Fund. "Donors." Accessed Apr. 23, 2018. Available at: https://alabamascholarshipfund.org/donors/.

(http://itep.org/wp-content/uploads/Figure2-SALT.jpg)

Some observers have suggested that in deciding which types of state tax credits will be subject to stricter federal rules, state lawmakers' intent may be factored into the IRS's decision making.[12] But once the law is enacted, lawmakers' original intent matters much less than the manner in which the credit is presented to potential claimants and the ways in which it is used.

The types of statements presented in Figure 2 are not merely idle chatter. In Alabama, a surge of interest among taxpayers seeking to circumvent the SALT cap led to the

state's entire allotment of tax credits ($30 million) being claimed more quickly this year than at any time in the program's history.[13] ITEP predicted this would happen in a report issued last December.[14] And accountants in the state anticipated a similar outcome with disclaimers like: "beware: credits will not last" and "act quickly … before the opportunity is gone."[15] It turns out that high-income taxpayers living in states such as Alabama and Pennsylvania are already enjoying the personal financial benefits of SALT cap workarounds, while those living in California, New York, and elsewhere are still waiting for their lawmakers to finish debating or implementing workaround credits.

NARROW ACTION AGAINST WORKAROUND CREDITS WOULD BE UNFAIR, VIOLATING TAX PRINCIPLE OF HORIZONTAL EQUITY

The most objectionable feature of these new workaround credits is a familiar one: taxpayers will receive federal charitable deductions for behavior that meets almost nobody's commonsense definition of philanthropy. If a taxpayer makes a so-called "donation" only to later be reimbursed (in full or in part) by their state government with tax credits, then the part of the donation that was reimbursed is clearly not charitable because it involved no financial sacrifice.

This concept is already well established in the context of other types of reimbursements. A donor who receives a tote bag or a steak dinner, for example, in return for donating must reduce their federal charitable deduction by the value of the item or service they received. This is consistent with the original intent of the charitable deduction to encourage genuine charitable giving rather than self-interested tax avoidance, a fact reiterated by more recent reforms to the deduction's treatment of donations of property that has grown in value.[16]

But federal tax law is blind to reimbursements that come in the form of state tax credits, even if those credits are so large that they wipe out of the cost of "donating" entirely.

Rather than broadly improving the federal tax code's measurement of real philanthropy by requiring taxpayers to reduce their deductions by the amount of state tax credits they receive in return, the narrow type of federal action being considered would allow some pseudo-donors to continue receiving full deductions while denying or reducing those deductions for others. This distinction would not be based on the taxpayers' actual level of financial sacrifice, but rather on the type of organization that accepts the donation.[17]

Under a narrow federal approach, a donation to a fund supporting public schools, for instance, would likely not be deductible if it was reimbursed with a tax credit. An identically-reimbursed donation to an organization supporting private schools, however, would remain deductible. In effect, pseudo-donations flowing to public institutions would be categorized as tax payments subject to the new SALT cap, while pseudo-donations supporting private ones would continue to be treated as genuine, fully deductible charitable gifts.

This type of distinction would amount to a clear violation of the tax fairness concept of "horizontal equity," under which similar taxpayers should be treated similarly by the tax code.

In the real world, this would mean that a New York taxpayer making a pseudo-donation to support public education would lose most of their federal charitable deduction if they claimed the state's 85 percent tax credit for such donations. An Alabama taxpayer making an even-less-charitable donation to support private school vouchers, by contrast, would continue to receive their full federal deduction even if they claimed a 100 percent tax credit from their state in return for making such a gift. As

explained earlier, both of these tax credits are being marketed to taxpayers as ways to circumvent the SALT cap. And indeed, the Alabama credit is actually the more lucrative option in this regard, since it reimburses 100 percent of the amount donated rather than only 85 percent. But nonetheless, the narrow federal approach would deny the New Yorker's charitable deduction while leaving the Alabamian's deduction intact.

Figure 3: "Narrow Action" versus "Broad Action"

This report envisions two broad categories of action that the federal government might take in response to the proliferation of SALT/charitable workaround credits.

- Under a **narrow action**, the federal government would examine each entity (government agency, public university, nonprofit organization, etc.) receiving a donation that benefited from a state charitable tax credit. Based on the outcome of that examination (using criteria that are not yet known), it would then decide to either (a) turn a blind eye and grant a full federal charitable deduction even when the alleged "donation" was reimbursed with a state tax credit, or (b) categorize the reimbursed portion of the "donation" as a state tax payment subject to the $10,000 SALT cap.
- Under a **broad action,** the federal government would focus its attention on the donor and would devise a better measure of when a genuine "charitable gift" has been made. When taxpayers receive significant state tax benefits in return for donating, those tax benefits would be subtracted from the donation amount to determine the truly "charitable" portion of the gift. Under this type of action, there would be no need for the IRS to make new distinctions between the different types of organizations currently eligible to receive tax deductible charitable gifts.

The central conclusions of this report are that broad action is needed, and that narrow action would be unfair and arbitrary, and ultimately ineffective as well.

(http://itep.org/wp-content/uploads/Figure3-SALT.jpg)

Some observers have tried to defend this inconsistency by suggesting that the IRS may only limit or deny deductibility for donations that support services that would have been funded even if the donation was not made.[18] According to this line of reasoning, these types of donations are most akin to tax payments and should be subject to the SALT deduction cap. But implementing this test would require proving a counterfactual and is therefore impractical. How is the IRS to know, for example, whether Alabama would have funded a $30 million private school voucher program through a direct appropriation in the absence of its $30 million voucher tax credit program? There is little logic in capping a taxpayer's SALT deductions for state income tax payments that are used to fund a private school voucher program, but allowing that same taxpayer an uncapped charitable deduction for state-reimbursed "donations"

funding a nearly identical program. The result of both arrangements on taxpayers, state coffers, and funding for school vouchers is the same.

FIGURE 4
Narrow Fix to SALT Workarounds Would Favor Private Schools Over Public Education

Source: ITEP Analysis

(http://itep.org/wp-content/uploads/Figure-4-Narrow-SALT-Workarounds-Private-vs-Public-Education.jpg)The heart of this problem is an abuse of the charitable giving deduction, whereby pseudo-donors who have given up little or nothing of value are nonetheless able to enjoy a federal income tax break. As ITEP showed last year in a report co-authored with AASA, the School Superintendents Association, voucher tax credits are routinely marketed as tools for generating federal charitable deductions without having to make genuine charitable donations.[19] Private schools and financial advisors commonly use phrases like "make money" and "profit" when describing the lucrative state and federal tax cuts generated by a pseudo-donation.

Donors who choose to act on this type of advice often do not care where their money is going. For evidence of this, look no further than Alabama which has fully reimbursed pseudo-donations with 100 percent tax credits for several years, and yet has still often struggled to generate enough interest in its private school voucher program to reach its full $30 million allotment. Anybody in Alabama with a real

interest in supporting private school vouchers would have been donating to this program already, as the state's 100 percent credit made those donations costless to the taxpayer. It was not until the donations actually became profitable for a larger group of taxpayers—because of the SALT cap—that the state began easily distributing its full credit allotment. It would be inappropriate for the federal government to treat New York "donors" supporting public education less favorably than Alabama "donors" supporting private schools, when both groups' behavior shows the same lack of charitable intent or effect.

In fact, it is not even necessary to compare different states for the inequities of a narrow federal approach to become apparent. Arizona, for instance, offers significant tax credits for donating to support private school vouchers, as well as a smaller credit for donating to support public schools.[20] Under the narrow approach, Arizonans seeking to make smart financial decisions for their families would continue to see profit potential in donating to support private school vouchers, but would lose the ability to turn an even smaller profit from donating to support public schools.

NARROW ACTION WOULD REQUIRE ARBITRARY CUTOFFS

Some observers have suggested that these workaround credits are somehow unique, and that the IRS, Treasury, or Congress could take narrow action against them without impacting the deductibility of gifts benefiting from many pre-existing state charitable tax credits. This argument seems to hinge on the idea that credits for donating to public services that would have been funded with taxes anyway can be neatly distinguished from credits for donating to private institutions. But the reality is that these new workaround credits are extremely similar to many existing tax credits.

Earlier this year, a team of academics working on this topic identified more than one hundred state charitable tax credits across 33 states.[21] Many of those credits are offered in return for donating to government agencies, public institutions, or regulated nonprofits performing services of the same type that states often provide directly.[22] The types of entities benefiting from these credits vary widely in their level of connection to governments, and it is impossible to draw a reasonable, definitive line between tax credits supporting public services and those only benefiting private institutions.

The below discussion offers an overview of some of the types of entities to which states seek to encourage donations by offering charitable tax credits. This is not a comprehensive accounting of these types of state policies.

- ***Credits for donating to governmental funds.*** This is the most common type of tax credit structure being pursued in the wake of the new federal tax law. Earlier this year **New York** lawmakers created the New York Charitable Gifts Trust Fund, with separate accounts for health and for education.[23] In the same bill, lawmakers also gave localities the ability to create Charitable Gift Reserve Funds to accept donations. Meanwhile in **New Jersey**, localities can now establish "charitable funds for specific public purposes" that "shall be kept separate from the other accounts of the local unit."[24] Other states continue to debate similar funds. **Illinois** lawmakers, for instance, are considering creating the Illinois Excellence Fund, which is a special fund subject to appropriation by the legislature exclusively for public education purposes.[25] **California** lawmakers are debating a new California Excellence Fund, which would be housed in the state general fund but would give donors some control over how their donations would be spent, including on K-12 education, higher education, or state parks. **Rhode Island** lawmakers are contemplating a new Rhode

Island Ocean State Fund, housed in the state's general fund and under the control of the legislature.[26] And **District of Columbia** lawmakers have proposed creating the District of Columbia Public Education Investment Fund, administered by the District's Chief Financial Officer.[27] The money in the fund must be used for public education and cannot be transferred into the general fund.

- ***Credits for donating to specific government agencies.*** These types of tax credits have a longer history at the state level, though Oregon lawmakers opted to implement this type of credit this year as a response to the SALT cap. Specifically, **Oregon** has created a new tax credit designed to reward donations to the Opportunity Grant Fund, from which funds are continuously appropriated to the Higher Education Coordinating Commission inside the state's Chief Education Office.[28] This is very similar to a tax credit in **California** used to provide financial aid to students by encouraging donations to the College Access Tax Credit Fund, administered by the State Treasurer.[29] In **Arkansas**, the state offers a tax credit for donations to the Public Roads Incentives Fund, managed by the Arkansas Economic Development Commission to be used to aid in the construction of public roads.[30] **Georgia** offers a tax credit for donations to the Innovation Fund Foundation, which is controlled by the Georgia Governor's Office of Student Achievement.[31] **Louisiana** offers a tax credit for donations to Family Responsibility Programs administered by the state's Department of Health and Hospitals. Separately, the state also offers a tax credit for donations to state-owned playgrounds in economically depressed areas. **Missouri** offers tax credits for donations to the Missouri Agricultural and Small Business Development Authority, which is housed in the state's Department of Agriculture.[32] Oregon offers a tax credit for donations to the Child Care

Contribution Tax Credit program, managed by the Oregon Department of Education's Early Learning Division. The donations are described as "supporting a statewide early learning system that is safe, high quality and accessible," and the funds are distributed to child care businesses throughout Oregon.[33] And finally, many states offer tax credits for donations of land or easements to state agencies for conservation purposes.[34]

- ***Credits for donating to public institutions.*** **Indiana** and **Montana** offer tax credits for donations to institutions of higher education within the state.[35] This includes public universities that also receive funding from state appropriations. **Idaho** offers a broader tax credit for donations to elementary and secondary schools, as well as higher education and other organizations.[36] And **Louisiana** offers a tax credit for technology donated to a very wide variety of schools.[37]
- ***Credits for donating to other levels of government.*** Taxpayers in **Arizona, Hawaii, Idaho, Louisiana**, and **Montana** can receive state tax credits for donating to public K-12 schools. These credits are similar to state aid to localities, since state revenues are being diminished for the benefit of local schools. Similar intergovernmental credit programs include **Colorado's** tax credit for donations to enterprise zone administrators, many of which are local governments' economic development offices.[38] And **Nebraska** offers a credit for donations to community development programs, some of which are administered by local government units.[39]
- ***Credits for donating to nonprofits with purpose of benefiting public organizations.*** **Indiana** allows a tax credit not just for direct donations to colleges and universities, but also to "corporations and foundations organized and operated exclusively for the benefit of any eligible colleges or universities."[40] This is very

similar to a new workaround credit enacted in **New York** this year, which offers tax credits for donations to two separate 501(c)(3) foundations: one benefiting the State University of New York (SUNY) system and another benefiting the City University of New York (CUNY).[41] **Oklahoma** offers a tax credit for donations to Educational Improvement Granting Organizations, which provide grants to rural public schools.[42] And **Connecticut** lawmakers enacted a workaround option for its localities that will allow them to choose to offer tax credits to property tax payers who donate to "community supporting organizations," which are 501(c)(3) organizations "organized solely to support municipal expenditures for public programs and services, including public education." [43]

- ***Credits for donating to public-private partnerships.*** **Missouri** offers a tax credit for donations to "Innovation Campuses," which are partnerships between high schools, higher educational institutions, technical colleges, and/or businesses.[44]
- ***Credits for donating to nonprofits created and/or managed by the state.*** **Kansas** offers a tax credit for donations to Network Kansas, a 501(c)(3) nonprofit organization that was established by the state to "promote an entrepreneurial environment."[45] Network Kansas often works with the Kansas Department of Commerce, which is listed as a "founding partner."[46] **Oregon** offers a tax credit for donations to the Oregon Cultural Trust, a nonprofit created by the state as "an ongoing funding engine for arts and culture across the state."[47] The Trust works with a number of state agencies. **South Carolina** offers a tax credit for donations to the Industry Partnership Fund, which is managed by the South Carolina Research Authority, a non-profit organization created by the state.[48] Additionally, South Carolina's private school voucher tax credit flows through a 501

(c)(3) organization created by the state and governed by political appointees and extensive state laws.[49]

- ***Credits for donating to nonprofits providing services that a state may have provided directly in the nonprofit's absence.*** Some skeptics of the new workaround credits have suggested that their downfall may be that they are funding services that the state would have funded even in the absence of the credit.[50] This is a counterfactual that is impossible to prove, and it could apply equally to many existing state charitable credits. For instance, many of the eighteen states providing funding for private K-12 school vouchers via a tax credit program may have provided that funding through a direct appropriation in the absence of the tax credit.[51] Separately, states such as **Arizona, Colorado, Idaho, Missouri**, and **Utah** fund various social services programs via state tax credits.[52] These include tax credits for donating to organizations that provide foster care, substance abuse counseling, or care for the disabled. Missouri's tax credit for donating to licensed residential treatment facilities is particularly notable, since it is only available for donations to facilities that "are under contract with the Department of Social Services (DSS) to provide treatment services for children who are residents or wards of residents of … this state."[53] Missouri also administers a separate program designed to promote positive youth development, but only allows donations to organizations whose detailed proposals for tax credit support receive a high score from the state's Department of Economic Development.[54] This same design—state tax credit support only for nonprofit organizations with very specific proposals approved by government agencies—is also used in **Indiana** to steer donations to private nonprofits that help low-income families build wealth.[55]

The multitude and variety of organizations eligible to receive tax-credit-reimbursed donations poses serious problems for any attempt to allow federal charitable deductions for some pseudo-donations but not others. An earlier section of this report already discussed the unfairness of allowing deductions for donations to private schools but not public ones. But the definitional problems could become even more complex than this.

For instance, if the critical distinction is one between donations to "public" versus "private" entities, how would donations of the following types be treated?

- Donations to a private entity that supports public schools, such as Oklahoma's Educational Improvement Granting Organizations.
- Donations to a publicly operated fund that awards the money to private nonprofits.
- Donations to a heavily regulated nonprofit that is only eligible to receive tax-credit-reimbursed donations if it meets a host of criteria spelled out by legislators or government employees.

A narrow approach that allows federal charitable deductions for some pseudo-donations but not others won't just be unfair, it will also prove to be arbitrary and confusing. It will inevitably raise difficult questions about why some organizations are exempt from the new rules but not others. In short, it would be a step backward for federal tax policy.

NARROW ACTION WOULD BE INEFFECTIVE

If the IRS, Treasury, or Congress takes narrow action against these workaround credits, they may start by denying charitable giving deductions when tax-credit-reimbursed donations flow to the types of funds discussed at beginning of the previous section: state and local general fund accounts and other similar accounts. This action would have the intended effect of only impacting new workaround

credits proposed in the wake of the SALT deduction cap, but it would fall far short of ending these workaround schemes. Some new workaround credits created this year would be unaffected, and lawmakers in states that would be affected by this action would almost surely respond by becoming more creative in their tax credit designs.

For instance, unless federal action also targeted donations to specific government agencies, Oregon's new workaround credit for donations to the Higher Education Coordinating Commission's financial aid program would remain unaffected, and more states would undoubtedly seek to fund agency functions with tax-credit-reimbursed donations. On the other hand, if federal lawmakers sought to deny tax deductions for tax-credit-reimbursed donations to government agencies, tax credits in states such as Arkansas, California, Georgia, Louisiana, and Missouri would also be impacted and the scope of the action would no longer be limited to the new workaround credits.

If the federal government decided to deny the charitable deduction on donations to government agencies, the next logical step might be for states to use such tax credits to raise funding for somewhat more independent entities, such as public colleges and universities, that it would otherwise have funded through direct appropriations. This arrangement offers one strategy for getting around some commenters' suggestions that the IRS should treat charitable tax credits unfavorably if the recipient of the donation (state governments) is the same entity that pays out the benefit to donors (state tax credits). Under this arrangement, colleges and universities would be receiving the donations, but state governments would be providing the tax credits. Of course, the federal government could attempt to stop these types of workaround schemes as well, but not without impacting long-running credits in Idaho, Indiana, Louisiana, and Montana.

States could also attempt to replace a significant portion of their aid to local governments and school districts with a charitable tax credit scheme. Federal action broad enough to prevent this type of workaround would impact a variety of existing state tax credits, including those used for the benefit of public schools in Arizona, Hawaii, Idaho, Louisiana, and Montana.

Under a narrow federal approach, it would be especially difficult to shut down workaround credits that steer donations to nonprofit organizations rather than governments. In Connecticut, for instance, lawmakers recently granted localities the authority to offer tax credits to fund nonprofits that advance public purposes that the government may otherwise have pursued. In states such as Indiana, New York, and Oklahoma, tax credits are available for donating to nonprofits that exist only to benefit public educational institutions—most often higher education. The New York credits were created as new workarounds this year, while the Indiana and Oklahoma credits have existed for years. In Kansas, a nonprofit created by the state performs an economic development role very similar to state agencies. And nonprofits providing social services in many states also benefit from tax credits. Despite being independent entities, state governments exercise substantial control over the work of these organizations through laws, regulations, and sometimes even requirements that detailed applications must be submitted to the state before those organizations can receive tax-credit-financed funding for particular projects.

Notably, a new workaround credit proposal in California relies heavily on non-profit organizations in its design precisely because this type of credit is less vulnerable to narrow federal action. The proposal from the chair of the California Assembly's tax-writing committee would allow taxpayers to donate to independent non-profit organizations and receive an 80 percent tax credit in return.[56] The state would recoup its costs, and then

some, by requiring nonprofits to acquire those tax credits from the state, at a cost of 90 cents per credit, prior to accepting tax-credit-eligible donations.

The least narrow of the “narrow fix” options would involve the federal government denying or reducing the charitable deduction when tax-credit-reimbursed donations flow not only to state and local governments, but also to nonprofits judged to be significantly entangled with those governments. Under this approach, most of the credits impacted would be existing tax credits rather than the new workaround credits. This approach would allow abuses of the charitable giving deduction to continue when the donations are judged to be flowing to truly independent nonprofits, and it would raise difficult line-drawing questions regarding which nonprofits are sufficiently independent to be exempt from the new federal rules.

One particularly worrisome result of this approach is that it would incentivize democratically elected state and local governments to relinquish control over many of their current functions, even as they still funded those functions via their tax credit programs. If Alabama’s nonprofit “scholarship granting organizations” are judged to be sufficiently independent of the state, for example, high-income taxpayers in Alabama would find that using the state’s 100 percent tax credit program to effectively earmark their tax dollars to private schools would be more financially beneficial than either supporting public schools by paying their state income taxes or using a (hypothetical) workaround tax credit related to public school funding. In effect, conservative-leaning states that are willing to “charitize” large swaths of their public education systems, human services, etc. would be best positioned to grant their taxpayers an opportunity to circumvent the SALT cap. Consider the following examples:

- **Scenario 1:** Taxpayer pays $50,000 in state income tax that the state uses to fund public schools and other

services. Maximum federal deduction is $10,000 because of the SALT deduction cap.

- **Scenario 2:** Taxpayer “donates” $50,000 to public schools and receives a $50,000 state “workaround credit” in return. In effect, the state has funded this “donation” because the taxpayer’s financial standing is unchanged from Scenario 1 (they have made a $50,000 “donation” rather than paid a $50,000 tax) while the state’s revenues are $50,000 lower. Under a narrow federal fix, the $50,000 “donation” would be categorized as a tax payment for federal tax purposes and the taxpayer’s maximum federal deduction would be $10,000—the same as in Scenario 1.
- **Scenario 3:** Taxpayer “donates” $50,000 to fund private K-12 school vouchers and receives a $50,000 state tax credit in return. Again, the state has funded this “donation” for the same reasons described in Scenario 2. Under a narrow fix that overlooked nonprofits distributing private school vouchers, this “donation” would be treated as if it were truly charitable and the taxpayer would receive a federal charitable deduction of up to $50,000. In this scenario, the taxpayer’s federal deduction ($50,000) is 5 times larger than in Scenarios 1 or 2 ($10,000) even though the taxpayer’s financial standing is the same, before federal taxes. The relevant difference between this scenario and Scenario 2 is that the state government is paying for children to be educated in private schools, rather than public ones.

This discussion should make clear that any attempt to crack down on some pseudo-donations but not others is sure to raise more questions than it answers. Even proponents of the narrow approach concede that their solutions are not comprehensive answers to this brand of charitable deduction abuse. Andy Grewal at the University of Iowa, for instance, has admitted that “whether the charitable contribution strategy works will depend on the details of a given state’s plans.”[57] And in contemplating some

iterations of the charitable credit scheme, Eric Rasmusen of Indiana University conceded that “the amended proposal might be valid, though I am not sure even in my own mind.”[58] Peter Faber of McDermott Will & Emery similarly goes back and forth between discussing state charitable schemes that might work, and those that might not, in his writing on the topic.[59]

As long as some version of the workaround credit scheme is left open for abuse, states, localities, and taxpayers are sure to exploit it to generate federal charitable deductions for acts that are not genuinely charitable. A narrow approach to this issue would be a missed opportunity at real reform and would make the tax code less fair, more arbitrary, and more confusing, without solving the root problem to which these new workaround credits have drawn so much attention.

BROAD ACTION WOULD BE FAIRER, SIMPLER, AND MORE EFFECTIVE

With the creation of new SALT workaround credits, a growing number of taxpayers can now make so-called “charitable donations” that are nothing of the sort because they receive state tax credits and federal tax deductions worth more than their actual donations. Some observers have suggested that the IRS should shut down some of these abuses, but not others, by drawing what would amount to arbitrary distinctions between different tax credit programs based on the nature of the organization receiving the donations. Peter Faber, for instance, has suggested denying the deduction only if the donations fund programs that the state would have funded anyway.[60] As with all counterfactuals, this would be impossible to prove in practice. The result would be unnecessary complexity and an incomplete solution to the problem of charitable deduction abuse.

(http://itep.org/wp-content/uploads/Figure5-SALT.jpg)

Figure 5: Recommendations for Federal Action

- Congress, rather than the IRS or Treasury Department, is best situated to address this problem. While the comparative ease of executive branch action is tempting, it will be difficult to achieve a fair and administratively simple solution without changing current law.
- Federal charitable deduction reform should be blind to the type of organization receiving the donation. Attempting to deny or reduce the federal deduction for donations related to public services but not private charities would be unfair and arbitrary, and ultimately ineffective as well.
- When calculating the amount of an alleged charitable gift that is truly "charitable," taxpayers should be required to subtract out any significant state tax benefits that they received in return for donating. This is consistent with how many other types of donor perks are treated in the law, such as tote bags or event tickets received in return for donating.
- For administrative simplicity, Congress should consider allowing a full federal charitable deduction even when ordinary state charitable deductions or smaller state tax credits are received in return for donating. By focusing a new law only on large state tax benefits (greater than 20 percent of the amount donated, for example), Congress could prevent this type of charitable deduction abuse without imposing new administrative requirements on most types of charitable gifts.
- Of course, this type of charitable deduction abuse is only possible because the federal income tax treats charitable donations more favorably than SALT payments. Replacing the $10,000 SALT cap with a broader limit on itemized deductions, or a new itemized deduction credit, is also worthy of consideration. This type of reform could improve the yield and progressivity of the federal tax code while also ending the type of gaming discussed in this report.

A much better approach would be for Congress to set its focus squarely on the donors, and to devise a more sophisticated method for determining when an alleged charitable gift is truly charitable, and what portion of each gift is actually charitable. As most commenters on this issue have pointed out, the tax code already requires taxpayers to reduce their charitable deductions by many types of financial benefits they receive in return—such as an NPR tote bag, Super Bowl tickets, or a steak dinner. Extending this same approach to include state tax credits would improve federal tax law.

But while the general notion of denying charitable deductions for reimbursed donations is simple enough, there are a few thorny issues that would need to be overcome to implement this ideal. For this reason, it would be preferable for Congress to take the lead in crafting policy that strikes a careful balance between the need for an improved measurement of genuine charity and the administrative difficulties involved in certain aspects of that measurement.

For example, would taxpayers in the roughly thirty states offering ordinary charitable deductions need to reduce the amount of their federal deduction by the value of the state

tax deduction they received?[61] Or how about the value of the federal charitable deduction itself? Would that amount need to be subtracted in calculating the true "charitable" portion of the deduction?[62] Calculating the precise benefit received from these tax deductions could be complicated in practice.[63] For simplicity's sake, the federal government should consider overlooking these run-of-the-mill tax deductions in favor of a new rule focused only on state tax credits. Because such a distinction is not included in current law, however, this would likely require legislative action rather than new guidance or a regulation from the executive branch.[64] The IRS or Treasury Department would have a difficult time explaining why the federal charitable deduction must now be reduced when some types of tax benefits are received (e.g., large state tax credits, including the new workaround credits) but not others (e.g., smaller state tax credits, state tax deductions, or perhaps even the federal deduction itself).

One possible template for federal legislative action is Rep. Terri Sewell's H.R. 4269, the *Public Funds for Public Schools Act*. [65] The bill, which was introduced prior to the enactment of the TCJA, deals only with state tax subsidies for donations to private K-12 school voucher funds. These types of donations were, and still are, the most common type of tax-credit-related abuse of the federal charitable deduction as they allow so-called "donors" in at least eleven states to receive tax cuts larger than the amount they donate.[66] Under H.R. 4269, taxpayers can receive a full federal charitable deduction even for donations to private school voucher funds that benefited from a state tax deduction. But the federal deduction is reduced in cases where the state tax benefit is provided in the form of a tax credit: under a 60 percent state tax credit, for example, only the 40 percent of the donation not offset by the credit would remain federally deductible. And to prevent gaming, the bill also claws back some or all of the federal charitable deduction if states offer deductions larger than the amount donated: say 200, or 300, or even 1000 percent of the

donation. The basic structure contained in this bill could be expanded to apply not just to private school voucher credits, but to state charitable tax credits more broadly.

If Congress is interested in enacting a solution that would be even simpler to administer, it could write a law that only overlooks state tax benefits equal to, say, 20 percent or less of the amount donated. This would provide a level playing field across states where even the largest state tax deductions (taken against California's top tax rate of 13.3 percent, for instance) would be allowed, as would any state credit or deduction of an equivalent amount. Any state tax benefit worth more than 20 percent of the donation, however, would require the taxpayer to calculate the precise amount of the state tax benefit they received and reduce their federal charitable deduction by a corresponding amount in order to arrive at the true "charitable" portion of the donation.

In the extreme cases of 100 percent personal income tax credits such as those received in return for donating to private school voucher funds in Alabama, Arizona, Georgia, Montana, and South Carolina, the taxpayer would receive no federal charitable deduction because the donation amount is reimbursed in full by the state. In the context of New York's new workaround credits, only the modest 15 percent of the donation not reimbursed by the state's 85 percent tax credit would be considered a charitable gift for federal tax purposes.

One drawback of this approach is that it would create a modest "cliff effect," where taxpayers who itemize at the federal level would find 20 percent state tax credits that are exempt from this new law to be more beneficial than somewhat larger state tax credits to which the law would apply. But this effect would be small in practice. For taxpayers in the top federal tax bracket of 37 percent, for instance, only credits in the range of 21-31 percent would be less beneficial than a 20 percent option. State credits of

32 percent and above would remain more beneficial than 20 percent credits despite being impacted by this new law.[67] And for states that offer, or wish to offer, credits in the range of 21-31 percent, the impact of this cliff could be mitigated by offering taxpayers the option of claiming a smaller, 20 percent credit, with the understanding that some itemizers may find it preferable to claim this smaller credit to remain below the federal threshold described above. Under the circumstances, this mild and partly avoidable cliff effect is a small price to pay for a dramatic and administratively feasible improvement to the federal charitable deduction's measurement of true charity.

But while a 20 percent limit of this type may be the most targeted option available for resolving the specific problem at issue here, Congress may also consider taking this opportunity to reopen a broader debate over the $10,000 cap on the SALT deduction.

For starters, broader reform of the SALT cap will likely be needed anyway if lawmakers wish to close other widely recognized loopholes, such as the ability of states to shift away from deductible income taxes and toward deductible payroll taxes or business taxes designed to be nearly identical in their effect.[68]

In the context of the workaround credits, any reform that puts SALT payments and charitable gifts on an even footing under federal income tax law would effectively shut down the schemes described in this report. If charitable gifts were not treated more favorably than tax payments, then states and localities would have no reason to help their residents launder the latter into the former.

Ultimately, the SALT deduction and charitable deduction are similar in adjusting for taxpayers' ability to pay federal income tax, and they often relate to funding for the same types of services, such as education and social services. While a detailed discussion of reforming itemized deductions more broadly is beyond the scope of this

report, there are good reasons to consider putting these two deductions on a more even footing. Depending on the details, lifting the $10,000 SALT cap and replacing it with a broader limit on itemized deductions, or a new itemized deduction credit, could improve the yield and progressivity of the federal tax code while also ending the type of gaming outlined in this report.

CONCLUSION

Several states have responded to the new federal cap on SALT deductions by debating or enacting tax credits that allow their residents to claim federal charitable deductions on so-called “donations” that meet almost nobody’s definition of genuine charity. This abuse of the federal charitable giving deduction is certainly absurd, but it is far from new and seeking to shut down the new workaround credits without impacting any existing charitable giving credits would be ill-advised. Any attempt at a narrow fix will introduce more unfairness and arbitrariness into the federal tax code without actually stopping states from exploiting this broad and long-running loophole.

The surge of interest in these workaround credits should be used as an opportunity to fix a part of the federal tax code that is long-overdue for reform. Adding a more sophisticated measure of charitable giving into the tax code—one that considers significant state tax benefits received in return for donating—is necessary to ensure that the charitable giving deduction is reserved for its original purpose of encouraging actual philanthropy, not sophisticated tax sheltering. It is well within Congress’s power to implement this type of reform in an administratively simple fashion, though the ability of either the IRS or Treasury Department to do so on its own is much more doubtful.

Alternatively, Congress may consider using this debacle as an opportunity to revisit its hastily devised cap on the SALT deduction. Any itemized deduction reform that puts SALT

payments and charitable donations an even footing would also have the effect of ending the type of gaming outlined in this report.

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[21] Ibid.

[22] Credits for donating to school voucher organizations tend to offer the highest rates of return, with reimbursements up to 100 percent of the amount donated. But credits for donating to other causes are large enough that the IRS or Treasury would find it exceedingly difficult to ignore them entirely in targeted action. While it may be reasonable for the IRS to treat 100 percent credits differently than credits in the range of 1 to 99 percent on the grounds that 100 percent credits involve zero financial sacrifice by the donor, drawing a bright line at any other specific percentage is likely impossible via the regulatory process and is a task best left to Congress. This helps explain why many of the new workaround credits are set at levels somewhat below 100 percent. It will be difficult for the IRS to treat New York's 85 percent workaround credit less favorably than Alabama's 100 percent voucher credit or even Indiana's 50 percent credit for donating to institutions of higher education.

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[64] Ibid.

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CHAPTER 59
S. 7509–C
Approved and effective April 12, 2018

PART H

Section 1. Subsection (c) of section 683 of the tax law is amended by adding a new paragraph 12 to read as follows:

<< NY TAX § 683 >>

(12) Except as otherwise provided in paragraph three of this subsection, or as otherwise provided in this section where a longer period of time may apply, if a taxpayer files an amended return, an assessment of tax (if not deemed to have been made upon the filing of the amended return), including recovery of a previously paid refund, attributable to a change or correction on the amended return from a prior return may be made at any time within one year after such amended return is filed.

§ 2. Subsection (c) of section 1083 of the tax law is amended by adding a new paragraph 12 to read as follows:

<< NY TAX § 1083 >>

(12) Except as otherwise provided in paragraph three of this subsection, or as otherwise provided in this section where a longer period of time may apply, if a taxpayer files an amended return, an assessment of tax (if not deemed to have been made upon the filing of the amended return), including recovery of a previously paid refund, attributable to a change or correction on the amended return from a prior return may be made at any time within one year after such amended return is filed.

§ 3. Subdivision (c) of section 11–1783 of the administrative code of the city of New York is amended by adding a new paragraph 9 to read as follows:

(9) Except as otherwise provided in paragraph three of this subdivision, or as otherwise provided in this section where a longer period of time may apply, if a taxpayer files an amended return, an assessment of tax (if not deemed to have been made upon the filing of the amended return), including recovery of a previously paid refund, attributable to a change or correction on the amended return from a prior return may be made at any time within one year after such amended return is filed.

<< Note: NY TAX §§ 683, 1083 >>

§ 4. This act shall take effect immediately and shall apply to amended returns filed on or after the effective date of this act.

Caution
As of: June 4, 2018 2:52 PM Z

Bankers Trust Corp. v. New York City

Supreme Court of New York, Appellate Division, First Department

November 19, 2002, Decided ; November 19, 2002, Entered

1048

Reporter
301 A.D.2d 321 *; 750 N.Y.S.2d 29 **; 2002 N.Y. App. Div. LEXIS 11231 ***

Bankers Trust Corporation, Respondent, v. New York City Department of Finance et al., Appellants.

Subsequent History: [*1]** As Corrected November 21, ***2002***.

Appeal granted by *Bankers Trust Corp. v. N.Y. City* ***Dep't*** *of Fin., 99 N.Y.2d 507, 787 N.E.2d 1164, 2003 N.Y. LEXIS 207, 757 N.Y.S.2d 818 (2003)*

Motion granted by *Bankers Trust Corp. v. N.Y. City* ***Dep't*** *of Fin., 2003 N.Y. LEXIS 3309 (N.Y., Oct. 21, 2003)*

Affirmed in part and modified in part by *Bankers Trust Corp. v. New York City* ***Dep't*** *of Fin., 2003 N.Y. LEXIS 3983 (N.Y., Nov. 25, 2003)*

Prior History: Appeal from an order and judgment (one paper) of the Supreme Court (Marcy Friedman, J.), entered May 7, 2001 in New York County, which (***1***) granted plaintiff's motion for summary judgment declaring that it was entitled to the tax refunds it had claimed from the City, and (2) denied defendants' cross motion for summary judgment.

Disposition: Reversed.

Core Terms

refund, adjustments, refund claim, net income, computing, changes, deductions, taxpayer's, exhaustion, returns, expenses, overpayment, allocated, audit, banking corporation, expiration, allocation of income, foreign subsidiary, summary judgment, subsidiaries, disallowance, challenges, taxation, statute of limitations, limitations period, tax year, reexamine, agency's, declaratory judgment action, administrative remedy

Case Summary

Procedural Posture
Defendant City of New York Department of Finance appealed from an order and judgment of the Supreme Court, New York County (New York), which granted summary judgment to plaintiff banking corporation and declared that it was entitled to a tax refund, and which denied the city's cross-motion for summary judgment in the corporation's declaratory judgment action.

Overview

The corporation claimed tax refunds for certain years based on changes to its state tax returns that had allowed previously disallowed deductions. The city denied the claims due to other adjustments that offset the refunds. The trial court's judgment in favor of the corporation was reversed on appeal. The court affirmed the trial court's determination that the action was maintainable even though all administrative remedies had not been exhausted because the corporation was challenging the city's statutory authority and not the accuracy of its determination. The court reversed the trial court's holding that the adjustments were ultra vires, finding that the reallocation of expenses made by the city did not violate New York City, N.Y., *Admin. Code § 11-678(3)(c)*. The court held that the city had acted within its statutory authority in making the adjustments to the corporation's entire net income. The corporation's argument that when the city was determining the refund amount on claims filed after the three-year limitations period for assessments, the scope of the audit should have been restricted to the proposed adjustments on which the refund claim was based, was rejected.

Outcome
The court reversed the trial court's judgment, directed the denial of the corporation's motion, and granted the city's motion for summary judgment. The court declared that the corporation was not entitled to the tax refunds.

LexisNexis® Headnotes

Governments > Local Governments > Claims By & Against

Tax Law > ... > Tax Credits & Liabilities > Credits, Overassessments & Refunds > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

HN1[] Local Governments, Claims By & Against

See New York City, N.Y., *Admin. Code § 11-678(3)(c)*.

Tax Law > ... > Foreign Base Company Income > Foreign Personal Holding Companies > Foreign Estates, Partnerships & Trusts

Tax Law > ... > Tax Accounting > Allocations of Deductions & Income > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

HN2[] Foreign Personal Holding Companies, Foreign Estates, Partnerships & Trusts

Pursuant to New York City's authority under New York City, N.Y., *Admin. Code § 11-646(g)*, the city is empowered to adjust items of income or deduction in computing entire net income in order to eliminate the effect of any agreement, understanding or arrangement between the taxpayer and any other corporation whereby the income of the taxpayer within the city is improperly or inaccurately reflected.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Tax Law > ... > Tax Credits & Liabilities > Credits, Overassessments & Refunds > General Overview

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

HN3[] Reviewability, Exhaustion of Remedies

A change of the allocation of income or capital upon which a taxpayer's return was based is forbidden by the City of New York to make, pursuant to New York City, N.Y., *Admin. Code § 11-678(3)(c)*, when it is computing the amount of the credit or refund to be granted based upon a correction of the federal or state return. *N.Y. Tax Law § 1087(c)(1)*.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Tax Law > State & Local Taxes > Estate & Gift Taxes > General Overview

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > Credits, Overassessments & Refunds

HN4[] Reviewability, Exhaustion of Remedies

New York City, N.Y. *Admin. Code § 11-678(3)(c)*, like *N.Y. Tax Law § 1086(a)*, authorizes the refunding of a tax "overpayment," and requires that the City of New York determine that there was actually an "overpayment" of tax before it may issue a refund.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Administrative Law > Judicial Review > General

Overview

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

HN5[] Reviewability, Exhaustion of Remedies

A person aggrieved by the action of a government agency is generally required to exhaust the available administrative remedies before seeking judicial review of the agency's action. New York City, N.Y., *Admin. Code § 11-681(2)*. However, the exhaustion rule is not an inflexible one, being subject to important qualifications. Among the recognized qualifications to the exhaustion rule is an exception to its applicability where an agency's action is challenged as wholly beyond its grant of power.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN6[] Declaratory Judgments, State Declaratory Judgments

A plaintiff may use a declaratory judgment action to challenge administrative action where, although the agency's general authority to act on the plaintiff was unquestioned, the plaintiff contended that the agency had purported to exercise that authority in a manner beyond its statutory power.

Governments > Local Governments > Claims By & Against

Governments > Legislation > Statute of Limitations > General Overview

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Finance

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > Credits, Overassessments & Refunds

HN7[] Local Governments, Claims By & Against

New York City, N.Y., *Admin. Code § 11-677(**1**)* authorizes the Commissioner of Finance to issue a refund only if it is determined that the taxpayer made an "overpayment" of taxes for the relevant tax year. Although *§ 11-677* does not define "overpayment," in the absence of any indication to the contrary, the term should be construed, in accordance with its usual sense, to mean any payment in excess of that which is properly due, or the payment of more than is rightfully due. Thus, upon the filing of a refund claim on any basis, the City of New York is required to compute the correct tax for the year in question, and therefore may reexamine any aspect of the return. The audit is not restricted to consideration of the particular items of adjustment proposed in the refund claim, even where the refund claim is based on state changes that were made after the statute of limitations for the assessment of deficiencies had expired. While the expiration of the assessment limitation period precludes the city from collecting any unpaid deficiency that may be discovered (except to the extent provided by New York City, N.Y., *Admin. Code § 11-674(3)(c)*, no refund may issue unless it appears that the taxpayer in fact overpaid its taxes.

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

HN8[] State & Local Taxes, Administration & Procedure

See New York City, N.Y., *Admin. Code § 11-677(**1**)*.

Tax Law > ... > Income Taxes > Corporations & Unincorporated Associations > General Overview

Tax Law > Federal Income Tax Computation > General Overview

HN9[] Income Taxes, Corporations & Unincorporated Associations

In determining how the tax due under New York City's Banking Corporation Tax is calculated, the following steps are used: first, one determines the taxpayer's "entire net income," which is defined as total net income from all sources which shall be the same as the entire taxable income which the taxpayer is required to report to the United States treasury department. New York City, N.Y., *Admin. Code § 11-641(a)(1)*, i.e., gross income less allowable deductions for expenses and losses, etc., subject to certain modifications and adjustments. Next, where the taxpayer does business both within and without New York City, one determines the taxpayer's "allocation percentage," which is the fraction of worldwide entire net income that is deemed to be derived from business within the city. The allocation percentage is computed based on the percentages of the taxpayer's total deposits, receipts, and payroll that reflect business activity within the city. New York City, N.Y., *Admin. Code § 11-642*. To derive the dollar amount of entire net income allocable to the city, one multiplies entire net income by the allocation percentage. Finally, to derive the amount of tax due, one multiplies entire net income allocable to the city by the tax rate.

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

Tax Law > State & Local Taxes > General Overview

HN10[] **State & Local Taxes, Administration & Procedure**

It is clear from the statutory context that New York City, N.Y., *Admin. Code § 11-678(3)(c)* uses the words, "the allocation of income or capital upon which the taxpayer's return was based," to refer specifically to the "allocation percentage" utilized to derive the amount of the taxpayer's entire net income or capital subject to municipal taxation. New York City, N.Y., *Admin. Code § 11-642(b)(1)*.

Governments > Legislation > Interpretation

HN11[] **Legislation, Interpretation**

In the absence of anything in a statute indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and the same meaning will be attached to similar expressions in the same or a related statute.

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

HN12[] **State & Local Taxes, Administration & Procedure**

New York City, N.Y., *Admin. Code § 11-678(3)(c)* is construed to prohibit only changes of the taxpayer's allocation percentage.

Tax Law > ... > Income Taxes > Individuals, Estates & Trusts > Deductions

Tax Law > Federal Income Tax Computation > Losses > Related Taxpayers

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

Tax Law > State & Local Taxes > Estate & Gift Taxes > General Overview

Tax Law > ... > Estate & Gift Taxes > Estate & Inheritance Tax > Imposition of Tax

Tax Law > ... > Income Taxes > Individuals, Estates & Trusts > General Overview

Tax Law > ... > Income Taxes > Individuals, Estates & Trusts > Imposition of Tax

HN13[] **Individuals, Estates & Trusts, Deductions**

Entire net income and allocation percentage are independent variables in the tax-computation formula, and New York City, N.Y., *Admin. Code § 11-678(3)(c)* is concerned with allocation percentage only. Nothing in *§ 11-678(3)(c)* prohibits an adjustment that, increases entire net income (worldwide) by shifting a deduction claimed by a taxpayer to a related entity whose income is not included in the taxpayer's entire net income. Stated otherwise, *§ 11-678(3)(c)* permits an adjustment disallowing a deduction based on a finding that the expenses generating the deduction were not incurred in the production of any part of the taxpayer's entire net income, from either within or without the City of New York, and therefore were not properly deductible in

computing entire net income. New York City, N.Y., Admin. Code § 11-646(f)(4)(i) and N.Y. Tax Law § 1462(f)(4)(i).

Headnotes/Syllabus

Headnotes

Administrative Law - Failure to Exhaust Administrative Remedies - Challenge to Taxing Agency's Statutory Authority to Deny Tax Refund

1. Plaintiff is not barred by the exhaustion of administrative remedies rule from bringing a declaratory judgment action to challenge the denial by defendant New York City Department of Finance of its tax refund claims made following changes to plaintiff's state tax returns, which allowed certain deductions of interest from second-tier and lower subsidiaries that defendant had initially disallowed on plaintiff's municipal banking corporation tax returns for the tax years 1986, 1987 and 1993. Plaintiff is not challenging the adjustments that resulted in the denial of its refund claims as exercises of duly granted authority that were tainted by factual or mathematical errors, or that were otherwise arbitrary, capricious or irrational. Such a challenge would be subject to the exhaustion rule. Rather, plaintiff challenges the adjustments as unauthorized both because the adjustments were "extraneous" to the state changes that occasioned the audit after expiration of the general three-year limitation period for deficiency assessments (Administrative Code of City of NY § 11-674 [**1**]), and because the adjustments violated the specific statutory prohibition of changes of the "allocation of income or capital" in computing the amount of refund due as the result of the state changes (Administrative Code § 11-678 [3] [c]). Plaintiff's challenges to the adjustments raise only pure issues of statutory construction, without any substantive factual dispute being involved.

Taxation - Tax Refund - New York City Banking Corporation Tax - Refund Based on State Tax Return

2. Defendant New York City Department of Finance did not act unreasonably in denying plaintiff's tax refund claims made following changes to plaintiff's state tax returns, which allowed certain deductions of interest from second-tier and lower subsidiaries that defendant had initially disallowed on plaintiff's municipal banking corporation tax returns for the tax years 1986, 1987 and 1993. Defendant acted within its statutory power in refusing to issue any refund because of other adjustments that offset the claimed refunds. Defendant, in computing the amount of refund due as the result of state changes (Administrative Code of City of NY § 11-678 [3] [c]), is authorized to reexamine all aspects of the municipal return to determine whether any refund is payable, and is not limited to making adjustments only reflecting the state changes. When plaintiff filed its refund claims based on the state changes, it placed at issue other aspects of its returns for purposes of determining whether any refundable "overpayment" had been made (*see* Administrative Code § 11-677 [**1**]), even though the three-year limitation period for deficiency assessments had expired.

Taxation - Tax Refund - New York City Banking Corporation Tax - Refund Based on State Tax Return

3. Defendant New York City Department of Finance did not act unlawfully in denying plaintiff's tax refund claims made following changes to plaintiff's state tax returns, which allowed certain deductions of interest from second-tier and lower subsidiaries that defendant had initially disallowed on plaintiff's municipal banking corporation tax returns for the tax years 1986, 1987 and 1993. Defendant offset plaintiff's refund by disallowing certain operating-expense deductions attributable to foreign subsidiaries not included in plaintiff's returns. Defendant's adjustments in computing the amount of refund due as the result of state changes did not violate the statutory prohibition against any "change of the allocation of income or capital upon which the taxpayer's return … was based" (Administrative Code of City of New York § 11-678 [3] [c]). While defendant's adjustments increased the entire net income figure reported on plaintiff's returns by disallowing certain expense deductions, they made no change in plaintiff's "allocation" percentage computed under Administrative Code § 11-642. The statute prohibits only changes of the taxpayer's "allocation" percentage, and does not prohibit an adjustment that increases entire net income by shifting a deduction claimed by the taxpayer to a related entity whose income is not included in the taxpayer's entire net income.

Counsel: *Kenneth I. Moore* of counsel (*Stephen L. Solomon* on the brief; *Hutton & Solomon LLP,* attorneys), for respondent.

Robert J. Firestone of counsel (*Paul T. Rephen, Elizabeth Dvorkin* and *Rita D. Dumain* on the brief; *Michael A. Cardozo, Corporation Counsel* of New York

City, attorney), for appellants.

Judges: Richard T. Andrias, J.P., Ernst H. Rosenberger, Israel Rubin, David Friedman, JJ. Andrias, J.P., Rosenberger and Rubin, JJ., concur.

Opinion by: David Friedman

Opinion

[*323] **[**31]** Friedman, **[***2]** J.

Plaintiff (Bankers Trust), a banking corporation subject to the New York City banking corporation tax (Administrative Code of City of NY, tit 11, ch 6, subch 3, part 4), commenced this declaratory judgment action to challenge the denial by defendant New York City Department of Finance (the City) of Bankers Trust's claims for tax refunds for certain years. The refund claims were based on changes to Bankers Trust's state tax returns, which allowed certain deductions the State Department of Taxation and Finance (the State) had previously disallowed. When Bankers Trust filed the refund claims, the City adopted the state changes but nevertheless refused to issue any refund because of other adjustments that offset the claimed refunds. These adjustments involved the disallowance of certain deductions on the ground that the underlying expenses were incurred on behalf of foreign subsidiaries of Bankers Trust whose income was not included on Bankers Trust's returns. The IAS court granted summary judgment to Bankers Trust, and the City has appealed.

The issues raised by this appeal concern (***1***) the scope of the doctrine of exhaustion of remedies, (2) whether, upon **[***3]** the filing of a refund claim after expiration of the limitation period for deficiency assessments, the City may consider matters other than those raised by the refund claim itself, and (3) what is the meaning of *Admin. Code § 11-678(3)(c)*, which provides that, ***HN1***[] where a municipal refund is based on a change in federal or state returns, such refund shall be computed "without change of the allocation of income or capital upon which the taxpayer's return … was based."

FACTS

In computing its "entire net income" (as defined by *Admin. Code § 11-641 [a]*) on its banking corporation tax returns for each of the tax years 1986, 1987 and 1993, Bankers Trust claimed a deduction for 17% of "interest income from subsidiary capital," as permitted by *Admin. Code § 11-641 (e) (11) (i)*. In claiming this deduction, Bankers Trust included 17% of its interest income from its subsidiaries of the second tier and lower. Upon auditing each return, the City disallowed the deduction of interest from second-tier and lower subsidiaries. The City based this disallowance on its position that the Administrative Code authorized **[***4]** the deduction of subsidiary interest for interest received from subsidiaries of the first tier only.

[*324] The City's disallowance of the subsidiary interest deductions was consistent with adjustments the State made to Bankers Trust's New York State tax returns for 1986 and 1987 under the corresponding provision of the State's franchise tax on banking corporations (*Tax Law § 1453 [e] [11] [i]*). Bankers Trust, however, filed refund claims with the State, arguing that a subsequent decision of the State Tax Appeals Tribunal established that the State should not have disallowed the deductions. The ensuing state administrative proceedings were ultimately resolved by an August 1997 settlement agreement, under which, among other things, the State allowed the deductions **[**32]** for interest from second-tier and lower subsidiaries for several prior tax years.

As required by *Admin. Code § 11-646 (e)*, Bankers Trust made a report to the City, in November 1997, of the changes in its taxable income that had been effected by the August 1997 settlement agreement with the State, including the State's allowance of the aforementioned deductions. Based on the **[***5]** correction of its state returns, Bankers Trust timely filed claims, pursuant to *Admin. Code §§ 11-677* and *11-678 (3)*, for refunds from the City for the tax years 1986, 1987 and 1993, among others, in the amounts of $ ***1***,272,475, $ ***1***,300,107 and $ 3,824,106, respectively. In response to the refund claims, the City reaudited Bankers Trust's returns for these tax years.

In January 1999, the City notified Bankers Trust that it was disallowing the refund claims for 1986, 1987 and 1993 in their entirety. While it followed the State in allowing the deductions for 17% of interest from second-tier and lower subsidiaries, the City reexamined other aspects of the returns ***HN2***[] pursuant to its authority under *Admin. Code § 11-646 (g)*, which empowers the City, as here relevant, "to adjust items of income or deductions in computing entire net income" in order to eliminate the effect of "any agreement, understanding or arrangement … between the taxpayer [here, Bankers Trust] and any other corporation [here, its foreign

subsidiaries] … whereby the … income … of the taxpayer within the city is improperly or inaccurately reflected **[***6]** " (*compare 26 USC § 482*). As described below, the new matter the City raised resulted in a redetermination of the tax due for each year that totally offset the claimed refund.

The City found that certain of the operating expenses Bankers Trust had deducted in determining its entire net income should have been attributed to its "non-combined" foreign subsidiaries, **[*325]** that is, foreign subsidiaries whose income was not included in Bankers Trust's tax returns and, as is apparently undisputed, were not subject to City taxation. In essence, the City took the position that, because these expenses were incurred on behalf of the foreign subsidiaries whose income was not included on Bankers Trust's returns, such expenses were not properly deductible by Bankers Trust. The City multiplied the resulting additional entire net income by Bankers Trust's "allocation percentage," i.e., the percentage of its income deemed to be derived from business within New York City pursuant to *Admin. Code § 11-642 (b) (**1**)*, and multiplied the portion of the additional entire net income thus allocated to the City by the nine percent tax rate (*Admin. Code § 11-643.5 [a]*). **[***7]** Although the three-year statute of limitations (*Admin. Code § 11-674 [**1**]*) prevented the City from seeking to collect the additional amounts of tax due resulting from its calculations, those amounts completely offset the refunds Bankers Trust claimed.

Instead of challenging the denial of the refund claims through the administrative channels prescribed by statute (*see Admin. Code §§ 11-680*, *11-681*), Bankers Trust commenced this action against the City in February 2000, seeking a judicial declaration that the City's denial of the refund claims was an ultra vires act beyond the City's statutory power. Bankers Trust's main argument in support of its motion for summary judgment was that, after expiration of the general three-year limitation period for assessments (*Admin. Code § 11-674 [**1**]*), the City, in reauditing municipal tax returns upon receiving a refund claim based on a correction to the taxpayer's corresponding federal or state returns, has authority to recalculate taxable income only for the limited purpose of giving effect to the decrease or increase in federal **[**33]** or state taxable **[***8]** income (*Admin. Code § 11-678 [3] [d]*). Bankers Trust asserted that the adjustment to taxable income on which the City based its denial of the refund was entirely "extraneous," and not in any way attributable, to the adjustment of the state return that occasioned the reaudit in the first place.

In addition to its primary argument that the City had authority to make only adjustments reflecting the state corrections, Bankers Trust made a second argument that the Administrative Code specifically prohibited the City's shifting of expenses from Bankers Trust to its foreign subsidiaries in determining the amount of the refund. Bankers Trust argued that this adjustment in fact constituted ***HN3***[] a "change of the allocation **[*326]** of income or capital upon which the taxpayer's return … was based," which *Admin. Code § 11-678 (3) (c)* forbids the City to make in computing the amount of the credit or refund to be granted based upon a correction of the federal or state return (*see also Tax Law § 1087 [c] [**1**]*).

In opposing Bankers Trust's motion and cross-moving for summary judgment in its own favor, the City argued, **[***9]** first, that the action should be dismissed on the ground that Bankers Trust had not exhausted its administrative remedies, and, second, that the City had not exceeded its statutory authority in denying the refund claims. In support of the second argument, the City contended that *Admin Code § 11-677 (**1**)*, ***HN4***[] which, like *Tax Law § 1086 (a)*, authorizes the refunding of a tax "overpayment," requires that the City determine that there was actually an "overpayment" of tax before it may issue a refund. Therefore, the City argued, the scope of the audit to be conducted upon receipt of Bankers Trust's refund claims was not limited to the specific subject matter of the state changes.

The City also denied Bankers Trust's claim that the adjustment that offset the refunds constituted a "change of the allocation of income or capital" forbidden by *Admin. Code § 11-678 (3) (c)*. The City took the position that the "allocation" to which *Admin. Code § 11-678 (3) (c)* refers is the "allocation percentage" of entire net income deemed to be derived from business within the City and therefore taxable **[***10]** by the City (*see Admin. Code § 11-642 [b] [**1**]*; *see also Admin. Code § 11-643.5 [a]* [banking corporation tax is imposed on "the taxpayer's entire net income, or *the portion thereof allocated to the city*" (emphasis added)]), which allocation percentage is calculated by the method set forth in *Admin. Code § 11-642*. The City noted that, in calculating the refund, if any, to which Bankers Trust was entitled for each year, it had used the very same allocation percentage that Bankers Trust had used in calculating its refund claim.

The IAS court granted summary judgment to Bankers Trust, declaring that Bankers Trust was entitled to the claimed refunds. The court found that the action was not barred by the failure to exhaust administrative remedies

because Bankers Trust was contending that the City lacked statutory authority to make the adjustments it invoked as grounds for denying the refunds. The court then determined that the adjustments in question were ultra vires based on Bankers Trust's second argument that each adjustment was a change of allocation **[*327]** prohibited by *Admin. Code § 11-678 (3) (c)*. **[***11]** The court based this conclusion on its mistaken belief that the City "does not deny that the reallocation of expenses which it made in computing plaintiff's refund claim violated … *Administrative Code § 11-678 (3) (c)* ."

ANALYSIS

We concur with the IAS court that this case falls within the exception to the exhaustion-of-remedies **[**34]** doctrine for challenges asserting that an administrative action was beyond the agency's statutory authority. Nevertheless, we conclude that the City acted within its statutory authority in making the challenged adjustments to Bankers Trust's entire net income that resulted in the denial of the refunds. We therefore reverse.

Exhaustion of Administrative Remedies

It is well established that ***HN5***[] a person aggrieved by the action of a government agency is generally required to exhaust the available administrative remedies before seeking judicial review of the agency's action (*see Admin. Code § 11-681 [2]*; *Watergate II Apts. v Buffalo Sewer Auth., 46 N.Y.2d 52, 57, 412 N.Y.S.2d 821, 385 N.E.2d 560*). It is equally well established, however, that the exhaustion rule "is **[***12]** not an inflexible one," being "subject to important qualifications" (*id.*). Among the recognized qualifications to the exhaustion rule is an exception to its applicability where an agency's action is challenged as "wholly beyond its grant of power" (*id.*).

It is the exhaustion rule's exception for challenges to administrative action as beyond the scope of the agency's power that Bankers Trust contends to be applicable here. We agree. Bankers Trust is not challenging the adjustments that resulted in the denial of its refund claims as exercises of duly granted authority that were tainted by factual or mathematical errors, or that were otherwise arbitrary, capricious or irrational. Such a challenge would be subject to the exhaustion rule (*see e.g. Reader's Digest Assn. v Friedlander, 100 A.D.2d 871, 872, 474 N.Y.S.2d 131*, *lv denied 64 NY2d 601, 474 N.E.2d 259*). Rather, Bankers Trust challenges the adjustments as unauthorized by the relevant statute (*Admin. Code § 11-678 [3]*), both because the adjustments were "extraneous" to the state changes that occasioned the audit after expiration of the statute of limitations for assessments, **[***13]** and because the adjustments violated the specific statutory prohibition of "change[s] of the allocation of income or capital" in computing the amount of refund due as the result of the state changes (*Admin. Code § 11-678 [3] [c]*). The propriety of Bankers Trust's maintenance of this declaratory judgment **[*328]** action is highlighted by the fact that the challenges to the adjustments raise only pure issues of statutory construction, without any substantive factual dispute being involved (*see e.g. Dun & Bradstreet v City of New York, 276 NY 198, 206, 11 N.E.2d 728*; *Apex Air Freight v O'Cleireacain, 210 A.D.2d 7, 8, 619 N.Y.S.2d 38 lv denied 86 NY2d 712, 635 N.Y.S.2d 949, 659 N.E.2d 772*; *Matter of Herberg v Perales, 180 A.D.2d 166, 169, 585 N.Y.S.2d 1*).

The City argues that the exception to the exhaustion rule for challenges to administrative actions allegedly in excess of the agency's power is limited to cases where there is a contention that the relevant statute is entirely inapplicable (*see e.g. Dun & Bradstreet v City of New York, supra*; *GTE Spacenet Corp. v New York State Dept. of Taxation & Fin., 201 A.D.2d 429, 430, 607 N.Y.S.2d 677*). **[***14]** Therefore, the City contends, the exception does not apply, since Bankers Trust does not dispute either that it was subject to the tax in question, or that the City was authorized to audit the refund claims.

Contrary to the City's view, the Court of Appeals has upheld ***HN6***[] the use of a declaratory judgment action to challenge administrative action where, although the agency's general authority to act on the plaintiff was unquestioned, the plaintiff contended that the agency had purported to exercise that authority in a manner beyond its statutory power (*see Watergate II Apts. v Buffalo Sewer Auth., supra, 46 N.Y.2d 52 at 58, 412 [**35] N.Y.S.2d 821, 385 N.E.2d 560* [exhaustion rule did not apply to plaintiff's challenge to sewer charges on the ground they constituted taxes beyond the authority's jurisdiction, based on the manner in which such charges were computed]). This is precisely the nature of the challenge in this case. While it is undisputed that the banking corporation tax was applicable and that the City had jurisdiction to conduct the audits in question, Bankers Trust contends that the City was without statutory authority to make the particular adjustments that resulted in denial of the refund claims. The challenge **[***15]** is based on the general nature of the adjustments, and does not require us to determine their accuracy by delving into the underlying facts or computations on which they were based. Under these circumstances, the exhaustion rule does not apply.

Scope of Audit To Determine Amount of Refund

Having established that this declaratory judgment action is not barred by the exhaustion rule, we proceed to consider the merits of the challenge to the City's action. As previously discussed, Bankers Trust's primary argument in the IAS court was that when the City conducts an audit to determine the amount of refund payable, if any, based on a claim filed after expiration of the three-year statute of limitations for assessments, **[*329]** the scope of the audit is restricted to the proposed adjustments on which the refund claim is based (in this case, the adjustments that would conform the municipal return to the adjusted state return pursuant to *Admin. Code § 11-678 [3]*). The IAS court did not address this argument, instead deciding the case based on its acceptance of Bankers Trust's second argument (addressed in the next section of this opinion) that the adjustments **[***16]** were changes of allocation specifically prohibited by *Admin. Code § 11-678 (3) (c)*.

We reject the contention that the scope of the audit of the refund claims was limited to the proposed adjustments on which the claims were based, i.e., adjustments corresponding to the state changes of entire net income. As the City correctly observes, ***HN7***[] the Administrative Code authorizes the Commissioner of Finance to issue a refund only if it is determined that the taxpayer made an "overpayment" of taxes for the relevant tax year (*Admin. Code § 11-677 [1]*). ***1***[1] Although the statute does not define "overpayment," it is well established in tax jurisprudence that, in the absence of any indication to the contrary, the term should be construed, in accordance with its usual sense, to mean "any payment in excess of that which is properly due," or "the payment of more than is rightfully due" (*Jones v Liberty Glass Co., 332 U.S. 524, 531, 92 L. Ed. 142, 68 S. Ct. 229*). Thus, upon the filing of a refund claim on any basis, the City is required to compute the correct tax for the year in question, and therefore may reexamine any aspect **[***17]** of the return. The audit is not restricted to consideration of the particular items of adjustment proposed in the refund claim, even where, as in this case, the refund claim is based on state changes that were made after the statute of limitations for the assessment of deficiencies had expired. While the expiration of the assessment limitation period precludes **[**36]** the City from collecting any unpaid deficiency that may be discovered (except to the extent provided by *Admin. Code § 11-674 [3] [c]*), no refund may issue unless it appears that the taxpayer in fact overpaid its taxes.

[*18]** The conclusion that the City was authorized to reexamine all aspects of the return in determining whether any refund was **[*330]** payable, notwithstanding that any deficiency assessment was time-barred, receives direct support from the decision of the United States Supreme Court in *Lewis v Reynolds (284 U.S. 281, 76 L. Ed. 293, 52 S. Ct. 145*, *mod on other grounds 284 U.S. 599*). In *Lewis,* the taxpayer filed a claim for a refund of its payment of a deficiency assessment. The refund claim, although timely, was filed after expiration of the limitation period for assessments of deficiencies. The Government, while it agreed with the taxpayer that the prior deficiency assessment should be reversed, rejected the refund claim based on a different adjustment that resulted in an additional amount of tax greater than the claimed refund. In sustaining the Government's position, the Supreme Court stated (*id. at 283*):

> "While the statutes authorizing refunds do not specifically empower the Commissioner to reaudit a return whenever repayment is claimed, authority therefor is necessarily implied. *An overpayment must appear before* ***[***19]*** *refund is authorized.* Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded." (Emphasis added.)

Bearing in mind that, as the parties agree, we may look for guidance to federal case law construing comparable provisions of the Internal Revenue Code, we find the Supreme Court's words in *Lewis* equally applicable to the present case. [2]

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[1] *Admin. Code § 11-677 (1)* provides:

"*§ 11-677*. ***HN8***[] *Overpayment.* ***1***. General. The commissioner of finance, within the applicable period of limitations, may credit *an overpayment of tax* and interest on such overpayment against any liability in respect of any tax imposed by any of the named subchapters of this chapter or [*sic*] on the taxpayer who made the overpayment, and the balance shall be refunded out of the proceeds of the tax." (Emphasis added.)

[2] The authorities cited by Bankers Trust on this point (*People ex rel. International Salt Co. v Graves, 267 NY 149, 196 N.E. 5*; *People ex rel. Jacob Doll & Sons v Graves, 257 App Div*

Before turning to the City's remaining argument, we note **[***20]** that the respondent's brief submitted by Bankers Trust includes an alternative argument in support of its position that the issues opened for reexamination by the refund claims were limited to the subject matter of the state corrections. Bankers Trust argues, apparently for the first time in opposition to this appeal, that the City agreed to such a limitation in the consent and waiver agreements the parties executed in 1992 and 1997. We cannot uphold the IAS court's decision on this ground, however, as a challenge to the denial of the refunds based on the consent and waiver agreements would not fall within any **[*331]** exception to the exhaustion-of-remedies doctrine. If the argument were not barred by Bankers Trust's failure to exhaust its administrative remedies, we would reject it as wholly lacking in merit. Nothing in the consent and waiver agreements purports to limit the scope of the issues the City would otherwise have legal authority to reexamine upon the filing of a refund claim.

*Whether the Challenged Adjustments Were Changes of Allocation Prohibited By Administrative*Admin. Code § 11-678(3)(c)

Finally, we reach the issue on which Supreme Court ruled in Bankers **[***21]** Trust's favor. To reiterate, the question is whether the City violated the prohibition **[**37]** against any "change of the allocation of income or capital upon which the taxpayer's return ... was based" (Admin. Code § 11-678 [3] [c]) when, in computing the amount of refund to be issued based on state changes made after expiration of the limitation period for deficiency assessments, it disallowed Bankers Trust's deduction of certain expenses based on a finding that such expenses were properly deductible by Bankers Trust's foreign subsidiaries not included in its returns. In considering this issue, our concern is limited to whether the adjustments violated the statutory prohibition. Again, we do not consider whether the adjustments were factually, mathematically or logically supportable, because the exhaustion rule forbids us to do so.

In regard to this issue, it is helpful to keep in mind **HN9**[] how the tax due under the City's banking corporation tax is calculated. First, one determines the taxpayer's "entire net income," which is defined as "total net income from all sources which shall be the same as the entire taxable income ... which the taxpayer is required **[***22]** to report to the United States treasury department" (Admin. Code § 11-641 [a] [1]), i.e., gross income less allowable deductions for expenses and losses, etc., subject to certain modifications and adjustments not relevant here. Next, where, as here, the taxpayer does business both within and without New York City, one determines the taxpayer's "allocation percentage," which is the fraction of worldwide entire net income that is deemed to be derived from business within the City. The allocation percentage is computed based on the percentages of the taxpayer's total deposits, receipts, and payroll that reflect business activity within the City (Admin. Code § 11-642; *see also* Admin. Code § 11-604 [3] [prescribing similar method for computation of allocation percentages under City's general corporation tax]). To derive the dollar amount of entire net income allocable to the City, **[*332]** one multiplies entire net income by the allocation percentage. Finally, to derive the amount of tax due, one multiplies entire net income allocable to the City by the tax rate (here, nine percent). [3]

[*23]** Turning to the question at hand, we again note that, in computing the amount to be refunded for each year, the only change the City made to the computations set forth in the refund claim was to increase entire net income by disallowing certain expense deductions. After deriving the increased entire net income figure, the City applied to it the identical allocation percentage that Bankers Trust had reported in the refund claim. Bankers Trust concedes this much in its appellate brief, acknowledging that the City made "no change in [its] allocation percentage." Nonetheless, Bankers Trust argues that the statutory prohibition of "change[s] of the allocation of income or capital upon which the taxpayer's return ... was based" (Admin. Code § 11-678 [3] [c]) is not limited to changes of the allocation percentage computed, for purposes of the banking corporation tax, under Admin. Code § 11-642. We cannot agree.

First, **HN10**[] it is clear from the statutory context that

481, 14 N.Y.S.2d 60; Matter of Ethyl Corp., 1999 NY City Tax LEXIS 26, 1999-1 NY Tax Cases CT-158, CT-175--CT-178 [NY City Tax Appeals Tribunal, June 28, 1999]) are not to the contrary.

[3] By way of a simplified example, assume a taxpayer subject to the banking corporation tax has gross income of $ *1*,000,000 and allowable deductions of $ 800,000. That taxpayer would report entire net income of $ 200,000 ($ *1*,000,000 less $ 800,000). Further assuming the taxpayer's allocation percentage to be 50%, the taxpayer would report allocated income of $ 100,000 ($ 200,000 x 50%), and tax due of $ 9,000 ($ 100,000 x 9%).

Admin. Code § 11-678 (3) (c) uses the words in question ("the allocation of income or capital upon which the taxpayer's return **[***24]** ... was based") to refer **[**38]** specifically to the "allocation percentage" utilized to derive the amount of the taxpayer's entire net income or capital subject to municipal taxation (*see* Admin. Code § 11-642 [b] [1]). McKinney's Consolidated Laws of NY, Book ***1***, Statutes § 236 states:

> "***HN11***[] In the absence of anything in the statute indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and the same meaning will be attached to similar expressions in the same or a related statute." (*See also* Riley v County of Broome, 95 N.Y.2d 455, 466, 719 N.Y.S.2d 623, 742 N.E.2d 98; 97 NY Jur 2d, Statutes § 126.)

Here, the words "allocation" and "allocated" appear numerous times throughout chapter 6 ("City Business Taxes") of title 11 **[*333]** of the Administrative Code, to which Admin. Code § 11-678 applies, and in almost every instance, the words are used in a manner that makes explicit that the reference is to the municipally taxable proportion of the taxpayer's entire net income or capital deemed **[***25]** to be derived from the City or located therein, as the case may be. For example, the words "allocation" and "allocated" are usually immediately followed by the phrase "to the city" or "within the city" when used in chapter 6; elsewhere in the chapter, "allocation" is immediately followed by the word "percentage." These usages are entirely inconsistent with the sense in which Bankers Trust would have us construe the word "allocation" in Admin. Code § 11-678 (3) (c), namely, as referring to the attribution of particular items of income or expense either to the taxpayer or to a separate but related entity not included in the same return. Accordingly, since nothing in Admin. Code § 11-678 (3) (c) indicates that it uses "allocation" in this sense, we ***HN12***[] construe the statute to prohibit only changes of the taxpayer's allocation percentage. [4]

[*26]** Conceding that the City's adjustments did not change its allocation percentages, Bankers Trust essentially argues that the prohibition of Admin. Code § 11-678 (3) (c) should be applied beyond its literal scope to bar adjustments of entire net income that have the effect of shifting an increment of income to an entity subject to City taxation from related entities not subject to City taxation. The adjustments at issue did have this economic effect, since the City based its disallowance of certain of Bankers Trust's operating-expense deductions on the ground that such expenses were attributable to Bankers Trust's foreign subsidiaries, which apparently are not subject to taxation by the City. "This," contends Bankers Trust, "is as much a reallocation of income to the City as a change in the allocation percentage."

The flaw in Bankers Trust's reasoning is that ***HN13***[] entire net income and allocation percentage are independent variables in the tax-computation formula, and Admin. Code § 11-678 (3) (c) is concerned with allocation percentage only. **[*334]** Nothing in the statute prohibits an adjustment that, like those at issue here, increases entire **[***27]** net income (worldwide) by shifting a deduction claimed by the taxpayer to a related entity whose income is not included in **[**39]** the taxpayer's entire net income. Stated otherwise, the statute permits an adjustment disallowing a deduction based on a finding that the expenses generating the deduction were not incurred in the production of any part of the taxpayer's entire net income, *from either within or without the City,* and therefore were not properly deductible in computing entire net income (*see* Admin. Code § 11-646 [f] [4] [i]; *see also* Tax Law § 1462 [f] [4] [i]). Further, since the adjustments at issue were not based on any reexamination of the deposit, receipt and payroll records necessary for the computation of the allocation percentage (*see* Admin. Code § 11-642), the adjustments did not defeat the apparent purpose of Admin. Code § 11-678 (3) (c) to limit the time the taxpayer must retain such records. The challenged adjustments were therefore entirely consistent with the letter, purpose and spirit of Admin. Code § 11-678 (3) (c).

[*28]** CONCLUSION

In sum, because Bankers Trust has chosen to pursue its attack on the City's denial of its refund claims through a declaratory judgment action, rather than through administrative proceedings, we approach this matter as one of statutory interpretation and disregard any

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[4] We recognize that the word "allocate" and its derivatives are commonly used in tax practice in the sense in which Bankers Trust would have us construe "allocation" in the statutory language. In fact, the City used the word "allocated" in this sense in the notice of proposed adjustment that accompanied the denial of the refunds, which stated, inter alia: "we *allocated* Home Office and Foreign Branch expenses to non-combined CFC's [controlled foreign corporations]" (emphasis added). As discussed above, however, this is not the kind of allocation prohibited by Admin. Code § 11-678 (3) (c).

particular factual or mathematical errors the City may have made. On this issue of statutory construction, we find that the Administrative Code did authorize the City to make adjustments of the kind that offset Bankers Trust's refund. When Bankers Trust filed its refund claims based on state changes, it placed at issue other aspects of its City returns for purposes of determining whether any refundable "overpayment" had been made, even though the statute of limitations for deficiency assessments had expired. Finally, the challenged adjustments did not violate *Admin. Code § 11-678 (3)(c)*'s specific prohibition against any "change of the allocation of income" in computing refunds based on state changes, because the City's adjustments, while increasing entire net income, made no change to Bankers Trust's allocation percentage computed under *Admin. Code § 11-642*.

[*29]** Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Marcy Friedman, J.), entered May 7, 2001, which granted Bankers Trust's motion for summary judgment declaring that Bankers Trust was **[*335]** entitled to the tax refunds it had claimed from the City for the tax years 1986, 1987 and 1993, and denied the City's cross motion for summary judgment, should be reversed, on the law, without costs, Bankers Trust's motion should be denied, the City's cross motion for summary judgment should be granted, and it should be declared that Bankers Trust is not entitled to such tax refunds.

Andrias, J.P., Rosenberger and Rubin, JJ., concur.

Order and judgment (one paper), Supreme Court, New York County, entered May 7, 2001, reversed, on the law, without costs, plaintiff's motion for summary judgment denied, defendants' cross motion for summary judgment granted, and a declaration issued that plaintiff is not entitled to certain tax refunds.

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2018 Sess. Law News of N.Y. Ch. 59 (S. 7509-C) (McKINNEY'S)
McKINNEY'S 2018 SESSION LAW NEWS OF NEW YORK
241st LEGISLATURE
Additions are indicated by **Text**; deletions by
Text.
Vetoes are indicated by Text ;
stricken material by **Text** .
CHAPTER 59
S. 7509–C
Approved and effective April 12, 2018

PART X

Section 1. Subdivision 1 of section 1131 of the tax law, as amended by chapter 576 of the laws of 1994, is amended to read as follows:

<< NY TAX § 1131 >>

(1) "Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of this article**, or has so acted**; and any member of a partnership or limited liability company. Provided, however, that any person who is a vendor solely by reason of clause (D) or (E) of subparagraph (i) of paragraph (8) of subdivision (b) of section eleven hundred one **of this article** shall not be a "person required to collect any tax imposed by this article" until twenty days after the date by which such person is required to file a certificate of registration pursuant to section eleven hundred thirty-four **of this part**.

§ 2. Subdivision (a) of section 1133 of the tax law, as amended by chapter 621 of the laws of 1967, is amended to read as follows:

<< NY TAX § 1133 >>

(a)**(1)** Except as otherwise provided in **paragraph two of this subdivision and in** section eleven hundred thirty-seven **of this part**, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. Any such person shall have the same right in respect to collecting the tax from his customer or in respect to nonpayment of the tax by the customer as if the tax were a part of the purchase price of the property or service, amusement charge or rent, as the case may be, and payable at the same time; provided, however, that the tax commission shall be joined as a party in any action or proceeding brought to collect the tax.

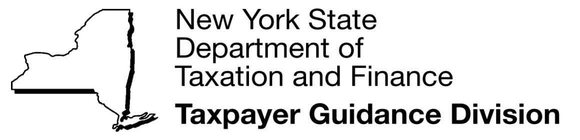
(2) Notwithstanding any other provision of this article: (i) The commissioner shall grant the relief described in subparagraph (iii) of this paragraph to a limited partner of a limited partnership (but not a partner of a limited liability partnership) or a member of a limited liability company if such limited partner or member demonstrates to the satisfaction of the commissioner that such limited partner's or member's ownership interest and the percentage of the distributive share of the profits and losses of such limited partnership or limited liability company are each less than fifty percent, and such limited partner or member was not under a duty to act for such limited partnership or limited liability company in complying with any requirement of this article. Provided, however, the commissioner may deny an application for relief to any such limited partner

or member who the commissioner finds has acted on behalf of such limited partnership or limited liability company in complying with any requirement of this article or has been convicted of a crime provided in this chapter or who has a past-due liability, as such term is defined in section one hundred seventy-one-v of this chapter.

(ii) Such limited partner or member must submit an application for relief, on a form prescribed by the commissioner, and the information provided in such application must be true and complete in all material respects. Providing materially false or fraudulent information on such application shall disqualify such limited partner or member for the relief described in subparagraph (iii) of this paragraph, shall void any agreement with the commissioner with respect to such relief, and shall result in such limited partner or member bearing strict liability for the total amount of tax, interest and penalty owed by their respective limited partnership or limited liability company pursuant to this subdivision.

(iii) A limited partner of a limited partnership or member of a limited liability company, who meets the requirements set forth in this paragraph and whose application for relief is approved by the commissioner, shall be liable for the percentage of the original sales and use tax liability of their respective limited partnership or limited liability company that reflects such limited partner's or member's ownership interest of distributive share of the profits and losses of such limited partnership or limited liability company, whichever is higher. Such original liability shall include any interest accrued thereon up to and including the date of payment by such limited partner or member at the underpayment rate set by the commissioner pursuant to section eleven hundred forty-two of this part, and shall be reduced by the sum of any payments made by (A) the limited partnership or limited liability company; (B) any person required to collect tax not eligible for relief; and (C) any person required to collect tax who was eligible for relief but had not been approved for relief by the commissioner at the time such payment was made. Provided, however, such limited partner or member shall not be liable for any penalty owed by such limited partnership or limited liability company or any other partner or member of such limited partnership or limited liability company. Any payment made by a limited partner or member pursuant to the provisions of this paragraph shall not be credited against the liability of other limited partners or members of their respective limited partnership or limited liability company who are eligible for the same relief; provided, however that the sum of the amounts owed by all of the persons required to collect tax of a limited partnership or limited liability company shall not exceed the total liability of such limited partnership or limited liability company.

§ 3. This act shall take effect immediately.



Technical Memorandum
TSB-M-11(17)S
Sales Tax
September 19, 2011

New Policy Relating to Responsible Person Liability Under the Sales Tax Law

This memorandum restates and includes additional information regarding the department's new policy relating to responsible person liability under sections 1131(1) and 1133 of the Tax Law for persons who are limited partners of a limited partnership or members of a limited liability company (LLC), as previously explained in TSB-M-11(6)S. Accordingly, TSB-M-11(6)S is obsolete.

General

Section 1133 of the Tax Law imposes personal responsibility for payment of sales and use taxes (sales taxes) on certain owners, officers, directors, employees, managers, partners, or members (responsible persons) of businesses that have outstanding sales tax liabilities. A responsible person is jointly and severally liable for the tax owed, along with the business entity or any of the business's other responsible persons. This means that the responsible person's personal assets could be taken by the Tax Department (the department) to satisfy the sales tax liability of the business.

In the case of a partnership or LLC, section 1131(1) of the Tax Law provides that each partner or member is a responsible person regardless of whether the partner or member is under a duty to act on behalf of the partnership or company. This means that these persons can be held responsible for 100% of the sales and use tax liability of a business. The department recognizes that this provision can result in harsh consequences for certain partners and members who have no involvement in or control of the business's affairs. Accordingly, the department has developed the following new policy that provides some relief from this *per se* personal liability for certain limited partners and members.

Eligibility for relief

Under the department's new policy, the following limited partners and LLC members who are responsible persons under section 1131(1) may be eligible for relief:

- Limited partners (of a limited partnership) may be approved for relief if they demonstrate that they were not under a duty to act in complying with the Tax Law on behalf of the partnership.

- LLC members who can document that their ownership interest and percentage distributive share of the profits and losses of the LLC are each less than 50% may be

approved for relief if they demonstrate that they were not under a duty to act on behalf of the company in complying with the Tax Law.

In addition to meeting one of the conditions stated above, the limited partner or member must also agree to the terms and conditions that the department sets forth in a written agreement for limiting a responsible person's liability, which shall include, but not be limited to:

- having the amount of their responsible person liability computed in the manner described under *Available relief* below, and

- cooperating with the department in providing substantiated information regarding the identities of other potentially responsible persons, particularly in identifying those persons who were involved in the day-to-day affairs of the business. In addition, in the case of tiered entities (for example, a partnership that is a partner in another partnership) the department will expect the limited partner's or member's assistance in detailing the overall ownership structure, including information regarding out-of-state entities. This requirement will be applied reasonably, with the recognition that certain partners or members, especially passive investors with only small ownership interests or distributive shares, may not know or have access to the information the department is seeking. The pending expiration of any statute of limitations in which to assess the sales and use tax due will also be taken into consideration in granting relief.

The following partners and members do not qualify for relief:

- any general partners of a partnership (including general partners of a limited partnership);

- any partners of a limited liability partnership (LLP); and

- any LLC member holding a 50% or more ownership interest in the LLC, or entitled to a distributive share of 50% or more of the profits and losses of the LLC.

Available relief

The eligible persons described above will qualify for the following relief:

- no penalty owed by the business or other responsible persons will be due from the eligible person; and

- the sales tax liability of the eligible person will be reduced to an amount determined by using the following steps:

Step 1: Add the amount of the business's original sales and use tax liability that has been assessed against the eligible person and the amount of accrued interest due on that liability. Interest will be computed using the minimum statutory (i.e., non-penalty) interest rate, and will be computed from the date the original tax was due through the date that the eligible person intends to pay his or her liability.

Step 2: Reduce the amount computed in Step 1 by the sum of any payments made by (a) the business, (b) any responsible persons not eligible for relief, and (c) any responsible persons who were eligible for relief but did not request relief at the time the payment was made.

Step 3: Multiply the amount determined in Step 2 by the higher of the eligible person's percentage of ownership in the business or the person's percentage share of the profits and losses of the business. This amount (or the amount of the business's remaining tax liability, if less) is the amount owed by the eligible responsible person.

> Example 1: *An LLC originally owed $10,000 in sales tax. Member X is a 4% passive member of the LLC and receives 4% of the profits and losses of the LLC. Member X has also been assessed the $10,000 on the grounds that member X is a responsible person of the LLC. Member X has requested relief. If granted relief, Member X intends to pay the reduced amount on September 10, 2011. The amount of accrued interest due on the original $10,000 computed through September 10, 2011 is $1,600. If granted relief, Member X's reduced liability would be computed as follows: $10,000 + $1,600 = $11,600 x 4% =$464.*

> Example 2: *Same facts as Example 1 except that member X is assessed for only $8,000 of the LLC's $10,000 liability because the statute of limitations barred the department from assessing X for one of the sales tax quarters in question. Interest on the original $8,000 through September 10, 2011, is $1,300. If granted relief, Member X's reduced liability would be computed as follows: $8,000 + $1,300 =$9,300 x 4% = $372.*

> Example 3: *A limited partnership originally owed $20,000 in sales tax. Partner Z is a 4% limited partner of the partnership but receives 6% of the partnership's profits and losses. Partner Z has also been assessed the $20,000 on the grounds that Partner Z is a responsible person of the partnership. Partner Z has requested relief. If granted relief, Partner Z intends to pay the reduced amount on October 1, 2011. The amount of interest due on the original $20,000 liability, computed through October 1, 2011, is $3,100. In addition, at the time Partner Z applies for relief, the partnership, and other responsible persons who either were not eligible for or did not request relief, have paid $8,000 towards the partnership's liability. If granted relief, Partner Z's liability would be computed as follows: $20,000 + $3,100 = $23,100 - $8,000 = $15,100 x 6% = $906.*

In the case of tiered entities (e.g., a partnership that is a partner in another partnership), where the lower-tier entity is eligible for relief, the above steps would also be used to determine the lower-tier entity's reduced liability. Furthermore, if any members or partners of the lower-tier entity are also eligible for relief, their reduced liability would then be determined by multiplying the lower-tier entity's reduced liability by the higher of the member's or partner's percentage of ownership in, or percentage share of the profits or losses of, the lower-tier entity.

Treatment of payments

Payments made by responsible persons will be applied as follows:

- Payments made by responsible persons who are eligible for the relief described in this memorandum will not be credited against the liability of other responsible persons who are also eligible for relief. That is, those other eligible responsible persons must calculate their responsible person liability by applying their applicable percentage to the full value of their assessment, without any credit for payments made by other responsible persons under this policy. The amount owed by those eligible responsible persons would be the amount so calculated or the business's remaining sales or use tax liability, whichever is less. Also, any payments made by eligible responsible persons subject to this new policy will be credited to the business entity's liability. Penalties (if applicable) and interest at the full statutory rate will continue to accrue for liabilities owed by the business entity and by responsible persons other than as part of this new policy.

- Payments made by responsible persons other than as part of the new policy would continue to be applied to the liability of the business and other responsible persons as they are currently.

Effective date

This new policy took effect March 9, 2011.

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.

Neutral
As of: June 4, 2018 2:56 PM Z

Ianniello v. New York Tax Appeals Tribunal

Supreme Court of New York, Appellate Division, Third Department

November 3, 1994, Decided ; November 3, 1994, Entered

68023

Reporter
209 A.D.2d 740 *; 617 N.Y.S.2d 973 **; 1994 N.Y. App. Div. LEXIS 10858 ***

In the Matter of Matthew Ianniello et al., Petitioners, v. New York Tax Appeals Tribunal et al., Respondents.

Subsequent History: **[***1]** As Amended November 10, 1994.

Prior History: Proceeding pursuant to CPLR article 78 (initiated in this Court pursuant to *Tax Law § 2016*) to review a determination of respondent Tax Appeals Tribunal which sustained a sales and use tax assessment imposed under *Tax Law articles 28* and 29.

Core Terms

sales tax, audit, petitioners', notice of determination, reasonably calculated, taxes due, confirm

Counsel: Hoffman & Pollok (John L. Pollok of counsel), New York City, for Matthew Ianniello, petitioner.

G. Oliver Koppell, Attorney-General (Daniel Smirlock of counsel), Albany, for James Wetzler, respondent.

Judges: Mercure, J. P., Crew III and Casey, JJ., concur.

Opinion by: White, J.

Opinion

[*740] **[**973]** White, J.

In September 1978, Paul Gelb, as president of P&G Funding Corporation (hereinafter P&G) leased property on Broadway in Manhattan. Thereafter P&G, doing business as Mardi Gras Bar, was licensed by the State Liquor Authority to operate a bar on said premises. The bar commenced operation in January 1979 and about that time petitioners acquired an interest in the profits of said bar, although they were not shareholders, officers or directors of P&G.

As a result of FBI surveillance of petitioners' business on 50th Street in Manhattan between September and December 1982, petitioners, Gelb **[***2]** and others, were indicted on a variety of Federal charges, including a scheme to evade a large portion of sales tax on the gross sales of P&G. After a jury trial, petitioners and Gelb were found guilty of, *inter alia,* a conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act *(see, 18 USC § 1961 et seq.),* mail fraud regarding filing of State sales tax returns and tax evasion. These convictions were upheld by the Second Circuit Court of Appeals *(see, United States v Ianniello, 808 [**974] F2d 184, cert denied 483 US 1006*). In its decision, the Second Circuit noted that Gelb had acted as a front for petitioners who actually, but secretly, directed and supervised the affairs of an enterprise which included the Mardi Gras as well as other bars and restaurants in Manhattan. The court further found that P&G, through its operation of the Mardi Gras, was the most profitable business of said enterprise and that from 1979 through 1982 petitioners and Gelb regularly "skimmed" its cash receipts, dividing over $ 2 million in unreported income equally among themselves.

Shortly thereafter, the State Department of Taxation and **[*741]** Finance **[***3]** (hereinafter Department) conducted a sales tax audit of P&G and, as a result, determined that from December 1, 1978 until February 4, 1986, the date the business was sold, there was an additional sales tax due in the amount of $ 292,902.50, and that by virtue of their actual ownership and control of P&G, petitioners were effectively officers of the corporation and responsible for said sales tax. Petitioners challenged the notice of determination, but waived a hearing and agreed to have the matter submitted to an Administrative Law Judge (hereinafter ALJ), who sustained the notices of determination and demands for payment of sales tax. Respondent Tax Appeals Tribunal affirmed the ALJ's determination and this appeal ensued.

Petitioners' main contention is that they were not persons required to collect sales tax pursuant to *Tax Law § 1131 (1)* since they were not officers, directors or employees of P&G and not under a duty to act for said corporation. We reject petitioners' narrow interpretation of the statute and agree with the ALJ, who found that petitioners possessed all the indicia of control that would impose liability upon an officer, director or employee of a corporation, **[***4]** and we also note that *Tax Law § 1131 (1)* includes, in a broad definition of persons required to collect sales tax, "every vendor of tangible personal property or services". As we stated in *Matter of Sunny Vending Co. v State Tax Commn. (101 AD2d 666, 667*, quoting *Matter of Chemical Bank v Tully, 94 AD2d 1, 3*, quoting *Matter of Albany Calcium Light Co. v State Tax Commn., 55 AD2d 502, 504*, *revd 44 NY2d 986*), the construction by the Tax Commission is consistent with "this court's recognition that the broad and inclusive language of the taxing statute ' "clearly expresses an intent to encompass most transactions involving the transfer or use of commodities in the business world" ' ". The economic reality of a transaction should be considered regardless of the form of the transaction where it is necessary to avoid creation of a loophole in the Tax Law *(see, Matter of Schrier v Tax Appeals Tribunal, 194 AD2d 273, lv dismissed 83 NY2d 944*). Where, as here, examination of the record reveals overwhelming evidence supporting the Tax Tribunal's finding that petitioners were involved in the corporation and obtained substantial income from said corporation as **[***5]** silent partners, the Tax Tribunal's determination was reasonable and should be upheld *(see, Matter of Kim Poy Lee v Tax Appeals Tribunal, 202 AD2d 924*).

Petitioners also contend that the audit conducted by the Department was not reasonably calculated to reflect the taxes **[*742]** due. Here, however, the records provided by petitioners were patently false and thus inadequate to enable the auditor to conduct the necessary audit. Given these circumstances the Department could select a method of audit reasonably calculated to reflect the taxes due *(see, Matter of Shukry v Tax Appeals Tribunal, 184 AD2d 874; see also, Matter of A & J Gifts Shop--Vanni v Chu, 145 AD2d 877, lv denied 74 NY2d 603; Matter of Ace Provision & Luncheonette Supply v Chu, 135 AD2d 1070*). Therefore, we confirm the Tax Tribunal's determination since it has a **[**975]** rational basis and is supported by substantial evidence *(see, Matter of Buzzard v Tax Appeals Tribunal of State of N. Y., 205 AD2d 852; Matter of Cohen v State Tax Commn., 128 AD2d 1022*).

Mercure, J. P., Crew III and Casey, JJ., concur.

Adjudged that the determination is confirmed, without costs, and petition **[***6]** dismissed.

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Cited
As of: June 4, 2018 3:04 PM Z

Matter of Luongo v. Tax Appeals Trib. of The State of New York

Supreme Court of New York, Appellate Division, Third Department

May 22, 2014, Decided; May 22, 2014, Entered

515599

Reporter
117 A.D.3d 1286 *; 987 N.Y.S.2d 114 **; 2014 N.Y. App. Div. LEXIS 3675 ***; 2014 NY Slip Op 3714 ****; 2014 WL 2118581

[**1]** In the Matter of Jessie Luongo, Petitioner, v Tax Appeals Tribunal of the State of New York et al., Respondents.

Core Terms

sales tax, Restaurant, sales

Case Summary

Overview

HOLDINGS: [1]-The Tax Appeals Tribunal properly determined that a shareholder was a responsible person and was personally liable under *Tax Law §§ 1131(1)* and *1133(a)* for the corporation's outstanding sales and use taxes because, while the shareholder did not control the day-to-day operations of the corporation, she retained the authority under the corporate bylaws to appoint and remove directors and officers.

Outcome

Determination confirmed and petition dismissed.

LexisNexis® Headnotes

Tax Law > State & Local Taxes > Administration & Procedure > Collection of Taxes

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

HN1[] **Administration & Procedure, Collection of Taxes**

Tax Law § 1133(a) imposes personal liability on any person who is responsible for collecting tax under *Tax Law art. 28*.

Business & Corporate Law > Corporations > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > Collection of Taxes

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

HN2[] **Business & Corporate Law, Corporations**

A person required to collect tax includes any officer, director, or employee of a corporation who is under a duty to act for such corporation in complying with any requirement of *Tax Law art. 28*. *Tax Law § 1131(1)*.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > Collection of Taxes

Business & Corporate Law > Corporations > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

HN3[] **Directors & Officers, Management Duties &**

Liabilities

A person who is not an officer, director, or employee of a corporation is required to collect tax if he or she possessed all the indicia of control that would impose liability upon an officer, director, or employee of a corporation.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > Collection of Taxes

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

Tax Law > State & Local Taxes > Sales Taxes > General Overview

HN4[] **Directors & Officers, Management Duties & Liabilities**

Whether a person has a duty to act for a corporation and is responsible for collecting sales tax is a factual determination to be made on a case-by-case basis. Such determination turns on a variety of factors, including the status of a stockholder, the authority to hire and fire employees, and responsibility for the corporation's management. *20 NYCRR 526.11(b)(2)*. In this regard, an important consideration is the person's authority and responsibility to exercise control over the corporation, not his or her actual assertion of such authority.

Tax Law > State & Local Taxes > Administration & Procedure > Collection of Taxes

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

HN5[] **Administration & Procedure, Collection of Taxes**

Although the Commissioner of Taxation and Finance has the authority to waive penalties, a petitioner bears the burden of establishing that the failure to pay tax was due to reasonable cause and not due to willful neglect. *Tax Law § 1145(a)(1)(iii)*, *20* NYCRR 536.1(c).

Headnotes/Syllabus

Headnotes

Taxation—Sales and Use Taxes—Personal Liability for Outstanding Taxes Owed by Corporation

Taxation—Sales and Use Taxes—Penalties for Underpayment of Taxes

Counsel: **[***1]** Roberts & Holland, LLP, New York City (Ellen S. Brody of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, Albany (Kathleen M. Arnold of counsel), for Commissioner of Taxation and Finance of the State of New York, respondent.

Judges: Before: Stein, J.P., McCarthy, Rose and Egan Jr., JJ. McCarthy, Rose and Egan Jr., JJ., concur.

Opinion by: Stein

Opinion

[115]** **[*1286]** Stein, J.P. Proceeding pursuant to *CPLR article 78* (initiated in this Court pursuant to *Tax Law § 2016*) to review a determination of respondent Tax Appeals Tribunal, which, among other things, sustained a sales and use tax assessment imposed under *Tax Law articles 28* and *29*.

Petitioner was the sole shareholder of Fifth Avenue Restaurant Acquisition Corporation, which operated Tuscan Square Restaurant and Marketplace. Tuscan Square was originally **[*1287]** owned and operated by Toscorp[1]—the parent company of Tuscan Square and other restaurants—through Toscorp's subsidiary, Rock 51 PRTN Corporation, of which petitioner's husband, Giuseppe Luongo, was the chief executive officer. After Toscorp and Rock 51 filed petitions for bankruptcy, Fifth Avenue was formed for the purpose of acquiring the assets of Rock 51. On the advice of counsel,

[1] Petitioner was a minority shareholder of Toscorp.

[*2]** petitioner agreed to take ownership of Fifth Avenue in an attempt to preserve the family's assets, but immediately named Luongo its sole director. Luongo, in turn, named himself its president, treasurer and secretary and, thereafter, ran the day-to-day operations of the restaurant.

Fifth Avenue eventually filed for bankruptcy and, as part of that process, the Department of Taxation and Finance conducted a sales tax field audit of its books and records for the period March 1, 2004 though November 30, 2006. That audit revealed that Fifth Avenue had underreported gross sales on its sales tax returns and owed sales and use taxes in excess of $230,000, plus applicable penalties and interest.[2] Consequently, the Department issued several notices of determination to petitioner, notifying her—as a "Responsible Person"—of the amount owed.***3***[1] After two conciliation conferences, the notices of determination were sustained.

Petitioner **[***3]** subsequently filed petitions with the Division of Tax Appeals, seeking a redetermination of the deficiency on the ground that petitioner was not responsible for Fifth Avenue's tax liabilities. A hearing was held before an Administrative Law Judge, who ultimately rejected petitioner's contention that she was not a person required to collect tax and denied the petitions. Petitioner filed a notice of exception with respondent Tax Appeals Tribunal, which affirmed the Administrative Law Judge's determination. This CPLR article 78 proceeding ensued.

[116]** We confirm. ***HN1***[] *Tax Law § 1133 (a)* imposes personal liability on any person who is responsible for collecting tax under *Tax Law article 28* (*see* *Matter of Coppola v Tax Appeals Trib. of State of N.Y., 37 AD3d 901, 902, 828 NYS2d 712 [2007]*). ***HN2***[] A person required to collect tax includes "any officer, director or employee of a corporation . . . who . . . is under a duty to act for such corporation . . . in complying with any requirement of [*Tax Law article 28*]" (*Tax Law § 1131 [1]*). Moreover, ***HN3***[] a person who is not an officer, director or employee of a corporation is required to collect tax if he **[*1288]** or she "possessed all the indicia of control that would impose liability upon **[***4]** an officer, director or employee of a corporation" (*Matter of Ianniello v New York Tax Appeals Trib., 209 AD2d 740, 741, 617 NYS2d 973 [1994]*). ***HN4***[] Whether a person has a duty to act for a corporation and is responsible for collecting sales tax is a factual determination to be made on a case-by-case basis (*see* *Matter of Coppola v Tax Appeals Trib. of State of N.Y., 37 AD3d at 903*; *Matter of Cohen v State Tax Commn., 128 AD2d 1022, 1023, 513 NYS2d 564 [1987]*; *20 NYCRR 526.11 [b] [1]*, *[2]*). Such determination turns on a variety of factors, including the status of a stockholder, the authority to hire and fire employees and responsibility for the corporation's management (*see* *Matter of Cohen v State Tax Commn., 128 AD2d at 1023*; *20 NYCRR 526.11 [b] [2]*). In this regard, an important consideration is "petitioner's authority and responsibility to exercise control over the corporation, not his [or her] actual assertion of such authority" (*Matter of Coppola v Tax Appeals Trib. of State of N.Y., 37 AD3d at 903*; *accord* *Matter of Ippolito v Commissioner of N.Y. State **Dept**. of Taxation & Fin., 116 AD3d 1176, 1177, 984 NYS2d 198, 200 [**2014**]*; *see* *Matter of Cohen v State Tax Commn., 128 AD2d at 1023*).

Here, it **[***5]** is undisputed that Luongo, not petitioner, controlled the day-to-day operations of Fifth Avenue. Petitioner did not sign checks, hire or fire employees, or assist in preparing tax returns. While petitioner's status as a shareholder, alone, may not be sufficient to impose tax collection responsibility on her, petitioner had the authority, in her capacity as the *sole* shareholder of Fifth Avenue, to appoint the board of directors and officers and, indeed, exercised that authority by appointing her husband as the sole director. Petitioner also retained the **[****2]** authority under the corporate bylaws to remove her husband from such position. Further, petitioner, along with Luongo, signed an alcoholic beverage retail license application for the restaurant and, perhaps most notably, petitioner *alone* signed an application for registration as a sales tax vendor. In such application, petitioner was listed as the sole owner/officer of the corporation and falsely averred that no "responsible officer[ ], director[ ], partner[ ], or employee[ ] owe[s] New York State or local sales and use taxes on [her] behalf, on behalf of another person, or as vendor of property or services."[4] As also noted by the Tribunal, **[***6]** petitioner reaped financial benefits

---

[2] The audit also revealed that Fifth Avenue underreported in other categories of taxes owed relating to capital purchases, expense purchases and tips not remitted to employees.

[3] Luongo was also assessed individually.

[4] By signing the registration application on her own and failing to list Luongo, the Department was not made aware that **[***7]** a corporate owner had outstanding tax liabilities in connection with his former corporations.

from the corporation, as Fifth Avenue was created to preserve the family's assets from the Rock 51 bankruptcy and to produce **[*1289]** income for petitioner and her husband. Under these circumstances, the Tribunal's determination that petitioner **[**117]** was a responsible person and was personally liable under *Tax Law §§ 1131 (1)* and *1133 (a)* for the outstanding sales and use taxes owed by the corporation is "rationally based upon and supported by substantial evidence," despite the existence of record evidence that would support a contrary conclusion (*Matter of Ippolito v Commissioner of N.Y. State **Dept**. of Taxation & Fin., 116 AD3d at 1178* [internal quotation marks and citations omitted]; *accord Matter of Ingle v Tax Appeals Trib. of the **Dept**. of Taxation & Fin. of the State of N.Y., 110 AD3d 1392, 1393, 973 NYS2d 877 [2013]*; *see Matter of Hwang v Tax Appeals Trib. of the State of N.Y., 105 AD3d 1151, 1152, 963 NYS2d 423 [2013]*; *Matter of Martin v Commissioner of Taxation & Fin., 162 AD2d 890, 891, 558 NYS2d 239 [1990]*). Therefore, we decline to disturb that determination.

We also reject petitioner's contention that the Tribunal erred by sustaining the penalties imposed upon petitioner for underpayment of taxes. ***HN5***[] Although respondent Commissioner of Taxation and Finance has the authority to waive penalties, petitioner bears the burden of establishing that the failure to pay tax "was due to reasonable cause and not due to willful neglect" (*Tax Law § 1145 [a] [1] [iii]*; *see Matter of Coppola v Tax Appeals Trib. of State of N.Y., 37 AD3d at 904*; *Matter of Cook v Tax Appeals Trib. of State of N.Y., 222 AD2d 962, 964, 635 NYS2d 355 [1995]*; *Matter of MCI Telecom. Corp. v New York State Tax Appeals Trib., 193 AD2d 978, 979, 598 NYS2d 360 [1993]*; *20 NYCRR 536.1 [c]*). Here, petitioner's allegation that Fifth Avenue undercollected sales tax due to a computer programing error was unsupported by any documentary evidence, and petitioner failed to explain the other tax deficiencies that were unrelated to such alleged error. Accordingly, we find substantial evidence in the record to support the Tribunal's determination upholding the penalties and interest. Petitioner's remaining contentions have been considered **[***8]** and found to be without merit.

McCarthy, Rose and Egan Jr., JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

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A01983 Summary:

BILL NO A01983

SAME AS No Same As

SPONSOR Farrell

COSPNSR

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Amd Tax L, generally

Provides that for the purposes of sales and compensating use tax collection, "persons required to collect tax" and "person required to collect any tax imposed by this article" shall include any member of a limited liability company; provides for the liability for the collection of motor fuel and petroleum business excise taxes by members or managers of business entities; requires further disclosure to the commissioner of taxation and finance of information on the ownership interests of parties within business entities.

A01983 Memo:

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A1983

SPONSOR: Farrell

TITLE OF BILL:

An act to amend the tax law, in relation to the personal liability of certain persons required to collect state and local sales and compensating use taxes and excise taxes imposed upon motor fuels and petroleum businesses, and disclosures of information concerning certain officers, managers, members and persons with certain ownership interests

PURPOSE:

To amend the New York State Tax Law so that a passive member of a partnership or limited liability company be relieved of personal liability

for any unpaid sales taxes, and to provide for better, more fair administration of the law covering compliance with the law and collection of taxes owed to the State of New York.

SUMMARY OF PROVISIONS:

This bill would:

remove the unlimited, strict liability currently imposed on limited partners and LLC members;

make the smallest changes possible to existing law by retaining the current "duty to act" standard and simply extending it to the only two groups of persons currently left out of that standard (limited partners and LLC members);

authorize the Commissioner to require sales tax vendors to provide information regarding persons who play an important role in the entity (by either owning 20% of more of the entity or having been designated to serve as an officer, manager, or as the person responsible for the entity's tax matters);

enable the Department to determine who is under a duty to act; the

providing of this information would not create liability on those persons identified;

provide that there would be no penalty or other punishment for a failure to provide the requested information other than an extension of the collections period that the State would otherwise have to collect unpaid sales tax.

EXISTING LAW:

The current law appears on its face to impose absolute liability for unpaid sales taxes on all members of an LLC and on all limited partners of a limited partnership, without regard to whether the member or limited partner had an active role or significant involvement in the financial affairs or management of the business.

JUSTIFICATION:

The current law imposes absolute liability for unpaid sales taxes on all members of an LLC and on all limited partners of a limited partnership, without regard to whether the member or limited partner had an active

role or significant involvement in the financial affairs or management of the business. This result is contrary to the "responsible person" concept that has been followed by state and federal taxing authorities for many years under New York State Tax law section 685(g) and federal Internal Revenue Code section 6672, as evidenced by its large body of case law. The absolute liability imposed by current state law is also in direct contrast to other provisions of New York law intended to encourage investment in LLCs and limited partnerships (See Limited Liability Company Law section 609(a) and New York Partnership law section 121-303).

The existing language of the state law that creates personal liability in passive investors is not just grossly unfair, it could deter investment in New York State businesses. This legislation would result in better tax administration and tax compliance. Requesting information as provided under this bill would be an appropriate function of a tax

administrator. The penalty for not complying is mild and is the only aspect of the law that encourages compliance with the information reporting. The collections period extension would not impose a new liability on any person, it would only extend the collections period for a person already obligated to pay the unpaid sales taxes and who was not identified in a timely information filing.

The penalty of an extended limitations period applies only to individuals who are under a duty to act and fail to see to it that the proper sales taxes are collected and paid over and also fail to see to it that they are properly identified to the state (as a 20% owner, officer, manager or tax-responsible person). This would be fair and appropriate in cases where there has been a failure to pay the sales taxes.

This legislation is being introduced at the request of the New York State Bar Association Tax Section.

LEGISLATIVE HISTORY:

The law sought to be amended was enacted as part of the creation of New York's Limited Liability Company Law.
A.33 2013 and 2014 Ways and Means

FISCAL IMPLICATIONS:

To be determined

EFFECTIVE DATE:
This act shall take effect on the first day of the quarterly period, as described in subdivision (b) of section 1136 of the tax law, next commencing at least ninety days after the date this act shall have become a law and shall apply to quarterly periods beginning on or after such date.

A01983 Text:

STATE OF NEW YORK

1983

2015-2016 Regular Sessions

IN ASSEMBLY

January 13, 2015

Introduced by M. of A. FARRELL -- read once and referred to the Committee on Ways and Means

AN ACT to amend the tax law, in relation to the personal liability of certain persons required to collect state and local sales and compensating use taxes and excise taxes imposed upon motor fuels and petroleum businesses, and disclosures of information concerning certain officers, managers, members and persons with certain ownership interests

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivision 5 of section 283 of the tax law, as separately
2 amended by chapters 275 and 276 of the laws of 1986, is amended to read
3 as follows:
4 5. A registration shall not be cancelled or suspended nor shall an
5 application for registration be refused unless the registrant or appli-
6 cant has had an opportunity for a hearing, provided, however, that an
7 application for registration may be denied without a prior hearing.
8 Provided, further, a registration may be cancelled or suspended without
9 a prior hearing, for failure to file a return within ten days of the
10 date prescribed for filing a return under this article or article twen-
11 ty-eight of this chapter with respect to sales and uses of motor fuel,
12 or for nonpayment of any taxes due pursuant to this article or article
13 twenty-eight or twenty-nine of this chapter with respect to sales and
14 uses of motor fuel if the registrant shall have failed to file such
15 return or pay such taxes within ten days after the date the demand
16 therefor is sent by registered or certified mail to the address of the
17 distributor given in his application for registration, or an address
18 substituted therefor as provided in this subdivision. A registration may
19 be cancelled or suspended prior to a hearing for the failure to continue
20 to maintain in full force and effect at all times the required bond or
21 other security filed with the [~~tax commission~~] ***commissioner***. Provided,

EXPLANATION--Matter in ***italics*** (underscored) is new; matter in brackets [~~-~~] is old law to be omitted.

LBD00056-01-5

1 however, if a surety bond is cancelled prior to expiration, the [~~tax~~
2 ~~commission~~] **commissioner**, after considering all the relevant circum-
3 stances, may make such other arrangements and require the filing of such
4 other bond or other security as [~~it~~] **the commissioner** deems appropriate.
5 Provided, further, a registration may be cancelled or suspended prior to
6 a hearing for the transfer of such registration without the prior writ-
7 ten approval of the [~~state tax commission~~] **commissioner**. A distributor
8 shall immediately inform the department, in [~~writing~~] **the manner**
9 **prescribed by the commissioner**, of any change in its address and, if the
10 distributor is a corporation [~~or~~]**,** partnership **or limited liability**
11 **company**, the distributor shall immediately inform the department, in
12 [~~writing~~] **the manner prescribed by the commissioner**, of any change in
13 its officers, directors**, members, managers** or partners or their resi-
14 dence addresses as shown in its application for registration **and any**
15 **change in ownership interest or profit distribution percentage causing**
16 **any person to have, or no longer have, an ownership interest of twenty**
17 **percent or more in such distributor (measured in the aggregate, and**
18 **whether direct or indirect), or profit distribution percentage if**
19 **different than the ownership percentage and such profit distribution**
20 **percentage is twenty percent or more**.
21 § 2. Subdivision 5 of section 283-a of the tax law, as amended by
22 chapter 560 of the laws of 1993, is amended to read as follows:
23 5. A license shall not be cancelled or suspended nor shall an applica-
24 tion for a license be refused unless the licensee or applicant for a
25 license has had an opportunity for a hearing, provided, however, that an
26 application for a license may be denied without a prior hearing.
27 Provided, further, a license may be cancelled or suspended without a
28 prior hearing, for failure to file a return or report within ten days of
29 the date prescribed for filing under this article or for nonpayment of
30 any sums due pursuant to this article or article twenty-eight or twen-
31 ty-nine of this chapter with respect to motor fuel if the licensee shall
32 have failed to file such return or report or pay such sums within ten
33 days after the date the demand therefor is sent by registered or certi-
34 fied mail to the address of the transporter given in his application for
35 a license, or an address substituted therefor as in this subdivision. A
36 license may also be cancelled or suspended prior to a hearing for the
37 failure to continue to maintain in full force and effect at all times
38 the bond or other security filed with the commissioner. Provided, howev-
39 er, if a surety bond is cancelled prior to expiration, the commissioner,
40 after considering all the relevant circumstances, may make such other
41 arrangements and require the filing of such other bond or other security
42 as the commissioner deems appropriate. Provided, further, a license may
43 be cancelled or suspended prior to a hearing for the transfer of such
44 license. A transporter shall immediately inform the department, in
45 [~~writing~~] **the manner prescribed by the commissioner**, of any change in
46 its address and, if the transporter is a corporation [~~or~~]**,** partnership
47 **or limited liability company**, the transporter shall immediately inform
48 the department, in [~~writing~~] **the manner prescribed by the commissioner**,
49 of any change in its officers, directors**, managers, members** or partners
50 or their residence addresses as shown in its application for a license
51 **and any change in ownership interest or profit distribution percentage**
52 **causing any person to have, or no longer have, an ownership interest of**
53 **twenty percent or more in such transporter (measured in the aggregate,**
54 **and whether direct or indirect), or profit distribution percentage if**
55 **different than the ownership percentage and such profit distribution**
56 **percentage is twenty percent or more**.

1 § 3. Subdivision 5 of section 283-b of the tax law, as added by chap-
2 ter 276 of the laws of 1986, is amended to read as follows:
3 5. A license shall not be cancelled or suspended nor shall an applica-
4 tion for a license be refused unless the licensee or applicant for a
5 license has had an opportunity for a hearing, provided, however, that an
6 application for a license may be denied without a prior hearing.
7 Provided, further, a license may be cancelled or suspended without a
8 prior hearing, for failure to file a return or report within ten days of
9 the date prescribed for filing under this article or nonpayment of any
10 sums due pursuant to this article or article twenty-eight or twenty-nine
11 of this chapter with respect to motor fuel if the licensee shall have
12 failed to file such return or report or pay taxes within ten days after
13 the date the demand therefor is sent by registered or certified mail to
14 the address of the terminal operator given in his application for a
15 license, or an address substituted therefor as in this subdivision. A
16 license may be cancelled or suspended prior to a hearing for the failure
17 to continue to maintain in full force and effect at all times the
18 required bond or other security filed with the [~~tax commission~~] **commis-**
19 **sioner**. Provided, however, if a surety bond is cancelled prior to expi-
20 ration, the [~~tax commission~~] **commissioner**, after considering all the
21 relevant circumstances, may make such other arrangements and require the
22 filing of such other bond or other security as [~~it~~] **the commissioner**
23 deems appropriate. Provided, further, a license may be cancelled or
24 suspended prior to a hearing for the transfer of such license. A termi-
25 nal operator shall immediately inform the department, in [~~writing~~] **the**
26 **manner prescribed by the commissioner**, of any change in its address and,
27 if the terminal operator is a corporation [~~or~~]**,** partnership **or limited**
28 **liability company**, the terminal operator shall immediately inform the
29 department, in [~~writing~~] **the manner prescribed by the commissioner**, of
30 any change in its officers, directors**, managers, members** or partners or
31 their residence addresses as shown in its application for a license **and**
32 **any change in ownership interest or profit distribution percentage caus-**
33 **ing any person to have, or no longer have, an ownership interest of**
34 **twenty percent or more in such terminal operator (measured in the aggre-**
35 **gate, and whether direct or indirect), or profit distribution percentage**
36 **if different than the ownership percentage and such profit distribution**
37 **percentage is twenty percent or more**.
38 § 4. Paragraph (b) of subdivision 1 of section 288 of the tax law, as
39 amended by chapter 44 of the laws of 1985, is amended to read as
40 follows:
41 (b) The [~~tax commission~~] **commissioner** shall determine the liability
42 for the penalty imposed by subdivision two of section two hundred eight-
43 y-nine-b **of this article** of any officer, director, shareholder or
44 employee of a corporation or of a dissolved corporation, member or
45 employee of a partnership **or a limited liability company** or employee of
46 an individual proprietorship. The [~~tax commission~~] **commissioner** shall
47 also determine the amount of such penalty. All of the provisions of this
48 section shall apply to any determination made pursuant to this paragraph
49 and for such purpose the term distributor, as used in subdivisions four,
50 five and six of this section, shall also mean and include such officer,
51 director, shareholder, employee**, partner, manager** or member as the case
52 may be.
53 § 5. Subdivisions 2 and 3 of section 288 of the tax law, subdivision 2
54 as amended and subdivision 3 as added by chapter 44 of the laws of 1985,
55 are amended to read as follows:

1 2. The [~~state tax commission~~] **commissioner** may determine the amount of
2 tax due at any time if such distributor (i) has not registered as
3 required by this article, (ii) fails to file a return, (iii) files a
4 willfully false or fraudulent return with intent to evade the tax, or
5 (iv) fails to comply with section two hundred eighty-three of this arti-
6 cle in not informing the department[~~, in writing,~~] **in the manner**
7 **prescribed by the commissioner** of any change in its address and, if a
8 corporation**, limited liability company** or partnership, in not informing
9 the department[~~, in writing~~]**, in the manner prescribed by the commis-**
10 **sioner**, of any change in its officers, directors**, managers, members** or
11 partners or their residence addresses as shown in its application for
12 registration **and any change in ownership interest or profit distribution**
13 **percentage causing any person to have, or no longer have, an ownership**
14 **interest of twenty percent or more in such distributor (measured in the**
15 **aggregate, and whether direct or indirect), or profit distribution**
16 **percentage if different than the ownership percentage and such profit**
17 **distribution percentage is twenty percent or more and whether such**
18 **person was under a duty to act for such registrant**.
19 3. If a distributor shall inform the department, in [~~writing~~] **the**
20 **manner prescribed by the commissioner**, of any change in its address and,
21 if a corporation**, limited liability company** or partnership shall inform
22 the department, in [~~writing~~] **the manner prescribed by the commissioner**,
23 of any change in its officers, directors**, managers, members** or partners
24 or their residence addresses as shown in its application for registra-
25 tion, **and any change in ownership interest or profit distribution**
26 **percentage causing any person to have, or no longer have, an ownership**
27 **interest of twenty percent or more in such distributor (measured in the**
28 **aggregate, and whether direct or indirect), or profit distribution**
29 **percentage if different than the ownership percentage and such profit**
30 **distribution percentage is twenty percent or more, and whether such**
31 **person was under a duty to act for such registrant,** the determination of
32 the amount of tax due may be made at any time within three years after
33 such information is [~~received~~] **filed with the department in the manner**
34 **prescribed by the commissioner**.
35 § 6. Subdivision 2 of section 289-b of the tax law, as amended by
36 chapter 276 of the laws of 1986, is amended to read as follows:
37 2. Any officer, director, shareholder or employee of a corporation or
38 of a dissolved corporation, [~~any~~] employee of a partnership**, manager,**
39 **member or employee of a limited liability company,** or [~~any~~] employee of
40 an individual proprietorship, who as such officer, director,
41 shareholder**, manager, member** or employee is under a duty to act for such
42 corporation, partnership**, limited liability company** or proprietorship in
43 complying with any requirement of this article, and any member of a
44 partnership **(but not including a limited partner unless the limited**
45 **partner is active in the operation of the partnership)**, which fails to
46 pay the taxes imposed by or pursuant to this article, shall, in addition
47 to other penalties provided by law, be liable to a penalty equal to the
48 total amount of the tax not paid, plus penalties and interest computed
49 pursuant to subdivision one of this section as if such person were a
50 distributor. If the [~~tax commission~~] **commissioner** determines that such
51 failure was due to reasonable cause and not due to willful neglect, [~~it~~]
52 **the commissioner** shall remit all or part of such penalty imposed under
53 this subdivision. Such penalty shall be determined, assessed, collected
54 and paid in the same manner as the taxes imposed by this article and
55 shall be disposed of as hereinafter provided with respect to moneys
56 derived from the tax.

1 § 7. Subdivision 1 of section 1131 of the tax law, as amended by chap-
2 ter 576 of the laws of 1994, is amended to read as follows:
3 (1) "Persons required to collect tax" or "person required to collect
4 any tax imposed by this article" shall include: every vendor of tangible
5 personal property or services; every recipient of amusement charges; and
6 every operator of a hotel. Said terms shall also include any officer,
7 director or employee of a corporation or of a dissolved corporation, any
8 employee of a partnership, any employee [or], member or manager of a
9 limited liability company, or any employee of an individual proprietor-
10 ship who as such officer, director, employee, member or manager is under
11 a duty to act for such corporation, partnership, limited liability
12 company or individual proprietorship in complying with any requirement
13 of this article; and any member of a partnership [or limited liability
14 company] (but not including a limited partner unless the limited partner
15 is active in the operation of the partnership). Provided, however, that
16 any person who is a vendor solely by reason of clause (D) or (E) of
17 subparagraph (i) of paragraph [(8)] eight of subdivision (b) of section
18 eleven hundred one of this article shall not be a "person required to
19 collect any tax imposed by this article" until twenty days after the
20 date by which such person is required to file a certificate of registra-
21 tion pursuant to section eleven hundred thirty-four of this part.
22 § 8. Section 1136 of the tax law is amended by adding a new subdivi-
23 sion (j) to read as follows:
24 (j) The commissioner may require any person registered or required to
25 be registered with the commissioner under section eleven hundred thir-
26 ty-four of this part to disclose, on a report, return, application or
27 form (or any combination of these), information including, but not
28 limited to, the following: (1) for any legal entity other than a public-
29 ly traded corporation, the name of, and identifying information for,
30 every person with an ownership interest of twenty percent or more (meas-
31 ured in the aggregate, and whether direct or indirect) in such person
32 registered or required to be registered, or profit distribution percent-
33 age if different than the ownership percentage and such profit distrib-
34 ution percentage is twenty percent or more; (2) for any legal entity
35 other than a publicly traded corporation, any change in ownership inter-
36 est causing any person to have, or no longer have, an ownership interest
37 or profit distribution percentage of twenty percent or more in such
38 person registered or required to be registered, and the name of, and
39 identifying information for, any such person having, or no longer
40 having, such an ownership interest or profit distribution percentage;
41 (3) for a corporation, the name of, and identifying information for, any
42 president, vice president, chief financial officer, chief executive
43 officer and secretary or treasurer of such corporation; (4) for a corpo-
44 ration, any change in any of the officers listed in paragraph three of
45 this subdivision and the name of, and identifying information for, any
46 new officer with any such title; (5) for a limited liability company or
47 partnership, the name of, and identifying information for, any person
48 designated as the tax matters partner or partners or treated as such
49 under the United States internal revenue code or otherwise designated by
50 the limited liability company or partnership as the individual or indi-
51 viduals responsible for tax issues; (6) for a limited liability company,
52 the name of, and identifying information for, every person designated as
53 a manager of the limited liability company by operation of law or under
54 the limited liability company's operating agreement; and (7) for a part-
55 nership or limited liability company, any change in any persons required
56 to be disclosed for such partnership or limited liability company pursu-

1 **ant to paragraph five or six of this subdivision and the name of, and**
2 **identifying information for, such persons. The commissioner shall**
3 **prescribe the form of such report, return, application or form and shall**
4 **indicate when and how it is to be filed. Provided, however, that such**
5 **disclosure shall not be required to be updated more frequently than**
6 **quarterly and the commissioner shall allow any person with respect to**
7 **whom such disclosure is required to be made to make the required disclo-**
8 **sure at their own initiative.**
9 § 9. Subparagraph (B) of paragraph 3 of subdivision (a) of section
10 1138 of the tax law, as amended by chapter 456 of the laws of 1998, is
11 amended to read as follows:
12 (B) The liability, pursuant to subdivision (a) of section eleven
13 hundred thirty-three of this [~~article~~] **part**, of any officer, director or
14 employee of a corporation or of a dissolved corporation, member or
15 employee of a partnership**, member, manager or employee of a limited**
16 **liability company** or employee of an individual proprietorship who as
17 such officer, director, employee**, manager,** or member is under a duty to
18 act for such corporation, partnership**, limited liability company** or
19 individual proprietorship in complying with any requirement of this
20 article for the tax imposed, collected or required to be collected, or
21 for the tax required to be paid or paid over to the [~~tax commission~~]
22 **commissioner** under this article, and the amount of such tax liability
23 (whether or not a return is filed under this article, whether or not
24 such return when filed is incorrect or insufficient, or where the tax
25 shown to be due on the return filed under this article has not been paid
26 or has not been paid in full) shall be determined by the [~~tax commis-~~
27 ~~sion~~] **commissioner** in the manner provided for in paragraphs one and two
28 of this subdivision. Such determination shall be an assessment of the
29 tax and liability for the tax with respect to such person unless such
30 person, within ninety days after the giving of notice of such determi-
31 nation, shall apply to the division of tax appeals for a hearing. If
32 such determination is identical to or arises out of a previously issued
33 determination of tax of the corporation, dissolved corporation, partner-
34 ship**, limited liability company** or individual proprietorship for which
35 such person is under a duty to act, an application filed with the divi-
36 sion of tax appeals on behalf of the corporation, dissolved corporation,
37 partnership**, limited liability company** or individual proprietorship
38 shall be deemed to include any and all subsequently issued personal
39 determinations and a separate application to the division of tax appeals
40 for a hearing shall not be required. The [~~tax commission~~] **commissioner**
41 may, nevertheless, of [~~its~~] **the commissioner's** own motion, redetermine
42 such determination of tax or liability for tax. Where the [~~tax commis-~~
43 ~~sion~~] **commissioner** determines or redetermines that the amount of tax
44 claimed to be due from a vendor of tangible personal property or
45 services, a recipient of amusement charges, or an operator of a hotel is
46 erroneous or excessive in whole or in part, [~~it~~] **the commissioner** shall
47 redetermine the amount of tax properly due from any such person as a
48 person required to collect tax with respect to such vendor, recipient,
49 or operator, and if such amount is less than the amount of tax for which
50 such person would have been liable in the absence of such determination
51 or redetermination, [~~it~~] **the commissioner** shall reduce such liability
52 accordingly. Furthermore, the [~~tax commission~~] **commissioner** may, of
53 [~~its~~] **the commissioner's** own motion, abate on behalf of any such person,
54 any part of the tax determined to be erroneous or excessive whether or
55 not such tax had become finally and irrevocably fixed with respect to
56 such person but no claim for abatement may be filed by any such person.

1 The provisions of this paragraph shall not be construed to limit in any
2 manner the powers of the attorney general under subdivision (a) of
3 section eleven hundred forty-one **of this part** or the powers of the [~~tax~~
4 ~~commission~~] **commissioner** to issue a warrant under subdivision (b) of
5 such section **eleven hundred forty-one** against any person whose liability
6 has become finally and irrevocably fixed.
7 § 10. Subdivision (b) of section 1147 of the tax law, as amended by
8 chapter 412 of the laws of 1986, is amended to read as follows:
9 (b) The provisions of the civil practice law and rules or any other
10 law relative to limitations of time for the enforcement of a civil reme-
11 dy shall not apply to any proceeding or action taken by the state or the
12 [~~tax commission~~] **commissioner** to levy, appraise, assess, determine or
13 enforce the collection of any tax or penalty provided by this article.
14 However, except in the case of a willfully false or fraudulent return
15 with intent to evade the tax no assessment of additional tax shall be
16 made after the expiration of more than three years from the date of the
17 filing of a return; provided, however, that where no return has been
18 filed as provided by law, the tax may be assessed at any time.
19 **Provided, further, that an assessment against any person with respect to**
20 **whom a disclosure was required to be filed or made pursuant to subdivi-**
21 **sion (j) of section eleven hundred thirty-six of this part who was under**
22 **a duty to act for a vendor, recipient of amusement charges, or operator**
23 **of a hotel as described in subparagraph (B) of paragraph three of subdi-**
24 **vision (a) of section eleven hundred thirty-eight of this part may be**
25 **made within six years from the later of the due date or the filing date**
26 **of the quarterly return pertaining to the tax liabilities at issue if**
27 **the required disclosure was not timely filed or made.** Where a purchaser
28 furnishes a vendor with a false or fraudulent certificate of resale or
29 other exemption certificate or other document with intent to evade the
30 tax, the tax may be assessed against such purchaser at any time. For
31 purposes of this subdivision, a return filed before the last day
32 prescribed by law or regulation for the filing thereof or before the
33 last day of any extension of time for the filing thereof shall be deemed
34 to be filed on such last day. [~~Notwithstanding any other provision of~~
35 ~~this article, if the time to assess additional tax would otherwise have~~
36 ~~expired on or before December nineteenth, nineteen hundred sixty-nine,~~
37 ~~the time to assess such additional tax is hereby extended to and includ-~~
38 ~~ing December twentieth, nineteen hundred sixty-nine, except that it may~~
39 ~~be further extended by a taxpayer's consent in writing as provided in~~
40 ~~subdivision (c) hereof.~~]
41 § 11. This act shall take effect on the first day of the quarterly
42 period, as described in subdivision (b) of section 1136 of the tax law,
43 next commencing at least ninety days after the date this act shall have
44 become a law and shall apply to quarterly periods beginning on or after
45 such date.

[NY CLS Tax § 171-v]

Current through 2018 Chapters 1-47, 50-58

New York Consolidated Laws Service > Tax Law (Arts. 1 — 41) > Article 8 Department of Taxation and Finance; Commissioner of Taxation and Finance (§§ 170 — 179)

§ *171-v*. Enforcement of delinquent *tax* liabilities through the suspension of drivers' licenses

(1) The commissioner shall enter into a written agreement with the commissioner of motor vehicles, which shall set forth the procedures for the two departments to cooperate in a program to improve ***tax*** collection through the suspension of drivers' licenses of taxpayers with past-due ***tax*** liabilities equal to or in excess of ten thousand dollars. For the purposes of this section, the term "***tax*** liabilities" shall mean any ***tax***, surcharge, or fee administered by the commissioner, or any penalty or interest due on these amounts owed by an individual with a New York driver's license, the term "driver's license" means any license issued by the department of motor vehicles, except for a commercial driver's license as defined in section five hundred one-a of the vehicle and traffic ***law***, and the term "past-due ***tax*** liabilities" means any ***tax*** liability or liabilities which have become fixed and final such that the taxpayer no longer has any right to administrative or judicial review.

(2) The agreement shall include the following provisions:

(a)the procedures by which the department shall notify the commissioner of motor vehicles of taxpayers with past-due ***tax*** liabilities, including the procedures by which the department and the department of motor vehicles shall share the information necessary to identify individuals with past-due ***tax*** liabilities, which shall include a taxpayer's name, social security number, and any other information necessary to ensure the proper identification of the taxpayer;

(b)the procedures by which the commissioner shall notify the department of motor vehicles that a taxpayer has satisfied his or her past-due ***tax*** liabilities, or has entered into an installment payment agreement or has otherwise made payment arrangements satisfactory to the commissioner, so that the suspension of the taxpayer's driver's license may be lifted; and

(c)any other matter the department and the department of motor vehicles shall deem necessary to carry out the provisions of this section.

(3) The department shall provide notice to the taxpayer of his or her inclusion in the license suspension program no later than sixty days prior to the date the department intends to inform the commissioner of motor vehicles of the taxpayer's inclusion. However, no such notice shall be issued to a taxpayer whose wages are being garnished by the department for the payment of past-due ***tax*** liabilities or past-due child support or combined child and spousal support arrears. Notice shall be provided by first class mail to the taxpayer's last known address as such address appears in the electronic systems or records of the department. Such notice shall include:

(a)a clear statement of the past-due ***tax*** liabilities along with a statement that the department shall provide to the department of motor vehicles the taxpayer's name, social security number and any other identifying information necessary for the purpose of suspending his or her driver's license pursuant to this section and subdivision four-f of section five hundred ten of the vehicle and traffic ***law*** sixty days after the mailing or sending of such notice to the taxpayer;

(b)a statement that the taxpayer may avoid suspension of his or her license by fully satisfying the past-due ***tax*** liabilities or by making payment arrangements satisfactory to the commissioner, and

information as to how the taxpayer can pay the past-due ***tax*** liabilities to the department, enter into a payment arrangement or request additional information;

(c)a statement that the taxpayer's right to protest the notice is limited to raising issues set forth in subdivision five of this section;

(d)a statement that the suspension of the taxpayer's driver's license shall continue until the past-due ***tax*** liabilities are fully paid or the taxpayer makes payment arrangements satisfactory to the commissioner; and

(e)any other information that the commissioner deems necessary.

(4) After the expiration of the sixty day period, if the taxpayer has not challenged the notice pursuant to subdivision five of this section and the taxpayer has failed to satisfy the past-due ***tax*** liabilities or make payment arrangements satisfactory to the commissioner, the department shall notify the department of motor vehicles, in the manner agreed upon by the two agencies, that the taxpayer's driver's license shall be suspended pursuant to subdivision four-f of section five hundred ten of the vehicle and traffic ***law***; provided, however, in any case where a taxpayer fails to comply with the terms of a current payment arrangement more than once within a twelve month period, the commissioner shall immediately notify the department of motor vehicles that the taxpayer's driver's license shall be suspended.

(5) Notwithstanding any other provision of ***law***, and except as specifically provided herein, the taxpayer shall have no right to commence a court action or proceeding or to any other legal recourse against the department or the department of motor vehicles regarding a notice issued by the department pursuant to this section and the referral by the department of any taxpayer with past-due ***tax*** liabilities to the department of motor vehicles pursuant to this section for the purpose of suspending the taxpayer's driver's license. A taxpayer may only challenge such suspension or referral on the grounds that (i) the individual to whom the notice was provided is not the taxpayer at issue; (ii) the past-due ***tax*** liabilities were satisfied; (iii) the taxpayer's wages are being garnished by the department for the payment of the past-due ***tax*** liabilities at issue or for past-due child support or combined child and spousal support arrears; (iv) the taxpayer's wages are being garnished for the payment of past-due child support or combined child and spousal support arrears pursuant to an income execution issued pursuant to section five thousand two hundred forty-one of the civil practice ***law*** and rules; (v) the taxpayer's driver's license is a commercial driver's license as defined in section five hundred one-a of the vehicle and traffic ***law***; or (vi) the department incorrectly found that the taxpayer has failed to comply with the terms of a payment arrangement made with the commissioner more than once within a twelve month period for the purposes of subdivision three of this section.

However, nothing in this subdivision is intended to limit a taxpayer from seeking relief from joint and several liability pursuant to section six hundred fifty-four of this chapter, to the extent that he or she is eligible pursuant to that subdivision, or establishing to the department that the enforcement of the underlying ***tax*** liabilities has been stayed by the filing of a petition pursuant to the Bankruptcy Code of 1978 (Title Eleven of the United States Code).

(6) Notwithstanding any provision of this chapter to the contrary, the department may disclose to the department of motor vehicles the information described in this section that, in the discretion of the commissioner, is necessary for the proper identification of a taxpayer referred to the department of motor vehicles for the purpose of suspending the taxpayer's driver's license pursuant to this section and subdivision four-f of section five hundred ten of the vehicle and traffic ***law***. The department of motor vehicles may not redisclose this information to any other entity or person, other than for the purpose of informing the taxpayer that his or her driver's license has been suspended.

(7) Except as otherwise provided in this section, the activities to collect past-due ***tax*** liabilities undertaken by the department pursuant to this section shall not in any way limit, restrict or impair the department from exercising any other authority to collect or enforce ***tax*** liabilities under any other applicable provision of ***law***.

History

Add, *L 2013, ch 59, § 1* (Part P), eff March 28, 2013 (see 2013 note below).

Annotations

Notes

Amendment Notes:

Laws 2013, ch 59, § 1 **(Part P),** eff March 28, 2013, provides as follows:

§ 5. This act shall take effect immediately; provided, however, that the department of taxation and finance and the department of motor vehicles shall have up to six months after this act shall have become a ***law*** to execute the written agreement and implement the necessary procedures as described in sections one and two of this act.

NOTES TO DECISIONS

1.Statute of limitations.

2.License suspension

3.Due process

1. Statute of limitations.

Tax preparers' challenge to the Department of Taxation and Finance's (DTF's) suspension of the preparers' driver's licenses for past-due ***tax*** liabilities was time-barred because DTF gave the requisite notice to the preparers in its October 25, 2013 correspondence, the preparers failed to reach an accord with DTF in the ensuing 60 days, and the preparers commenced the instant matter nine months after the statutory period began to run. *Matter of Jimenez v New York State Dept. of Taxation & Fin., 143 A.D.3d 1221, 40 N.Y.S.3d 622, 2016 N.Y. App. Div. LEXIS 6964 (N.Y. App. Div. 3d Dep't 2016)*, app. denied, *28 N.Y.3d 914, 74 N.E.3d 676, 52 N.Y.S.3d 291, 2017 N.Y. LEXIS 123 (N.Y. 2017)*.

2. License suspension

Tax Appeals Tribunal did not err by sustaining the notice of proposed driver's license suspension referral imposed under ***Tax Law*** article 8 because the license holder did not assert that its contents failed to comply with the statute, nor did she raise any of the enumerated grounds set forth in the statute, despite that subdivision plainly stating that those were the only grounds upon which a suspension or referral could be challenged. Thus, according to the plain language of the statute, the Tribunal was required to uphold the suspension notice.*Matter of Jacobi v **Tax** Appeals Trib. of The State of New York, 156 A.D.3d 1154, 68 N.Y.S.3d 184, 2017 N.Y. App. Div. LEXIS 8952 (N.Y. App. Div. 3d Dep't 2017)*.

3. Due process

There was no due process violation because, as required by the statute, the Division's notice set forth the basis for the driver's license suspension, was issued 60 days prior to the proposed referral to the Department of Motor

Vehicles for suspension and informed the license holder of ways to avoid suspension (resolving the ***tax*** debt, setting up a payment plan, notifying the Department of Taxation and Finance of eligibility for an exemption or protesting the proposed suspension by filing a request for a conciliation conference or filing a petition with the Division of ***Tax*** Appeals). The license holder took advantage of the processes that were available.*Matter of Jacobi v* ***Tax*** *Appeals Trib. of The State of New York, 156 A.D.3d 1154, 68 N.Y.S.3d 184, 2017 N.Y. App. Div. LEXIS 8952 (N.Y. App. Div. 3d Dep't 2017)*.

State Notes

Research References & Practice Aids

Hierarchy Notes:

NY CLS ***Tax****, Art. 8*

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Current through 2018 Chapters 1-47, 50-58

New York Consolidated Laws Service > Tax Law (Arts. 1 — 41) > Article 22 Personal Income Tax (Pts. I — VI) > Part I General (§§ 601 — 607)

§ 605. General provisions and definitions

(a) Accounting periods and methods.

(1) Accounting periods. A taxpayer's taxable year under this article shall be the same as his taxable year for federal income ***tax*** purposes.

(2) Change of accounting periods. If a taxpayer's taxable year is changed for federal income ***tax*** purposes, his taxable year for purposes of this article shall be similarly changed. If a taxable year of less than twelve months results from a change of taxable year, the New York standard deduction and the New York exemptions shall be prorated under regulations of the ***tax*** commission.

(3) Accounting methods. A taxpayer's method of accounting under this article shall be the same as his method of accounting for federal income ***tax*** purposes. In the absence of any method of accounting for federal income ***tax*** purposes, New York taxable income shall be computed under such method as in the opinion of the ***tax*** commission clearly reflects income.

(4) Change of accounting methods.

(A) If a taxpayer's method of accounting is changed for federal income ***tax*** purposes, his method of accounting for purposes of this article shall be similarly changed.

(B) If a taxpayer's method of accounting is changed, other than from an accrual to an installment method, any additional ***tax*** which results from adjustments determined to be necessary solely by reason of the change shall not be greater than if such adjustments were ratably allocated and included for the taxable year of the change and the preceding taxable years, not in excess of two, during which the taxpayer used the method of accounting from which the change is made.

(C) If a taxpayer's method of accounting is changed from an accrual to an installment method, any additional ***tax*** for the year of such change of method and for any subsequent year which is attributable to the receipt of installment payments properly accrued in a prior year, shall be reduced by the portion of ***tax*** for any prior taxable year attributable to the accrual of such installment payments, in accordance with regulations of the ***tax*** commission.

(b) Resident, nonresident and part-year resident defined.

(1) Resident individual. A resident individual means an individual:

(A)who is domiciled in this state, unless (i) the taxpayer maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or (ii) (I) within any period of five hundred forty-eight consecutive days the taxpayer is present in a foreign country or countries for at least four hundred fifty days, and (II) during the period of five hundred forty-eight consecutive days the taxpayer, the taxpayer's spouse (unless the spouse is legally separated) and the taxpayer's minor children are not present in this state for more than ninety days, and (III) during the nonresident portion of the taxable year with or within which the period of five hundred forty-eight consecutive days begins and the nonresident portion of the taxable year with or within which the period ends, the taxpayer is present in this state for a number of days which does not exceed an amount which

bears the same ratio to ninety as the number of days contained in that portion of the taxable year bears to five hundred forty-eight, or

(*B*)who maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, whether or not domiciled in this state for any portion of the taxable year, unless such individual is in active service in the armed forces of the United States.

(*2*)Nonresident individual. A nonresident individual means an individual who is not a resident or a part-year resident.

(3) Resident estate or trust. A resident estate or trust means:

(A)the estate of a decedent who at his death was domiciled in this state,

(*B*)a trust, or a portion of a trust, consisting of property transferred by will of a decedent who at his death was domiciled in this state, or

(C)a trust, or portion of a trust, consisting of the property of:

(i)a person domiciled in this state at the time such property was transferred to the trust, if such trust or portion of a trust was then irrevocable, or if it was then revocable and has not subsequently become irrevocable; or

(ii)a person domiciled in this state at the time such trust, or portion of a trust, became irrevocable, if it was revocable when such property was transferred to the trust but has subsequently become irrevocable.

(D)

(i) Provided, however, a resident trust is not subject to ***tax*** under this article if all of the following conditions are satisfied:

(I)all the trustees are domiciled in a state other than New York;

(II)the entire corpus of the trusts, including real and tangible property, is located outside the state of New York; and

(III)all income and gains of the trust are derived from or connected with sources outside of the state of New York, determined as if the trust were a non-resident trust.

(ii) For purposes of item (II) of clause (i) of this subparagraph, intangible property shall be located in this state if one or more of the trustees are domiciled in the state of New York.

(iii) Provided further, that for the purposes of item (I) of clause (i) of this subparagraph, a trustee which is a banking corporation as defined in subsection (a) of section fourteen hundred fifty-two of this chapter, as such section was in effect on December thirty-first, two thousand fourteen, and which is domiciled outside the state of New York at the time it becomes a trustee of the trust shall be deemed to continue to be a trustee domiciled outside the state of New York notwithstanding that it thereafter otherwise becomes a trustee domiciled in the state of New York by virtue of being acquired by, or becoming an office or branch of, a corporate trustee domiciled within the state of New York.

For the purposes of the foregoing, a trust or portion of a trust is revocable if it is subject to a power, exercisable immediately or at any future time, to revest title in the person whose property constitutes such trust or portion of a trust, and a trust or portion of a trust becomes irrevocable when the possibility that such power may be exercised has been terminated.

(4) Nonresident estate or trust.

(A)A nonresident estate means an estate which is not a resident.

(*B*)A nonresident trust means a trust which is not a resident or part-year resident.

(5) Part-year resident individual. A part-year resident individual is an individual who is not a resident or nonresident for the entire taxable year.

(6) Part-year resident trust. A part-year resident trust is a trust which is not a resident or nonresident for the entire taxable year.

(c)*Tax* treatment of charitable contributions for determining domicile. Notwithstanding any other provision of any other ***law*** to the contrary, the making of a financial contribution, gift, bequest, donation or any other financial instrument or pledge in any amount or the donation or loan of any object of any value, or the volunteering, giving or donation of uncompensated time, or any combination of the foregoing, considered a charitable contribution under subsection (c) of section one hundred seventy of the internal revenue code, or to a not-for-profit organization, as defined in subdivision seven of section one hundred seventy-nine-q of the state finance ***law***, shall not be used in any manner to determine where an individual is domiciled.

History

Add, L 1960, ch 563, § ***2***; amd, L 1969, ch 653, § 1; L 1977, ch 225, § 1; L 1977, ch 675, § 44; L 1978, ch 790, § 3; L 1987, ch 28, § 8 (see 1987 note below); L 1987, ch 333, § 9 (see 1987 note below); *L 1992, ch 760, § 38* (see 1992 note below); *L 1994, ch 607, § 1* (see 1994 note below); *L 2003, ch 658, § 1*, eff Oct 7, 2003 (see 2003 note below); *L 2009, ch 57, § 1* (Part A–1), eff April 7, 2009 (see 2009 note below); *L 2014, ch 59, § 66* (Part A), eff Jan 1, 2015 (see 2014 note below); *L 2018, ch 59, § 1* (Part O), eff April 12, 2018.

Annotations

Notes

Editor's Notes:

Laws **1987, ch 28, § 1,** eff April 20, 1987, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "***Tax*** Reform and Reduction Act of 1987".

Laws **1987, ch 28, § 107,** eff April 20, 1987, provides, in part, as follows:

§ 107. This act shall take effect immediately, provided that: (a) . . . sections five through eight . . . shall apply to taxable years beginning after nineteen hundred eighty-six; . . . .

Laws **1987, ch 333, § 1,** eff July 20, 1987, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "***Tax*** Reform Technical Corrections and New York City ***Tax*** Reduction Act of 1987".

Laws **1987, ch 333, § 176,** eff July 20, 1987, provides, in part, as follows:

§ 176. This act shall take effect immediately, provided that:

. . . (***b***) . . . sections six through eleven . . . shall apply to taxable years beginning after nineteen hundred eighty-seven; . . . .

Laws 1992, ch 760, § 93**(i),** eff July 31, 1992, provides as follows:

§ 93. This act shall take effect immediately, except that:

(i) sections thirty-eight, forty, forty-one, fifty-four, fifty-five and fifty-six of this act shall apply to taxable years beginning after 1987; provided, however, that these provisions shall not permit the issuance of any assessment or any claim for credit or refund otherwise barred by any provision of the ***tax law***;.

Laws 1994, ch 607, § 3**,** eff July 26, 1994, provides as follows:

§ 3. This act shall take effect immediately and shall apply to contributions, gifts, bequests, donations, pledges, loans, volunteering, and other activities covered in this act, made in taxable years beginning on or after January 1, 1994.

Laws 2003, ch 658, § 3**,** eff Oct 7, 2003, provides as follows:

§ 3. This act shall take effect immediately and shall apply to ***tax*** years beginning on or after January 1, 1996.

Laws 2009, ch 57, § 6 **(Part A-1),** eff April 7, 2009, provides as follows:

§ 6. This act shall take effect immediately and apply to taxable years beginning on or after January 1, 2009.

Laws 2014, ch 59, § 113 **(Part A),** eff Jan 1, 2015, provides as follows:

§ 113. This act shall take effect January 1, 2015 and shall apply to taxable years commencing on or after such date; provided that the amendments to *section 25 of the **tax law*** made by section forty-three of this act shall not affect the repeal of such section and shall be deemed repealed therewith; provided, further, that the amendments to the opening paragraph of subdivision (a), subparagraph (C) of paragraph ***2*** of subdivision (e) and subdivision (f) of *section 35 of the **tax law*** made by section fifty of this act shall not affect the repeal of such provisions and shall be deemed repealed therewith; provided, further, that the amendments to clause (xxxii) of subparagraph (***B***) of paragraph 1 of subsection (i) of *section 606 of the **tax law*** made by section sixty-eight of this act shall not affect the repeal of such clause and shall be deemed repealed therewith; provided, further, that the amendments to clause (xxxiii) of subparagraph (***B***) of paragraph 1 of subsection (i) of *section 606 of the **tax law*** made by section sixty-eight of this act shall not affect the repeal of such clause and shall be deemed repealed therewith; and provided, further, that the amendments to clause (ii) of subparagraph (***B***) of paragraph ***2*** of subsection (q), paragraph 3 of subsection (s) and the closing paragraph of paragraph 1 of subsection (t) of *section 1085 of the **tax law*** made by section eighty-one of this act shall not affect the repeal of such provisions and shall be deemed repealed therewith.

Subsection History:

Section heading, add, L 1987, ch 28, § 8, eff April 20, 1987 (see 1987 note below).

Former section heading redesignated part of sub (***b***), L 1987, ch 28, § 8, eff April 20, 1987.

Sub (a), formerly substance of § 604, add, L 1987, ch 28, § 8, eff April 20, 1987 (see 1987 note below).

Former sub (a), redesignated sub (***b***), opening par and par (1), L 1987, ch 28, § 8, eff April 20, 1987.

Sub (a), par (***2***), amd, L 1987, ch 333, § 9, eff July 20, 1987 (see 1987 note below).

Sub (***b***), formerly entire § ***605***, redesignated sub (***b***) and amd, L 1987, ch 28, § 8, eff April 20, 1987 (see 1987 note below).

Former sub (***b***), redesignated sub (***b***), par (***2***), L 1987, ch 28, § 8, eff April 20, 1987.

Sub (***b***), opening par, formerly section heading, redesignated sub (***b***), opening par and amd, L 1987, ch 28, § 8, eff April 20, 1987 (see 1987 note below).

Sub (***b***), par (1), subpar (A), formerly sub (a), par (1), amd, L 1977, ch 675, § 44, L 1978, ch 790, § 3; redesignated sub (***b***), par (1), subpar (A) and amd, L 1987, ch 28, § 8 (see 1987 note below); amd, *L 1992, ch 760, § 38*, eff July 31, 1992 (see 1992 note below), *L 2009, ch 57, § 1* (Part A-1), eff April 7, 2009 (see 2009 note below).

Sub (***b***), par (1), subpar (***B***), formerly sub (a), par (***2***), amd, L 1977, ch 225, § 1, redesignated sub (***b***), par (1), subpar (***B***), L 1987, ch 28, § 8, eff April 20, 1987 (see 1987 note below).

Sub (***b***), par (***2***), formerly sub (***b***), redesignated sub (***b***), par (***2***) and amd, L 1987, ch 28, § 8, eff April 20, 1987 (see 1987 note below).

Sub (***b***), par (3), formerly sub (c), opening par, redesignated sub (***b***), par (3), L 1987, ch 28, § 8, eff April 20, 1987 (see 1987 note below).

Sub (***b***), par (3), subpar (A), formerly sub (c), par (1), redesignated sub (***b***), par (3), subpar (A), L 1987, ch 28, § 8, eff April 20, 1987 (see 1987 note below).

Sub (***b***), par (3), subpar (***B***) formerly sub (c), par (***2***), redesignated sub (***b***), par (3), subpar (***B***), L 1987, ch 28, § 8, eff April 20, 1987 (see 1987 note below).

Sub (***b***), par (3), subpar (C), formerly sub (c), par (3), redesignated sub (***b***), par (3), subpar (C), L 1987, ch 28, § 8, eff April 20, 1987 (see 1987 note below).

Sub (***b***), par (3), subpar (D), add, *L 2003, ch 658, § 1*, eff Oct 7, 2003 (see 2003 note below).

Sub (***b***), par (3), subpar (D), cl (iii), amd, *L 2014, ch 59, § 66* (Part A), eff Jan 1, 2015 (see 2014 note below).

Sub (***b***), par (4), heading and subpar (A), formerly sub (d), redesignated sub (***b***), par (4), heading and subpar (A) and amd, L 1987, ch 28, § 8, eff April 20, 1987 (see 1987 note below).

Sub (***b***), par (4), subpar (***B***), add, L 1987, ch 28, § 8, eff April 20, 1987 (see 1987 note below).

Sub (***b***), pars (5) and (6), add, L 1987, ch 28, § 8, eff April 20, 1987 (see 1987 note below).

Sub (c), add, *L 1994, ch 607, § 1*, eff July 26, 1994 (see 1994 note below).

Former sub (c), amd, 1967, ch 792, § 1, L 1969, ch 653, § 1; redesignated sub (***b***), par (3), L 1987, ch 28, § 8, eff April 20, 1987.

Former sub (d), redesignated sub (***b***), par (4), L 1987, ch 28, § 8, eff April 20, 1987.

Former sub (e), deleted, L 1987, ch 28, § 8, eff April 20, 1987 (see 1987 note below).

Amendment Notes:

2014. Chaper 59, § 66 (Part A) amended:

Sub (***b***), par (3), subpar (D), cl (iii) by adding the matter in italics.

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31.—Military base quarters as permanent place of abode

32.—Ship quarters as permanent place of abode

33.—Returning to state after service

34.—Miscellaneous

***B*.Nondomiciliaries**

35.Living in New York more than 183 days

36.Living in New York for 183 or fewer days

C.Estates and Trusts

37.Generally

I. In General

1. Generally

*CLS **Tax** § **605**(**b**)(1)(**B**)* does not violate dormant Commerce Clause (US Const Art I § 8) because it does not operate to disadvantage of any identifiable interstate market, but rather simply ***taxes*** residents based on their status as residents; fact that ***tax*** may have incidental effects on interstate commerce does not prove violation of dormant Commerce Clause. *Tamagni v **Tax** Appeals Tribunal, 91 N.Y.2d 530, 673 N.Y.S.2d 44, 695 N.E.2d 1125, 1998 N.Y. LEXIS 1071 (N.Y.)*, cert. denied, *525 U.S. 931, 119 S. Ct. 340, 142 L. Ed. 2d 280, 1998 U.S. LEXIS 6508 (U.S. 1998)*.

In an action by a taxpayer against the State ***Tax*** Commission seeking a review of a determination which sustained a personal income ***tax*** assessment, taxpayer's election to report the sale of eight and seven-tenth's shares of stock on his 1972 State resident income ***tax*** return under the installment method was held proper where the sale of eight and seven-tenth's shares of stock to the purchasers of the corporate business in exchange for cash and promissory notes and the subsequent redemption by the corporation of the taxpayer's remaining five and one-tenth's shares of stocks in exchange for the remaining assets of the corporation not wanted by the purchasers were separate and distinct transactions supported by legitimate business purposes, and where the partial sale and partial redemption enabled the purchasers to buy only that portion of the corporation stock representing corporate assets they desired, and enabled the taxpayer to remove his accumulated earnings while receiving capital gains treatment. *Rosen v State **Tax** Comm., 89 A.D.2d 289, 456 N.Y.S.2d 452, 1982 N.Y. App. Div. LEXIS 18377 (N.Y. App. Div. 3d Dep't 1982)*.

Article 78 proceeding was not proper vehicle for challenging constitutionality of *CLS **Tax** § **605**(**b**)(1)(**B**)* and thus court converted portion of petition which alleged that statute violated Commerce Clause into declaratory judgment action. *Tamagni v **Tax** Appeals Tribunal, 230 A.D.2d 417, 659 N.Y.S.2d 515, 1997 N.Y. App. Div. LEXIS 6712 (N.Y. App. Div. 3d Dep't 1997)*, aff'd, *91 N.Y.2d 530, 673 N.Y.S.2d 44, 695 N.E.2d 1125, 1998 N.Y. LEXIS 1071 (N.Y. 1998)*.

Taxpayer on cash basis method of accounting need not pay ***tax*** on increases in inaccessible restricted accounts, used as security for bank loans, until the loans are paid and the funds are released. In re Barvinchak, Op State ***Tax*** Comm, July 7, 1977.

Issue of taxpayer's statutory residency under *CLS **Tax** § **605*** was not clearly raised by Division of Taxation in pre-hearing communications where, at no point prior to hearing before Administrative ***Law*** Judge, were matters of "permanent place of abode," "days in New York," "statutory residency," or *CLS **Tax** § **605*** former (a)(***2***) (present (***b***)(1)(***B***)) mentioned by division or taxpayer; mere use of term "resident" with regard to domicile did not provide sufficient notice by division to taxpayer that he must prove that he was not statutory resident of New York in addition to proving that he was not New York resident based on domicile. NY ***Tax*** Appeals Tribunal TSB-D-94-(9)I, 1992 *N.Y. **Tax** LEXIS 202*.

Division of Taxation failed raise issue of statutory residency during hearing before Administrative ***Law*** Judge (ALJ), despite ALJ's questioning of parties in which he asked "Both of you will be arguing the ***law*** of domicile I expect? How about the problem with permanent place of abode and days in New York and so on? Do either of you have any presentation on that?" and taxpayer's representative answered only "Yes. For his domicile being in New Jersey I have some case ***law*** on that also, your honor"; such response to ALJ was too unclear to allow conclusion that taxpayer was agreeing that statutory residency was in issue, which was reinforced by fact that ALJ stated in his opinion that matter was not issue in case. NY ***Tax*** Appeals Tribunal TSB-D-94-(9)I, 1992 *N.Y. **Tax** LEXIS 202*.

Clear and convincing evidence standard, rather than preponderance of evidence standard, may be properly imposed on taxpayers in New York City statutory residence matters, even though such matters do not involve issues of intent, since courts have applied clear and convincing standard in context of several different ***tax*** matters not involving intent, including sales ***tax*** audit cases, income ***tax*** audit methodology cases, highway use ***tax*** audit methodology cases, and franchise ***tax*** cases where issue was one of statutory interpretation. NY ***Tax*** Appeals Tribunal TSB-D-95-(30)I.

Taxpayers failed to show how their domicile in New Jersey and their statutory residence in New York constituted interstate commerce, and thus they did not meet their burden of proof to show that *CLS **Tax** § **605(b)**(1)(**B**)*, as applied to them, was unconstitutional violation of federal commerce clause, where they relied solely on ***law*** review article in asserting that "if a taxpayer lives in one state and travels to work in another state, this travel probably involves interstate commerce". NY ***Tax*** Appeals Tribunal TSB-D-95-(32)I.

Nondomiciliary taxpayers failed to show how their statutory New York residency violated CLS *NY Const Art XVI § 3* with regard to taxation of income generated from intangible assets, despite language providing that situs of intangibles is deemed to be located at domicile of owner, since history of provision indicates that provision was designed to assure nonresidents that they could keep intangibles in New York without fear that established legislative policy of nontaxability would be changed, and that such property would enjoy privilege against taxation until it was used; taxpayers were being ***taxed*** not on ownership of intangible asset but, as residents, on income generated from asset. NY ***Tax*** Appeals Tribunal TSB-D-95-(32)I.

II. Domicile

A. Effect

_2_. Generally

*CLS **Tax** § **605(b)**(1)(**B**)* is not discriminatory on basis that it subjects statutory residents of New York to potential double taxation which New York domiciliaries residing solely in New York do not face, as statutory residents domiciled in another state are not similarly situated to New York; statutory residents domiciled in another state enjoy privileges and protections of another state and may therefore be subject to taxation by that state. *Tamagni v*

***Tax** Appeals Tribunal, 91 N.Y.2d 530, 673 N.Y.S.2d 44, 695 N.E.2d 1125, 1998 N.Y. LEXIS 1071 (N.Y.)*, cert. denied, *525 U.S. 931, 119 S. Ct. 340, 142 L. Ed. 2d 280, 1998 U.S. LEXIS 6508 (U.S. 1998)*.

Domicile itself provides a basis for taxation, and presence within the state of a domiciliary is not necessary in order to ***tax*** him. *Starer v Gallman, 50 A.D.2d 28, 377 N.Y.S.2d 645, 1975 N.Y. App. Div. LEXIS 11422 (N.Y. App. Div. 3d Dep't 1975)*.

The evidence to establish the required intention to effect a change in domicile must be clear and convincing. *Bodfish v Gallman, 50 A.D.2d 457, 378 N.Y.S.2d 138, 1976 N.Y. App. Div. LEXIS 10646 (N.Y. App. Div. 3d Dep't 1976)*.

Taxpayers' susceptibility to both New York and New Jersey ***tax*** for income from intangibles pursuant to *CLS **Tax** § **605**(**b**)(1)(**B**)* did not implicate Commerce Clause, as their commuting from New Jersey to work in New York did not produce requisite effect on commerce, and their maintaining residence and spending time in New York (in addition to domicile in New Jersey) did not necessarily involve interstate commerce. *Tamagni v **Tax** Appeals Tribunal, 230 A.D.2d 417, 659 N.Y.S.2d 515, 1997 N.Y. App. Div. LEXIS 6712 (N.Y. App. Div. 3d Dep't 1997)*, aff'd, *91 N.Y.2d 530, 673 N.Y.S.2d 44, 695 N.E.2d 1125, 1998 N.Y. LEXIS 1071 (N.Y. 1998)*.

Taxpayers, who were members of Seneca Indian Nation and residents of Cattarugus Indian Reservation, were properly ***taxed*** by audit division on income earned in California because income in question was not earned by taxpayers on reservation, but was earned beyond boundaries of such reservation. In re Twoguns, Dec St ***Tax*** Comm, TSB-H-87-(187)-I.

Petitioners' susceptibility to both New York and New Jersey income ***tax*** for their income from intangibles did not violate commerce clause. NY ***Tax*** Appeals Tribunal TSB-D-95-(32.1)I.

B. Adoption of New York Domicile

3. Particular circumstances

Fact that petitioner married on December 30, 1967, and that his wife thereafter lived in New York had absolutely no relevance to the petitioner's domicile in 1967 for state income ***tax*** purposes. *Starer v Gallman, 50 A.D.2d 28, 377 N.Y.S.2d 645, 1975 N.Y. App. Div. LEXIS 11422 (N.Y. App. Div. 3d Dep't 1975)*.

There was a rational basis for the State ***Tax*** Commission's finding that taxpayers were domiciliaries of New York during the years in which they spent three months of the year in this state and at least eight months of the year in St. Maarten, Netherland Antilles, where taxpayers maintained a joint bank account in New York state, possessed New York state driver's licenses, and maintained a post office box in New York, and where one of taxpayers testified that he had no intention of giving up his United States citizenship. *Schulman v Tully, 86 A.D.2d 705, 446 N.Y.S.2d 548, 1982 N.Y. App. Div. LEXIS 15255 (N.Y. App. Div. 3d Dep't)*, app. denied, *56 N.Y.2d 507, 1982 N.Y. LEXIS 5423 (N.Y. 1982)*, app. denied, *56 N.Y.2d 885, 453 N.Y.S.2d 429, 438 N.E.2d 1144, 1982 N.Y. LEXIS 3496 (N.Y. 1982)*.

Determination that a taxpayer was a statutory resident for *N.Y. **Tax Law** § **605**(**b**)(1)(**B**)* purposes was affirmed because the tribunal's findings that the taxpayer, in addition to owning the building at issue, maintained a telephone and the utilities in his own name at the apartment, paid those bills as well as all other expenses for the apartment, retained unfettered access to the apartment, occasionally slept there, failed to establish that he kept the apartment exclusively for his parents, and did not prove that he held the property solely for investment purposes were supported by substantial evidence. *Matter of Gaied v New York State **Tax** Appeals Trib., 101 A.D.3d 1492, 957 N.Y.S.2d 480, 2012 N.Y. App. Div. LEXIS 9098 (N.Y. App. Div. 3d Dep't 2012)*, rev'd, *22 N.Y.3d 592, 983 N.Y.S.2d 757, 6 N.E.3d 1113, 2014 N.Y. LEXIS 173 (N.Y. 2014)*.

Petitioners failed to establish continuation of a California domicile during their New York resident period, where they offered no evidence other than a California marriage certificate. In re Norsig 1983 Dec State ***Tax*** Comm, TSB-H-83(145)I, June 13, 1983.

Petitioners were domiciliaries and residents of New Jersey until March 13, 1975, at which time they changed both domicile and residence to State of New York, where (1) husband accepted employment as hospital administrator in Lake Placid, New York in October 1974, but terms of such employment called for probationary period of 6 months, during which he could have been terminated at any time, (***2***) he lived at motel during his probationary period, first in one room rented on a daily basis and later in a ***2***-room suite rented on a weekly basis, (3) he spent each weekend with his family in New Jersey during his probationary period, and (4) he purchased house in Lake Placid and physically moved there with his family and household possessions on March 13, 1975. In re Harrington, 1983 Dec State ***Tax*** Comm, TSB-H-83(210)I, July 25, 1983.

Marriage to New York domiciliary ordinarily effects immediate change of domicile to New York; female Armed Services member does not automatically become domiciliary of New York upon marriage to New York domiciliary absent evidence of intent to make New York State permanent home. In re Bernhard, Dec State ***Tax*** Comm, TSB-H-83-(331)-I.

Domicile, once established, continues until person in question moves to new location with bona fide intention of making fixed and permanent home there; Canadian citizen employed as professional athlete in New York does not adopt New York domicile where athlete came to New York only to play hockey, retained close ties to family in Canada, continuely returned to Canada, and financially assisted in maintaining Canadian household; fact that taxpayer took full-year lease on Manhattan apartment because he could not find seasonal apartment falls short of demonstrating intent to become domiciliary of New York. In re Steven Vickers, Dec State ***Tax*** Comm, TSB-H-83-(341)-I.

Military officer’s stationing in New York and purchase of home away from base does not indicate adoption of New York domicile where officer voluntarily chose New Jersey as domicile, obtained drivers licenses and automobile registrations in New Jersey, and voted in New Jersey by absentee ballot. In re Connor, Dec State ***Tax*** Comm, TSB-H-84-(139)-I.

Taxpayers, citizens of Canada and domiciliaries of Indiana prior to year in question, did not establish domicile in New York by residing in state for duration of temporary job assignment where business and financial connections with Indiana were maintained; disposal of home in Indiana and rental of home in New York does not mandate different result where such action was taken merely to avoid financial burden of commuting from Indiana to job in New York or cost of maintaining two residences. In re Berdusco, Dec State ***Tax*** Comm, September 21, 1979.

No change of domicile results from removal to new location if intent is to remain there only for limited time; petitioners lived in New York only during interim assignment of husband for company for which he worked, petitioners never voted in New York, had Vermont and French driver’s licenses, registered their automobile in Vermont, and had personal checking account with bank in Vermont. In re Davis, Dec State ***Tax*** Comm, July 15, 1980.

Taxpayer was not resident of New York state during year he spent seeking employment in New York while staying at friend’s apartment where he had no intention of residing in New York on permanent basis until he found employment. In re Myers, 1982 Dec State ***Tax*** Comm, February 18, 1982.

Taxpayer intended to change his domicile to New York as evidenced by purchase of New York City apartment and sale of District of Columbia home, voting in New York, failure to pay any income ***taxes*** to District of Columbia and obtaining of New York drivers license, notwithstanding he retained some ties with District of Columbia and intended to eventually return there. In re Hensel, 1982 Dec State ***Tax*** Comm, Dec. 31, 1982.

Although owning a home and voting in New York State are indications of New York domicile, taxpayers cannot be considered residents of New York where the transient nature of the job which brought them to the state and

taxpayers' retained contacts with their home state and their intention to return there in the future indicate that they had no intent to change their domicile to New York. In re Shofner, 1981 Dec St ***Tax*** Com, Dec. 7, 1981.

Taxpayers became domiciled in New York City in certain year, despite their contention that they left their Long Island home without intent to establish new permanent home in New York City, where they did not retain Long Island residence, there was no evidence that they ever intended to again reside in Long Island or that they did so, and association they had with New York City from date of arrival to their change of domicil outside city was permanent one. NY ***Tax*** Appeals Tribunal TSB-D-95-(34)I.

C. Abandonment of New York Domicile

4. Interstate relocations; factors affecting—In general

For purposes of determining whether petitioner's domicile for ***tax*** purposes changed during the year 1967, the question was not whether petitioner intended to leave New York forever and set upon a seagoing career, but whether he intended to settle down in a city in a different state, to make that city his permanent home with the range of sentiment, feeling and permanent association with it. *Starer v Gallman, 50 A.D.2d 28, 377 N.Y.S.2d 645, 1975 N.Y. App. Div. LEXIS 11422 (N.Y. App. Div. 3d Dep't 1975)*.

Where petitioner who, prior to 1967 was a domiciliary of the state, did not even attempt to show that he acquired a new domicile in 1967, no change in domicile from New York could have been effected. *Oatman v State **Tax** Comm'n, 50 A.D.2d 1015, 377 N.Y.S.2d 659, 1975 N.Y. App. Div. LEXIS 12002 (N.Y. App. Div. 3d Dep't 1975)*, app. denied, *39 N.Y.2d 709, 1976 N.Y. LEXIS 3388 (N.Y. 1976)*, app. dismissed, *429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed. 2d 785, 1977 U.S. LEXIS 486 (U.S. 1977)*.

In an action for redetermination or refund of 1971 state income ***tax*** on the ground that the petitioners were non-residents and non-domiciliaries of the state for that year, the claim for refund was properly denied and the petition for review would be dismissed where they failed to meet the burden of proving a clear and convincing intent to change their domicile in 1970. *Cooper v State **Tax** Com., 82 A.D.2d 950, 441 N.Y.S.2d 30, 1981 N.Y. App. Div. LEXIS 14683 (N.Y. App. Div. 3d Dep't 1981)*.

Couple that moved from New York to Vermont during the taxable year were liable for New York ***taxes*** on all income moved during that year; they failed to meet the 183-day limit where the only substantial evidence indicated that they enrolled their children in school in the fall and their New York State house was not sold until November. *Schibuk v N.Y. State **Tax** Appeals Tribunal, 289 A.D.2d 718, 733 N.Y.S.2d 801, 2001 N.Y. App. Div. LEXIS 12005 (N.Y. App. Div. 3d Dep't 2001)*, app. denied, *98 N.Y.2d 720, 748 N.Y.S.2d 900, 778 N.E.2d 551, 2002 N.Y. LEXIS 2286 (N.Y. 2002)*.

Intention to acquire domicile without actual residence in locality does not result in acquisition of domicile; physical presence without intention to acquire domicile does not result in acquisition of domicile. In re Braka, Dec State ***Tax*** Comm, TSB-H-83-(6)-I.

Under *CLS **Tax** § 689*, taxpayers once domiciled in New York have burden of proving abandonment of New York domicile. In re Sawyer, Dec State ***Tax*** Comm, TSB-H-83-(340)-I.

Presumption against foreign domicile is stronger than general presumption against change in domicile, and less evidence is required to establish change in domicile from one state to another than from one nation to another. In re Brett, Dec State ***Tax*** Comm, TSB-H-84-(136)-I.

Temporary removal from New York state for limited period of time does not change domicile of resident and domicile continues until new one is established. In re Jacobius, Dec State ***Tax*** Comm, No. 15271.

The presumption against a foreign domicile is stronger than the general presumption against a change of domicile, and evidence establishing the required intention to effect a change to a foreign domicile must be clear and convincing. In re Smith, Op State ***Tax*** Comm, August 16, 1977.

Domicile once established continues until person in question moves to new location with bona fide intention of making his fixed and permanent home there; general presumption against foreign domicile is stronger than general presumption against change of domicile. In re Minsky, 1979 Dec. State ***Tax*** Comm., December 14, 1979.

No change of domicile results from a removal to new location if intention is to remain there only for a limited time, and this applies even though individual may have sold or disposed of former home; petitioners spent more than 30 days in New York and did not maintain permanent place of abode outside New York. In re Wall, Dec State ***Tax*** Comm, August 21, 1980.

Evidence to establish the required intention to effect a change in domicile must be clear and convincing. In re Dell, 1981 Dec St ***Tax*** Comm, December 3, 1981.

Fact that person leaves his established domicile with intention of never returning is important but not necessarily conclusive, and such domicile continues until new one is clearly established; in determining individuals intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. In re Hauser, 1979 Dec State Com., December 20, 1979.

Administrative ***Law*** Judge correctly determined that taxpayers' New York home constituted permanent place of abode, and thus they did not qualify for treatment as nonresidents with regard to personal income ***tax***, even though they owned Florida house and held Florida driver's licenses, where they utilized their New York home on their visits to New York from Florida, house was maintained on year-round basis (including cable television and pool service), they also held New York driver's licenses, they registered vehicles in New York, they utilized services of professionals in New York, and they collected rent from other New York real property owned by them. NY ***Tax*** Appeals Tribunal TSB-D-94-(4)I.

Petitioners failed to establish that they abandoned their New York domicile in favor of Florida when husband retired from his New York business, on ground that they intended to make Florida their domicile, where they made assertions in their brief about their Florida home, their lifestyle change and recreational activities they engaged in at Florida country club, but they did not appear at hearing and did not submit any testimony or documentary evidence. NY ***Tax*** Appeals Tribunal TSB-D-97-(44)I.

5. —Employment

The ***Tax*** Commissioner's determination that a taxpayer was a New York resident was supported by substantial evidence, despite his claim that he had moved his residence to Florida, where he had not abandoned his New York home in that he used it more frequently than he did his Florida residence, and where a very considerable portion of his time was spent in fulfilling his responsibilities as director of two banks located in New York State. *Clute v Chu, 106 A.D.2d 841, 484 N.Y.S.2d 239, 1984 N.Y. App. Div. LEXIS 21745 (N.Y. App. Div. 3d Dep't 1984)*.

Taxpayer maintained New York domicile for purposes of gift ***tax*** where, prior to her husband's death, husband maintained apartment and corporate headquarters in New York City, there was no evidence that wife's 3-year stay in Florida prior to husband's death and 18 month stay in Florida following husband's death was result of deliberate choice of new domicile, taxpayer spent all of her time in New York City at time of hearing due to severe incapacitation, and where only indication of her intent to become domiciled in Florida were documentary statements made after controversy arose. *Kaskel v New York State **Tax** Com., 111 A.D.2d 431, 488 N.Y.S.2d 322, 1985 N.Y. App. Div. LEXIS 51526 (N.Y. App. Div. 3d Dep't 1985)*.

Petitioner was domiciled in New York for years 1976 and 1977, notwithstanding that he registered to vote, filed a declaration of domicile and citizenship, joined clubs, and changed his will to Florida, where he continued to maintain his house and furniture in New York long after he bought condominium in Florida, he lived in New York for

extensive periods during 1976 and 1977 and worked at the same New York corporations as before the move, and he did not transfer residence until after 1977. In re Clute, 1983 Dec State ***Tax*** Comm, TSB-H-83(284)I, October 14, 1983.

Petitioners' conduct does not clearly demonstrate intention to give up New York domicile and take up new domicile, and petitioners were therefore domiciled in New York during 1979, where they continued to maintain their house and furniture in New York after they moved to Florida, they returned to New York for 3 months in 1978 and 4 months in 1979 to allow husband to work at New York plant, and, during these periods, petitioners lived in their New York home; the fact that petitioners registered to vote and filed Declaration of Residence in Florida, while indicative of an intent to change domicile, is not conclusive. In re Zigrossi, 1983 Dec State ***Tax*** Comm, TSB-H-83(181)I, June 20, 1983.

Taxpayer born in New York was domiciliary of New York during years at issue where it was shown that taxpayer lived with parents in New York City until 1973 when he left to attend Yale University in Connecticut, stayed at parents' home for brief periods of time during 7 years he was at Yale, during summer of 1978 and 1979 worked at Chicago ***law*** firm and San Francisco ***law*** firm, upon graduation obtained clerkship in Chicago where it was shown that such position was admittedly of limited duration, and taxpayer voted in New York in fall of 1980. In re David W. & Marilyn A. Rivkin, Dec St ***Tax*** Comm, TSB-H-86(139)-I.

Taxpayer who was domiciliary of New York when he entered United States Public Health Service for ***2*** year tour of duty in Oklahoma did not effect change of domicile since absence from New York state was for particular purpose and for limited period of time; temporary removal from New York state for limited period of time does not change domicile of resident and domicile continues until new one is established. In re Jacobius, Dec State ***Tax*** Comm, No. 15271.

Taxpayer continued to be a domiciliary of New York during period while he resided in Illinois as a union officer, as he had no permanent Illinois residence, intended to return after the fixed term, and retained his New York home, savings account, telephone listing, driver's license, and safe deposit box, even though during the period he had removed all of his personal effects to Illinois, voted in Illinois, and obtained an Illinois driver's license. In re Chancey, Op State ***Tax*** Comm, June 14, 1977.

Taxpayers failed to prove change of domicile, despite their formal declarations of intent to make Florida their new domicile, where several factors indicated that they failed to abandon their New York domicile and sever their ties with New York, including their continued ownership and use of house in New York, their wage and ***tax*** statements showing that New York address, and taxpayer husband's constant supervision and review of his business interests in New York. NY ***Tax*** Appeals Tribunal TSB-D-91-(23)I.

Taxpayer's business ties to New York were significant, and thus he failed to prove by clear and convincing evidence that he and his wife intended to change their domicile from New York to Vermont, where he was actively involved with designing educational materials for company of which he was president, he spent considerable time at company's New York offices, and he was in frequent telephone contact with company. NY ***Tax*** Appeals Tribunal TSB-D-94-(20)I.

Non-New York City taxpayer failed to produce evidence sufficient to prove cogent pattern of travel accounting for his location outside city during 61 days at issue, despite his assertion that he had established "pattern" of never working on Mondays unless there was meeting scheduled, and that he usually worked on Fridays, where record showed that he spent nearly as many Mondays as Fridays in city. NY ***Tax*** Appeals Tribunal TSB-D-95-(30)I.

Witnesses' testimony as to nondomiciliary taxpayer's visits to his New York City office was insufficient to meet his burden of showing on what days he was in city or at home, even though such testimony might have been truthful and competent, where it did not relate to any particular day and it only raised possibility that taxpayer was not in city for any one of 61 days in issue. NY ***Tax*** Appeals Tribunal TSB-D-95-(30)I.

Absence of credit card charge on given day should not, in itself, result in excluding that day from nondomiciliary taxpayer's calculation of days spent within New York City, despite his claim that if he had spent day in city, he

would have had to eat meal there, payment for which he would have made on his credit card, where he made frequent trips into city. NY ***Tax*** Appeals Tribunal TSB-D-95-(30)I.

6. —Maintenance of state driver's license or registration of motor vehicle in state

Petitioner demonstrated that necessary intent existed at time of his removal from New York to Connecticut to effect change of domicile, notwithstanding that he continued to maintain his New York driver's license, where this was done because it was cheaper than obtaining a Connecticut license. In re Rones, 1983 Dec State ***Tax*** Comm, TSB-H-83(262)I, October 7, 1983.

Petitioner established by clear and convincing proof that he changed his domicile from New York to Florida prior to 1975, where he purchased a home there in March 1973, his employer relocated there in 1974, he had his bank accounts there and his car registered there, and he joined the local Chamber of Commerce and was active on the local United Way and Easter Seal campaigns and had been a member of a country club there since 1974. His wife remained in their New York home and would travel to Florida on a regular but limited basis, since her mother who was aged and ill resided with her in her New York home together with her children, but petitioner sold their home in New York subsequent to the death of wife's mother in 1976. In re Rush, 1983 Dec State ***Tax*** Comm, TSB-H-83(280)I, October 14, 1983.

Taxpayer continued to be a domiciliary of New York during period while he resided in Illinois as a union officer, as he had no permanent Illinois residence, intended to return after the fixed term, and retained his New York home, savings account, telephone listing, driver's license, and safe deposit box, even though during the period he had removed all of his personal effects to Illinois, voted in Illinois, and obtained an Illinois driver's license. In re Chancey, Op State ***Tax*** Comm, June 14, 1977.

Petitioners maintained a permanent place of abode in New York during 1967 regardless of their claim of changing domicile to Connecticut in 1966 where petitioners continued to rent and occupy a New York City apartment in 1967, registered their automobile in New York during that year, were listed in Who's Who at a New York address for 1967 and were registered to vote in New York. In re Farago 1980 Dec St ***Tax*** Comm, Apr 11, 1980.

Petitioners did not sustain burden of proof with respect to change of domicile for year 1970; petitioners owned two cars one of which was registered in New York, maintained New York operators licenses, voted in New York elections in 1972 and 1976, received mail at both New York and Florida residences, and maintained membership with one New York club. In re Campana, Dec State ***Tax*** Comm, Aug 12, 1980.

Affirming the decision of the Administrative ***Law*** Judge that petitioner changed his domicile from New York to Florida, the Tribunal rejected the argument of the ***Tax*** Division that petitioner's formal acts, that is, the filing of a declaration of domicile, registering to vote, and obtaining a driver's license in Florida, were self-serving and should have been accorded little or no weight by the Administrative ***Law*** Judge. The ***Tax*** Division's argument that these kinds of actions should be discounted as self-serving is an argument, in essence, that they are not, and never can be, credible. Carried to its logical end, this argument would have as rule of general application to disregard such actions in determining domicile. Each case must be taken in accord with the facts and circumstances entered. The significance of these formal acts in each case will depend upon other relevant factors in the case and depending upon these factors may take on greater or lesser importance. NY ***Tax*** Appeals Tribunal TSB-D-90 (33) I (1990).

7. —Personal property located in state

Petitioner was domiciled in New York for years 1976 and 1977, notwithstanding that he registered to vote, filed a declaration of domicile and citizenship, joined clubs, and changed his will to Florida, where he continued to maintain his house and furniture in New York long after he bought condominium in Florida, he lived in New York for extensive periods during 1976 and 1977 and worked at the same New York corporations as before the move, and

he did not transfer residence until after 1977. In re Clute, 1983 Dec State ***Tax*** Comm, TSB-H-83(284)I, October 14, 1983.

Petitioners' conduct does not clearly demonstrate intention to give up New York domicile and take up new domicile, and petitioners were therefore domiciled in New York during 1979, where they continued to maintain their house and furniture in New York after they moved to Florida, they returned to New York for 3 months in 1978 and 4 months in 1979 to allow husband to work at New York plant, and, during these periods, petitioners lived in their New York home; the fact that petitioners registered to vote and filed Declaration of Residence in Florida, while indicative of an intent to change domicile, is not conclusive. In re Zigrossi, 1983 Dec State ***Tax*** Comm, TSB-H-83(181)I, June 20, 1983.

Taxpayer continued to be a domiciliary of New York during period while he resided in Illinois as a union officer, as he had no permanent Illinois residence, intended to return after the fixed term, and retained his New York home, savings account, telephone listing, driver's license, and safe deposit box, even though during the period he had removed all of his personal effects to Illinois, voted in Illinois, and obtained an Illinois driver's license. In re Chancey, Op State ***Tax*** Comm, June 14, 1977.

Taxpayer did not intend to permanently change domicle to Georgia as evidenced by statement in Georgia ***tax*** return that he was not resident of that state, by his spending most of his time in New York with his girlfriend and son, and retention of his New York financial advisors, bank accounts, and his Manhattan apartment. In re Meminger, 1982 Dec State ***Tax*** Comm, Dec. 31, 1982.

8. —Retention of living quarters or mailing address in state

The ***Tax*** Commissioner's determination that a taxpayer was a New York resident was supported by substantial evidence, despite his claim that he had moved his residence to Florida, where he had not abandoned his New York home in that he used it more frequently than he did his Florida residence, and where a very considerable portion of his time was spent in fulfilling his responsibilities as director of two banks located in New York State. *Clute v Chu, 106 A.D.2d 841, 484 N.Y.S.2d 239, 1984 N.Y. App. Div. LEXIS 21745 (N.Y. App. Div. 3d Dep't 1984)*.

Taxpayer maintained New York domicile for purposes of gift ***tax*** where, prior to her husband's death, husband maintained apartment and corporate headquarters in New York City, there was no evidence that wife's 3-year stay in Florida prior to husband's death and 18 month stay in Florida following husband's death was result of deliberate choice of new domicile, taxpayer spent all of her time in New York City at time of hearing due to severe incapacitation, and where only indication of her intent to become domiciled in Florida were documentary statements made after controversy arose. *Kaskel v New York State **Tax** Com., 111 A.D.2d 431, 488 N.Y.S.2d 322, 1985 N.Y. App. Div. LEXIS 51526 (N.Y. App. Div. 3d Dep't 1985)*.

Evidence supported determination that petitioner, renowned architect, was domiciled in New York during year in question, even though he subleased his New York City apartment and only spent 56 days in New York during that year, where he did not relinquish his rights to his New York apartment, he retained his name on utility accounts as to apartment, most of his furniture, together with family artwork and other personal possessions, remained in apartment, he thereafter moved back to New York City, filed New York resident income ***tax*** returns for ensuing ***2*** years, and eventually purchased apartment, and in subsequent letter to his attorney, petitioner indicated that he did not own apartment he used in California for year in question and stated that "my home for over 20 years has been my apartment 9B at 525 Park Avenue." *Warnecke v **Tax** Appeals Tribunal, 252 A.D.2d 748, 676 N.Y.S.2d 286, 1998 N.Y. App. Div. LEXIS 8295 (N.Y. App. Div. 3d Dep't 1998)*.

Taxpayer did not prove a change in domicile prior to realizing nearly $***2*** million in capital gains on April 30, 2004, where she extended her lease on the New York apartment until June 2004, actually vacated that apartment in July 2004, maintained duplicate household items in both her Tennessee and New York apartments and did not affect a change in her lifestyle or related business interests until July 2004; the taxpayer did not present any evidence or credible testimony regarding the amount of time she spent in Tennessee versus New York during the relevant time

period, and her registration of a vehicle and to vote in Tennessee were not conclusive as they were merely to escape taxation. *Matter of Ingle v **Tax** Appeals Trib. of the Dept. of Taxation & Fin. of the State of N.Y., 110 A.D.3d 1392, 973 N.Y.S.2d 877, 2013 N.Y. App. Div. LEXIS 7084 (N.Y. App. Div. 3d Dep't 2013)*.

Petitioner established by clear and convincing proof that he changed his domicile from New York to Florida prior to 1975, where he purchased a home there in March 1973, his employer relocated there in 1974, he had his bank accounts there and his car registered there, and he joined the local Chamber of Commerce and was active on the local United Way and Easter Seal campaigns and had been a member of a country club there since 1974. His wife remained in their New York home and would travel to Florida on a regular but limited basis, since her mother who was aged and ill resided with her in her New York home together with her children, but petitioner sold their home in New York subsequent to the death of wife's mother in 1976. In re Rush, 1983 Dec State ***Tax*** Comm, TSB-H-83(280)I, October 14, 1983.

Petitioner was domiciled in New York for years 1976 and 1977, notwithstanding that he registered to vote, filed a declaration of domicile and citizenship, joined clubs, and changed his will to Florida, where he continued to maintain his house and furniture in New York long after he bought condominium in Florida, he lived in New York for extensive periods during 1976 and 1977 and worked at the same New York corporations as before the move, and he did not transfer residence until after 1977. In re Clute, 1983 Dec State ***Tax*** Comm, TSB-H-83(284)I, October 14, 1983.

Petitioners' conduct does not clearly demonstrate intention to give up New York domicile and take up new domicile, and petitioners were therefore domiciled in New York during 1979, where they continued to maintain their house and furniture in New York after they moved to Florida, they returned to New York for 3 months in 1978 and 4 months in 1979 to allow husband to work at New York plant, and, during these periods, petitioners lived in their New York home; the fact that petitioners registered to vote and filed Declaration of Residence in Florida, while indicative of an intent to change domicile, is not conclusive. In re Zigrossi, 1983 Dec State ***Tax*** Comm, TSB-H-83(181)I, June 20, 1983.

Petitioner has failed to sustain burden of proof under CLS ***Tax** L § **605**(a)(1)* that he had bona fide intention of establishing fixed and permanent home in Connecticut, despite fact that petitioner accepted permanent employment in Connecticut, that car registration was with Connecticut, that petitioner has Connecticut driver's license and has bank accounts in Connecticut, where petitioner (1) voted in New York during year in question, (***2***) maintained post office box in New York, (3) rented apartment in Connecticut on month-to-month basis and (4) filed amended New York ***tax*** return as resident individual. In re Malcolm Kafka, Dec State ***Tax*** Comm, TSB-H-84-(128)-I.

Taxpayer born in New York was domiciliary of New York during years at issue where it was shown that taxpayer lived with parents in New York City until 1973 when he left to attend Yale University in Connecticut, stayed at parents' home for brief periods of time during 7 years he was at Yale, during summer of 1978 and 1979 worked at Chicago ***law*** firm and San Francisco ***law*** firm, upon graduation obtained clerkship in Chicago where it was shown that such position was admittedly of limited duration, and taxpayer voted in New York in fall of 1980. In re David W. & Marilyn A. Rivkin, Dec St ***Tax*** Comm, TSB-H-86(139)-I.

Taxpayer continued to be a domiciliary of New York during period while he resided in Illinois as a union officer, as he had no permanent Illinois residence, intended to return after the fixed term, and retained his New York home, savings account, telephone listing, driver's license, and safe deposit box, even though during the period he had removed all of his personal effects to Illinois, voted in Illinois, and obtained an Illinois driver's license. In re Chancey, Op State ***Tax*** Comm, June 14, 1977.

Taxpayer who had lived with his parents in New York, but then had accepted several jobs in different states and lived with relatives and also had travelled widely, but used his parents' address on some federal ***tax*** returns and had important mail sent to his parents, remained a New York resident, as he did not sustain his burden of proof that he intended to change domicile, because none of his other residences were intended to be his fixed and permanent home. In re Hamill, Op State ***Tax*** Comm, June 30, 1977.

New York attorney, who had a 3 year employment contract in New Jersey and rented an apartment there during that time, remained a New York resident, as he retained his New York home where his wife lived, continued being a member of the New York bar, and was at his home at least 30 days in each year, notwithstanding that he attempted to find a permanent home in New Jersey, voted in New Jersey, and had a temporary New Jersey driver's license. In re Patterson, Op State ***Tax*** Comm, August 16, 1977.

Despite fact that taxpayer used a New York address on his federal return, taxpayer was not a New York domiciliary, where several years previously he sold his New York home and business, moved to Nevada, obtained Nevada operator's and automobile licenses, voted in Nevada, executed a Nevada will, and only visited New York on occasion and owned a New York passive real estate investment company. In re Wolf, Op State ***Tax*** Comm, October 11, 1977.

Taxpayer who was transferred from job in New York to job in Pennsylvania remained domiciliary of New York for ***tax*** year in question where he maintained home in New York where his wife and children lived, and spent at least 60 days in New York for purpose of visiting his family. In re Kester, Dec State ***Tax*** Comm, Oct. 9, 1979.

Petitioners maintained a permanent place of abode in New York during 1967 regardless of their claim of changing domicile to Connecticut in 1966 where petitioners continued to rent and occupy a New York City apartment in 1967, registered their automobile in New York during that year, were listed in Who's Who at a New York address for 1967 and were registered to vote in New York. In re Farago 1980 Dec St ***Tax*** Comm, Apr 11, 1980.

Where petitioners maintained a permanent place of abode in New York and spent in the aggregate more than 30 days in the state during the taxable year in question, they were domiciliary resident individuals of New York within the meaning of ***Tax Law** § **605**(a)* since they satisfy the residency requirements and since, although they purchased an apartment in Florida, they never filed a declaration of intent to change domicile with the State of Florida. In re Karnell, 1980 Dec St ***Tax*** Comm, May 16, 1980.

Petitioner, a management consultant for a Connecticut company with its home office in Connecticut, is a domiciliary of New York during the year in question despite the fact that he maintained an abode in Connecticut, worked there, and claimed his permanent residence there for income ***tax*** purposes since petitioner's legal spouse maintained a New York City apartment for her convenience and for business purposes and petitioner contributed to the rental and maintenance payments of the apartment, occasionally stayed there, and failed to introduce any evidence as to the number of days he stayed in New York or to show that the maintenance of a separate abode for his wife was the result of marital difficulties. In re Schweppe, 1980 Dec St ***Tax*** Comm, July 7, 1980.

Petitioners did not sustain burden of proof with respect to change of domicile for year 1970; petitioners owned two cars one of which was registered in New York, maintained New York operators licenses, voted in New York elections in 1972 and 1976, received mail at both New York and Florida residences, and maintained membership with one New York club. In re Campana, Dec State ***Tax*** Comm, Aug 12, 1980.

Petitioners effected change of domicile by selling New York home, moving to Florida to live with brother, opening bank accounts, registering to vote, and obtaining drivers license in Florida; change of domicile was effected although petitioners maintained apartment in New York City, which was small and remained empty most of time. In re Fielding, Dec State ***Tax*** Comm, Aug 22, 1980.

Taxpayer did not intend to permanently change domicle to Georgia as evidenced by statement in Georgia ***tax*** return that he was not resident of that state, by his spending most of his time in New York with his girlfriend and son, and retention of his New York financial advisors, bank accounts, and his Manhattan apartment. In re Meminger, 1982 Dec State ***Tax*** Comm, Dec. 31, 1982.

Facts that petitioner retained an interest in a New York apartment and did not immediately change his will to show a change of domicile are not sufficient to negate a clearly manifested intent to change his domicile from New York to New Jersey. In re Carity, 1981 Dec St ***Tax*** Ct, October 28, 1981.

Taxpayers failed to prove by clear and convincing evidence that they changed their domicile from New York to Florida, even though taxpayers filed declaration of domicile, registered their automobile, obtained driver's licenses, and registered to vote, all in State of Florida, where taxpayers retain their home in New York and returned there for approximately for 3 months each year, as well as fact that taxpayers leased furnished condominium in Florida. In Matter of Zapka, NYS Dept. of ***Tax***. & Fin., ***Tax*** Appeals Tribunal Decision No. TSB-D-89-(16)**I**.

Although continued ownership of former New York home is often indication that there was no intent to change domicile, such fact is only one factor that needs to be considered; where person has ***2*** homes, his domicile is one which he considers and uses as his permanent home, and length of time spent at each location is important factor in determining intention in this regard. NY ***Tax*** Appeals Tribunal TSB-D-94-(9)**I**.

Taxpayer's uncontroverted testimony that he never entered his New York residence during 18 months in question, due to separation from his wife and couple's intent to get divorce, diminished importance of his retention of New York home in determination of domicile. NY ***Tax*** Appeals Tribunal TSB-D-94-(9)**I**.

Fact that taxpayers continued to maintain large New York residence, and did not sell their original New York home, did not indicate that they could not have intended to effectuate change of domicile to Florida since it was significant that taxpayers moved their most personal belongings and memorabilia to Florida, including photographs, china and such. NY ***Tax*** Appeals Tribunal TSB-D-94-(18)**I**.

Mere assertion by taxpayer that he did not live in his mother's house during his tenure in New York City did not sufficiently establish his lack of permanent place of abode in state and city; moreover, fact that he paid for more than 50 percent of expenses associated with his mother's house contradicted his assertion that he did not maintain permanent place of abode. NY ***Tax*** Appeals Tribunal TSB-D-94-(22)**I**.

Taxpayers failed to show that they had changed their domicile from New York to Florida, despite purchase of home in Florida, where their pattern of life did not change during years in question, they maintained their New York home and could not support their claim that they had placed it on market, they utilized New York attorneys, accountants and physicians, they continued their membership and activities in New York social, charitable and religious organizations, they used their New York and Florida checking accounts equally, and they were "less than candid" with auditor's requests for information concerning their organization memberships, wills, driver's licenses, vehicle registrations and bank accounts. NY ***Tax*** Appeals Tribunal TSB-D-94-(38)**I**.

Taxpayer failed to prove that he changed his domicile to New jersey where he stayed at his New Jersey address only 3 or 4 nights per week and returned to New York residence for remainder where his family was still located, he and his wife always intended to move into their "dream home" (second New Jersey address) on its completion and intended their first New Jersey address to be temporary, he did not register to vote or register his vehicle in New Jersey, he did not hold New Jersey driver's license, and he had no New Jersey bank accounts. NY ***Tax*** Appeals Tribunal TSB-D-95-(5)**I**.

Taxpayers failed to show that they had permanently abandoned their New York home, and thus that they were not statutory New York residents after their move to New Jersey, where they continued to own New York house, furniture remained which did not preclude occasional use, one taxpayer continued to work in New York, and credit card receipts established pattern of purchases in New York. NY ***Tax*** Appeals Tribunal TSB-D-95-(5)**I**.

Nondomiciliary taxpayers maintained "permanent place of abode" in New York City during 1987 through 1989 for purposes of *CLS **Tax** § **605(b)**(1)(**B**)* where it was undisputed that they owned and maintained apartment in city during such years. NY ***Tax*** Appeals Tribunal TSB-D-95-(32)**I**.

Taxpayers failed to show that they had changed their domicile from New York City to Long Island during 4-year period in which one taxpayer was preparing for retirement where period was one of "transition" following purchase of his company, winding down of his business affairs and change of status as owner was part of natural process, and during period he maintained much daily contact with New York City, including maintenance of permanent place of abode and use of city for many daily services and professional contacts. NY ***Tax*** Appeals Tribunal TSB-D-95-(34)**I**.

Petitioners' New York City apartment was dwelling place suitable for full-time occupancy by petitioners, regardless of whether they removed most of their furniture, and thus it was properly determined to be permanent place of abode within meaning of *CLS **Tax** § 605(**b**)(1)* and *20* NYCRR former § 102.***2***(a)(1) without evidence that petitioners did not or could not have resided therein. NY ***Tax*** Appeals Tribunal TSB-D-97-(22)I.

Fact that petitioner subleased his New York City apartment and spent only 56 days in New York for year in question did not establish change in domicile where he did not relinquish his rights to apartment, he retained his name on utility accounts thereto, most of his furniture, together with family artwork and other personal possessions, remained in apartment, and he moved back to New York City, filed New York resident income ***tax*** returns for subsequent years, and eventually purchased apartment. NY ***Tax*** Appeals Tribunal TSB-D-97(6.1) I.

Tax Appeals Tribunal did not err in sustaining a notice of deficiency of petitioner's personal income ***tax*** for the 2007 and 2008 ***tax*** years, in which he filed nonresident income ***tax*** returns, as he failed to present clear and convincing evidence that, as of 2007, he had abandoned his New York domicile and acquired a new Florida domicile; the Tribunal reasonably deferred to the administrative ***law*** judge's refusal to credit petitioner's testimony that he intended for Florida to be his domicile long before the 2007 sale of his Florida office building since he had misrepresented on both his 2006 and 2007 nonresident and part-year ***tax*** returns that neither he nor his wife had living quarters in New York. *Matter of Campaniello v New York State Div. of **Tax** Appeals Trib., 2018 N.Y. App. Div. LEXIS 3345 (N.Y. App. Div. 3d Dep't 2018)*.

9. —Returning to state

Taxpayer maintained New York domicile for purposes of gift ***tax*** where, prior to her husband's death, husband maintained apartment and corporate headquarters in New York City, there was no evidence that wife's 3-year stay in Florida prior to husband's death and 18 month stay in Florida following husband's death was result of deliberate choice of new domicile, taxpayer spent all of her time in New York City at time of hearing due to severe incapacitation, and where only indication of her intent to become domiciled in Florida were documentary statements made after controversy arose. *Kaskel v New York State **Tax** Com., 111 A.D.2d 431, 488 N.Y.S.2d 322, 1985 N.Y. App. Div. LEXIS 51526 (N.Y. App. Div. 3d Dep't 1985)*.

Taxpayer incurred change of domicile from New York to Kansas and was thus taxable as part-year resident individual where it was shown that although taxpayer maintained some contacts with New York after his move to Kansas, he evidenced clear intention to leave New York in 1980 and move to Kansas, and move was permanent commitment rather than move for specified period or purpose, and work and residence in Kansas was ended only by his illness; furthermore, after taxpayer left Kansas taxpayer did not return to New York but instead purchased residence in Florida. In re Wills, Dec St ***Tax*** Comm, TSB-H-86(134)-I.

Petitioners established no clear intention to remain permanently in Florida, where they moved from New York to Florida, back to New York and stayed for more than a year, and moved to Florida a second time. In re Recchia, Dec State ***Tax*** Comm, August 22, 1980.

Petitioner changed his domicile from New York State to California, where (1) he voluntarily interviewed for position in San Francisco, California and his subsequent transfer there did not represent a corporate transfer in which petitioner had little voice, but in fact represented a voluntary act on his part and (***2***) petitioner, who subsequently returned to New York, testified to the effect that he would not have taken any job in New York City just to get back to New York. In re Wall, 1983 Dec State ***Tax*** Comm, TSB-H-83(249)I, August 24, 1983.

Petitioner who lived and worked in New York State until December of 1970 and who thereafter terminated his employment, sold his furniture, vacated his apartment and went to Los Vegas, Nevada did not show necessary intent to establish new domicile where, after beginning employment in his field (personnel) and obtaining divorce, petitioner, in or about October of 1971, decided that he did not want to live in Los Vegas and looked for employment in southwestern part of country, thereafter deciding to return to New York area because of his established reputation in his field of work; since petitioner did not change his domicile during 1971, he is New York State

resident for entire year, within meaning and intent of § ***605***(a). In re Hauser, 1979 Dec State Com., December 20, 1979.

Taxpayers were domiciled in, and residents of, state of New York for year in question, notwithstanding that they took many steps towards establishing Florida as their domicile (e.g., filing Declaration of Domicile, automobile registration, driver's licenses, bank accounts, and voting registration), where they retained their New York home, which they returned to for approximately 6 months during relevant year, and taxpayer husband conducted medical consulting and service-oriented work to VA hospital and nursing home in New York. NY ***Tax*** Appeals Tribunal TSB-D-91-(11)I.

Although act of taxpayer in reconciling with his wife in New York after moving to New Jersey could be significant in showing "range of sentiment, feeling and permanent association" that he felt for his purported new domicile, such act was not conclusive, and thus his later return to New York did not automatically preclude him from having had sincere intention in remaining permanently in New Jersey at time when he moved there. NY ***Tax*** Appeals Tribunal TSB-D-94-(9)I.

10. —Spouse/children remaining in state

Petitioner established by clear and convincing proof that he changed his domicile from New York to Florida prior to 1975, where he purchased a home there in March 1973, his employer relocated there in 1974, he had his bank accounts there and his car registered there, and he joined the local Chamber of Commerce and was active on the local United Way and Easter Seal campaigns and had been a member of a country club there since 1974. His wife remained in their New York home and would travel to Florida on a regular but limited basis, since her mother who was aged and ill resided with her in her New York home together with her children, but petitioner sold their home in New York subsequent to the death of wife's mother in 1976. In re Rush, 1983 Dec State ***Tax*** Comm, TSB-H-83(280)I, October 14, 1983.

New York attorney, who had a 3 year employment contract in New Jersey and rented an apartment there during that time, remained a New York resident, as he retained his New York home where his wife lived, continued being a member of the New York bar, and was at his home at least 30 days in each year, notwithstanding that he attempted to find a permanent home in New Jersey, voted in New Jersey, and had a temporary New Jersey driver's license. In re Patterson, Op State ***Tax*** Comm, August 16, 1977.

Taxpayer who was transferred from job in New York to job in Pennsylvania remained domiciliary of New York for ***tax*** year in question where he maintained home in New York where his wife and children lived, and spent at least 60 days in New York for purpose of visiting his family. In re Kester, Dec State ***Tax*** Comm, Oct. 9, 1979.

Petitioner, a management consultant for a Connecticut company with its home office in Connecticut, is a domiciliary of New York during the year in question despite the fact that he maintained an abode in Connecticut, worked there, and claimed his permanent residence there for income ***tax*** purposes since petitioner's legal spouse maintained a New York City apartment for her convenience and for business purposes and petitioner contributed to the rental and maintenance payments of the apartment, occasionally stayed there, and failed to introduce any evidence as to the number of days he stayed in New York or to show that the maintenance of a separate abode for his wife was the result of marital difficulties. In re Schweppe, 1980 Dec St ***Tax*** Comm, July 7, 1980.

Taxpayer was properly found not to be New York domiciliary where he moved out of his New York marital home and into New Jersey condominium which he had purchased during previous year, and there was evidence that taxpayer's separation from his wife was not intended to be temporary when he moved out, and that couple intended to get divorced. NY ***Tax*** Appeals Tribunal TSB-D-94-(9)I.

Taxpayer did not maintain New York City apartment as permanent place of abode, even though his wife resided there, he often spent one night per week there and couple sought to maintain "viable familial relationship" despite informal separation, where he maintained Connecticut residence, he had no property right in apartment (i.e., he did not own, lease or rent it, but rather his wife rented it), there was no connection between couple's agreement to pay

money to wife and his utilization of apartment, and he did not have free and continuous access to apartment under their agreement. NY ***Tax*** Appeals Tribunal TSB-D-95-(3)I.

Fact that taxpayer and his wife sought to maintain "viable familial relationship" did not make any less serious their marital separation "in fact," and thus taxpayer's occasional visits to wife's New York City apartment were insufficient to establish permanent place of abode in New York, where couple had agreed to informal separation that, inter alia, placed restrictions on his access to apartment. NY ***Tax*** Appeals Tribunal TSB-D-95-(3)I.

11. —Voting rights

Petitioner has failed to sustain burden of proof under CLS *Tax L § 605(a)(1)* that he had bona fide intention of establishing fixed and permanent home in Connecticut, despite fact that petitioner accepted permanent employment in Connecticut, that car registration was with Connecticut, that petitioner has Connecticut driver's license and has bank accounts in Connecticut, where petitioner (1) voted in New York during year in question, (***2***) maintained post office box in New York, (3) rented apartment in Connecticut on month-to-month basis and (4) filed amended New York ***tax*** return as resident individual. In re Malcolm Kafka, Dec State ***Tax*** Comm, TSB-H-84-(128)-I.

Taxpayer born in New York was domiciliary of New York during years at issue where it was shown that taxpayer lived with parents in New York City until 1973 when he left to attend Yale University in Connecticut, stayed at parents' home for brief periods of time during 7 years he was at Yale, during summer of 1978 and 1979 worked at Chicago ***law*** firm and San Francisco ***law*** firm, upon graduation obtained clerkship in Chicago where it was shown that such position was admittedly of limited duration, and taxpayer voted in New York in fall of 1980. In re David W. & Marilyn A. Rivkin, Dec St ***Tax*** Comm, TSB-H-86(139)-I.

Taxpayer continued to be a domiciliary of New York during period while he resided in Illinois as a union officer, as he had no permanent Illinois residence, intended to return after the fixed term, and retained his New York home, savings account, telephone listing, driver's license, and safe deposit box, even though during the period he had removed all of his personal effects to Illinois, voted in Illinois, and obtained an Illinois driver's license. In re Chancey, Op State ***Tax*** Comm, June 14, 1977.

Petitioners maintained a permanent place of abode in New York during 1967 regardless of their claim of changing domicile to Connecticut in 1966 where petitioners continued to rent and occupy a New York City apartment in 1967, registered their automobile in New York during that year, were listed in Who's Who at a New York address for 1967 and were registered to vote in New York. In re Farago 1980 Dec St ***Tax*** Comm, Apr 11, 1980.

Petitioners did not sustain burden of proof with respect to change of domicile for year 1970; petitioners owned two cars one of which was registered in New York, maintained New York operators licenses, voted in New York elections in 1972 and 1976, received mail at both New York and Florida residences, and maintained membership with one New York club. In re Campana, Dec State ***Tax*** Comm, Aug 12, 1980.

12. —Miscellaneous

Evidence indicating that husband and wife retained their New York domicile until husband's primary business interest had ben sold provided substantial evidence for concluding that they had not abandoned their New York domicile. *Gray v Tax Appeals Tribunal, 235 A.D.2d 641, 651 N.Y.S.2d 740, 1997 N.Y. App. Div. LEXIS 97 (N.Y. App. Div. 3d Dep't 1997)*.

Petitioners failed to establish that they intended to make New Jersey their fixed and permanent home, where husband's testimony was that he did not anticipate living in New Jersey "forever," and petitioners held only a month-to-month leasehold on their New Jersey apartment. In re Press, 1983 Dec State ***Tax*** Comm, TSB-H-83(235)I, July 29, 1983.

Taxpayer was not taxable as full year resident individual of New York State because taxpayer was not domiciliary of New York State or New York City who either maintained permanent place of abode in New York, spent more than 30 days in New York or did not maintain permanent place of abode outside state and city; taxpayer has sustained her burden of proof to show that she changed her domicil from New York to Washington, D.C. and therefore taxpayer is taxable as nonresident of state and city of New York. In re Michel, Dec St ***Tax*** Comm, TSB-H-87-(176)-I.

Taxpayer is not resident individual of New York State where he evinced clear intention to abandon New York as domicil by not only physically moving to Florida, but also increasing his business activities in Florida and executing new will in Florida. In re Rosenthal, Dec St ***Tax*** Comm, TSB-H-87-(181)-I.

Taxpayer who was domiciled in New York until May of year in question did not acquire new domicile by acts of taking employment and boarding with friend in New Jersey; although taxpayer did not maintain permanent place of abode in New York State during latter part of year in question, he is still considered resident of New York during year because he was domiciled in state, spent more than 30 days in state, and did not maintain permanent place of abode outside state during entire period. In re Cook, Dec State ***Tax*** Comm, August 8, 1979.

Petitioners' removal from New York State to Illinois solely as the result of a military assignment coupled with petitioners' search, while in Illinois, for a location to setup a medical practice, leads to the strong inference that petitioners had no intent to remain permanently in Illinois and therefore, petitioners were domiciled in New York State during the taxable year in question. In re Schanzer, 1980 Dec St ***Tax*** Comm, May 23, 1980.

Taxpayers changed their domicile from New York to Florida, even though they maintained substantial ties to New York, including purchase of a condominium, maintenance of bank accounts, contributions to New York political campaigns, and reception of mail at New York address, where working taxpayer substantially reduced his participation in New York businesses and charities, both taxpayers were active in decision to purchase Florida condominium and to design improvements thereto, and they showed intent to retire from their many New York business, social and charitable activities by engaging in such activities in Florida. NY ***Tax*** Appeals Tribunal TSB-D-94-(7)I.

Taxpayer's continued business contacts with New York may be important factor in determining intent to change domicile, but it is just one factor to be considered within totality of circumstances. NY ***Tax*** Appeals Tribunal TSB-D-94-(9)I.

Taxpayer's continuing business activities in New York did not provide adequate basis for disturbing determination of Administrative ***Law*** Judge as to intent to change domicile from New York to New Jersey where, as commodities broker, he ceased being active in his New York firm and hired other floor brokers to be responsible for customers there, he operated commodities clearing firm and dealt only with other brokers rather than outside customers, and he derived most of his income from other sources, including profits from trading in property for his own account and number of investments in partnerships and "S corporations" with no specific geographic sources of income. NY ***Tax*** Appeals Tribunal TSB-D-94-(9)I.

Administrative ***Law*** Judge properly determined that taxpayer failed to prove by clear and convincing evidence that he changed his domicile from New York to Connecticut where taxpayer did not have permanent place of abode after selling his New York residence and he was staying with others, his proof of voting registration in Connecticut related to time after year in issue, and his proof of executing will in Connecticut consisted only of photocopy of letter by witnesses stating that they witnessed such execution at taxpayer's Connecticut residence. NY ***Tax*** Appeals Tribunal TSB-D-94-(11)I.

Administrative ***Law*** Judge properly determined that taxpayers did not abandon their New York domicile until 1988, despite earlier Florida voter registration and homestead exemption, where one taxpayer's diary entry was made in that year and stated their intent to abandon their New York domicile, and their actions included involvement in New York real estate business in 1987, reception of mail at post office box in New York, employment of secretary in New York, maintenance of telephone line, retention of New York driver's licenses and car and trailer registrations, and retention of New York attorney and bank accounts. NY ***Tax*** Appeals Tribunal TSB-D-94-(14)I.

It was not unreasonable to accept taxpayer's explanation that telephone calls and office visits made to New York from Florida related primarily to personal, rather than business, matters, and thus such explanation supported taxpayer's testimony that he had changed his domiciliary to Florida on retiring from his New York business, where he had managed substantial rental operation before retirement, and overall amount of telephone contact (some 24 hours over 3 years) and limited number of office visits were not sufficient to constitute active involvement, or to foster efficiency. NY ***Tax*** Appeals Tribunal TSB-D-94-(18)I.

13. Foreign relocations; factors affecting—In general

A determination of the State ***Tax*** Commission that the petitioner is liable for ***taxes*** on income from the sale of securities abroad prior to July, 1971 on the ground that petitioner was a resident of the State for ***tax*** purposes for the year 1971 is reinstated; petitioner's conduct during a stay of over 15 years in England does not conclusively establish a change of domicile from New York State to England. *Shapiro v State **Tax** Com., 50 N.Y.2d 822, 430 N.Y.S.2d 33, 407 N.E.2d 1330, 1980 N.Y. LEXIS 2405 (N.Y. 1980)*.

Presumption against a foreign domicile is stronger than general presumption against a change of domicile for income ***tax*** purposes. *Klein v State **Tax** Com., 55 A.D.2d 982, 390 N.Y.S.2d 686, 1977 N.Y. App. Div. LEXIS 10302 (N.Y. App. Div. 3d Dep't)*, aff'd, *43 N.Y.2d 812, 402 N.Y.S.2d 396, 373 N.E.2d 290, 1977 N.Y. LEXIS 2587 (N.Y. 1977)*.

In order to establish domicile outside of New York, it is not necessary for petitioners to prove that they had intention of remaining there for rest of their lives; it is sufficient to establish foreign domicile that there is no proof that when petitioners took up residence in foreign country they had existing intention to leave foreign country and to take up residence at some other definite location at particular time. *McKone v State **Tax** Com., 111 A.D.2d 1051, 490 N.Y.S.2d 628, 1985 N.Y. App. Div. LEXIS 50288 (N.Y. App. Div. 3d Dep't 1985)*, aff'd, *68 N.Y.2d 638, 505 N.Y.S.2d 71, 496 N.E.2d 230, 1986 N.Y. LEXIS 19029 (N.Y. 1986)*.

United States citizen will not ordinarily be deemed to have changed domicile by going to foreign country unless it is clearly shown that he intends to remain permanently; presumption against foreign domicile is stronger than general presumption against change in domicile, and less evidence is required to establish change in domicile from one state to another than from one nation to another. In re Brett, Dec State ***Tax*** Comm, TSB-H-84-(136)-I.

Taxpayers who left New York for ***2*** year employment assignment in Australia did not establish new domicile there because no change of domicile results from removal to new location if intention is to remain there only for limited time and presumption against foreign domicile is stronger than general presumption against change of domicile; United States citizen will not ordinarily be deemed to have changed his domicile by going to foreign country unless it is clearly shown that he intends to remain there permanently. In re Luse, Dec State ***Tax*** Comm, Sept. 28, 1979.

The presumption against a foreign domicile is stronger than the general presumption against a change of domicile and much less evidence is required to establish a change of domicile from one state to another than from one nation to another. In re Solomon, 1981 Dec St ***Tax*** Com, Dec. 31, 1981.

Affirming the decision of the Administrative ***Law*** Judge that petitioner changed his domicile from New York to Florida, the Tribunal rejected the argument of the ***Tax*** Division that petitioner's formal acts, that is, the filing of a declaration of domicile, registering to vote, and obtaining a driver's license in Florida, were self-serving and should have been accorded little or no weight by the Administrative ***Law*** Judge. The ***Tax*** Division's argument that these kinds of actions should be discounted as self-serving is an argument, in essence, that they are not, and never can be, credible. Carried to its logical end, this argument would have as rule of general application to disregard such actions in determining domicile. Each case must be taken in accord with the facts and circumstances entered. The significance of these formal acts in each case will depend upon other relevant factors in the case and depending upon these factors may take on greater or lesser importance. NY ***Tax*** Appeals Tribunal TSB-D-90 (33) I (1990).

14. —Employment

The State ***Tax*** Commission properly determined that a taxpayers's actions were merely preparatory to establishing a Canadian domicile but did not actually establish a change of domicile, where, although the evidence indicated that the taxpayer changed his domicile to Canada for seven months by accepting employment with a Canadian firm, that he sought to purchase a home there, and that he opened an account with a Canadian bank, registered his automobile with the Province of Ontario, filed and paid ***taxes*** to the Canadian government and inquired of the Canadian Consulate as to procedures for becoming a landed immigrant, the taxpayer's family remained in New York in a residence owned by him which he attempted unsuccessfully to sell, he visited his family occasionally on weekends, and continued to contribute the family's support. *Kennedy v New York State Income **Tax** Bureau, 85 A.D.2d 837, 446 N.Y.S.2d 429, 1981 N.Y. App. Div. LEXIS 16662 (N.Y. App. Div. 3d Dep't 1981)*.

In an Article 78 proceeding to review a personal income ***tax*** assessment, the ***tax*** was properly assessed on a man who was domiciled in New York where the man lived abroad only under the terms of a year-to-year contract with his employer, absent any effort on his part to attain foreign citizenship. *Mercer v State **Tax** Com., 92 A.D.2d 636, 459 N.Y.S.2d 938, 1983 N.Y. App. Div. LEXIS 16906 (N.Y. App. Div. 3d Dep't 1983)*.

Petitioner did not establish domicile in Saudi Arabia for purposes of ***Tax*** § ***605***, where, inter alia, he accepted job there with understanding that he would be there for minimum of 5 years, he opened a savings account in New York when he found out he was going overseas and planned to have his wages deposited into this account and then draw on these funds as needed while in Saudi Arabia, he sold one of his ***2*** horses prior to leaving New York, but retained other horse so that his daughter would have it available for riding, he obtained permanent visa 4 or 5 months after arriving in Saudi Arabia, and he resided with other associates in a villa leased by his employer. In re Davison, 1983 Dec State ***Tax*** Comm, TSB-H-83(111)I, June 13, 1983.

Taxpayer's intent was not to remain abroad permanently, but only so long as job assignment was in effect, where taxpayer moved to England in June 1976 because of his job assignment, but returned to New York in December 1976 when such assignment ended, rather than seek other employment in England; accordingly, taxpayer remained New York domiciliary during entire taxable year 1976. In re Stavrides, 1983 Dec State ***Tax*** Comm, TSB-H-83(135)I, June 13, 1983.

Petitioners failed to clearly show that their move to Canada was of such a permanent nature as to effect a change of domicile, where husband's transfer to Canada was at the request of his employer and within the realm of his duties as a corporate officer, notwithstanding that petitioners entered Canada on a permanent resident visa, thereby becoming landed immigrants, and paid income ***taxes*** to the Canadian government for years 1973 through 1976. In re McKone, 1983 Dec State ***Tax*** Comm, TSB-H-83(242)I, July 28, 1983.

Officer of company who was moved to company's London office, partly at his request to leave his estranged wife, and who formed attachments in England, did not meet burden of proof that he intended to change his domicile, as he did not establish that his association with the company was not his key factor in staying in England, and he moved back to New York when the company made him president. In re Shapiro, Op State ***Tax*** Comm, August 16, 1977.

Since petitioner stated, in a letter to the Income ***Tax*** Bureau, that his intention at the time of his removal from New York was to return to the United States and that his removal to Canada was for a limited time and that his employer could transfer him back to the United States, petitioner's domicile continues to be New York since he has failed to meet the burden of proof of establishing his move to Canada was with the bona fide intention of making that country his fixed and permanent home. In re Bryant, 1980 Dec St ***Tax*** Comm, Nov 16, 1979.

Petitioner established by a preponderance of the evidence that they changed their domicile from New York to Switzerland in the year in question where petitioner accepted a position in Switzerland which was of indefinite duration, sold their home in New York and purchased one in Switzerland and received a residence permit from a Swiss population office. In re Mestre 1980 Dec St ***Tax*** Comm, Apr 11, 1980.

Petitioner remained a New York domiciliary despite his move to Peru on a foreign assignment for a definite two to four year period where petitioner's previous foreign assignments invariably led to his return to New York, petitioner lacked any other abode or asserted domicile, he failed to establish an intent to change his domicile and he spent more than 30 days in New York during the year in question. In re Freeborn, 1980 Dec St ***Tax*** Comm, April 11, 1980.

Petitioners failed to present clear and convincing evidence showing intent to change domicile, and therefore are subject to New York personal income ***tax***; although petitioner accepted position of hotel manager in England he merely leased premises there, registered as voter with United States embassy, and employed real estate firm to manage and lease New York home. In re Starke, Dec State ***Tax*** Comm, August 28, 1980.

Although petitioners moved to Bahama Island with the intent to work there, obtained the necessary approvals from the Bahamian officials and became residents of the Bahamas due to petitioner's employment, petitioner did not change his New York domicile by going to the Bahamas when he remained there only 7 months; such stay was not sufficient to sustain the burden of proof where petitioner intended to remain there permanently. In re Healey, 1980 St ***Tax*** Comm, Feb. 15, 1980.

Taxpayer did not change his domicile from New York to Mexico during the ***tax*** year where evidence shows that his marriage to a Mexican national and his purchase of a home in Mexico occurred after close of ***tax*** year in question and that he continued to use a New York checking account, retained his United States citizenship, continued his membership in a New York professional society, did not pay any income ***tax*** to Mexico, and that his move to Mexico was connected with his employment. In re Trucios, 1982 Dec State ***Tax*** Comm, Dec. 24, 1982.

15. —Immigration status

In proceeding to review determination of State ***Tax*** Commission which denied petitioner's application for redetermination of deficiency of personal income ***tax*** for year 1970 on theory that income earned in Pakistan was not includable, evidence, including fact that petitioners had entered Pakistan not on an immigration visa, but on a "four year multiple entry" visa, did not present a clear and convincing showing of intent to change domicile. *Bodfish v Gallman, 50 A.D.2d 457, 378 N.Y.S.2d 138, 1976 N.Y. App. Div. LEXIS 10646 (N.Y. App. Div. 3d Dep't 1976)*.

In an Article 78 proceeding to review a determination of the State ***Tax*** Commission that sutained a deficiency against a husband and wife and denied their application for a redetermination of personal income ***tax***, there was sufficient evidence to rationally conclude that the husband and wife did not change their domicile to Canada where the husband retained viable New York City business interests, which he tended to during several trips during the period at issue, where he continued to maintain a checking account in a New York City bank and was unable to state with any certainty that he had not voted in New York in elections during the period at issue, where he testified that neither he nor his wife at the time they went to Canada was ready to give up United States citizenship, and where, despite the fact that they applied for "landed immigrant" status in Canada, they were required to do so as a condition precedent to engaging in a business enterprise. *Minsky v Tully, 78 A.D.2d 955, 433 N.Y.S.2d 276, 1979 N.Y. App. Div. LEXIS 14840 (N.Y. App. Div. 3d Dep't 1979)*.

In an Article 78 proceeding to review a personal income ***tax*** assessment, the ***tax*** was properly assessed on a man who was domiciled in New York where the man lived abroad only under the terms of a year-to-year contract with his employer, absent any effort on his part to attain foreign citizenship. *Mercer v State **Tax** Com., 92 A.D.2d 636, 459 N.Y.S.2d 938, 1983 N.Y. App. Div. LEXIS 16906 (N.Y. App. Div. 3d Dep't 1983)*.

In a proceeding to review a determination of the State ***Tax*** Commission as to an individual's personal income ***tax*** assessment, a determination of the commission that the taxpayer was a New York resident for the entire year of 1972 would be modified to the extent that the determination was based on the conclusion that the taxpayer had failed to establish a change of domicile, since the factors relied upon by the commission for reaching its conclusion did not provide the necessary rational basis therefor where it appeared that the taxpayer had moved to New York in the fall of 1971 and that in May, 1972, the taxpayer and his children left New York and went to France where they resided in Paris with a French woman to whom the taxpayer become married after his divorce became final and that

the taxpayer had not lived in New York or in the United States since moving to France; there was no support for the finding that the taxpayer had failed to follow the normal procedure for a person who intended to live and work in France and the taxpayer's failure to apply for French nationality after residing in France for five years could not be construed to mean that he maintained a New York domicile. *Bernbach v State **Tax** Com., 98 A.D.2d 559, 471 N.Y.S.2d 903, 1984 N.Y. App. Div. LEXIS 16504 (N.Y. App. Div. 3d Dep't 1984)*.

Petitioner did not establish domicile in Saudi Arabia for purposes of ***Tax*** § ***605***, where, inter alia, he accepted job there with understanding that he would be there for minimum of 5 years, he opened a savings account in New York when he found out he was going overseas and planned to have his wages deposited into this account and then draw on these funds as needed while in Saudi Arabia, he sold one of his ***2*** horses prior to leaving New York, but retained other horse so that his daughter would have it available for riding, he obtained permanent visa 4 or 5 months after arriving in Saudi Arabia, and he resided with other associates in a villa leased by his employer. In re Davison, 1983 Dec State ***Tax*** Comm, TSB-H-83(111)I, June 13, 1983.

Petitioners failed to clearly show that their move to Canada was of such a permanent nature as to effect a change of domicile, where husband's transfer to Canada was at the request of his employer and within the realm of his duties as a corporate officer, notwithstanding that petitioners entered Canada on a permanent resident visa, thereby becoming landed immigrants, and paid income ***taxes*** to the Canadian government for years 1973 through 1976. In re McKone, 1983 Dec State ***Tax*** Comm, TSB-H-83(242)I, July 28, 1983.

Taxpayers who had moved to Israel, applied for immigrant aid, obtained new jobs in Israel, sold their home and sold or moved their personal goods, and exercised the rights of Israeli immigrants had changed their domicile for the purposes of New York income ***tax***. In re Leiter, Op State ***Tax*** Comm, August 16, 1977.

Taxpayer who spent 53 days in New York during 1974 is resident within meaning of ***Tax Law*** *§* ***605****(a)(1)* where, although her only place of abode during 1974 was in Spain, she did not renounce her United States citizenship nor take positive steps to obtain Spanish citizenship, where she traveled on United States passport, and where she conceded that she was New York domiciliary through 1973. In re Elbert, 1980 Dec State ***Tax*** Comm, Jan 11, 1980.

Petitioner established by a preponderance of the evidence that they changed their domicile from New York to Switzerland in the year in question where petitioner accepted a position in Switzerland which was of indefinite duration, sold their home in New York and purchased one in Switzerland and received a residence permit from a Swiss population office. In re Mestre 1980 Dec St ***Tax*** Comm, Apr 11, 1980.

Although petitioners moved to Bahama Island with the intent to work there, obtained the necessary approvals from the Bahamian officials and became residents of the Bahamas due to petitioner's employment, petitioner did not change his New York domicile by going to the Bahamas when he remained there only 7 months; such stay was not sufficient to sustain the burden of proof where petitioner intended to remain there permanently. In re Healey, 1980 St ***Tax*** Comm, Feb. 15, 1980.

Taxpayer did not change his domicile from New York to Mexico during the ***tax*** year where evidence shows that his marriage to a Mexican national and his purchase of a home in Mexico occurred after close of ***tax*** year in question and that he continued to use a New York checking account, retained his United States citizenship, continued his membership in a New York professional society, did not pay any income ***tax*** to Mexico, and that his move to Mexico was connected with his employment. In re Trucios, 1982 Dec State ***Tax*** Comm, Dec. 24, 1982.

16. —Marriage to foreign national

In a proceeding to review a determination of the State ***Tax*** Commission as to an individual's personal income ***tax*** assessment, a determination of the commission that the taxpayer was a New York resident for the entire year of 1972 would be modified to the extent that the determination was based on the conclusion that the taxpayer had failed to establish a change of domicile, since the factors relied upon by the commission for reaching its conclusion did not provide the necessary rational basis therefor where it appeared that the taxpayer had moved to New York in

the fall of 1971 and that in May, 1972, the taxpayer and his children left New York and went to France where they resided in Paris with a French woman to whom the taxpayer become married after his divorce became final and that the taxpayer had not lived in New York or in the United States since moving to France; there was no support for the finding that the taxpayer had failed to follow the normal procedure for a person who intended to live and work in France and the taxpayer's failure to apply for French nationality after residing in France for five years could not be construed to mean that he maintained a New York domicile. *Bernbach v State **Tax** Com., 98 A.D.2d 559, 471 N.Y.S.2d 903, 1984 N.Y. App. Div. LEXIS 16504 (N.Y. App. Div. 3d Dep't 1984)*.

Taxpayer did not change his domicile from New York to Mexico during the ***tax*** year where evidence shows that his marriage to a Mexican national and his purchase of a home in Mexico occurred after close of ***tax*** year in question and that he continued to use a New York checking account, retained his United States citizenship, continued his membership in a New York professional society, did not pay any income ***tax*** to Mexico, and that his move to Mexico was connected with his employment. In re Trucios, 1982 Dec State ***Tax*** Comm, Dec. 24, 1982.

17. —Personal property located in state

In an Article 78 proceeding to review a determination of the State ***Tax*** Commission that sutained a deficiency against a husband and wife and denied their application for a redetermination of personal income ***tax***, there was sufficient evidence to rationally conclude that the husband and wife did not change their domicile to Canada where the husband retained viable New York City business interests, which he tended to during several trips during the period at issue, where he continued to maintain a checking account in a New York City bank and was unable to state with any certainty that he had not voted in New York in elections during the period at issue, where he testified that neither he nor his wife at the time they went to Canada was ready to give up United States citizenship, and where, despite the fact that they applied for "landed immigrant" status in Canada, they were required to do so as a condition precedent to engaging in a business enterprise. *Minsky v Tully, 78 A.D.2d 955, 433 N.Y.S.2d 276, 1979 N.Y. App. Div. LEXIS 14840 (N.Y. App. Div. 3d Dep't 1979)*.

Petitioner did not establish domicile in Saudi Arabia for purposes of ***Tax*** § ***605***, where, inter alia, he accepted job there with understanding that he would be there for minimum of 5 years, he opened a savings account in New York when he found out he was going overseas and planned to have his wages deposited into this account and then draw on these funds as needed while in Saudi Arabia, he sold one of his ***2*** horses prior to leaving New York, but retained other horse so that his daughter would have it available for riding, he obtained permanent visa 4 or 5 months after arriving in Saudi Arabia, and he resided with other associates in a villa leased by his employer. In re Davison, 1983 Dec State ***Tax*** Comm, TSB-H-83(111)I, June 13, 1983.

Petitioners failed to show that on May 1, 1974 they intended to relinguish their New York domicile, where they maintained and made use of their Manhattan apartment during the entire period May 1, 1974 through December 31, 1975, husband retained his New York voter registration and operator's license, and both kept their New York bank accounts. In re Press, 1983 Dec State ***Tax*** Comm, TSB-H-83(235)I, July 29, 1983.

Taxpayers who left New York in January and bought sizable estate in Jamaica did not show sufficient intent to establish new and permanent domicile with appropriate sentiment where they put house in New York up for sale but did not sell it, moved only portion of their belongings to Jamaica, husband returned to New York on numerous business trips during year, and taxpayers returned to residence in New York State in mid-December for health reasons. In re Reeves, 1978 Op State ***Tax*** Comm, September 1, 1978.

Taxpayers, former residents and domiciliaries of New York state who went to Hong Kong pursuant to employment assignment remained domiciliaries of New York because they maintained their furnished New York City apartment during absence, on ground that landlord refused to break lease, although they rented and later purchased quarters in Hong Kong and became members of various organizations there; because taxpayers were domiciled in New York they were residents of state during years in question in accordance with meaning and intent of ***Tax Law** § **605**(a)(1)*. In re House, Dec State ***Tax*** Comm, Sept. 28, 1979.

Although petitioner obtained apartment in Portugal, he was domiciled in and resident of New York during year in question where he maintained post office box, telephone, bank accounts and home in New York State. In re Shevlin, Dec State ***Tax*** Comm, Aug 19, 1980.

18. —Retention of living quarters in state

Petitioners sustained their burden of proof to show that they changed their domicile to Belgium, notwithstanding that they retained a ***2*** ½ room apartment in New York City which was on same landing as duplex which they sold, but which faced back of the building and had no view, where apartment was retained because (1) husband needed place to stay on his business trips to New York and had determined that the maintenance fees on the apartment were lower than the rates at a suitable hotel and (***2***) the real estate market was soft at the time petitioners moved from New York and sale of the apartment was consequently impeded. In re Landau, 1983 Dec State ***Tax*** Comm, TSB-H-83(250)I, October 1, 1983.

Petitioners, citizens of Iran, were domiciliaries of New York for entire year of 1976, notwithstanding their testimony that they intended to remain permanently in Iran when they returned there in December 1973, where, inter alia, 3 of their 4 children continued to reside in their home in New York State, they returned to New York for a short time in 1975 to meet with immigration authorities for the purpose of extending husband's re-entry permit, and they returned to New York in June 1976 because their son would not have been allowed to graduate from high school there without a legal guardian present. In re Nabavi, 1983 Dec State ***Tax*** Comm, TSB-H-83(200)I, July 15, 1983.

Petitioners failed to show that on May 1, 1974 they intended to relinguish their New York domicile, where they maintained and made use of their Manhattan apartment during the entire period May 1, 1974 through December 31, 1975, husband retained his New York voter registration and operator's license, and both kept their New York bank accounts. In re Press, 1983 Dec State ***Tax*** Comm, TSB-H-83(235)I, July 29, 1983.

Taxpayers, because they were domiciled in New York and either maintained permanent place of abode in New York, maintained no permanent place of abode elsewhere, or spent time in aggregate more than 30 days in New York, were properly considered to be resident individuals under ***tax law***. In re Castagna, Dec St ***Tax*** Comm, TSB-H-87-(189)-I.

Taxpayers who left New York in January and bought sizable estate in Jamaica did not show sufficient intent to establish new and permanent domicile with appropriate sentiment where they put house in New York up for sale but did not sell it, moved only portion of their belongings to Jamaica, husband returned to New York on numerous business trips during year, and taxpayers returned to residence in New York State in mid-December for health reasons. In re Reeves, 1978 Op State ***Tax*** Comm, September 1, 1978.

Despite strong indications of taxpayers' intent to make London their permanent place of abode, they are resident individuals of New York State within meaning of ***Tax Law** § **605**(a)(1)* where they maintain apartment in New York for use by their son who was attending school in New York, and they spent over 30 days visiting New York. In re Cooper, Dec State ***Tax*** Comm, August 17, 1979.

Taxpayers, former residents and domiciliaries of New York state who went to Hong Kong pursuant to employment assignment remained domiciliaries of New York because they maintained their furnished New York City apartment during absence, on ground that landlord refused to break lease, although they rented and later purchased quarters in Hong Kong and became members of various organizations there; because taxpayers were domiciled in New York they were residents of state during years in question in accordance with meaning and intent of ***Tax Law** § **605**(a)(1)*. In re House, Dec State ***Tax*** Comm, Sept. 28, 1979.

Petitioners failed to establish that they had effected a change of domicile from New York to Israel despite purchasing an apartment in Israel and residing there 10 months out of the year where petitioner also maintained an apartment in New York and spent more than 30 days in the state. In re Katz, 1980 Dec St ***Tax*** Comm, Apr. 4, 1980.

Although petitioner obtained apartment in Portugal, he was domiciled in and resident of New York during year in question where he maintained post office box, telephone, bank accounts and home in New York State. In re Shevlin, Dec State ***Tax*** Comm, Aug 19, 1980.

Petitioners failed to present clear and convincing evidence showing intent to change domicile, and therefore are subject to New York personal income ***tax***; although petitioner accepted position of hotel manager in England he merely leased premises there, registered as voter with United States embassy, and employed real estate firm to manage and lease New York home. In re Starke, Dec State ***Tax*** Comm, August 28, 1980.

Although petitioners may have left New York in 1970 with the veritable intention of not returning, they failed to sustain the burden of proof that they established a new domicile in France where petitioner maintained a co-operative apartment in New York, spent 30 days in the state in the year in question and returned permanently to New York in June, 1972. In re Greenstan Dec. St. ***Tax*** Comm., Oct. 17, 1980.

19. —Spouse/children remaining in state

The State ***Tax*** Commission properly determined that a taxpayers's actions were merely preparatory to establishing a Canadian domicile but did not actually establish a change of domicile, where, although the evidence indicated that the taxpayer changed his domicile to Canada for seven months by accepting employment with a Canadian firm, that he sought to purchase a home there, and that he opened an account with a Canadian bank, registered his automobile with the Province of Ontario, filed and paid ***taxes*** to the Canadian government and inquired of the Canadian Consulate as to procedures for becoming a landed immigrant, the taxpayer's family remained in New York in a residence owned by him which he attempted unsuccessfully to sell, he visited his family occasionally on weekends, and continued to contribute the family's support. *Kennedy v New York State Income **Tax** Bureau, 85 A.D.2d 837, 446 N.Y.S.2d 429, 1981 N.Y. App. Div. LEXIS 16662 (N.Y. App. Div. 3d Dep't 1981)*.

Petitioners, citizens of Iran, were domiciliaries of New York for entire year of 1976, notwithstanding their testimony that they intended to remain permanently in Iran when they returned there in December 1973, where, inter alia, 3 of their 4 children continued to reside in their home in New York State, they returned to New York for a short time in 1975 to meet with immigration authorities for the purpose of extending husband's re-entry permit, and they returned to New York in June 1976 because their son would not have been allowed to graduate from high school there without a legal guardian present. In re Nabavi, 1983 Dec State ***Tax*** Comm, TSB-H-83(200)I, July 15, 1983.

Despite strong indications of taxpayers' intent to make London their permanent place of abode, they are resident individuals of New York State within meaning of ***Tax Law** § **605**(a)(1)* where they maintain apartment in New York for use by their son who was attending school in New York, and they spent over 30 days visiting New York. In re Cooper, Dec State ***Tax*** Comm, August 17, 1979.

20. —Voting rights

In an Article 78 proceeding to review a determination of the State ***Tax*** Commission that sutained a deficiency against a husband and wife and denied their application for a redetermination of personal income ***tax***, there was sufficient evidence to rationally conclude that the husband and wife did not change their domicile to Canada where the husband retained viable New York City business interests, which he tended to during several trips during the period at issue, where he continued to maintain a checking account in a New York City bank and was unable to state with any certainty that he had not voted in New York in elections during the period at issue, where he testified that neither he nor his wife at the time they went to Canada was ready to give up United States citizenship, and where, despite the fact that they applied for "landed immigrant" status in Canada, they were required to do so as a condition precedent to engaging in a business enterprise. *Minsky v Tully, 78 A.D.2d 955, 433 N.Y.S.2d 276, 1979 N.Y. App. Div. LEXIS 14840 (N.Y. App. Div. 3d Dep't 1979)*.

Petitioners failed to show that on May 1, 1974 they intended to relinguish their New York domicile, where they maintained and made use of their Manhattan apartment during the entire period May 1, 1974 through December 31, 1975, husband retained his New York voter registration and operator's license, and both kept their New York bank accounts. In re Press, 1983 Dec State ***Tax*** Comm, TSB-H-83(235)I, July 29, 1983.

Petitioners, medical student and wife who maintained no place of abode in New York during period from end of June, 1968 until July 1969, during which time husband interned at San Francisco hospital, and who testified that they returned to New York only because wife had been accepted at medical school there, but who voted by absentee ballot for State of New York in 1968 election, failed to sustain burden of proof of intention to abandon New York domicile and make California permanent home. In re Stone (File No. 13731) Op State ***Tax*** Comm, April 24, 1978.

Petitioners failed to present clear and convincing evidence showing intent to change domicile, and therefore are subject to New York personal income ***tax***; although petitioner accepted position of hotel manager in England he merely leased premises there, registered as voter with United States embassy, and employed real estate firm to manage and lease New York home. In re Starke, Dec State ***Tax*** Comm, August 28, 1980.

Petitioner who moved to foreign country halfway through taxable year was taxable as a resident of New York under ***Tax Law*** *§* ***605****(a)(1)* where petitioner's evidence, inter alia, that his New York voter registration was canceled and that he intended to return to Indiana after tour in foreign country, failed to establish his intent to establish permanent residence in location other than New York State. Petition of Haumann, No. 12108 State ***Tax*** Com., August 25, 1978.

Affirming the decision of the Administrative ***Law*** Judge that petitioner changed his domicile from New York to Florida, the Tribunal rejected the argument of the ***Tax*** Division that petitioner's formal acts, that is, the filing of a declaration of domicile, registering to vote, and obtaining a driver's license in Florida, were self-serving and should have been accorded little or no weight by the Administrative ***Law*** Judge. The ***Tax*** Division's argument that these kinds of actions should be discounted as self-serving is an argument, in essence, that they are not, and never can be, credible. Carried to its logical end, this argument would have as rule of general application to disregard such actions in determining domicile. Each case must be taken in accord with the facts and circumstances entered. The significance of these formal acts in each case will depend upon other relevant factors in the case and depending upon these factors may take on greater or lesser importance. NY ***Tax*** Appeals Tribunal TSB-D-90 (33) I (1990).

21. —Business trips to state

In an Article 78 proceeding to review a determination of the State ***Tax*** Commission that sutained a deficiency against a husband and wife and denied their application for a redetermination of personal income ***tax***, there was sufficient evidence to rationally conclude that the husband and wife did not change their domicile to Canada where the husband retained viable New York City business interests, which he tended to during several trips during the period at issue, where he continued to maintain a checking account in a New York City bank and was unable to state with any certainty that he had not voted in New York in elections during the period at issue, where he testified that neither he nor his wife at the time they went to Canada was ready to give up United States citizenship, and where, despite the fact that they applied for "landed immigrant" status in Canada, they were required to do so as a condition precedent to engaging in a business enterprise. *Minsky v Tully, 78 A.D.2d 955, 433 N.Y.S.2d 276, 1979 N.Y. App. Div. LEXIS 14840 (N.Y. App. Div. 3d Dep't 1979)*.

Petitioners sustained their burden of proof to show that they changed their domicile to Belgium, notwithstanding that they retained a ***2*** ½ room apartment in New York City which was on same landing as duplex which they sold, but which faced back of the building and had no view, where apartment was retained because (1) husband needed place to stay on his business trips to New York and had determined that the maintenance fees on the apartment were lower than the rates at a suitable hotel and (***2***) the real estate market was soft at the time petitioners moved from New York and sale of the apartment was consequently impeded. In re Landau, 1983 Dec State ***Tax*** Comm, TSB-H-83(250)I, October 1, 1983.

Taxpayers who left New York in January and bought sizable estate in Jamaica did not show sufficient intent to establish new and permanent domicile with appropriate sentiment where they put house in New York up for sale but did not sell it, moved only portion of their belongings to Jamaica, husband returned to New York on numerous business trips during year, and taxpayers returned to residence in New York State in mid-December for health reasons. In re Reeves, 1978 Op State ***Tax*** Comm, September 1, 1978.

22. —Miscellaneous

Where taxpayer failed to prove bona fide intention of making his fixed and permanent home in Puerto Rico, his New York domicile continued throughout year in question; accordingly, taxpayer was resident individual of New York State and is subject to New York State ***tax*** on that basis. In re Roache, Dec St ***Tax*** Comm, TSB-H-87-(180)-I.

Taxpayer who moved from New York to the Bahamas during second half of 1968 remained New York resident, within meaning and intent of ***Tax Law*** *§* ***605****(a)(1)*, for entire year since move to Bahamas did not change his domicile. In re Kaplan, Op State ***Tax*** Comm, April 14, 1977.

Taxpayer who permanently moved to California and worked there was entitled to refund of New York withholding ***tax*** deducted by employer which had home office in New York. In re Myers, Op State ***Tax*** Comm, August 26, 1977.

Professor at State University of New York who took leave of absence from teaching position in June, 1973, resided at apartment in Florida for 3 weeks, moved to Brussels, Belgium, for about ***2*** years, and returned to his teaching position in August, 1975, in the same status and under same conditions as existed prior to leave of absence, was domiciled in New York State during all of 1973 for income ***tax*** purposes. In re Zionts, Op State ***Tax*** Comm, November 3, 1978.

Taxpayer, employee of New York based corporation, who was assigned to Europe on or about July 1, 1971, for purpose of investigating potential market there remained New York domiciliary for all of 1971 where record was devoid of any information concerning where he resided for 3-month period commencing with his arrival in Europe, where record revealed that from October 1, 1971 through September 30, 1972, taxpayer leased furnished apartment in Brussels, Belgium; taxpayer's contention that wife's closing all charge accounts prior to joining him in December of 1971 establishes his intention at time of his removal from New York to remain permanently in Brussels, Belgium is insufficient to sustain burden of proof imposed by § 689(e) which requires taxpayer to show that he changed his domicile from New York to Belgium during 1971. In re Shorin, 1979 Dec. State ***Tax*** Comm., December 14, 1979.

Petitioner, a journalist with the National Broadcasting Company, did not establish that he intended to remain abroad permanently and therefore was domiciled in New York for the entire taxable year in question since petitioner moved to various foreign locations at the discretion of his employer for indefinite durations of time, the amount of which was directly and solely related to his employment. In re Steinman, 1980 Dec St ***Tax*** Comm, Jan 11, 1980.

Petitioner was domiciled in, and a resident of, New York State for 1972 despite the fact that petitioner was inducted into the armed forces in 1967 and, after a short visit to New York upon his discharge in 1969, remained overseas in Austria or Germany until August 1, 1972 since petitioner did not indicate intent to change domicile regardless of the fact that he rented an apartment, purchased furniture, opened bank accounts, purchased an automobile, and practiced ***law*** in Germany. In re Siegel, 1980 Dec St ***Tax*** Comm, Feb. 15, 1980.

Taxpayers who moved to Bahamas in 1976, declared their intent to retire in Florida following completion of assignment in Bahamas, registered to vote in Florida, obtained Florida drivers license and sold their New York home were nonetheless New York residents for 1976 ***tax*** year in view of their failure to move to Florida. In re Wilbur, 1982 Dec State ***Tax*** Comm, Dec. 24, 1982.

Taxpayer's move to California was temporary and was made primarily because California was where he could best resolve his financial problems; thus, he did not change his domicile from New York to California for year at issue. NY ***Tax*** Appeals Tribunal TSB-D-97(6)I.

23. Declaration of intent to change domicile

Petitioners acquired foreign domicile in Brazil where their taking up of residence in their rented home there confirmed their stated intention to make Brazil their domicile, where they completely abandoned their New York domicile by selling their home and moving, where husband expected his employment in Brazil to continue indefinitely, and where petitioners are registered and pay ***taxes*** in Brazil as permanent residents. In re Wightman, 1983 Dec State ***Tax*** Comm, TSB-H-83(244)I, July 28, 1983.

Where taxpayer filed a retroactive Florida declaration of domicile because he was not certain on the retroactive date that he intended to change his domicile, he did not change his domicile on the retroactive date for purposes of the New York income ***tax***. In re Toplitz, Op State ***Tax*** Comm, August 16, 1977.

Taxpayer is resident of state during 1974 within meaning of § ***605***(a) of ***Tax Law***, where, prior to 1974, taxpayer was resident of state and frequently visited home owned by her father in Florida, taxpayer submitted notarized statement on which she contended that in August, 1974 she decided to become resident of Florida and in same month started to attend college in Florida, but taxpayer failed to submit any evidence supporting her notarized statement or her contentions. In re Usdan, Dec State ***Tax*** Comm, Oct 3, 1980.

24. Miscellaneous

Taxpayer, who entered into separation agreement with wife which recited that he lived in New York City, had an apartment in New York City, and provided no proof that the apartment was leased for business purposes only, but listed his address on his federal income ***tax*** return as the wife's Pennsylvania address, was a New York resident. In re Koles, Op State ***Tax*** Comm, June 30, 1977.

Petitioners were domiciliaries of New York during the years in question since they spent more than 30 days in New York, owned a summer cottage in New York, possessed a New York driver's license and, although they spent 8 months out of the year in St. Maarten, N. A., continued to list their New York address on their passports. In re Schulman, 1980 Dec St ***Tax*** Comm, Feb 22, 1980.

Petitioners were domiciled in State of New York; they did not maintain permanent place of abode outside New York State, although they only spent approximately 18 days in New York State. In re Duff, Dec State ***Tax*** Comm, August 12, 1980.

Where petitioners moved into yacht located in Florida and leased slip for yacht, they did not evidence intent to take up new residence required to establish new domicile, even though they may have evidenced intent to abandon New York domicile. In re Allan, Dec State ***Tax*** Comm, Aug 28, 1980.

Petitioner will be deemed domiciled in New York despite the fact that he lives in Florida, filed a Florida state ***tax*** return, has a Florida driver's license and executed a Florida will where petitioner spent more than 30 days in New York in each of the years in question on business associated with a New York based brokerage firm. In re Richman, 1980 Dec St ***Tax*** Comm, Feb 15, 1980.

Taxpayers who moved to Bahamas in 1976, declared their intent to retire in Florida following completion of assignment in Bahamas, registered to vote in Florida, obtained Florida drivers license and sold their New York home were nonetheless New York residents for 1976 ***tax*** year in view of their failure to move to Florida. In re Wilbur, 1982 Dec State ***Tax*** Comm, Dec. 24, 1982.

Field audit guidelines for personal income ***tax*** investigation do not indicate that statement as to residence signed by petitioners, and corroborating testimony of petitioners and their accountant, would be acceptable proof of time spent outside state. NY ***Tax*** Appeals Tribunal TSB-D-94-(4)I.

Petitioners' did not prove that they intended to abandon their New York City domicile and acquire new domicile in Westchester County, where they did not appear at hearing to offer testimony no furnish affidavits containing their intent, and there was no evidence regarding Westchester County residence which demonstrated their actual dates of residence there; administrative ***law*** judge properly relied on case ***law*** relating to New York state residence, as *NYC Admin Code § 11-1705(**b**)(1)* contains identical language as that of *CLS **Tax** § **605**(**b**)(1)*. NY ***Tax*** Appeals Tribunal TSB-D-97-(22)I.

III. Residence for *Tax* Purposes

A. Domiciliaries

25. 30 days or abode in New York; generally

Since taxpayer was domiciled in New York and did not maintain permanent place of abode elsewhere, she was subject to ***tax*** as resident of New York. In re Sultan, Dec St ***Tax*** Comm, TSB-H-87-(164)-I.

Taxpayers, because they were domiciled in New York and either maintained permanent place of abode in New York, maintained no permanent place of abode elsewhere, or spent time in aggregate more than 30 days in New York, were properly considered to be resident individuals under ***tax law***. In re Castagna, Dec St ***Tax*** Comm, TSB-H-87-(189)-I.

Where taxpayers successfully showed that they left New York State with no intention of returning, but failed to sustain burden of proof required to show that they established new domicile outside New York State, taxpayers continued to be domiciled in New York State within meaning and intent of ***tax law***; in such circumstances taxpayers were domiciled in New York State for all of year in question, maintained permanent place of abode in state for part of year, spent more than 30 days in state and, therefore, were residents of state for entire year. In re De Witt, Dec State ***Tax*** Comm, August 17, 1979.

All income earned by petitioners in year in question is taxable as New York income since (1) they maintain a permanent place of abode in New York, (***2***) they did not maintain a permanent place of abode outside of New York for the entire taxable year and (3) they spent more than 30 days in New York during the year in question. In re Drachenberg, 1980 Dec St ***Tax*** Comm, Nov. 26, 1979.

Where taxpayer was registered voter in New York, served on jury duty, maintained bank accounts in New York throughout entire period in issue, listed New York City address as address of residence on federal income ***tax*** returns, owned home in New York State throughout period in issue, and he spent more than 30 days in New York State in each of years in issue, he was resident of New York State pursuant to § ***605***(a)(1) and all income for years at issue was includible in New York adjusted gross income and was subject to taxation. In re Hofmann, 1979 Op State ***Tax*** Comm, January 24, 1979.

Taxpayer was resident of New York where he moved to New York from Chicago to take advancement with company, spent 6 months in New York, was assigned ***2***-year position in Australia, terminated employment with company, and returned to Chicago, and where he failed to establish by preponderance of evidence that he changed his domicile from New York and did not spend at least 30 days in New York. In re Young, 1980 Dec State ***Tax*** Comm, Jan ***2***, 1980.

Taxpayers were resident individuals within meaning and intent of § ***605***(a)(1) where they were domiciliaries of New York State and spent more than 30 days in New York State during 1973, did not have permanent place of abode outside New York State for entire year, and did have permanent place of abode in New York State for part of said year. In re Noaks, 1980 Dec. State ***Tax*** Comm, February 1, 1980.

Taxpayer is not a New York resident for ***tax*** purposes despite the fact that his family remained in their New York home while he lived in a hotel room and searched for suitable housing at his new job location. In re Quinn, 1981 Dec St ***Tax*** Comm, December 3, 1981.

Any person domiciled in New York is resident for income ***tax*** purposes for specific taxable year unless for that year (1) he maintains no permanent place of abode in New York, (***2***) he maintains permanent place of abode elsewhere during entire year, and (3) he spends in aggregate not more than 30 days of taxable year in New York. In re Christ, 1982 Dec State ***Tax*** Comm, March 5, 1982.

Petitioners were resident individuals of New York within the meaning of ***Tax Law** § **605**(a)* from January 1, 1971 through August 31, 1971 since they maintained a permanent place of abode in New York and spent more than 30 days in New York; although ***Tax Law** § **605*** does not provide for the collation of income that was done by the Income ***Tax*** Bureau for petitioners' 1971 ***taxes***, petitioners did not show that the figures as computed by the Bureau were incorrect and therefore their petition will be denied. In re Restler, 1980 Dec St ***Tax*** Com, Apr 11, 1980.

Taxpayers were subject to ***tax*** as resident individuals of New York State during year in question, even though they spent less than 30 days in New York during relevant year, and even assuming that their 34-foot motor home on its lot in Florida constituted permanent place of abode, since taxpayer admittedly owned home in New York at time in question, and there was no showing that it was rented out or even that it was up for sale. NY ***Tax*** Appeals Tribunal TSB-D-92-(19)I.

26. —Other home in another state

Income ***tax*** imposed on worldwide income of statutory residents of New York who are New Jersey domiciliaries does not substantially affect interstate commerce, as neither commuting from New Jersey to New York to work nor maintaining permanent residence in New York produces requisite effect on commerce; thus, protections of dormant Commerce Clause (US Const Art I § 8) do not apply. *Tamagni v **Tax** Appeals Tribunal, 91 N.Y.2d 530, 673 N.Y.S.2d 44, 695 N.E.2d 1125, 1998 N.Y. LEXIS 1071 (N.Y.)*, cert. denied, *525 U.S. 931, 119 S. Ct. 340, 142 L. Ed. 2d 280, 1998 U.S. LEXIS 6508 (U.S. 1998).*

When a taxpayer who had an apartment in Manhattan showed that he bought and furnished a house in New Jersey, the conclusory affidavits he and his father submitted averring that the taxpayer and his wife lived in New Jersey and the taxpayer's father and brother lived in the apartment in Manhattan were not clear and convincing evidence that the taxpayer had established a new domicile in New Jersey, so, under *N.Y. **Tax Law** § **605**(**b**)(1)(A)*, he was a New York resident, for ***tax*** purposes because he did not show he had terminated his lease on the Manhattan apartment or that someone else paid the rent and/or utilities there. *Matter of El-Tersli v Commissioner of Taxation & Fin., 14 A.D.3d 808, 787 N.Y.S.2d 526, 2005 N.Y. App. Div. LEXIS 248 (N.Y. App. Div. 3d Dep't 2005)*.

When a taxpayer who had an apartment in Manhattan showed that he bought and furnished a house in New Jersey, he did not show he was not a statutory resident of New York, for ***tax*** purposes, under *N.Y. **Tax Law** § **605**(**b**)(1)(**B**)* because he did not show he had terminated his lease on the Manhattan apartment or that he did not otherwise contribute to the household living there, nor did he show that he did not spend more than 183 days in New York during the periods at issue. *Matter of El-Tersli v Commissioner of Taxation & Fin., 14 A.D.3d 808, 787 N.Y.S.2d 526, 2005 N.Y. App. Div. LEXIS 248 (N.Y. App. Div. 3d Dep't 2005)*.

Taxpayer fails to meet her burden of proof that she was not New York resident during taxable years in question where (1) she contended that she operated her business out of apartment in New York City which was leased in name of business, that she used apartment as an occasional place to stay overnight while in New York, and that she spent less than 4 months there in each of the ***tax*** years in question, (***2***) she contended that she was a resident of Connecticut during years in issue and put in evidence to leases which named her as co-tenant of premises in Connecticut, (3) she filed an application for enrollment as a voting elector in Connecticut in October of second ***tax*** year in question, (4) she reported that her home address was in Connecticut on her federal income ***tax*** returns for years in question, but (5) she offered no cancelled rental payment checks, no local business bills, nor any other

evidence indicative of Connecticut residency during ***tax*** years in issue. In re Rosenberg, 1983 Dec State ***Tax*** Comm, TSB-H-83(171)I, June 20, 1983.

Petitioner was resident of New York in 1977 under ***Tax*** § ***605***(a)(1), notwithstanding that he purchased house in Florida on June 23 of that year, and he and his wife moved to that house, and notwithstanding that he offered his house in New York for sale at the same time, where his New York house did not sell for ***2*** years, during which time petitioner's son lived in it. In re Thomas, 1983 Dec State ***Tax*** Comm, TSB-H-83(177)I, June 20, 1983.

Petitioner was not taxable as New York State resident individual in 1972 within meaning and intent of ***Tax*** § ***605***, notwithstanding that he maintained some contacts with New York and permanent place of abode there after his move to Ohio, where he went to Ohio to operate business he viewed as his own, as opposed to going there to work for particular employer, and where his residence in Ohio was ended by events over which he had no control. In re Cromwell, 1983 Dec State ***Tax*** Comm, TSB-H-83(205)I, July 25, 1983.

Petitioners were residents of New York State for personal income ***tax*** purposes, notwithstanding their assertion that they were domicilliaries of Washington, D. C. where they did not demonstrate that they acted in accordance with this assertion for District of Columbia income ***tax*** purposes, since, if they were domiciled in Washington during year in question, they should have filed ***tax*** return with and paid income ***tax*** to District of Columbia. In re Vaughn, 1983 Dec State ***Tax*** Comm, TSB-H-83(217)I, July 25, 1983.

Wife was not taxable as resident individual until July 9, 1979, when she moved to New York to join her husband, despite fact that husband acquired New York domicile on January 8, 1979, date he left other state for permanent employment in New York. In re Brenda M. Keegan, Dec State ***Tax*** Comm, TSB-H-84-(178)-I.

Taxpayer born in New York was domiciliary of New York during years at issue where it was shown that taxpayer lived with parents in New York City until 1973 when he left to attend Yale University in Connecticut, stayed at parents' home for brief periods of time during 7 years he was at Yale, during summer of 1978 and 1979 worked at Chicago ***law*** firm and San Francisco ***law*** firm, upon graduation obtained clerkship in Chicago where it was shown that such position was admittedly of limited duration, and taxpayer voted in New York in fall of 1980. In re David W. & Marilyn A. Rivkin, Dec St ***Tax*** Comm, TSB-H-86(139)-I.

Taxpayer was not taxable as full year resident individual of New York State because taxpayer was not domiciliary of New York State or New York City who either maintained permanent place of abode in New York, spent more than 30 days in New York or did not maintain permanent place of abode outside state and city; taxpayer has sustained her burden of proof to show that she changed her domicil from New York to Washington, D.C. and therefore taxpayer is taxable as nonresident of state and city of New York. In re Michel, Dec St ***Tax*** Comm, TSB-H-87-(176)-I.

Taxpayers who were living in Florida at time of receipt of single-sum distribution of pension account were New York domiciliaries and residents within meaning of ***Tax Law*** *§* ***605****(a)(1)* where, inter alia, they had lived in New York for first two months of year and maintained furnished apartment in New York for two more years. In re Tegen, Op State ***Tax*** Comm, April 14, 1977.

Taxpayers who maintained apartments in New York and Florida, had bank accounts in both states, and were registered to vote in Florida, with husband taxpayer dividing his working time between Florida and New York, maintaining his New York driver's license, and filing Florida property ***tax*** returns, were New York domiciliaries and residents within meaning of ***Tax Law*** *§* ***605****(a)(1)* since they maintained permanent place of abode in New York and spent more than 30 days a year in New York during years in question. In re Butensky, Op State ***Tax*** Comm, April 14, 1977.

Taxpayer, who had lived in New York, moved to Georgia and Florida, but did not sell house and would visit house on occasion, and moved back to house and became domiciliary of New York in 1972, and lived in New York for at least 30 days during 1972 was a New York resident in 1972 under ***Tax*** *L §* ***605****(a)(1)*. In re Zinn, Op State ***Tax*** Comm, June 14, 1977.

Site manager and spouse who maintained mailing address within New York State, who went wherever manager's jobs took them within and without New York State where they rented cottages by the week and opened bank accounts, and who offered no substantial evidence that they did not spend at least 30 days per year within New York State, were domiciled in New York State and were subject to the New York personal income ***tax*** as resident individuals on all their income, including income earned outside of New York State. In re Gillert, Op State ***Tax*** Comm, September 29, 1977.

Petitioner was a resident of New York during year in question pursuant to ***Tax Law § 605*** where petitioner failed to show that the home he jointly owned with his wife located in New York did not constitute his permanent place of abode since, while petitioner worked in Indiana and did not spend more than 30 days in New York during the year in question, petitioner only maintained an apartment in Indiana and returned to his home in New York where his wife and children resided throughout the year in question. In re Martin, 1980 Dec St ***Tax*** Comm, Feb 15, 1980.

Petitioner were residents of New York State for income ***tax*** purposes for the first 7 months of 1972 where they owned several co-operative apartments in New York and spent more than 30 days there; however, petitioners were not residents for the remainder of the year when petitioners decided to abandon New York as a domicile, notified their bank of a change of address to Connecticut, advised their brokers of the same change, allowed their New York State drivers licenses to expire, reregistered their automobile in Connecticut and registered and voted in Connecticut in 1972. In re Silver, Dec St ***Tax*** Comm, October 3, 1980.

Taxpayer who moved out of New York State to work as a personal secretary to her employer who had been appointed Secretary of the Navy, remains a New York State resident during her 3 ½ year stay in Washington, D.C. since her removal to that area was solely for the limited period of her employer's appointment and she continued to maintain her New York apartment. In re Fisher, 1981 Dec St ***Tax*** Comm, December 3, 1981.

Petitioners were residents of New York for income ***tax*** purposes where, inter alia, their children attended school in New York City during relevant period when they were allegedly domiciled in New Jersey and Virgin Islands, petitioners spent at least twice as much time in New York City than they did in either Virgin Islands or New Jersey, they claimed business deductions from their activities in New York City, and they continuously held themselves out as New York City residents on various administrative and legal documents, including, but not limited to, their marriage license, children's birth certificates, real property transfer ***tax*** return, and maintenance of checking and mortgage accounts in New York City. NY ***Tax*** Appeals Tribunal TSB-D-98-(18)I.

27. —Other home in foreign country

Petitioners are deemed resident individuals of State and City of New York for ***tax*** purposes, since allegations that wife was bona fide resident of Puerto Rico and that husband maintained Brooklyn apartment only as matter of convenience, are insufficient to invoke exceptions provided in § ***605***[a][1] of ***Tax Law***. In re Juan Rodriguez & Ana Rodriguez, Dec St ***Tax*** Comm, TSB-H-86-[22]-I.

Petitioner was New York resident in accordance with meaning and intent of ***Tax Law § 605****(a)(1)*, where he was New York domiciliary during year in question, he worked at N.Y. office of employer for first part of year, and used parents' N.Y. address for mail and on ***tax*** withholding statements and spent more than 30 days in New York that year, notwithstanding fact that on April 15 of year he was assigned to South African office of employer and shared apartment in Connecticut with friend. IN re Tulley, Op State ***Tax*** Comm, February 28, 1977.

Petitioners remained New York residents for 1968 and 1969, despite facts that in April of 1968 they and their children moved to France as result of employment there by French firm, vacating their leased New York apartment, their visa classified them as provisional French residents, and they did not return to New York until October of 1969, where they maintained permanent place of abode in New York during years in question and spent more than 30 days per year in New York during said years. In re Lasry, Op State ***Tax*** Comm, March 7, 1977.

Taxpayers who moved from New York to Guam in middle of year pursuant to husband's two-year assignment as air traffic controller, remained New York residents within meaning and intent of ***Tax Law § 605****(a)(1)*, where they

admittedly spent more than 6 months of year in which they moved in New York, during that time they had no permanent place of abode outside of New York, and they failed to establish by preponderance of evidence their intention to have established new permanent home in Guam at time of move, despite, inter alia, their having sold their New York home, having closed their New York bank account, and having acquired Guam drivers' licenses. In re Schehr, Op State ***Tax*** Comm, April 14, 1977.

Taxpayer who was domiciliary of New York when he left to spend 10 years in Italy was New York resident within meaning and intent of ***Tax Law** § **605**(a)(1)* during year following his departure for Italy, for which year he told Italian authorities he was not resident of Italy, where he failed to prove that he spent not more than 30 days in New York during that year. In re Gabbe, Op State ***Tax*** Comm, April 14, 1977.

Taxpayers who maintained permanent places of abode in Tokyo, Milan, and New York, continued to be New York domiciliaries and residents within intent and meaning of ***Tax Law** § **605**(a)(1)* during two-year period in which they did not spend more than 30 days in New York. In re Estate of Bernstein, Op State ***Tax*** Comm, April 14, 1977.

Where former New York residents, residing overseas, maintained summer residence in New York for entire time of absence from state, and returned to that residence in September of year in question they were domiciliaries of New York during year and since they spent more than 30 days in state during year they were individuals within meaning and intent of CLS ***Tax Law** § **605***. In re Evans, 1978 Op State ***Tax*** Comm, September 13, 1978.

Taxpayers were domiciliaries of New York State and spent more than 30 days in New York State during 1972, even though taxpayer had accepted employment in West Germany for indefinite duration and during 1972 his house in Germany was rented on renewable long-term lease. In re Clark, 1979 Op State ***Tax*** Comm, February 14, 1979.

Taxpayer, native New Yorker, would be considered New York resident where he was resident of New York until 1966 at which time he was assigned overseas by employer, where his stays at each foreign location were for indefinite durations at discretion of employer and were directly and solely related to his employment, and where taxpayer returned to and took up residence in New York in July of the year in question. In re Steinman, 1980 Dec State ***Tax*** Comm, Jan 11, 1980.

Where petitioners maintained a permanent place of abode in New York during part of the year in question, spent more than 30 days in New York and failed to show that they intended to abandon their New York domicile and establish a new domicile in Canada, where petitioners had taken a ***2*** year assignment with the U. S. Customs Service, petitioners will be considered to be domiciled in New York and taxable as residents in accordance with ***Tax Law** § **605***. In re Jablonski, 1980 Dec St ***Tax*** Comm, Jan. 11, 1980.

Petitioners would be considered New York residents by maintaining a permanent abode in New York state, not maintaining a permanent abode outside New York state for entire taxable year and spending, in aggregate, more than 30 days in New York state, where petitioners were residents of New York from January to June, husband accepted assignment from his employer in Canada which was to last for one year with option for ***2*** year extension, and where petitioners resided in leased house in Canada with option to renew said lease on annual basis, even though petitioners contended they had no real property in New York state after June and had no intention of returning to New York. In re Jablonski, 1980 Dec State ***Tax*** Comm, January 11, 1980.

Petitioners failed to establish that they had effected a change of domicile from New York to Israel despite purchasing an apartment in Israel and residing there 10 months out of the year where petitioner also maintained an apartment in New York and spent more than 30 days in the state. In re Katz, 1980 Dec St ***Tax*** Comm, Apr. 4, 1980.

Petitioner, flight engineer on airline flights originating and terminating at Kennedy airport, who moved from home in New York to Bahamas, leasing apartment there and renting out New York home, and who made practice of coming to New York on day before or day of scheduled flight, and returning to Bahamas as soon as possible after flight, failed to clearly sustain burden of proof that he intended to remain in Bahamas permanently, and therefore was considered New York domiciliary, as well as failing to sustain burden of proof that he did not spend more than 30 days in New York State, and therefore was considered resident for income ***tax*** purposes. In re Ramey, Op State ***Tax*** Comm, April 17, 1978.

28. No abode in state, abode elsewhere, and not present 30 days in state

New York domiciliaries who maintain no permanent place of abode in state and aggregate not more than 30 days of taxable year in state are taxable as nonresidents; rental of taxpayers' home in New York State during time of residence abroad constitutes lack of permanent place of abode in New York. In re Cunningham, Dec State ***Tax*** Comm, TSB-H-83-(14)-I.

Income earned by taxpayer, while in military service, was subject to New York State personal income ***tax*** since taxpayer did not maintain permanent place of abode outside of New York State for entire year in issue. In re Quadrini, Dec St ***Tax*** Comm, TSB-H-86(152)-I.

Taxpayers, who lived in Japan, which was their permanent place of abode, until October of 1968 at which time they moved to New Jersey and ceased being New York domiciliaries were not New York state residents within meaning and intent of ***Tax Law § 605****(a)(1)* and § ***605***(***b***), where they had no permanent place of abode in New York during 1968 and did not spend more than 30 days in New York during that year. In re Martinuzzi, Op State ***Tax*** Comm, April 14, 1977.

Although taxpayers who moved to a foreign country remained domiciliaries in New York, since they did not maintain a permanent place of abode in New York, maintained a permanent place of abode elsewhere, and spent less than 30 days in New York, they were not residents for ***tax*** purposes. In re Smith, Op State ***Tax*** Comm, August 16, 1977.

Taxpayer who resided and worked outside New York during year in question and who considered New York State his home, retained New York State driver's license and license plates but did not maintain permanent place of abode in New York or visit state more than 30 days during year in question was not resident of state or subject to New York State personal income ***tax*** during year. In re Coppola, Dec State ***Tax*** Comm, September 21, 1979.

Taxpayer is not resident individual within meaning and intent of ***Tax Law § 605****(a)* where he had formerly established domicile in New York but did not maintain permanent place of abode in New York during year in question, did maintain permanent place of abode elsewhere, and was not present in New York for more than 30 days of taxable year; taxpayer's wife would be resident individual of New York State where during same year she spent more than 30 days within state. In re Whealy, Dec State ***Tax*** Comm, October 5, 1979.

Where New York taxpayer and his wife are separated by consent and wife resides in New Jersey where she is registered voter and where she maintains permanent place of abode, employment and bank accounts and wife neither came into New York during year in question nor had permanent place of abode in state, New York taxpayer need not include wife's income on his state income ***tax*** return. In re Burr, 1979 Op St ***Tax*** Comm, April 6, 1979.

Petitioner, as minor, was domiciled with mother who had legal custody; petitioner had permanent place of abode outside New York State, had no permanent place of abode in state and spent less than 30 days in state, and is therefore considered nonresident and not subject to state income ***tax***. In re Wei, Dec State ***Tax*** Comm, Aug 28, 1980.

Taxpayers who vacated their apartment in New York in August 1965, lived in Japan until August 1971, and then moved to Connecticut were domiciliaries of New York until 1971, despite their alleged intent not to return to New York after they left for Japan, but were not residents of New York for purposes of the ***tax law*** after 1965, as while they were in Japan they maintained no permanent place of abode in New York, maintained a permanent place of abode elsewhere, and did not spend 30 days in New York. In re Marsh, Op State ***Tax*** Comm, August 22, 1977.

Taxpayer who purchases sailboat upon which he and his family will live, which boat will never be present in New York State, and taxpayer will not maintain permanent place of abode in New York State nor spend more than 30 days in New York State will continue to be residents of New York State for taxable years they continue to live aboard sailboat, as although evidencing intent to abandon New York domicile, taxpayer will not have evidenced intent to take up new residence to which he is attached full range of sentiment, feeling and permanent association

required to establish new domicile, and living aboard sailboat will not constitute maintenance of permanent place of abode. NYS Dept. of ***Tax***. & Fin., Commissioner of Taxation & Finance, Advisory Op. No. TSB-A-89(7)I.

29. Military personnel—Maintenance of contacts with state

Petitioner failed to remove himself from resident classification for personal income ***tax*** purposes, notwithstanding that he entered military service and left state during ***tax*** year in question, where he maintained a permanent abode and spent more than 30 days in state during such year. *Lane v Gallman, 49 A.D.2d 963, 373 N.Y.S.2d 700, 1975 N.Y. App. Div. LEXIS 11267 (N.Y. App. Div. 3d Dep't 1975)*, app. dismissed, *42 N.Y.2d 823, 1977 N.Y. LEXIS 3941 (N.Y. 1977)*, app. dismissed, *434 U.S. 1055, 98 S. Ct. 1222, 55 L. Ed. 2d 755, 1978 U.S. LEXIS 633 (U.S. 1978)*.

Air force officer who was stationed in Korea during 1970, who was domiciled in New York upon entering into service, who effected no change of domicile prior to 1970, and whose wife and family resided in New York, was subject to New York State personal income ***tax*** for that year. In re Bortle, Op State ***Tax*** Comm. April 13, 1976.

Taxpayer, who was resident of New York State at time he entered military service was domiciled in New York during year when he was stationed in Germany although he did not maintain permanent place of abode in New York where he did not maintain permanent place of abode outside New York and did maintain bank account at bank located in New York State. In re Tighe, Dec State ***Tax*** Comm, August 8, 1979.

30. —No permanent place of abode outside of state

Adoption of new permanent abode requires dwelling place of fixed character, and abodes which are transitory in nature and which cannot be considered permanent do not constitute permanent place of abode outside of New York; military officer who resided in several apartments during year of departure from New York does not maintain permanent place of abode outside of New York for entire year. In re Revett, Dec State ***Tax*** Comm, TSB-H-84-(91)-I.

Interstate relocation as result of military assignment does not result in change of domicile in absence of factors to indicate that taxpayer has definite plan for remaining permanently at place of reassignment. In re Gatchell, Dec State ***Tax*** Comm, TSB-H-84-(95)-I.

Determination of whether a serviceman maintains a permanent place of abode outside New York State is not dependent merely upon whether serviceman lives on or off a military base; other factors include type and location of quarters occupied by taxpayer and how and by whom such quarters are maintained, and further, the maintenance of place of abode by serviceman outside New York State generally will not be considered permanent if it is maintained only briefly during a duty assignment of temporary nature. In re Johnson, Dec St ***Tax*** Comm, TSB-H-85-(120)-I.

Income earned by taxpayer, while in military service, was subject to New York State personal income ***tax*** since taxpayer did not maintain permanent place of abode outside of New York State for entire year in issue. In re Quadrini, Dec St ***Tax*** Comm, TSB-H-86(152)-I.

Petitioner, who was domiciliary of New York at time he entered military service, was not subject to New York income ***tax*** for 1969, during which year, while in flight training, he lived in off-base housing as permanent place of abode outside New York, but was subject to ***tax*** in 1970 during which year he served in Vietnam and did not maintain permanent place of abode outside New York. In re Polanco, Op State ***Tax*** Comm, May 18, 1976.

Taxpayer, career naval officer, who was New York domiciliary prior to entry into Navy, and who has not resided in New York, been stationed in New York, maintained permanent place of abode in New York or spent more than 30 days in New York for ***tax*** years in question is resident individual where temporary or indefinite nature of his duty assignments from Navy prevented him from establishing permanent abode elsewhere. In re Lynch, Dec State ***Tax*** Comm, File #00514.

Taxpayer, who was resident of New York State at time he entered military service was domiciled in New York during year when he was stationed in Germany although he did not maintain permanent place of abode in New York where he did not maintain permanent place of abode outside New York and did maintain bank account at bank located in New York State. In re Tighe, Dec State ***Tax*** Comm, August 8, 1979.

31. —Military base quarters as permanent place of abode

Residence in bachelor officers quarters provided by military may constitute permanent place of abode outside of New York where quarters are maintained over sufficiently significant period of time to create well-settled physical connection with geographical area; taxpayer may establish permanent nature of quarters by submission of telephone bill and credit card evidencing private phone maintained by taxpayer in his quarters, automobile insurance policy issued at naval address, out-of-state medical license issued to taxpayer, evidence of checking account maintained out-of-state by taxpayer, and evidence of charitable services rendered out of state. In re Brazin, Dec State ***Tax*** Comm, TSB-H-83-(342)-I.

Residence in bachelor officers' quarters does not constitute maintenance of permanent place of abode unless such quarters are comparable to off-base housing, and New York domiciliary who resided in such quarters for more than ***2*** months did not maintain permanent place of abode outside New York State for ***tax*** year. In re Mannle, Dec State ***Tax*** Comm, TSB-H-84-(59)-I.

In absence of special factors, commission presumes that residence in military base domitory does not constitute permanent residence; accordingly, residence of New York domiciliary in base dormitory at Air Force base does not constitute maintenance of permanent place of abode outside of New York State. In re Ogrodnik, Dec State ***Tax*** Comm, TSB-H-84-(68)-I.

In absence of indicia of permanency, accommodations in military barracks do not constitute dwelling place permanently maintained by taxpayer; residence in military barracks is presumed to be temporary in nature unless presumption is rebutted by presence of significant factors tending to indicate that accommodations are permanent or that taxpayer reasonably regards such accommodations as permanent. In re Gatchell, Dec State ***Tax*** Comm, TSB-H-84-(95)-I.

Determination of whether a serviceman maintains a permanent place of abode outside New York State is not dependent merely upon whether serviceman lives on or off a military base; other factors include type and location of quarters occupied by taxpayer and how and by whom such quarters are maintained, and further, the maintenance of place of abode by serviceman outside New York State generally will not be considered permanent if it is maintained only briefly during a duty assignment of temporary nature. In re Johnson, Dec St ***Tax*** Comm, TSB-H-85-(120)-I.

32. —Ship quarters as permanent place of abode

Record, in proceeding to determine petitioner's income ***tax*** liability, contained substantial evidence to support the finding of the State ***Tax*** Commission that petitioner's domicile did not change from New York State in the year 1967, even though from the time of his graduation from the U. S. Merchant Marine Academy in New York on February 10, 1967, petitioner lived on board ship for remainder of year, even when the ship was in port, and even though he joined a union, rented a post office box and opened a bank account in New Jersey. *Starer v Gallman, 50 A.D.2d 28, 377 N.Y.S.2d 645, 1975 N.Y. App. Div. LEXIS 11422 (N.Y. App. Div. 3d Dep't 1975)*.

Evidence was sufficient to support State ***Tax*** Commission's determination which denied an application for a redetermination of a deficiency for New York personal income ***tax*** for the year 1967, which was filed by a seaman in the merchant marine who was assigned to a ship which sailed to and from New York City during the year 1967. *Oatman v State **Tax** Comm'n, 50 A.D.2d 1015, 377 N.Y.S.2d 659, 1975 N.Y. App. Div. LEXIS 12002 (N.Y. App.*

Div. 3d Dep't 1975), app. denied, *39 N.Y.2d 709, 1976 N.Y. LEXIS 3388 (N.Y. 1976)*, app. dismissed, *429 U.S. 1067, 97 S. Ct. 799, 50 L. Ed. 2d 785, 1977 U.S. LEXIS 486 (U.S. 1977)*.

Determination of whether a serviceman maintains a permanent place of abode outside New York State is not dependent merely upon whether serviceman lives on or off a military base; other factors include type and location of quarters occupied by taxpayer and how and by whom such quarters are maintained, and quarters assigned on vessels generally do not qualify as permanent places of abode maintained by serviceman, absent proof of significant special indicia of permanency; further, the maintenance of place of abode by serviceman outside New York State generally will not be considered permanent if it is maintained only briefly during a duty assignment of temporary nature. In re Johnson, Dec St ***Tax*** Comm, TSB-H-85-(120)-I.

33. —Returning to state after service

Petitioner, who was domiciliary of New York at time he entered military service, was not subject to New York income ***tax*** for 1969, during which year, while in flight training, he lived in off-base housing as permanent place of abode outside New York, but was subject to ***tax*** in 1970 during which year he served in Vietnam and did not maintain permanent place of abode outside New York. In re Polanco, Op State ***Tax*** Comm, May 18, 1976.

Taxpayer who was resident and domiciliary of New York until enrollment in United States Naval Academy, and who thereafter lived in various states and countries, was a resident of New York State during 1967 in accordance with ***Tax Law** § **605**(a)(1)* and 20 NYCRR 102.***2*** where, upon discharge from service in June, 1967, taxpayer obtained employment in New York and from October 29, 1967, his employer paid motel and living expenses in New York until taxpayer acquired his own home, even though taxpayer contended that he had purchased land in North Carolina where he ultimately intended to live. In re Missailidis, 1980 Dec State ***Tax*** Comm, Jan 11, 1980.

Taxpayer who has resided in New York since retiring from military must include his military retirement pay on his New York state ***tax*** return despite fact that he was resident of Indiana when he entered military service and never lived or was stationed in New York before or during his active duty. In re Deane, 1982 Dec of State ***Tax*** Comm, April 26, 1982.

34. —Miscellaneous

Taxpayers, who lived in Japan, which was their permanent place of abode, until October of 1968 at which time they moved to New Jersey and ceased being New York domiciliaries were not New York state residents within meaning and intent of ***Tax Law** § **605**(a)(1)* and § ***605***(***b***), where they had no permanent place of abode in New York during 1968 and did not spend more than 30 days in New York during that year. In re Martinuzzi, Op State ***Tax*** Comm, April 14, 1977.

B. **Nondomiciliaries**

35. Living in New York more than 183 days

When a nondomiciliary seeks treatment in New York for a serious illness, the time spent in a medical facility for the treatment of that illness should not be counted in determining whether such a nondomiciliary was a resident of the State for income ***tax*** purposes during such confinement; accordingly, decedent, a nondomiciliary who maintained a New York apartment for her occasional visits to New York, and who, during 1973, was confined in a New York hospital for 148 days and spent 67 days in her New York apartment, was not subject to New York State income ***tax*** for 1973, despite the facts that decedent's apartment was a permanent place of abode within the State and that she spent more than 183 days in the State in 1973. *Stranahan v New York State **Tax** Com., 68 A.D.2d 250, 416 N.Y.S.2d 836, 1979 N.Y. App. Div. LEXIS 10545 (N.Y. App. Div. 3d Dep't 1979)*.

Tax Commission properly determined that taxpayer was New York resident under *CLS **Tax** § **605*** although he was domiciled in Connecticut, where he worked 5 days per week in New York for 6 hours per day, for more than 183 days, and he maintained apartment in New York which qualified as permanent place of abode, since regulation defining "day" for purpose of 183-day requirement as "presence within New York for any part of a calendar day" was not irrational or unreasonable; thus, it was error for court, in Article 78 proceeding, to annul personal ***tax*** assessments imposed under CLS ***Tax*** Art 22 on ground that commission lacked power to define term "day" as period of time less than 24 hours. *Leach v Chu, 150 A.D.2d 842, 540 N.Y.S.2d 596, 1989 N.Y. App. Div. LEXIS 5448 (N.Y. App. Div. 3d Dep't)*, app. dismissed, app. denied, *74 N.Y.2d 839, 546 N.Y.S.2d 344, 545 N.E.2d 634, 1989 N.Y. LEXIS 2939 (N.Y. 1989)*.

Judgment which annulled determination of State ***Tax*** Commission sustaining personal income ***tax*** assessments reversed–Department of Taxation and Finance issued two notices of deficiency to decedent for three ***tax*** years; issues were whether decedent was New York resident for years in question and, if so, whether he was eligible for resident credit for ***taxes*** paid to another jurisdiction on income derived from other jurisdiction (***Tax Law** § 620 [a]*)–***Tax Law** § **605** (**b**) (1) (**B**)* includes as resident one who is not domiciled in this State but maintains permanent place of abode in this State and spends in aggregate more than 183 days of taxable year in this State; regulations define day as presence within State for any part of calendar day (20 NYCRR 102.***2*** [c]); decedent had worked five days per week in New York from 10:00 A.M. to 4:00 P.M.; while he was domiciled in Connecticut and usually returned to his home there after workday; he also maintained apartment in New York and used it approximately one night per week except in summer; on his ***tax*** returns, decedent stated that he worked 200, 192 and 192 days in New York for subject years–***Tax*** Commission properly defined day as "any part" of day; decedent was, accordingly, resident under ***Tax Law** § **605** (**b**) (1) (**B**)*–credit of ***Tax Law** § 620 (a)* on its face does not apply to decedent, given that he was resident under ***Tax Law** § **605** (**b**) (1) (**B**)* and since income at issue, dividends and capital gains from sale of securities, was not derived from Connecticut; imposition of ***tax*** does not violate Privileges and Immunities Clause; decedent was not being denied any benefits granted to New York residents; there is also no equal protection violation since decedent is considered resident and was treated no less favorably than other residents. *Leach v Chu, 150 A.D.2d 842, 540 N.Y.S.2d 596, 1989 N.Y. App. Div. LEXIS 5448 (N.Y. App. Div. 3d Dep't)*, app. dismissed, app. denied, *74 N.Y.2d 839, 546 N.Y.S.2d 344, 545 N.E.2d 634, 1989 N.Y. LEXIS 2939 (N.Y. 1989)*.

Imposition of personal income ***tax*** on income from intangibles pursuant to *CLS **Tax** § **605**(**b**)(1)(**B**)* does not violate CLS *NY Const Art XVI § 3*; taxpayers are not ***taxed*** on ownership located in New York nor are their intangibles ***taxed*** on ad valorem basis, but rather they are ***taxed*** based on income generated by those intangibles. *Tamagni v **Tax** Appeals Tribunal, 230 A.D.2d 417, 659 N.Y.S.2d 515, 1997 N.Y. App. Div. LEXIS 6712 (N.Y. App. Div. 3d Dep't 1997)*, aff'd, *91 N.Y.2d 530, 673 N.Y.S.2d 44, 695 N.E.2d 1125, 1998 N.Y. LEXIS 1071 (N.Y. 1998)*.

Taxpayers' daily diary did not sustain their burden of establishing that they spent fewer than 184 days in state during year where each review of diary had yielded different total number of days, and taxpayers offered no documentary evidence to support their contention that "blank" days in diary represented days spent in Connecticut. *Wachsman v New York State Comm'r of Taxation & Fin., 241 A.D.2d 708, 660 N.Y.S.2d 462, 1997 N.Y. App. Div. LEXIS 7444 (N.Y. App. Div. 3d Dep't 1997)*.

Petitioners were statutory residents of New York within meaning and intent of ***Tax Law** § **605**(a)(**2**)*, where, although they were domiciliaries of Connecticut, they maintained permanent place of abode within New York, spent more than 183 days in New York in each year in question. In re Hodge, Op State ***Tax*** Comm, March 7, 1977.

Taxpayers who were domiciled in Michigan were residents of New York pursuant to ***Tax Law** § **605**(a)(**2**)*, thus making all income taxable to New York, where husband was executive of company, worked in New York office, spent excess of 183 days in New York in each year at issue, and sublet apartment in New York which was permanent place of abode for taxpayers. In re Foley, Op State ***Tax*** Comm, April 14, 1977.

Although taxpayers changed their domicile in July, they were New York residents for the entire taxable year, because they did not sell their New York home until the next year, thereby having spent more than 183 days in New York and maintained a permanent place of abode for the entire year in New York. In re Smith, Op State ***Tax*** Comm, June 24, 1977.

Taxpayer who had a vacation apartment in New York, and who was involuntarily in New York for 183 days in year because she was confined to a New York hospital, was a resident of New York for ***tax*** purposes. In re Holmyard, Op State ***Tax*** Comm, July 6, 1977.

Taxpayer who maintained apartment in state for storage of furniture and for use during frequent business trips to state is resident individual of state within meaning and intent of ***Tax Law*** *§* ***605****(a)(****2****)* where taxpayer failed to keep and have available for examination by ***Tax*** Commission, adequate records to substantiate claim that he did not spend more than 183 days within state. In re Peralta-Ramos, Dec State ***Tax*** Comm, September 21, 1979.

Petitioner maintained permanent place of abode in New York State, since his stay was for unspecified duration and he spent more than 183 days in state; therefore he was resident and subject to income ***tax***. In re Covington, Dec State ***Tax*** Comm, August 12, 1980.

A taxpayer who is not domiciled in New York but maintains a permanent place of abode in New York and spent in the aggregate more than 183 days in New York during ***tax*** year is a resident of New York State for income ***tax*** purposes pursuant to ***Tax Law*** *§* ***605****(a)(****2****)*. In re Melvin, 1981 Dec St ***Tax*** Comm, December 3, 1981.

Where individual is domiciled outside New York State for entire taxable year, maintains permanent place of abode in New York State for only portion of taxable year and spends in aggregate more than 183 days in New York State during taxable year, individual is not considered New York State resident individual, pursuant to CLS ***Tax*** *L §* ***605****(****b****)(1)(****B****)*, for such taxable year. 1988 New York State Dept. of Taxation & Finance ***Tax*** Advisory Opinion, TSB-A-88-(16)-I (Income ***Tax***).

Nondomiciliary taxpayers failed to sustain their burden to prove that they were in New York less than 184 days in particular year where neither one testified as to their whereabouts on specific days, one could not remember where he was on specific days, sole documentary evidence offered by them with respect to their daily activities were inconsistent summary schedules, and they did not offer specific testimony from individual or individuals who prepared summary schedules to explain how they were prepared. NY ***Tax*** Appeals Tribunal TSB-D-95-(31)I.

Neither *CLS* ***Tax*** *§* ***605****(****b****)(1)* nor § 1305(a) violated Commerce Clause of United States Constitution or CLS *NY Const Art XVI § 3* as applied to nondomiciliary taxpayers, who maintained permanent place of abode in New York City and who spent in excess of 183 days in New York City during years at issue. NY ***Tax*** Appeals Tribunal TSB-D-97(5)I.

Taxpayer did not show that she had not spent more than 183 days in New York State and New York City during years in issue solely by her testimony as to the general pattern of activity. NY ***Tax*** Appeals Tribunal TSB-D-97(9)I.

36. Living in New York for 183 or fewer days

Petitioners who moved out of New York State in July of 1967 could not qualify as residents for the entire year under definition contained in ***Tax Law*** *§* ***605***, subd a(***2***). *Kritzik v Gallman, 41 A.D.2d 994, 344 N.Y.S.2d 107, 1973 N.Y. App. Div. LEXIS 4369 (N.Y. App. Div. 3d Dep't 1973)*.

Taxpayers who moved from state in July of 1967 and did not maintain a residence in the state after that time clearly fell within the provisions of ***Tax Law*** *§ 654* rather than ***Tax Law*** *§* ***605***, subd a(***2***). *Kritzik v Gallman, 41 A.D.2d 994, 344 N.Y.S.2d 107, 1973 N.Y. App. Div. LEXIS 4369 (N.Y. App. Div. 3d Dep't 1973)*.

Petitioner was nonresident of New York State for entire taxable year 1975, where, inter alia, (1) he had leased an apartment in Florida beginning in 1969, (***2***) he and his wife moved most of their furniture to Florida, but gave remaining furniture to their daughter who continued to reside in an apartment in New York State which the family had occupied for many years, (3) he executed a will in 1967 in which he characterized himself as Florida resident, (4) he registered to vote in Flordia on July 1, 1975, (5) he and his wife filed joint ***tax*** returns with Florida Department of Revenue for 1975, 1976, and 1977, stating on each return that they had moved to Florida in November, 1974, and (6) he and his wife stated that they spent approximately 22 days in New York State during 1975 and that during

these visits they stayed at their summer house which was otherwise used during summer season by their son and daughter. In re Leibman, 1983 Dec State ***Tax*** Comm, TSB-H-83(120)I, June 13, 1983.

Professional hockey player who has place of abode in New York state which is maintained only during tempporary stay during hockey season is not deemed to be state resident since place of abode is not permanent; New York place of abode is not permanent where taxpayer maintains checking accounts and home in foreign country and does not obtain New York driver's license, does not vote in New York, and has not applied for or received United States citizenship. In re MacMillan, Dec State ***Tax*** Comm, TSB-H-84-(67)-I.

Domiciliary of another state will not become resident of New York for purposes of personal income ***tax*** by virtue of purchase of vacation home in New York if vacation home constitutes mere camp or cottage which is suitable and used only for vacations; if home is more substantial in nature and does constitute permanent place of abode, its purchase does not by itself render taxpayer resident for purposes of income ***tax*** unless such taxpayer in addition spends more than 183 days of taxable year in New York. In re Nimmannit, Op State ***Tax*** Comm, January 19, 1981 (Advisory Opinion No. 1801030 ***B***).

Maine domiciliary who had an apartment in New York used only for business and recreational purposes, and who spent less than 183 days in New York was not a New York resident. In re Combemale, Op State ***Tax*** Comm, July 29, 1977.

Sixty-eight year old bachelor who worked 110 of 240 working days within New York state, who applied for and was granted permanent residence status in Switzerland, and who resided while in Switzerland at a hotel which always held a suite available for him was not a resident of New York state for ***tax*** purposes. In re Heymans, Op State ***Tax*** Comm, September 29, 1977.

Taxpayers, husband and wife, who filed joint New York State income ***tax*** resident return for 1970, on which they listed their period of New York residence as "from January 1, through January 5, 1970" and who spent less than 183 days within New York State during taxable year at issue were not "resident individuals" of New York State within meaning and intent of § ***605*** subsequent to January 5, 1970 where husband left New York for Montreal, Canada to commence his duties as president of corporation despite fact that wife remained in New York until June of 1970 for express purpose of allowing children to complete school year since ordinarily wife's domicile follows that of her husband. In re Mulholland, 1979 Dec. State ***Tax*** Comm, December 14, 1979.

Petitioner, retired chiropodist and owner of various casinos and nightclubs in Las Vegas, is not a resident of New York in the years in question where petitioner resided in Nevada and derived all of his income from Nevada sources, and where his only contact with New York was an apartment which he rented year round but visited only a few weeks a year and a bank account which he kept in a New York City bank. In re Lewis, 1980 Dec St ***Tax*** Comm, Jan. ***2***, 1980.

Petitioner was not resident of New York where he had previously been resident of Connecticut, sold house in Connecticut, moved to Zambia for business purposes only, and used company furnished apartment in New York as United States address. In re Vuillequez, Dec State ***Tax*** Comm, Aug 25, 1980.

Although petitioner maintained permanent abode in New York, and spent more than 30 days and less than 183 days in state she was nonresident; petitioner's domicile was that of her husband who was not citizen of United States and did not evince an intention to make New York his home. In re Iervolino, Dec State ***Tax*** Comm, July 21, 1980.

Taxpayer, employee of international oil company who spent nearly 40 years working throughout world on various employment assignments, did not become resident of New York when he was assigned to state temporarily awaiting another overseas assignment nor did such subsequent overseas assignment amount to merely temporary removal from state for limited period of employment where taxpayer, upon leaving state, intended to spend remainder of his natural life elsewhere, he did not own property in state nor did he rent, lease or own any apartment in state and he had never voted in state in any city, state or federal elections and during year in question taxpayer spent total of 135 days in state. In re Walstow, 1979 Op ***Tax*** St Comm, March 15, 1979.

Affirming the decision of the Administrative ***Law*** Judge that petitioner changed his domicile from New York to Florida, the Tribunal rejected the ***Tax*** Division's argument that petitioner failed to keep sufficient records to show that he was not present in New York for greater than 183 days for each of the ***tax*** years at issue. The testimony of petitioner was that he was in New York "certainly less than 100 days per year" and more likely visited New York no more than 60 to 75 days per year. Telephone bills in petitioner's name revealed that outgoing calls were placed from petitioner's Florida condominium on 164 different days over a period of 11 months in 1981 and on 187 different days over a period of 10 ½ months in 1982. The bills corroborate petitioner's testimony as to his time spent in Florida and together with his testimony formed a sufficient basis to conclude that petitioner was not present in New York for greater than 183 days for each of the ***tax*** years at issue. NY ***Tax*** Appeals Tribunal TSB-D-90 (34) I (1990).

Taxpayers adequately substantiated their claim that they did not spend more than 183 days at their permanent place of abode in New York, despite absence of diaries or detailed records of their day-to-day whereabouts, where their accountant analyzed checks, utility and telephone bills, bank statements, travel itineraries and credit card statements, and prepared summaries outlining petitioners' whereabouts for each day during years at issue. NY ***Tax*** Appeals Tribunal TSB-D-94-(7)I.

Taxpayer failed to show that he had spent fewer than 183 days in New York, despite occupying residence in New Jersey, where business address of his employer and partnerships with which he was associated were in New York, he received wage income from New York employer and made no attempt to explain his relationship with business, and he offered little proof that he was not present in New York on at least 183 days other than his own testimony, which was not credible. NY ***Tax*** Appeals Tribunal TSB-D-95-(5)I.

Computer printout submitted by taxpayers entitled "NYS Diary of Days In & Out of NYS" was not, in fact, diary in support of showing actual days in and out of New York since there was no indication as to when document was prepared, and taxpayer admitted that it was merely "the best of my recollection, just an attempt at it." NY ***Tax*** Appeals Tribunal TSB-D-99-(1)I.

Absent corroborating documentary evidence, testimony of taxpayer, his business associates, and his wife's cousin, standing alone, was insufficient to show that taxpayers spent fewer than 183 days in New York for year in question. NY ***Tax*** Appeals Tribunal TSB-D-99-(1)I.

C. Estates and Trusts

37. Generally

Request to transfer situs of two trusts to Delaware was denied where the testator and the grantor had expressed an intent that the trusts be New York trusts, and the trustees' goal of avoiding New York income ***tax*** was achieved by *N.Y. **Tax Law** § **605**(**b**)(3)(D)*, by which a New York resident trust was treated as a non-resident trust for ***tax*** purposes. *In re Bush, 774 N.Y.S.2d 298, **2** Misc. 3d 744, 2003 N.Y. Misc. LEXIS 1640 (N.Y. Sur. Ct. 2003)*.

Trust executed in Connecticut by New York State domiciliary, which by its terms is to be administered under Connecticut ***law***, may properly be ***taxed*** by New York State as a resident trust, because a substantial portion of the trust property is located in New York State and because a majority of the trustees reside within New York State. In re John Frankel Trust, Dec State ***Tax*** Comm, September 5, 1980.

The residence of an irrevocable inter vivos trust may not change; thus, such a trust established in New York State is a resident trust for ***tax*** purposes notwithstanding that the trust corpus, beneficiaries and trustees have all removed from New York State. In re Cole Trust L. ***2***, 1982, Dec State ***Tax*** Comm, Nov. 24, 1982.

Opinion Notes

Agency Opinions

I. In General

1. Generally

Intent of *CLS **Tax** § **605**(c)*—to assure that donations of money, objects of value or time to not-for-profit organization may not be used by Department of Taxation and Finance in determining resident status—is consistent with longstanding departmental policy that charitable donations are not considered in determining domicile for New York state personal income ***tax*** purposes. NY Adv Op Comm T & F TSB-A-95(***2***)I.

Activities of nonresident individual in donating objects of value, as well as additional funds, to not-for-profit organization in order to establish private museum, may not be considered in making any determination regarding individual's domicile where organization qualified as ***tax***-exempt organization under *Internal Revenue Code § 501(c)(3)*; moreover, contributions of additional funds by individual to trust which is sole shareholder of organization, and concomitant contribution of capital by trust to organization, as well as individual's donation of uncompensated time on behalf of both entities as liaison with organization, may not be considered in such context since, under trust agreement, organization will be ultimate beneficiary of such gifts and activities. NY Adv Op Comm T & F TSB-A-95(***2***)I.

II. Domicile

A. Adoption of New York Domicile

2**. Particular circumstances**

When individual (who is not domiciled in New York) purchases cooperative apartment in New York, apartment will be permanent place of abode under *20 NYCRR § 105.20(e)*, even if it will be vacant portion of taxable year, and thus individual will be considered resident of New York under *CLS **Tax** § **605**(**b**)* and *20 NYCRR § 105.20(a)*, and will be subject to personal income ***tax***, for any taxable year he maintains permanent place of abode for substantially all of taxable year, and spends aggregate more than 183 days of taxable year in state. NY Adv Op Comm T & F TSB-A-94(14)I.

Residency audit guidelines of Department of Taxation and Finance note that residence maintained by one individual but used exclusively by another should not be deemed permanent place of abode for individual who maintains it. NY Adv Op Comm T & F TSB-A-95(3)I.

B**. Abandonment of New York Domicile**

3. Interstate relocations; factors affecting—In general

4. —Miscellaneous

Taxpayer's abode in New Jersey from August 1998 to May 1999 was not considered permanent place of abode because he was on temporary assignment for particular purpose, and, likewise, his assignment in Washington D.C. from June 1999 to August 1999 was temporary assignment for particular purpose; thus, for portion of 1998 and 1999 at issue, when taxpayer was not considered nonresident of New York State under 548 day rule under *CLS **Tax** § **605**(a)(A)(ii)*, he did not meet condition of *CLS **Tax** § **605**(**b**)(1)(A)(i)* that he maintain permanent place of abode outside New York State. NY Adv Op Comm T & F TSB-A-01-(4)I.

Petitioners did not maintain permanent place of abode in New York state for substantially all of taxable year, and thus were part-year residents up to date they changed their domicile to Florida, where, inter alia, they moved all of their household furnishings, clothing and other tangible personal effects to their new home in Florida on August 17 and, after that date, their New York house and all its contents were listed for sale. NY Adv Op Comm T & F TSB-A-97-(3)I.

III. Residence for *Tax* Purposes

A. Domiciliaries

5. No abode in state, abode elsewhere, and not present 30 days in state

As long as individual who is domiciled in New York State continues to meet requirements of either paragraph (1) or paragraph (***2***) of Income ***Tax*** Regulations § 102.***2***(***b***), he or she will be considered nonresident for income ***tax*** purposes; where individual domiciled in New York State claims to be nonresident for any taxable year, such individual has burden to show that during that year he or she satisfied aforementioned requirements. NY Adv Op Comm T & F TSB-A-90-(4)I.

Burden is on taxpayer to prove number of days he was present in foreign country for purposes of "548 day rule" under *CLS **Tax** § **605**(**b**)(1)(ii)*; hotel receipts, airline ticket receipts, and military orders would be type of proof that would be relevant. NY Adv Op Comm T & F TSB-A-90-(11)I.

6. Military personnel—Maintenance of contacts with state

7. —Ship quarters as permanent place of abode

Petitioner was nonresident of New York State for personal income ***tax*** purposes where he had sold his New York home and began living on boat situated in Maine, whereupon he and his family sailed from United States and had not returned, and he had not maintained permanent place of abode in New York for any taxable year, had not spent more than 30 days of any year in New York State, and had maintained permanent place of abode outside New York State. NY Adv Op Comm T & F TSB-A-98-(1)I.

Determination of whether serviceman maintains permanent place of abode is not dependent merely upon whether serviceman lives on or off military base, and other factors include type and location of quarters occupied by individual and individual's immediate family, and how and by whom such quarters are maintained; further, maintenance of place of abode by serviceman will not be considered permanent if it is maintained only during duty assignment of limited or temporary nature. NY Adv Op Comm T & F TSB-A-90-(4)I.

***B*. Nondomiciliaries**

8. Living in New York more than 183 days

Individual was not New York domiciliary and would be nonresident of New York State for taxable years during which her presence in New York State was maintained in nursing home since individual's presence in New York State was not result of her own intent and decision but due to physical or mental incapacity. NY Adv Op Comm T & F TSB-A-91-(10)I.

Taxpayer would be nonresident individual of New York state for duration of his 4-year employment contract, even though he would spend more than 183 days of each taxable year in New York, where he would keep his home in Nebraska where his wife would continue to live, he would file federal income ***tax*** return with his Nebraska address, he would vote in Nebraska and maintain his Nebraska driver's licence, he would retain all significant bank accounts and his safety deposit box in Nebraska, he would retain his Nebraska address for all other personal items such as credit card billings and his passport address, he would be given use of company apartment in New York, and on expiration of contract in 4 years or less, he would retire, resign his employment, and return to Nebraska. NY Adv Op Comm T & F TSB-A-94(3)I.

Petitioners would be subject to ***tax*** for taxable year 1989 as statutory residents of New York state under *CLS **Tax** § **605**(**b**)(1)*, regardless of change of domicile to another state during year, where they maintained permanent place of abode in state for entire year and they spent in aggregate more than 183 days of year in state. NY Adv Op Comm T & F TSB-A-94(9)I.

Taxpayer would be nonresident individual of New York State for duration of his 4-year employment contract, even though he might spend more than 183 days of each taxable year in New York, where he would keep his home outside state, he would maintain another office outside state, and he would have use of furnished apartment in New York provided by his New York employer. NY Adv Op Comm T & F TSB-A-94(15)I.

Taxpayer domiciled in Tennessee, who was present in New York solely to care for her 14-year-old son during school year when he attended orthodox religious high school in New York, would not be deemed to be statutory resident of New York under *CLS **Tax** § **605(b)**(1)(**B**)* even though she would spend more than 183 days per year in New York, but would continue to be considered nonresident and file nonresident return. NY Adv Op Comm T & F TSB-A-97-(8)I.

Employees of multinational bank would be deemed residents of New York State under *CLS **Tax** § **605(b)*** for duration of employees' temporary assignment to work in New York State if employees maintained permanent place of abode in New Yoork State for substantially all of taxable year and they spent in aggregate more than 183 days of taxable year in New York. NY Adv Op Comm T&F TSB-A-98(10) I.

9. Living in New York for 183 or fewer days

Admittance of petitioner's wife to nursing home in New York would not cause her to be considered resident of New York for personal income ***tax*** purposes, even though she and her husband owned and occasionally used apartment in New York, since any day spent in such facility would not count for purposes of 183-day rule under *CLS **Tax** § **605(b)**(1)* and *20 NYCRR § 105.20(a)*. NY Adv Op Comm T & F TSB-A-06-(6)I.

C. Estates and Trusts

10. Generally

Complex inter vivos trust was resident trust of New York under *CLS **Tax** § **605(b)**(3)(C)* and *20 NYCRR § 105.23* where it consisted of property of person domiciled in New York state when such property was transferred to trust, and trust was irrevocable. NY Adv Op Comm T & F TSB-A-94(7)I.

Fact that trust is deemed resident trust of New York under *CLS **Tax** § **605(b)**(3)(C)* and *20 NYCRR § 105.23* does not ipso facto mean that it is subject to New York state personal income ***tax*** under CLS ***Tax*** Art 22. NY Adv Op Comm T & F TSB-A-94(7)I.

Three conditions contained in *20 NYCRR § 105.23(c)* were met, and thus no New York state personal income ***tax*** would be imposed on complex inter vivos trust for years 1990, 1991, and 1992, despite fact that trust would be deemed New York resident, where (1) petitioner was sole trustee of trust, he sold his New York home in 1985 and became domiciled in Connecticut, and he changed his domicile to Colorado in 1991, (***2***) corpus of trust consisted solely of intangibles, and such cash, securities and federal government obligations were held by trust company in New York, and (3) no assets were employed in business carried on in New York, and all income and gains were derived from sources outside state, determined as if trust were nonresident. NY Adv Op Comm T & F TSB-A-94(7)I.

Situs of intangible assets of trust are deemed to be at domicile of trustee, even if such assets are held by trust company located in New York. NY Adv Op Comm T & F TSB-A-94(7)I.

No New York city personal income ***tax*** authorized under CLS ***Tax*** Art 30 would be imposed on complex inter vivos trust for years 1990, 1991, and 1992, despite fact that trust would be deemed New York resident, where trust met 3 conditions contained in *20 NYCRR § 105.23(c)* and no state personal income ***tax*** would be imposed. NY Adv Op Comm T & F TSB-A-94(7)I.

Trust was resident trust under *CLS **Tax** § **605(b)**(3)(c)* where it consisted of property of person domiciled in New York State at time such property was transferred to trust, and when trust became irrevocable. NY Adv Op Comm T & F TSB-A-96(4)I.

No New York State personal income ***tax*** would be imposed on resident trust for those years in which all trustees were domiciled outside New York State, corpus of trust consisted of intangible assets, none of assets of trust were employed in business carried on in New York State, and all income and gains of trust were derived from sources outside New York State, determined as if trust were nonresident. NY Adv Op Comm T & F TSB-A-94(4)I.

Testamentary trust created under last will and testament of Florida domiciliary and resident, to be funded primarily with Florida assets, is nonresident trust under *CLS **Tax** § **605(b)**(4)*, even though its principal place of business and location of trust records was to be in New York state. NY Adv Op Comm T & F TSB-A-96-(***2***)I.

Trust, consisting of property of individual who was domiciled in New York State at time such property was transferred to trust, and when trust became irrevocable, was resident trust of New York under *CLS **Tax** § **605(b)**(3)(c)*; however, no New York State personal income ***tax*** would be imposed on such trust for years when trustee was domiciled outside New York State, corpus of trust consisted of intangible assets, situs of which were deemed to be at trustee's domicile, and none of trust assets were employed in business carried on in New York State and all income and gains of trust were derived from sources outside New York State, determined as if trust were nonresident. NY Adv Op Comm T & F TSB-A-00-(***2***)I.

Research References & Practice Aids

Cross References:

This section referred to in §§ 639, 657.

Codes, Rules and Regulations:

Accounting periods and methods and resident defined. *20 NYCRR §§ 105.1* et seq.

Federal Aspects:

Tax on nonresident aliens, *26 USCS §§ 871* et seq.

Jurisprudences:

100 NY Jur 2d Taxation and Assessment §§ 1203, 1204.

71 Am Jur 2d, State and Local Taxation §§ 512 et seq.

Matthew Bender's New York Civil Practice:

1 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶¶ 102.01, 103.18; 4 Cox, Arenson, Medina, *New York Civil Practice: SCPA ¶1610.03*.

2 Rohan, New York Civil Practice: EPTL ¶¶ 3-4.6, 3-5.1.

Matthew Bender's New York Practice Guides:

1 *New York Practice Guide: Business and Commercial § 1.09*.

State Notes

Research References & Practice Aids

Hierarchy Notes:

*NY CLS **Tax**, Art. 22*

*NY CLS **Tax**, Art. 22, Pt. I*

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STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **DAVID AND KAREN SOBOTKA** for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2008.	ORDER DTA NO. 826286

Petitioners, David and Karen Sobotka, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2008.

On April 24, 2015, petitioners, appearing by Hodgson Russ LLP (Timothy P. Noonan, Esq., of counsel), filed a motion seeking summary determination in their favor pursuant to 20 NYCRR 3000.5 and 3000.9(b). Accompanying the motion was the affidavit of Timothy P. Noonan, Esq., dated March 27, 2015, and annexed exhibits in support of the motion. On May 24, 2015, the Division of Taxation, appearing by Amanda Hiller, Esq. (Michelle M. Helm, Esq., of counsel), filed a responding brief in opposition to the petitioners' motion. Petitioners requested and received permission, pursuant to 20 NYCRR 3000.5(b), to submit a reply to the Division's response, and did so on June 2, 2015, which date commenced the 90-day period for issuance of this order. After due consideration of the affidavit and documents submitted in support of the motion, the response thereto, the reply to the response, and all pleadings filed in this matter, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether, because petitioners were domiciliaries of New York State and New York City and were thus taxable as residents thereof for a portion of the year 2008, the Division of Taxation (Division) is precluded pursuant to the terms of Tax Law § 605(b)(1)(B) from holding petitioners subject to taxation as "statutory" residents of New York State and New York City for the remaining portion of the year 2008.

FINDINGS OF FACT[1]

1. For the year 2008, petitioners, David and Karen Sobotka, jointly filed a New York State and New York City Nonresident and Part-Year Resident Income Tax Return (Form IT-203). Thereafter, they filed an Amended Nonresident and Part-Year Resident Income Tax Return (Form IT-203-X) for such year. On such returns petitioners reported a change of domicile to New York State and City as of August 18, 2008.

2. On March 20, 2014, the Division issued to petitioners a Notice of Deficiency (L-040851299) asserting additional New York State and New York City personal income tax in the amount of $1,063,803.00 for the year 2008, plus interest.

3. The foregoing Notice of Deficiency was issued under the assertion that petitioner David Sobotka became domiciled in New York State and New York City beginning in October of 2007, and was both a statutory resident and a domiciliary of New York State and New York City for the year 2008.

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[1] Petitioner Karen Sobotka's name appears herein by virtue of the fact that she filed a joint part-year resident personal income tax return with her husband, petitioner David Sobotka, for the year 2008. While both Mr. and Mrs. Sobotka are petitioners herein, the Division has taken the position that only petitioner David Sobotka was subject to tax as a full-year resident for the year 2008. Unless otherwise specified or made necessary by context, references to petitioner or to petitioners herein shall mean petitioner David Sobotka.

4. The Division has since concluded and the parties agree that petitioner was only domiciled in New York State and New York City from August 18, 2008 to December 31, 2008, as reported on his returns. As a consequence, the deficiency is now based solely on the Division's assertion that petitioner was also subject to tax as a statutory resident of New York State and New York City during the 2008 calendar year.

5. Petitioners filed a timely petition, challenging the foregoing notice and alleging that David Sobotka cannot be subjected to tax as a "statutory" resident because:

> a) he did not maintain a "permanent" place of abode in New York State or New York City, i.e., that his relationship to a hotel room maintained by his employer while he was assigned to New York on a temporary basis was impermanent by its very nature and lacked the "permanence" required under the Tax Law, and
>
> b) the "statutory" resident provision in the Tax Law (Tax Law § 605[b][1][B]) only applies to taxpayers who are "not domiciled in New York," and since it is undisputed that Mr. Sobotka was domiciled in New York during 2008, one of the three requirements of the statutory resident test is not met.

6. Petitioners acknowledge that the first argument set forth above, at Finding of Fact 5(a), is not part of the subject motion for summary determination, given the factual questions inherent in such argument. Thus, petitioners' motion pertains only to the second argument set forth above, at Finding of Fact 5(b), with respect to which there are no facts in dispute.

CONCLUSIONS OF LAW

A. Tax Law § 605(b) defines the terms "resident," "nonresident," and "part-year resident."[2] Pursuant to Tax Law § 605(b), a resident individual is defined as follows:

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[2] The noted terms are defined in identical manner for both New York State and New York City purposes, save for the substitution of the term "City" for "State" in each case (***compare*** Tax Law § 605[b]; Administrative Code of City of New York § 11-1705[b]). Unless otherwise specified or required by context, statutory citations for New York State purposes herein shall also include New York City (without reference or parallel citation to the New

> "(1) Resident individual. A resident individual means an individual:
>
> (A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .
>
> (B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in the active service in the armed forces of the United States."

The latter portion of the foregoing statutory language, Tax Law § 605(b)(1)(B), is commonly referred to as the "statutory resident" provision.

B. A nonresident individual is defined as an individual who is not a resident or a part-year resident (Tax Law § 605[b][2]).

C. A part-year resident is defined as individual who is not a resident or a nonresident for the entire taxable year (Tax Law § 605[b][5]).[3]

D. Petitioner's filing position is that he was a resident for only a part of 2008, and specifically that he was taxable as such only for the portion of 2008 commencing when he established his domicile in New York (August 18, 2008) and continuing through the end of 2008 (hereinafter "the later period"). In turn, and by his filings, petitioner claims he was a nonresident for the preceding portion of 2008 (from January 1, 2008 through August 17, 2008), upon the position that he did not meet all three of the criteria for being a statutory resident for such period (hereinafter "the earlier period"). The Division agrees that petitioner was properly taxable as a

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York City Administrative Code).

[3] The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State or City (as relevant) source income, whereas residents are taxed on their income from all sources (***see Matter of Tamagni v. Tax Appeals Tribunal of State***, 91 NY2d 530 [1998], ***cert denied*** 525 US 931; ***Matter of Robertson***, Tax Appeals Tribunal, September 23, 2010).

resident on the basis of his New York domicile for the later period. However, the Division challenges petitioner's claim of nonresident status for the earlier period, maintaining that petitioner was subject to tax as a "statutory resident" pursuant to Tax Law § 605(b)(1)(B). If correct, the Division's position negates petitioner's claim of being a part-year resident, and results in petitioner being a resident, for tax purposes, for the entire year 2008, albeit on two differing bases, i.e., statutory resident basis (for the earlier period) and domicile basis (for the later period).

E. Petitioner's position on this motion is succinct. Petitioner maintains that: a) because a statutory resident is directly defined as an individual who is *not* domiciled in New York, and b) because the Division has agreed that he *was* domiciled in New York for a portion of the year 2008, then the Division is precluded from subjecting him to taxation as a statutory resident for that same year (and thereby taxing him as a resident for the entire year). Thus, according to petitioner, even if the evidence were to show that he spent more than 183 days in New York and maintained a permanent place of abode in New York in 2008, he still may not be subjected to New York tax as a statutory resident for any part of that year because the first of the three criteria for statutory resident status (that the taxpayer is *not* a domicilliary of New York) has not been met.

F. Tax Law § 605(b)(5) anticipates circumstances where a taxpayer may be taxable as a resident for only a portion of a given year, i.e., a "part-year resident," and defines a part-year resident to be an individual who is not a resident or a nonresident for the entire year. Petitioner claims this status. The question, as framed on this motion, is whether an individual who files and claims part-year resident status may nonetheless be held taxable as a resident for each of two separate periods during a single year, and thus be subject to tax as a resident for that entire year.

G. To answer the foregoing question, one must determine the propriety of a taxpayer's claimed split status as a part-year resident and as a part-year nonresident by reviewing the

particular facts for each of the discrete periods during which such differing status is claimed. Here, the parties agree that petitioner is subject to tax as a resident, on the basis of domicile, for the later period. For the earlier period, however, the parties disagree over whether petitioner met each of the *three* statutory criteria for being subjected to taxation as a statutory resident during such period. Since there is no claim by either party that petitioner was a domiciliary of New York during the earlier period, it follows that petitioner may indeed, as a nondomiciliary for such discrete period, be subjected to tax as a resident *if* the evidence adduced at hearing shows that he maintained a permanent place of abode in New York and was present in New York for the requisite number of days during such discrete period. As a consequence, petitioner would be taxable as a resident for the entire year, notwithstanding his filing claim to the contrary. That is, for each of the discrete claimed periods involved, petitioner would meet the defined status of "resident" under Tax Law § 605(b)(1)(A) and (B), respectively. As a result, he would not meet the definition of "nonresident" (Tax Law § 605[b][2] ["an individual who is not a resident or a part-year resident"]). Further, having met the criteria for being a "resident" for each of the two discrete periods (comprising together the entire year), he would not meet the definition of "part-year resident" (Tax Law § 605[b][5] ["an individual who is not a resident or a nonresident for the entire year"]). While the statutory definition of "resident" is phrased in the disjunctive (i.e., either a domicile-based resident [Tax Law § 605(b)(1)(A)] *or* a "statutory" based resident [Tax Law § 605(b)(1)(B)],) such definition does not result in mutual exclusion in the context of analyzing taxable status where a taxpayer claims a different taxable status for each of two separate and discrete portions of the same year, as is the case here. Instead, and as outlined above, the statutory definitions are to be applied separately to each of such claimed discrete portions within the year. In sum, if the evidence shows that petitioner met the criteria for being a statutory resident for the earlier portion of 2008, then

under the statutory framework and by process of elimination, he will be taxable as a resident for the entire year.

H. As noted, for 2008 petitioner admittedly meets the literal definition of a resident individual under Tax Law § 605(b)(1)(A), i.e., one who is domiciled in this state, though only for the latter period beginning as of August 18, 2008. Under prior law, petitioner would have simply been subject to tax as a resident for the entire year because he resided in New York during the last six months of the calendar year (***see*** Tax Law former § 350[7]). Deeming this result "too drastic," the Legislature amended the Tax Law in 1922, effectively providing for "part-year resident" status (***see*** Tax Law former 357-a [L 1922, ch 425]). Under this amendment, and in cases such as the present where a taxpayer became domiciled in New York and thus became subject to tax as a resident partway through the year, he could file two tax returns so as to be taxable as a resident only for the part of the year after he took up his New York domicile (***see*** Recommendation of Approval, Bill Jacket, L 1922, ch 425, at 5).[4] The purpose of the foregoing amendment was to "make it possible to adjust equitably and ratably the tax upon persons changing their residence, allowing them to be taxed as residents for the time they actually were residents, and as nonresidents, for the time they were nonresidents" (Assembly Mem In Support, Bill Jacket, L 1922, ch 425, at 3). After such amendment, a taxpayer could (and here does) claim the status of a nonresident and thus be taxable only to the extent allowed under such status for the non-New York-domiciled balance of the year (here the earlier period). Such a *claim* of nonresident status for part of a year is clearly not immune to challenge by the Division, however, and the challenge question here devolves to whether, *for such claimed nonresident period*, the taxpayer (despite his

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[4] This manner of filing would likewise be available in instances where a taxpayer leaves New York, abandons his New York domicile and establishes a new domicile in another state partway through the year.

claim to the contrary) fulfills the three criteria upon which he would be properly subject to taxation as a statutory resident for such nondomiciled period.

I. The foregoing conclusion is consistent with Tax Law § 605(b)(1)(A) and (B), and its "either/or" disjunctive definition of "resident," as well as with the Legislative aim and intent to enable "equitable" (or ratable) taxation based upon a person's "actual" connection with New York. Under the reasoning advanced by petitioner herein, one could effectively eliminate the Division's right to challenge a claimed nonresident filing status for a portion of a year. A taxpayer could, for example, frustrate the Legislature's aim and intent by the simple expedient of changing domicile to New York late in the year (or out of New York early in the year), thereby relegating the balance of the same year beyond scrutiny due to the simple fact that the taxpayer had been domiciled in New York for some portion of the year. Petitioner's premise that being a domicile-based resident for any portion of a year precludes one from being a "statutory" resident for any other portion of the same year is thus rejected as inconsistent with the concept of being entitled to claim part-year resident and part-year nonresident status. That is, the preclusion part of petitioner's claim is based on a "full-year" view and, as such, effectively ignores the separate and discrete periods of his claimed filing status. Correctly viewed, petitioner's taxable status turns on a review of his claimed two part status, such that he may be, for tax purposes, a resident for the entire year and taxable as such, albeit as a statutory resident for the earlier period (if the evidence adduced at hearing supports such status) and as a domiciliary for the later period (as here admitted). At the same time, and based on the evidence, it may be that petitioner did *not* maintain a permanent place of abode and/or did *not* spend more than 183 days in New York during the earlier period, and would thus be taxable as a resident only for the later period during which he was domiciled in New York. That determination, as noted, will turn on the facts adduced at hearing.

J. Petitioner finds support for his position in ***Marks v. Commissioner of Revenue*** (2014 Minn Tax LEXIS 71 [Minn. Tax Ct Oct. 23, 2014]). The ***Marks*** case is similar to the matter at issue, both with respect to the statutory language by which a taxpayer's resident, nonresident or part-year resident income tax status is determined (***see*** Minn Stat § 290.01[7]), and with respect to the facts (taxpayers maintained a place of abode in Minnesota and spent in the aggregate more than 183 days in Minnesota during the year in issue [2007], but were domiciled outside of Minnesota [in Florida] until they moved back to Minnesota and became domiciled there in 2007). Of critical importance, however, is that the taxpayers in ***Marks*** had *not* been physically present in Minnesota for 183 or more days *at the point in time when they moved back into Minnesota and became Minnesota domiciliaries*. The Minnesota Tax Court granted petitioners' motion for partial summary determination, concluding that petitioners were part-year domicile-based residents of Minnesota, but were not statutory residents. In so doing, the Court held that in applying the day count for statutory residence purposes, the only days that may be counted are those spent in state while the taxpayers are domiciled *outside* of the state.[5] The ***Marks*** case thus supports the specific conclusion that one cannot count days spent in the state during a period when a taxpayer is domiciled in the state, for purposes of determining whether that taxpayer meets the physical presence test for statutory resident status. Contrary to petitioner's claim here, the ***Marks*** case does not stand for the broader proposition that a taxpayer who is domiciled in a

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[5] As noted, the petitioners had not been physically present in Minnesota for 183 or more days, as required for statutory resident purposes, when they became domiciled in Minnesota, and hence did not (and could not) meet the day count requirement for statutory resident status. The Court noted that the phrase "in the aggregate" within the context of the statutory residence day count means nothing more than that the days spent in-state need not be *consecutive* days. The Court remanded the matter for an evidentiary hearing on the question of precisely when the petitioners became Minnesota (part-year domicile based) residents, presumably for purposes of apportionment and allocation of petitioners' income as such part-year residents.

state, even if for only part of the year, simply cannot be a statutory resident. Rather, under the facts of the case, the Court held that Mr. and Mrs. Marks could not be held taxable as statutory residents because they lacked the requisite number of days (physical presence) during the period of claimed statutory residence (i.e., during their non-domiciled period). In contrast to ***Marks***, and noting that 2008 was a leap year, there were a total of 230 days during the earlier period in this case (January 1, 2008 through August 17, 2008), and thus it is clearly possible that petitioner herein may meet the physical presence requisite for being subjected to tax as a "statutory" resident for such period.

K. The parties discuss at some length in their motion papers the Division's perceived ambiguity in the interplay of the resident, nonresident and part-year resident provisions of the Tax Law. Review of such provisions leaves no such ambiguity apparent. The Tax Law provides definitions for an individual's status as: 1) a full-year resident (based on either domicile in New York or on stated statutory requirements [not domiciled in New York but maintaining an abode plus physical presence]); 2) a full-year a nonresident; or 3) a part-year resident. Under the third such possible status, the Tax Law and relevant regulations anticipate and address the required filing of separate returns for each of the claimed part-year periods (***see*** Tax Law § 651[a][3]; 20 NYCRR 154.1, 151.6), and provide extensive guidance and rules concerning the apportionment and allocation of items between the two periods (***see generally*** 20 NYCRR 112, 132).[6] This statutory (and regulatory) framework is fully consistent with the legislative aim of achieving equitably ratable taxation where factually appropriate, and avoiding or curtailing the actual or

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[6] Though the Tax Law previously called for "separate" filings (***see*** Tax Law former § 654[a]), the same is now accomplished on a single return, Form IT-203 with appropriate required attachments (***see*** Tax Law § 651[a][3]).

perceived inappropriate manipulation of an individual's tax status (***see*** Assembly Mem In Support, Bill Jacket, L 1922, ch 425, at 3). Such statutory framework points clearly to discrete periods where one's claimed taxable status for each of such periods will rise or fall on the basis of the defined criteria (domicile-based or statutory-based resident status, nonresident status or part-year resident status) for each of the claimed separate periods, a result consistent with the legislative aim of taxing those individuals as residents for the period of time during which they "actually were residents" as defined. By contrast, adopting petitioner's "all or nothing" argument runs afoul of the part-year statutory language, requires ignoring the concept of two separate taxable periods with separate filings resulting therefrom, and curtails the Division's right and ability, upon review, to challenge the correctness of each of those filings both as to personal taxable status and as to the reporting, allocation and apportionment of items and amounts thereon. Notwithstanding a filing position claiming part-year nonresident status, a taxpayer may indeed have no period of part-year *non*resident status during a given year, regardless of the fact that each of such resident periods (encompassing together the entire year) results from different statutory standards and calculations specific to each of such separate and discrete periods within the same year. Thus, a taxpayer claiming part-year domicile-based resident status may also be a statutory resident for the other part of that same year (as a nondomiciliary who, for such period, maintained a permanent place of abode and [where the claimed part-year nonresident period includes, as here, more than 183 available days] was present on at least 183 of such [available] days). Conversely, and consistently, since the physical presence "day count" is not necessary or

determinative for domicile-based resident status,[7] a taxpayer may be taxable only as a part-year resident if he meets the burden of establishing the fact and date on which he became a New York domiciliary, and further establishes (for example) that his claimed part-year nonresident period is not sufficiently long to encompass the requisite number of days for statutory resident status (with whatever consequent perceived tax benefits or detriments may flow therefrom).[8]

L. The Division argues, in general, that petitioner's position, if adopted, would serve to preclude New York from taxing the "very individuals that the [1922] legislation sought to tax." The Division further specifically argues that "[i]f the state is unable to count the number of days an individual was actually domiciled within New York State in its determination of whether an individual was a statutory resident, then it would be more challenging (and in some situations impossible) for New York State to fully tax those individuals who, 'for all intents and purposes,' were residents of the state." The Division is correct in its first argument. That is, petitioner's broad claim that if a taxpayer is a domiciliary for any part of the year, then that taxpayer may not be subject to tax as a statutory resident during the same year, is not supported by the statutory framework and such claim has been rejected herein. At the same time, while the Division might prefer an interpretation that allows it to count and include days during the domicile period as available days for statutory resident purposes, this interpretation and result fails to respect the

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[7] Though not determinative for domicile-based resident status purposes (i.e., domicile based resident status does not concern itself, per se, with a specific day count), the number of days spent in a particular jurisdiction is relevant as in indicator of intent vis-a-vis one's habit or pattern of life and hence may be indicative of their domicile (***see*** 20 NYCRR 105.20[d][4]; ***Matter of Silverman***, Tax Appeals Tribunal, June 8, 1989 ***citing Matter of Trowbridge*** 266 NY 283, 289 [1935]).

[8] A taxpayer could claim and establish domicile in New York at a point in time during the year early enough to eliminate the possibility of being taxable as a statutory resident for want of a sufficient aggregate number of available days during the non-domicile period, a result that is entirely consistent with the statute. To the extent this possible "planning opportunity" may be viewed as an unintended negative or unduly beneficial consequence, the remedy therefor, if any, rests within the purview of the Legislature.

language whereby statutory resident status is determined upon *three* conditions, to wit, nondomicile status during the possible statutory residence period, coupled with physical presence and maintenance of an abode. In order to properly analyze and determine whether one is, as claimed, a nonresident as opposed to a statutory resident for a portion of a given year, it is necessary to examine *all* of the criteria concerning statutory resident status, though only for the period during which such status is claimed or challenged. The Division's argument that days within the domicile-based resident period may be counted for purposes of the statutory resident physical presence requirement effectively ignores the first of the foregoing three conditions necessary for statutory resident status. Thus, the Division may not count days during the part-year domicile period as available or applicable days for purposes of imposing statutory resident status for the claimed nonresident part-year period.

M. Further support for the foregoing (day count) conclusion may be found by comparing the definition of "resident" under Tax Law former Article 16, § 350(7), with the current definitions of "resident," "nonresident" and "part-year resident" under Tax Law Article 22 (***see*** Conclusions of Law A, B and C).[9] Under Tax Law former Article 16, § 350(7), the definition of a "resident" was set forth in one paragraph and included both a person who was domiciled in New York, and a person who (in current parlance) would be a "statutory" resident, with the latter described therein as

> "any person "who maintains a permanent place of abode within the state and spends in the aggregate more than one hundred eighty-three days of the taxable year within the state, *whether or not domiciled in the state during any portion of*

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[9] Former Article 16 was replaced by Article 22, effective and applicable to short taxable years ending in 1960 and to taxable years ending on or after December 31, 1960. Former Article 16 was repealed by Laws of 1987 (ch 267, § 10, effective July 20, 1987).

said period, and such person shall be taxed the same as though he had been domiciled in the state during the entire taxable year" (italics added).

There was no separate definition of a "nonresident" provided under Tax Law former § 350(7).

In contrast, Tax Law Article 22, former § 605(a)(1), (2) and (b) provided separate definitions for a "resident individual," including specifically (in separate paragraphs) both a person who was domiciled in New York (Tax Law former § 605[a][1)]), and a person who would be a "statutory" resident (Tax Law former § 605[a][2]), and for a "nonresident individual" (Tax Law former § 605[b]). In 1987, the Legislature added Tax Law § 605(b)(5), specifically defining a "part-year resident individual" (L 1987, ch 28, effective April 20, 1987, and applicable to taxable years beginning after 1986). The foregoing definitions of resident and nonresident individuals, though renumbered in connection with the 1987 addition of the definition of a "part-year resident individual," carry through to the present.[10] Of particular and significant relevance here, the current definition of a "statutory" resident, as set forth in Tax Law § 605(b)(1)(B), did not carry forward and include the italicized language ("whether or not domiciled in the state during any portion of said [183 day] period") notwithstanding that such language had been in the very definition of a statutory resident under Tax Law former § 350(7). This distinction strongly supports the conclusion that for purposes of determining statutory resident status during a portion of a given year, one may not count days that fall within the domicile-based resident portion of that same year.

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[10] The definitions, formerly set forth at Tax Law § 605(a), now appear at Tax Law § 605(b).

N. Finally, the conclusion reached herein imposes no stricture on the Division's authority to challenge a taxpayer's claimed filing status of resident, nonresident or part-year resident, including specifically its ability to assert that a taxpayer claiming nonresident or part-year resident status is, in fact, a full year resident, taxable as such *either* on the basis of being a full year domiciliary or alternatively (and if the proof fails to support such assertion of full-year domicile-based resident status), on the basis of being a full-year statutory resident. The Division has cited cases concerning arguments made in the alternative, i.e., that taxpayers were domicile-based residents for the full year and, even if proof of the same failed, they were nonetheless statutory residents for the full year (***see Matter of Hero***, Tax Appeals Tribunal, September 11, 2013; ***Matter of Kornblum***, Tax Appeals Tribunal, January 16, 1992, ***confirmed*** 194 AD2d 882 [1993]; ***Matter of Veeder***, Tax Appeals Tribunal, January 16, 1992; ***Matter of Edward L. Smith v. State Tax Commn.*** 68 Ad2d 993 [1979]). Those cases dealt with the proposition that all days may be counted in the context of determining physical presence for statutory resident purposes on a full-year basis, but are not controlling for purposes of determining statutory resident status for only a portion of a year. To the extent such cases appear to indicate otherwise, they are viewed as expressing dicta, noting that the arguments raised in such cases effectively dealt with full-year analysis of taxable status under alternative bases.

O. Petitioners' motion for summary determination is hereby denied and the matter shall proceed to hearing in due course as scheduled.[11]

DATED: Albany, New York
August 20, 2015

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[11] At hearing, and consistent with the conclusions reached herein, evidence may be presented as to petitioner's whereabouts (i.e., presence in or absence from New York) for statutory resident "day count" purposes, during the earlier (claimed nonresident) period. In addition, evidence may also be presented as to petitioner's whereabouts during the later (domicile-based resident period), so as to create a complete record for purposes of any appeal that may be taken with respect to the conclusions reached herein.

S07509 Summary:

BILL NO S07509C

SAME AS SAME AS UNI.

SPONSOR BUDGET

COSPNSR

MLTSPNSR

Amd Various Laws, generally

Enacts into law major components of legislation which are necessary to implement the state fiscal plan for the 2018-2019 state fiscal year; makes the STAR income verification program mandatory; relates to the calculation of income for basic STAR purposes; repeals subparagraphs (v) and (vi) of paragraph (b) of subdivision 4, paragraphs (b) and (c) of subdivision 5 and paragraph (c) of subdivision 6 of section 425 of the real property tax law relating to the school tax relief (STAR) exemption; and repeals section 171-o of the tax law relating to income verification for a city with a population of one million or more (Part B); makes technical corrections to various statutes impacting property taxes and repeals certain sections of law relating thereto (Part E); relates to assessment ceilings for local public utility mass real property, in relation to the effectiveness thereof (Part G); relates to the statute of limitations for assessing tax on amended tax returns (Part H); provides for employee wage reporting consistency between the department of taxation and finance and the department of labor by adjusting certain reporting periods (Part I); relates to sales and compensating use taxes imposed on food and beverages sold by restaurants and similar establishments, exempting sales for resale from such taxes (Part J); relates to sharing with the comptroller information regarding unwarranted fixed and final debt (Part K); relates to the definition of resident for tax purposes of the personal income tax (Part O); establishes that any reference to section 24 of the Internal revenue code shall be a reference to such section as it existed immediately prior to the enactment of Public Law-115-97 (Part P); extends the hire a veteran credit for an additional two years (Part Q); relates to the New York youth job program (Part R); relates to exempting from sales and use tax certain veterinary drugs and medicines and removing the refund/credit therefor (Part W); provides relief from sales tax liability for certain partners of a limited partnership and members of a limited liability company (Part X); relates to extending the revenue distribution provisions for the additional rates of sales and use tax of Genesee, Monroe, Onondaga and Orange counties (Part Z); relates to adjusting the franchise payment; establishes an advisory committee to review the structure, operations and funding of equine drug testing and research (Part EE); relates to the sums of pertaining to simulcast of out-of-state thoroughbred races, simulcasting of races run by out-of-state harness tracks and licenses for simulcast facilities (Part GG); relates to the commercial gaming revenue fund; and repeals subdivision 4 of section 97-nnnn of the state finance law relating to base year gaming revenue (Part HH); addresses changes made to the internal revenue code (Part JJ); relates to federal gross income and federal deductions allowed pursuant to the internal revenue code; and relates to the taxation of business corporations (Part KK); establishes the charitable gifts trust fund and the health charitable account, and the elementary and secondary education charitable account; relates to credits for contributions to accounts in the charitable gifts trust fund; authorizes school districts, counties and New York city to establish charitable funds; and authorizes such localities to provide a credit against real property taxes for such contributions (Part LL); establishes the employer compensation expense program (Part MM); relates to the New York Jockey Injury Compensation Fund, Inc.; creates a separate account for the horsemen's organization for the purposes of collateral to secure workers' compensation insurance coverage (Part NN); relates to the disposition of net revenue (Part OO); relates to the state low income housing credit (Part PP); extends certain tax rates (Part QQ); relates to the credit for rehabilitation of historical properties (Part RR); relates to the personal income tax on residents of the city of New York (Part SS); relates to capital awards to vendor tracks (Part TT); relates to the disposition of certain proceeds collected by the commissioner of motor vehicles, the disposition of certain fees and assessments, and certain funds; repeals subdivision 5 of section 317 of the vehicle and traffic law relating to certain assessments charged and collected by the commissioner of motor vehicles; repeals subdivision 6 of section 423-a of the vehicle and traffic law relating to funds collected by the department of motor vehicles from the sale of certain assets; and repeals subdivision 4 of section 94 of the transportation law relating to certain fees collected by the commissioner of transportation (Part UU); relates to funding of capital and operating costs related to projects in the MTA New York city subway action plan (Part VV); utilizes reserves in the mortgage insurance fund for various housing purposes; authorizes the homeless housing and assistance corporation with the office of temporary and disability assistance to administer the sum of two million dollars; further authorizes the state of New York municipal bond bank agency to provide the sum not to exceed nine million dollars to the city of Albany; increases the number of supreme court justices in judicial districts 9, 10, 11, 12 and 13 (Part XX); increases the standards of monthly need for aged, blind and disabled persons living in the community (Part YY); establishes a rental subsidy for public assistance recipients living with HIV/AIDS (Part ZZ); relates to funding local government entities from the urban development corporation (Part AAA); provides for the administration of certain funds and accounts related to the 2018-19 budget and authorizes certain payments and transfers; relates to payments, transfers and deposits; relates to funding project costs undertaken by non-public schools; relates to funding project costs for certain capital projects; relates to the financing of the correctional facilities improvement fund and the youth facility improvement fund, in relation to the issuance of bonds; relates to housing program bonds and notes; establishes the dedicated highway and bridge trust fund, in relation to the issuance of bonds; relates to the issuance of bonds by the dormitory authority; relates to issuance of bonds by the urban development corporation; relates to the issuance of bonds; relates to the state environmental infrastructure projects; increases the aggregate amount of bonds to be issued by the New York state urban development corporation; relates to financing of peace bridge and transportation capital projects; relates to dormitories at certain educational institutions other than state operated institutions and statutory or contract colleges under the jurisdiction of the state university of New York; relates to bonds and mental health facilities improvement notes; increases the bonding limit for certain public protection facilities; authorizes certain payments and transfers, in relation to the effectiveness thereof; increases the amount of authorized matching capital grants; increases the amount of bonds authorized to be issued; authorizes the issuance of bonds in relation to grants made to voluntary agencies; and provides for the repeal of certain provisions upon expiration thereof (Part BBB); relates to contracts for excellence and the apportionment of public moneys; relates to the reporting of teacher diversity; relates to teaching tolerance; relates to reporting requirements of school level funding; relates to supplemental public excess cost aid; relates to total foundation aid; relates to building aid; relates to full day kindergarten aid; relates to academic enhancement aid; relates to high tax aid; relates to universal pre-kindergarten aid; relates to the statewide universal full-day pre-kindergarten program; relates to state aid adjustments; relates to the teachers of tomorrow teacher recruitment and retention program; relates to class sizes for special classes containing certain students with disabilities; relates to reimbursements for the 2018-2019 school year; relates to withholding a portion of employment preparation education aid and relates to the effectiveness of provisions of law relating to funding a program for work force education conducted by the consortium for worker education in New York city; relates to employment preparation education programs; relates to the effectiveness of provisions of law relating to state aid to school districts and the appropriation of funds for the support of government; relates to the effectiveness of provisions of law relating to supplementary funding for dedicated programs for public school students in the East Ramapo central school district; relates to the effectiveness of provisions of law relating to conditional appointment of school district, charter school or BOCES employees; relates to the expiration of provisions of law relating to certain provisions

related to the 1994-95 state operations, aid to localities, capital projects and debt service budgets; relates to the effectiveness of provisions relating to the provision of supplemental educational services, attendance at a safe public school and the suspension of pupils who bring a firearm to or possess a firearm at a school; relates to the effectiveness of provisions relating to implementation of the No Child Left Behind Act of 2001; relates to the expiration to provisions relating to providing that standardized test scores shall not be included on a student's permanent record; relates to requiring the commissioner of education to include certain information in the official score report of all students; relates to school bus driver training; relates to special apportionment for salary expenses and public pension accruals; relates to sub-allocations of appropriations; relates to the city school district of the city of Rochester; relates to total foundation aid for the purpose of the development, maintenance or expansion of certain magnet schools or magnet school programs for the 2017-2018 school year; relates to the support of public libraries; relates to certain apportionments; and relates to transportation aid (Part CCC); relates to the utilization of reserves in the mortgage insurance fund for various housing purposes (Part DDD); relates to an online application system for taxpayers to submit claims for reimbursements of certain payments (Part EEE); relates to establishing the health care transformation fund (Subpart A); and authorizes the commissioner the health to redeploy excess reserves of certain not-for-profit managed care organizations (Subpart B) (Part FFF); extends expiration of payments to members of the assembly serving in a special capacity; extends provisions relating to the operation and administration of the assembly (Part GGG); establishes a compensation committee to determine the appropriate salaries for members of the legislature and certain state officials; repealer (Part HHH); amends chapter 59 of the laws of 2014, amending the tax law relating to a musical and theatrical production credit, in relation to extending the provisions thereof (Part III); establishes the "Democracy Protection Act" relating to disclosure of the identities of political committees making certain expenditures for political communications (Part JJJ); establishes the New York City Rikers Island Jail Complex Replacement act; and provides for the repeal of such provisions (Part KKK); establishes the New York city public housing authority modernization investment act; repealer (Part LLL); enacts the "New York Penn Station redevelopment act" (Part MMM); relates to transportation services; establishes the New York city transportation assistance fund and the supplemental revenue transparency program; relates to the installation of mobile bus lane photo devices on buses operating on certain rapid transit routes in the borough of Manhattan and the disposition of revenue from fines and penalties collected from the use of such stationary bus lane photo devices; establishes the metropolitan transportation sustainability advisory workgroup and provides for the repeal of such provision (Part NNN); relates to the minority and women-owned business enterprise program (Part OOO); establishes the "New York City housing authority emergency management act" and relates to the development and execution of a plan to remediate conditions affecting the health and safety of tenants of the New York city housing authority (Part PPP); establishes the New York city BQE Design Build Act (Part QQQ); relates to union dues and the duty of fair representation (Part RRR); relates to substantial equivalence for nonpublic elementary and secondary schools (Part SSS); relates to the possession of weapons by domestic violence offenders (Part TTT); and relates to the health care facility transformation program (Part UUU).

S07509 Text:

STATE OF NEW YORK

S. 7509--C A. 9509--C

SENATE - ASSEMBLY

January 18, 2018

IN SENATE -- A BUDGET BILL, submitted by the Governor pursuant to article seven of the Constitution -- read twice and ordered printed, and when printed to be committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

IN ASSEMBLY -- A BUDGET BILL, submitted by the Governor pursuant to article seven of the Constitution -- read once and referred to the Committee on Ways and Means -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee -- again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee

AN ACT intentionally omitted (Part A); to amend the real property tax law, in relation to making the STAR income verification program mandatory; to amend the tax law, in relation to the calculation of income for basic STAR purposes; to repeal subparagraphs (v) and (vi) of paragraph (b) of subdivision 4, paragraphs (b) and (c) of subdivision 5 and paragraph (c) of subdivision 6 of section 425 of the real property tax law relating to the school tax relief (STAR) exemption; and to repeal section 171-o of the tax law relating to income verification for a city with a population of one million or more (Part B); intentionally omitted (Part C); intentionally omitted (Part D); to amend the general municipal law, the education law, the state finance law, the real property tax law and the tax law, in relation to making technical corrections to various statutes impacting property taxes; and to repeal subsection (bbb) of section 606 of the tax law, section 3-d of the general municipal law and section 2023-b of the education law, relating thereto (Part E); intentionally omitted (Part F); to amend the real property tax law, in relation to assessment ceilings; and to amend chapter 475 of the laws of 2013, amending the real property tax law relating to assessment ceilings for local public utility mass real property, in relation to the effectiveness thereof (Part G); to amend

EXPLANATION--Matter in ***italics*** (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD12674-08-8

1 card (except the sale of drinks in a heated state made through such a
2 vending machine) or is for consumption off the premises of the vendor,
3 except where food (other than sandwiches) or drink or both are (A) sold
4 in an unheated state and, (B) are of a type commonly sold for consump-
5 tion off the premises and in the same form and condition, quantities and
6 packaging, in establishments which are food stores other than those
7 principally engaged in selling foods prepared and ready to be eaten.
8 § 2. This act shall take effect June 1, 2018 and shall apply to sales
9 made on and after such date.

10 PART K

11 Section 1. The tax law is amended by adding a new section 171-z to
12 read as follows:
13 **§ 171-z. Information sharing with the comptroller regarding unclaimed**
14 **funds. 1. Notwithstanding any other law, the commissioner is authorized**
15 **to release to the comptroller information regarding fixed and final**
16 **unwarranted debts of taxpayers for purposes of collecting unclaimed**
17 **funds from the comptroller to satisfy fixed and final unwarranted debts**
18 **owed by taxpayers. For purposes of this section, the term "unwarranted**
19 **debt" shall mean past-due tax liabilities, including unpaid tax, inter-**
20 **est and penalty, that the commissioner is required by law to collect and**
21 **that have become fixed and final such that the taxpayer no longer has**
22 **any right to administrative or judicial review and a warrant has not**
23 **been filed; and the term "taxpayer" shall mean any individual, corpo-**
24 **ration, partnership, limited liability partnership or company, partner,**
25 **member, manager, sole proprietorship, estate, trust, fiduciary or enti-**
26 **ty, who or which has been identified as owing taxes to the state. This**
27 **section shall not be deemed to abrogate or limit in any way the powers**
28 **and authority of the comptroller to set off debts owed the state from**
29 **unclaimed funds, under the constitution of the state or any other law.**
30 **2. The comptroller shall keep all information he or she obtains from**
31 **the commissioner confidential, and any employee, agent or representative**
32 **of the comptroller is prohibited from disclosing any taxpayer informa-**
33 **tion received under this section to anyone other than the commissioner**
34 **or staff of the department or staff of the department of audit and**
35 **control for the purposes described in this section.**
36 § 2. This act shall take effect immediately.

37 PART L

38 Intentionally Omitted

39 PART M

40 Intentionally Omitted

41 PART N

42 Intentionally Omitted

43 PART O

44 Section 1. Subparagraph (B) of paragraph 1 of subsection (b) of
45 section 605 of the tax law, as amended by chapter 28 of the laws of
46 1987, is amended to read as follows:

1 (B) who [~~is not domiciled in this state but~~] maintains a permanent
2 place of abode in this state and spends in the aggregate more than one
3 hundred eighty-three days of the taxable year in this state, **whether or**
4 **not domiciled in this state for any portion of the taxable year,** unless
5 such individual is in active service in the armed forces of the United
6 States.
7 § 2. Paragraph 2 of subsection (a) of section 1305 of the tax law, as
8 amended by chapter 225 of the laws of 1977, is amended to read as
9 follows:
10 (2) who [~~is not domiciled in such city but~~] maintains a permanent
11 place of abode in such city and spends in the aggregate more than one
12 hundred eighty-three days of the taxable year in such city, **whether or**
13 **not domiciled in this city for any portion of the taxable year,** unless
14 such individual is in active service in the armed forces of the United
15 States.
16 § 3. Subparagraph (B) of paragraph 1 of subdivision (b) of section
17 11-1705 of the administrative code of the city of New York, as amended
18 by chapter 333 of the laws of 1987, is amended to read as follows:
19 (B) who [~~is not domiciled in this city but~~] maintains a permanent
20 place of abode in this city and spends in the aggregate more than one
21 hundred eighty-three days of the taxable year in this city, **whether or**
22 **not domiciled in this city for any portion of the taxable year,** unless
23 such individual is in active service in the armed forces of the United
24 States.
25 § 4. This act shall take effect immediately and shall apply to taxable
26 years commencing on or after such date.

27 PART P

28 Section 1. Paragraph 1 of subsection (c-1) of section 606 of the tax
29 law, as amended by section 1 of part L-1 of chapter 109 of the laws of
30 2006, is amended to read as follows:
31 (1) A resident taxpayer shall be allowed a credit as provided herein
32 equal to the greater of one hundred dollars times the number of qualify-
33 ing children of the taxpayer or the applicable percentage of the child
34 tax credit allowed the taxpayer under section twenty-four of the inter-
35 nal revenue code for the same taxable year for each qualifying child.
36 Provided, however, in the case of a taxpayer whose federal adjusted
37 gross income exceeds the applicable threshold amount set forth by
38 section 24(b)(2) of the Internal Revenue Code, the credit shall only be
39 equal to the applicable percentage of the child tax credit allowed the
40 taxpayer under section 24 of the Internal Revenue Code for each qualify-
41 ing child. For the purposes of this subsection, a qualifying child shall
42 be a child who meets the definition of qualified child under section
43 24(c) of the internal revenue code and is at least four years of age.
44 The applicable percentage shall be thirty-three percent. **For purposes**
45 **of this subsection, any reference to section 24 of the Internal Revenue**
46 **Code shall be a reference to such section as it existed immediately**
47 **prior to the enactment of Public Law 115-97.**
48 § 2. This act shall take effect immediately and shall apply to taxable
49 years commencing on or after January 1, 2018.

50 PART Q

New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Report No. 1391

New York State Bar Association
Tax Section
Comments on 2018-2019 New York State Executive Budget[1]

Tax #5 March 9, 2018

Introduction

This report on selected tax provisions of the 2018-2019 New York State Executive Budget (the "Budget Bill") was prepared by the Tax Section of the New York State Bar Association. It focuses on certain technical, administrative and conceptual issues raised by selected provisions of the Budget Bill with reference to the New York Tax Law (the "Tax Law") and identifies aspects we think should be clarified or reconsidered prior to adoption by the Legislature.

This report offers comments and recommendations on the following parts of the Budget Bill:

Part H: Extend the State of Limitations on Amended Tax Returns.

Part K: Allow Warrantless Tax Debt to be Assessed Against Unclaimed Funds.

Part M: Carried Interest Provision.

Part N: DTF Right to Appeal DTA Tribunal Decisions.

Part O: Clarify New York Residency Requirements for Tax Purposes.

[1] The principal drafters of this report were: Jack Trachtenberg, Megan L. Brackney, Paul R. Comeau, Peter L. Faber, Joshua E. Gewolb, Debra Silverman Herman, Sherry S. Kraus, Alysse McLoughlin, Elizabeth Pascal, Dennis Rimkunas, Leah Robinson, Arthur R. Rosen, Irwin M. Slomka, and Andrew W. Wright. Helpful comments were received from Andy Braiterman, Elizabeth Kessenides, Stephen B. Land, Michael Schler, and Andrew P. Solomon and Karen G. Sowell. This report reflects solely the views of the Tax Section and not those of the NYSBA Executive Committee or House of Delegates or any other party.

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

Part S:	Defer Business Related Tax-Credit Claims.
Part T:	Amend the Refund and Joint Liability Provisions of the Real Estate Transfer Tax.
Part X:	Provide Responsible Person Sales Tax Relief for Minority LLC Owners.
Part AA:	Impose an Internet Fairness Conformity Tax.

Discussion

I. Part H: Extend the State of Limitations on Amended Tax Returns

A. Current Law

The general period of limitations for assessment of tax is three years after the filing of a return. *See* Tax Law §§ 683(c), 1083(c), and City of New York Administrative Code § 11-1783(c). There are numerous exceptions that provide for extension of this time period in particular circumstances, such as where the return is fraudulent or where more than 25% of gross income is omitted, but the filing of an amended return is not currently one of them. *See In re George and Carol Bello*, N.Y. Tax App. Trib. Dkt No. 806543 (1993) (citing *Dowell v. Commissioner*, 68 T.C. 646, 649, *rev'd on other grounds*, 614 F.2d 1263 (1980), and then adopting the court's interpretation that the three-year statute of limitations runs from the filing of an original return, not from an amended return).

To claim a refund, an amended return must be filed three years from the filing of the original return, or two years from the payment of the tax, whichever is later. Tax Law §§ 687(a), 1087. The Department has authority to examine any and all aspects of an amended return to compute the correct tax for the year at issue. Unless limited by statute, the review is not necessarily restricted to consideration of the particular items of adjustment proposed in the refund claim, although the expiration of the limitation period may preclude assessment of a

deficiency. *See e.g.*, *Bankers Trust Corp. v. New York City Dept. of Finance*, 750 N.Y.S.2d 29, 35-36 (1st Dep't 2002).

Where an erroneous refund has been paid, the refund is 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 two years from the making of the refund." This period is extended to five years if "it appears that any part of the refund was induced by fraud or misrepresentation of a material fact." Tax Law §§ 683(c)(5) and 1083(c)(5); City of New York Administrative Code § 11-1783(c)(5). The term "erroneous refund" generally means a refund that was issued as a result of a mathematical or clerical error made by an employee of the Department. *See* 20 NYCRR §§ 36.1(a) and 107.7(a).

B. Proposed Changes

Part H of the Budget Bill would amend the limitations on assessment provisions of Tax Law §§ 683(c) and 1083(c), and City of New York Administrative Code § 11-1783(c), to add the following paragraph:

> Except as otherwise provided in paragraph three of this subsection, or as otherwise provided in this section where a longer period of time may apply, if a taxpayer files an amended return, an assessment of tax (if not deemed to have been made upon the filing of the amended return), including recovery of a previously paid refund, attributable to a change or correction on the amended return from a prior return may be made at any time within three years after such amended return is filed.

The stated purpose for the extended period of limitations is to limit refund abuse:

> The Executive Budget will reduce refund abuse by extending the statute of limitations to three years after the filing date of the amended return, rather than three years after the original return filing date. Currently, taxpayers can file an amended return containing a refund request close to three years after the due date of their initial return, hampering the possibility of an audit and assessment by DTF.

FY 2019 Executive Budget Briefing Book, at 18.

C. Comments

Limitations on the assessment of tax serve an important purpose, as "public policy favors the effective, timely, and definitive collection of unpaid taxes." *In re King Center Corp.*, 573 B.R. 384, 398 (Bkrtcy. E.D.N.Y. 2017). As stated by the U.S. Supreme Court, tax "recomputations are immensely difficult or impossible when a long period has intervened." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 88 392 U.S. 481, 503 (1968). Extension of the limitation period should only be made where a systemic problem exists under the existing period that hampers the government's ability to timely assess the tax. Otherwise, for the majority of taxpayers who file non-fraudulent amended returns, the additional lengthy period of limitations imposes additional burdens to maintain records, and fails to provide the closure necessary for financial reporting and business planning. Before broadly extending the period of limitations, these important policy considerations should be taken into account.

1. *Clarify the Meaning of "Attributable To"*

The proposed amendment limits the Department's ability to assess additional tax under the extended statute of limitations to assessments that are "attributable to a change or correction on the amended return." In this regard, we note that it is unclear what the phrase "attributable to" means. For example, if a corporate taxpayer files an amended return to change the composition of its combined group (i.e., to add or remove entities from the combined return), is the Department's ability to assess additional tax under the extended statute of limitations limited to only re-adjusting which affiliated entities should be in the combined group? Or could the Department also adjust the apportionment factors of the entities in the combined group on the grounds that a change to the group's apportionment is "attributable" to

the change in the group composition reported by the taxpayer? The Tax Section encourages the legislature to clarify that the proposed amendment is intended to prevent the Department from opening the taxpayer's entire return for audit under the extended statute of limitations and to consider providing a definition of what it means for the Department's assessment to be "attributable to" a change on the amended return. Opening the entire return would unfairly burdens taxpayers who file amended returns to correct errors in favor of New York, or to claim refunds to which they are lawfully entitled. In other words, a taxpayer should not have to weigh the purpose of amending its return for a single issue against the possibility that data-intensive aspects of a return could be revisited years after the natural close of the statutory period.

2. *Absent Clarification, the Amendment May Discourage Taxpayers from Self-Correcting Erroneous Returns*

In general, there is no legal obligation to file an amended tax return, although a taxpayer is required to file an amended return to report Federal changes, corrections, and disallowances, or if the taxpayer has filed a Federal amended return. Tax Law § 659; 20 NYCRR §§ 159.2, 159.3. If the proposed amendment is not clarified to limit the scope of the Department's review and ability to assess additional tax under the extended statute of limitations, taxpayers may be discouraged from self-correcting returns (including to make adjustments in favor of the taxing authority) and filing claims for refund that are rightfully owed to the taxpayer. As noted above, taxpayers may fear that filing an amended return for a discrete issue could result in a burdensome audit related to other aspects of the return.

3. *The Amendment May Conflict with Sections 687(b) and 1087(b) of the Tax Law*

Absent clarification, the Tax Section is also concerned that the proposed statute would undo the protections provided in Tax Law §§ 687(b) and 1087(b). Those code sections provide

that, if the taxpayer and the Department have entered into an agreement to extend the period for the assessment of additional tax (i.e., a waiver) and have done so within the period prescribed for the filing of a refund claim, then the period for filing a refund claim shall not expire prior to six months after the expiration of the waiver. While these provisions extend the period of limitations for the taxpayer to file a refund claim, they do not extend the period of limitations for assessment. Accordingly, under existing law, when taxpayers avail themselves of their right to file a claim for refund pursuant to section 687(b) or 1087(b), the Department is permitted to defend against the refund claim, but cannot open the entire return up for review and assessment of additional tax.

Sections 687(b) and 1087(b) were designed to give taxpayers sufficient time to raise claims for credit or refund as a means to offset assessments of additional tax asserted by the Department near the end of the limitations period for filing such claims. We believe this is a laudable policy goal and are concerned that the proposed amendments to sections 683(c) and 1083(c) would be in conflict with the protections provided under sections 687(b) and 1087(b). Specifically, if the "attributable to" language in the proposed amendment is not clarified to limit the scope of the Department's ability to assess additional tax under the extended statute of limitations, it may give the Department the right to audit other aspects of an amended return filed pursuant to sections 687(b) and 1087(b), which is precisely what those sections were designed to prohibit. At a minimum, the proposed amendments should be clarified to provide that the Department cannot avail itself of the additional time to audit an amended return if such return was filed during the extended six month period provided for in sections 687(b) and 1087(b).

4. *The Proposed Amendment Should be Modified to Provide for a Shorter Extension of the Statute of Limitations*

A three-year extension of the statute of limitations could be viewed as extensive. While some states have adopted a three-year extension of the statute of limitations in the context of amended returns, *see* Conn. Gen. Stat. § 12-733(e); Md. Code Ann. Tax-Gen. § 13-1101(d), other states have adopted much shorter (e.g., six month to one year) extensions. *See e.g.*, Ga. Code Ann. § 48-2-49(e); Kan. Stat. Ann. § 79-3230(a). We note that a shorter six-month extension of the statute of limitations would parallel the six-month extension of time that is granted to taxpayers to seek offsets of assessments issued by the Department as a result of an audit conducted pursuant to a waiver issued by the taxpayer (discussed above).

Alternatively, the proposed legislation could be narrowed to conform to the Internal Revenue Code, which provides for a limited extension in the case of amended returns filed within the 60-day period ending on the day on which the statute of limitations would otherwise expire. For those amended returns, the IRS has an additional 60 days to assess additional tax. IRC § 6501(c)(7). Enacting a similar provision would address the legislature's concern that some taxpayers attempt to hamper the ability of the Department to assess additional tax by filing an amended return just before the statute of limitations expires. As this group of amended returns is most likely to be problematic, the extension provision could be limited to them. We note, however, that while the Internal Revenue Service has only 60 days to assess additional tax when an amended return is filed within the 60-day period ending on the day on which the statute of limitations would otherwise expire, it has two years to recover erroneously issued refunds. The Department also has two years to recover erroneously issued refunds, but it, unlike the Internal Revenue Service, is limited to recovering erroneous refunds that were issued as a result of a mathematical or clerical error by an employee of the Department.

II. Part K: Allow Warrantless Tax Debt to Be Assessed Against Unclaimed Funds

Part K allows the Department to share information with the State Comptroller to satisfy past-due tax liabilities with unclaimed funds without the necessity of filing a tax warrant. As stated in the Memorandum in Support of the Budget Bill, "secrecy statutes in the Tax Law prevent the Commissioner from sharing debtor/taxpayer information with the Comptroller when warrants have not been filed," therefore the change "is needed so the Commissioner has authorization to share taxpayer information with the Comptroller regarding unwarranted fixed and final debts so the debts can be satisfied, in whole or in part, with unclaimed funds."

A. Current Law

Currently, the Commissioner and Comptroller share information regarding warranted fixed and final debts, which results in the Commissioner routinely applying a taxpayer's unclaimed funds to fixed and final warranted tax debt. Thus, this proposal provides the Department with a modified tool to enforce the collection of past-due liabilities.

B. Proposed Change

Part K of the Budget Bill would allow the Department to share information with the State Comptroller regarding fixed and final unwarranted debts of taxpayers for purposes of collecting unclaimed funds from the Comptroller, who serves as the custodian of the funds, to satisfy the taxpayers' past-due liabilities.

The authorization is limited to the release of information regarding fixed and final unwarranted debts of taxpayers for purposes of collecting unclaimed funds from the Comptroller to satisfy fixed and final unwarranted debts owed by taxpayers. The phrase "unwarranted debt" is defined as "past-due tax liabilities, including unpaid tax, interest and penalty, that the commissioner is required by law to collect and that have become fixed and

final such that the taxpayer no longer has any right to administrative or judicial review and a warrant has not been filed." And, "taxpayer" is defined as "any individual, corporation, partnership, limited liability partnership or company, partner, member, manager, sole proprietorship, estate, trust, fiduciary or entity, who or which has been identified as owing taxes to the state." The term "unclaimed funds" is not defined in the legislation.

The State Comptroller would be required to keep all information obtained from the Department confidential.

C. Comments

The Tax Section commends the Budget Bill's proposal to allow the Commissioner to share information with the State Comptroller to facilitate the collection of taxpayers' past-due liabilities from unclaimed funds, without the need to file a tax warrant. Without this authority, the Commissioner would continue to be required to file a public tax warrant with the appropriate county clerk's office and the Department of State prior to the undertaking of any enforcement action with respect to unclaimed funds. Publicly filed tax warrants can impose harms and burdens on taxpayers that may not be necessary to effectively enforce the state's tax laws. These include negatively affecting the taxpayer's credit report, causing an increase to the taxpayer's insurance premiums rates, and jeopardizing employment opportunities with employers that conduct credit checks as part of the hiring process. By allowing the Department to share information with the Comptroller regarding fixed and final unwarranted debts of taxpayers, the Department will be permitted to engage in a routine and productive tax collection technique without creating unnecessary burdens and hardships for taxpayers.

The Tax Section has previously issued reports acknowledging the many benefits from the Department's warrantless wage garnishment, which also permits the Department to engage in a routine collection action, without the necessity of filing a tax warrant.

While we commend this legislation, we note the following technical comments. First, we believe the title of the provision could be changed to better describe the provision and parties involved. The proposed title is “Information sharing with the Comptroller regarding unclaimed funds.” An alternative option is “Information sharing with the State Comptroller regarding tax debt for collection of unclaimed funds.” (Similarly, the word "State" should also be added throughout the statute before the term Comptroller).

Second, the term "taxpayer" is defined to include generally an entity or person "who or which has been identified as <u>owing taxes</u> to the state" (emphasis added). This language seems overbroad. We suggest that the language be revised to apply solely to an entity or person "who or which has been identified as owing <u>past-due tax liabilities</u> to the state" (emphasis added).

Third, the term “unclaimed funds” is not currently defined in the legislation. We believe it should be defined to provide clarity, such as “unclaimed funds under New York’s Abandoned Property Law.” Furthermore, in this regard, the Memorandum in Support cites to general common law and case law as the basis for the Comptroller to satisfy debt owed to the State with unclaimed funds of a debtor/taxpayer. Specifically, the Memorandum in Support states that "common law and case law authorize and permit the Comptroller to satisfy debt owed to the State with unclaimed funds of a debtor/taxpayer when 1) a debt is owed; 2) the debtor/taxpayer received notice of the debt; and, 3) the debtor/taxpayer no longer has any right to administrative or judicial review of the debt.”

Presumably the common law doctrine being referred to is the Comptroller's common law right to offset any valid claim or debt owed to the State against a claimant who is due money under the Comptroller's control, even if the setoff is unrelated to the state's debt to that

claimant. Or, stated differently, if a claimant is owed money by a state agency but also owes money to the same or another state agency, the Comptroller may subtract and withhold the money owed to the state from the money owed by the state, thereby facilitating the collection by the state of the money it is due. *See, e.g., Suburban Restoration Co., Inc. v. Office of the State Comptroller,* 2012 NY Slip Op 07022 (3rd Dep't).

The Tax Section is concerned that there is no written agreement between the Department and the State Comptroller that addresses the enforcement of delinquent tax liabilities through unclaimed funds. For example, the procedures for identifying unclaimed funds, provisions addressing certifications that the funds are unclaimed (i.e., proper notice has been provided to the claimant), and/or procedures for transferring the funds so the funds can be applied to satisfy past-due unpaid tax liabilities. It is our understanding that the current unclaimed funds program against warranted debt has generated substantial returns, through both automated funds offsets and manual exceptions (i.e., unclaimed funds primarily related to intangible property). Under current federal and state debtor protection laws, the Department cannot reach by levy to pay tax debts a tax debtor's social security payments, public assistance payments, veteran's benefits, unemployment insurance, child support and workers compensation payments. If the Department levies a bank account containing exempt funds, there is a procedure available for the owner of the account to claim an exemption for the exempt funds. *See* CPLR § 5222-a. Consideration should be given to the fact that unclaimed funds in New York can include bank accounts. Also, in the case of decedents, there is a possibility that the unclaimed funds no longer belong to the named claimant decedent, but rather are the property of the decedent's beneficiaries. Federal and state debtor protection laws should not be violated as a result of this enforcement action. In this regard, we think it is

instructive to look at the written agreements required under Tax Law § 171 relating to the enforcement of delinquent tax liabilities through the suspension of drivers' licenses (Tax Law § 171-v) , enforcement of delinquent state tax liabilities through the suspension of eligibility for STAR exemptions (Tax Law § 171-y) and various provisions relating to the Commissioner's authority to credit any overpayments of taxpayers against outstanding debts owed to a state agency (Tax Law § 171-f) or to New York City (Tax Law § 171-l).

Upon being turned over to the Comptroller, abandoned property does not become the property of the State; instead the State assumes its care and custody in a special fund for the benefit of those entitled to receive it, and any person who can prove his or her right to such property is entitled to have it paid over to him or her at any time. The Tax Section is concerned that once the State Comptroller transfers the unclaimed funds to the Commissioner, there is no public record that a claimant ever had unclaimed funds. Presumably, the State Comptroller could be required to maintain a public list that details the names of claimants for which it transferred unclaimed funds to the Department to satisfy past-due tax liabilities. However, the legislation at issue is necessary precisely because the Commissioner is unable to disclose unwarranted tax debt of taxpayers due to taxpayer secrecy provisions. Indeed, the provision requires that the Comptroller keep all of the information confidential. Thus, no public record would be available to notify claimants of unwarranted debts that their unclaimed funds were transferred to the Department to satisfy such debts.

III. Carried Interest Provision

A. Current Law

The Tax Law has no special provisions dealing with income from a carried interest. In general, partnership income that is taxed to the partners has the same character in the hands of the partners as it had in the hands of the partnership regardless of how the partner acquired his

or her partnership interest. For example, partnership investment income, including long-term capital gains, flows through to the partners and is treated the same in their hands even if one or more partners acquired their partnership interest in exchange for services rendered to the partnership or to other partners.[2]

A carried interest is an interest in a partnership that is disproportionately high relative to the partner's capital contribution. It is common for the organizers of an investment partnership to contribute a small amount of the partnership's capital but to receive a much higher interest in partnership profits. Arguably, this disproportionate interest is received in exchange for services rendered in organizing and/or operating the partnership. Nevertheless, New York State, mirroring the federal income tax treatment, has treated income from a carried interest just like any other partnership income that is taxed to the partners. Until the enactment of the federal Tax Cuts and Jobs Act of 2017 ("TCJA"), the Internal Revenue Code contained no special provisions for carried interest income and the Internal Revenue Service treated the income as retaining the character that it had in the hands of the partnership. The TCJA amended section 1061 of Internal Revenue Code to provide, in general, that a partner who received a partnership interest in connection with the performance of substantial services would not treat long-term capital gains realized by the partnership as long-term capital gains unless the property sold by the partnership had been held by the partnership for more than three years. Section 1061 does not treat carried interest income as income received in exchange for services or as business income; its only effect is to convert what otherwise might have been long-term capital gains to short-term capital gains.

[2] References to partnerships and partners include limited liability companies and their members to the extent that they are treated as partnerships and partners for income purposes.

B. Proposed Changes

Part M of the Budget Bill would add a new section 44 to the Tax Law and would amend sections 208.6(a), 617(b), and 632(b) to change the treatment of carried interest income. The Memorandum in Support of the Budget Bill explains that the provisions are intended to "close the carried interest loophole" by treating carried interest income as income from a trade or business and not as capital gains. One consequence of this recharacterization would be that carried interest income would be taxable to a nonresident of New York to the extent that the partnership's income was attributable to New York sources. In addition, the Budget Bill would impose a 17% "carried interest fairness fee" on a portion of carried interest income that, in the words of the Memorandum, "would remain in effect until federal law is amended to treat the provision of investment management services for federal tax purposes substantially the same as under this legislation." The provisions of the Budget Bill would take effect only upon the enactment of similar legislation by Connecticut, New Jersey, Massachusetts, and Pennsylvania.

C. Comments

The Tax Section takes no position with respect to whether carried interest income should be treated as business income or should be given favorable tax treatment.

The Budget Bill applies the new regime to income that a partner is deemed to have received from "investment management services." Section 44 defines this phrase as including investment advice regarding the purchase or sale of securities as defined in section 475(c)(2) of the Internal Revenue Code, real estate held for rental or investment, and certain partnership interests, including managing, acquiring, or disposing of such assets, arranging financing with respect to the acquisition of such assets, and related activities.

The operative provision of section 44 indicates that a partner who performs investment management services for a partnership will not be treated as a partner with respect to the

partner's distributive share of income, gain, loss, and deduction, including guaranteed payments, "that is in excess of the amounts such distributive share would have been if the partner had performed no investment management services for the partnership." That excess amount will be treated as a business receipt for services and for purposes of the personal income tax as income attributable to a trade, business, profession, or occupation. Similar provisions would apply to an S corporation shareholder. An exception would be provided for certain real estate businesses. A partner or shareholder will not be deemed to be providing investment management services if at least 80% of the average fair market value of the partnership's assets consists of real estate held for rental or investment.

It may be difficult to determine whether a partner received all or part of a partnership interest in exchange for investment management services. It does not automatically follow that an interest that is disproportionate to a partner's capital contribution is received in exchange for investment management services or, for that matter for any services. For example, the organizers of a partnership might be willing to give a particularly prestigious individual a disproportionately high partnership interest because the person's name might enhance the partnership's reputation or ability to attract other investors or otherwise assist in relations with private or public organizations. Other partners might simply strike a hard bargain and succeed in negotiating for a partnership interest that is disproportionately high relative to their capital contributions.

The new regime applies to income received by a partner for services performed by that partner. As written, it would not apply to income received by a partner who received a partnership interest as a gift from a person who performed services for the partnership (e.g., the service provider's spouse or children).

Section 44(c) provides for "an additional tax, referred to as the 'carried interest fairness fee.'" This fee is equal to 17% of the amount treated as business income under section 44(b). This fee will remain in effect until "federal legislation has been enacted that treats the provision of investment management services for federal tax purposes substantially the same as provided in this section." It is not clear what kind of federal legislation would be needed to result in a termination of the fee. The bill converts investment income to business income. If Congress wanted to completely eliminate favorable treatment for capital gains realized by partnerships that had partners with carried interests, it could do so by expanding on the approach taken by the TCJA and simply providing that all long-term capital gains realized by a partnership will be treated as short-term capital gains to the extent that they are passed through to carried interests. That would eliminate any federal preference for carried interest income, but it would not treat that income as business income as the New York statute does. It would still be investment income for other purposes of the federal tax laws. That would not result in treatment "substantially the same as provided" in the New York law.

The carried interest provisions take effect only if Connecticut, New Jersey, Massachusetts, and Pennsylvania all adopt legislation "having substantially the same effect as this act." It is unclear what this phrase means. In the unlikely event that all four states adopt some kind of legislation dealing with carried interest income, they could take different approaches. They could recharacterize carried interest income as business income but not impose a punitive "fairness fee," or they could impose a "fee" that was much lower than New York's fee.

IV. Part N: DTF Right to Appeal DTA Tribunal Decisions

A. Current Law

The statute that created the Division of Tax Appeals within the Department of Taxation and Finance has, since its enactment in 1986, provided a mechanism for taxpayers to appeal adverse decisions rendered by the Tax Appeals Tribunal (the "Tribunal"); such appeals are made to Supreme Court, Appellate Division (Third Department) under a specially modified procedure under Article 78 of the Civil Procedure Law and Rules. The Department, however, has been provided no such appeal opportunity and thus decisions of the Tribunal in which the taxpayer prevails are final. Consequently, inasmuch as Tribunal decisions are precedential, the Department has occasionally resorted to seeking legislative changes to substantive Tax Law provisions when it has believed the law should be different than as interpreted by the Tribunal.

B. Proposed Changes

Part N of the Budget Bill would modify the Tax Law by providing the Department with the same appeal rights as currently afforded taxpayers.

C. Comments

From the time that the original Division of Tax Appeals legislation was being developed in the early 1980s through as recently as 2009, the Tax Section has supported placing the Department on equal footing with taxpayers in the context of appeal rights. This position was based on two important considerations. First, unlike the former State Tax Commission, which exercised adjudicative as well as administrative and regulatory functions, the Tribunal is an independent, adjudicative body. Thus, whereas there was no need for a right of appeal when the State Tax Commission (i.e., the Department) made its own final determinations of tax cases (because it had ultimate control of such determinations), each litigant before the independent Tribunal should have the right to appeal. Such a procedure

would be consistent with the procedure at the United States Tax Court, which permits the Internal Revenue Service to appeal adverse United States Tax Court decisions. *See* NYSBA Report #382, "Need For and Feasibility of a New York Tax Tribunal (Jan. 4, 1983); *see also* Letter from Erika W. Nijenhuis, Chair, Tax Section, NYSBA to Hon. David A. Paterson, Governor, New York State (Apr. 24, 2009).

Second, the Tax Section's historic support for granting the Department a right to appeal an adverse Tribunal decision was based on the belief that in cases where (a) the degree of the persuasiveness of the adverse parties' positions are approximately equal and (b) only one party can appeal further, a decision-making body will tend to rule against the party that has the opportunity to pursue such an appeal. This seems to be especially true when broad questions, such as Constitutional issues, are being decided. The Tax Section's concern has been that this will create the perception, whether valid or not, that the system lacks fairness because the Tribunal will decide close cases involving important tax principles against taxpayers. The Tax Section sees no reason why these considerations do not remain valid.

With the passage of time, however, some members of the Tax Section have come to believe that the existing process for adjudicating tax disputes before the Division of Tax Appeals has worked well and that the prohibition on the Department appealing adverse Tribunal decisions should not be changed. The primary concern of these members is that granting the Department an appeal right would create undue burdens on taxpayers that are not justified by the reasons asserted for granting the appeal right.

By the time a taxpayer's case has reached the Tribunal, the taxpayer (whether an individual or a corporation) will typically have gone through several stages of administrative proceedings, including an audit by the Department, a protest before the Department's Bureau

of Conciliation and Mediation Services, and a hearing before an administrative law judge at the Division of Tax Appeals. These proceedings frequently take years to resolve and often require taxpayers to expend significant resources. If the proposed amendment is adopted, the Department would have the power to extend the litigation process beyond these proceedings, not just to the New York State Supreme Court, Appellate Division, Third Department, but potentially to the New York State Court of Appeals. Those Tax Section members who oppose granting the Department an appeal right are concerned that a large segment of the taxpayer community will be unable to endure an extended litigation process due to financial, time or other resource constraints, or even because the taxpayer does not have the psychological stamina to proceed.

In this regard, the potential imbalance in "staying power" between the government and taxpayers should be considered, as should the legislative history behind the 1986 legislation creating the Tribunal. That legislative history makes it clear that the Tribunal was created primarily to benefit taxpayers by, among other thing, establishing an independent adjudicative body and providing for a "rapid" system for resolving tax dispute. *See* Memorandum of State Executive Department, L.1986, c.282 at 2898-2899 (July 19, 1986). Permitting the Department to extend litigation beyond the Tribunal arguably goes against the purpose of the 1986 legislation.

In light of the above, those Tax Section members opposing the appeal right question whether the justifications set forth in the Memorandum in Support of the Article VII Legislation justify changing the current system. According to the Memorandum in Support, the Department should be granted the right to appeal adverse Tribunal decisions because "[j]udicial review presents the quickest and most efficient method of reaching finality: in the

absence of judicial review, the Department's only recourse is to seek legislation to reverse significant Tribunal decisions with which the Department disagreed as a matter of law." Those Tax Section members who do not support providing the Department with the proposed appeal right find the assertion that judicial review is quicker and more efficient to be dubious. The judicial appeal process can take years to complete, whereas the Department has routinely succeeded in quickly persuading the legislature to adopt legislation—often retroactive in nature—to overturn Tribunal decisions with which it disagrees.[3] The Department has also been successful in overturning, through legislation, adverse decisions of the very judicial courts that it now says it must be permitted to appeal to for redress when the Tribunal issues a decision with which it disagrees.[4]

We also note that the Department has successfully utilized the Tribunal's rehearing process to convince the Tribunal to overturn its own decisions. The rehearing process permits a party to a proceeding before the Tribunal, including the Department, to file a motion with the Tribunal to reargue its case. In recent times, the Department has used the rehearing process to demonstrate to the Tribunal that its original decision misapprehended important issues of fact or law.[5] Currently, the Department has moved to reargue the two September 2017 decisions regarding the non-discrimination clause of the United State-Germany 1989 Tax Treaty that are referenced in the Memorandum in Support as further support for permitting the Department to appeal adverse Tribunal decisions. In this regard, the Memorandum in Support inaccurately

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[3] Recent examples include legislation to retroactively overturn the Tribunal's decisions in *Matter of Baum*, Tax Appeals Trib. (Feb. 12, 2009) and *Matter of Weber*, Tax Appeals Trib. (Aug. 25, 2016).

[4] *See, e.g.*, *Tenn. Gas Pipeline v. Urbach*, 96 N.Y.2d 124 (2001).

[5] *See e.g.*, *Matter of Gaied*, Tax Appeals Trib. (June 16, 2011).

states that "judicial review is the only avenue for seeking reversal of [these] adverse opinion[s]."

While the majority of the Tax Section supports granting the Department an appeal right, it also acknowledges the validity of the concerns of those who believe that providing such an appeal right will impose an undue burden on taxpayers, especially those with limited resources and/or limited tax amounts at issue in a particular case. Several approaches to addressing these concerns have been raised since the early 1980s. Among the proposals (some of which are not mutually exclusive of some others) that should be considered are:

1. Provide the Division of Taxation the right to seek leave to appeal from the Appellate Division, Third Department, based on specified criteria (i.e., the Division would need permission from the Third Department before being permitted to proceed with the appeal).

2. Require the Department to reimburse the taxpayer's reasonable litigation costs if the Department is unsuccessful in its appeal.

3. Provide that the Attorney General must approve of the Division of Taxation's request to appeal and provide written justification as to why: (1) an appeal is in the best interest of the State; and (2) imposing the litigation burden on the particular taxpayer is warranted.

4. Provide a mechanism by which the Division of Taxation may move the Tax Appeals Tribunal to render its decision non-precedential (similar to "unpublished decisions" in many states), rather than appeal.

5. Provide that the Division of Taxation may appeal an adverse Tax Appeals Tribunal decision only where either the dollar amount at issue exceeds a certain threshold and/or the taxpayer's net worth exceeds a certain threshold.

It is important to note that virtually all of these approaches would require a change to the current Article 78 principles and procedures since Article 78 is the codification of the common law proceedings for mandamus, prohibition, and certiorari, which are proceedings against the government since if the Division of Taxation has the right to undertake an appeal, the situation would be one where the government is proceeding against a taxpayer. We believe that these present mere "mechanical" issues that can be addressed by relatively simple legislation.

V. Part O: Clarify New York Residency Requirements for Tax Purposes

The Budget Bill proposes to amend the definition of a New York State and New York City "resident individual" under Tax Law §§ 605(b)(1)(B) and 1305(a) for personal income tax purposes.

A. Current Law

In addition to most individuals domiciled in the state, the Tax Law currently defines a "resident individual" to include someone "***who is not domiciled in this state but*** maintains a permanent place of abode in this state [city] and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state [city]."[6] This is commonly referred to as the "statutory residency" test. The highlighted language was the subject of a 2015 Order from New York's Division of Tax Appeals in *Matter of Sobotka*.[7] In *Sobotka,* an Administrative Law Judge determined that days spent in New York during the part of a tax year when the taxpayer was domiciled in New York could not be counted toward the 183-day limit found in Tax Law §§ 605(b)(1)(B) and 1305(a)(2).

[6] Tax Law §§ 605(b)(1)(B) and 1305(a)(2). Other than the geographic descriptors, the language in the Tax Law sections applicable to state and city statutory residency is identical.

The underlying bases for this ruling were (1) the plain language in Tax Law §§ 605(b)(1)(B) and 1305(a)(2) stating that statutory residency test applies only to an individual "who is not domiciled in the state" and (2) the legislative history of a 1922 amendment to the Tax Law section defining resident individuals (Tax Law former §350(7)).

The Department claimed it has historically counted all days an individual is present in New York during a given tax year—regardless of whether that individual is a part-year domiciliary of New York—to determine whether that individual is a statutory resident. In the *Sbotka* decision, the Division of Tax Appeals held that the Department's interpretation was inconsistent with the language of the statute and was not supported by the legislative history.

B. Proposed Changes

The Budget Bill proposes two changes to Tax Law §§ 605(b)(1)(B) and 1305(a)(2). First, it eliminates the language highlighted above, ridding the statute of the requirement that an individual not be domiciled in the state [city] to meet the definition of a statutory resident. Second, it adds language stating that an individual who meets the two-pronged requirement of statutory residency (maintenance of a permanent place of abode plus more than 183 days spent in New York) is a resident individual "whether or not domiciled in this state for any portion of the taxable year."

The Budget Bill would make these changes effective prospectively and retroactively to all taxable years for which the statute of limitations for seeking a refund or assessing additional tax is still open.

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[7] *Matter of Sobotka,* New York Division of Tax Appeals, Administrative Law Judge (DTA No. 826286), August 20, 2015.

C. Comments

The Court of Appeals has twice held (in *Gaied v. N.Y. Tax Appeals Tribunal* and *Tamagni v. Tax Appeals Tribunal of the State of New York*[8]) that the legislative history of the statutory residency provision was to tax as residents those individuals who "for all intents and purposes" were residents of New York State, but claimed domicile elsewhere. While we take no position on whether the Legislature should amend the Tax Law's statutory residency provisions to reject the analysis of the administrative law judge in *Sobotka*, we note that the proposed amendment would have the effect of taxing individuals as full-year residents of New York when they are "for all intents and purposes" only part-year residents.

Such results would, arguably, also be inconsistent with the Court of Appeals decision in *Gaied*. In *Gaied*, the Court of Appeals noted that "[t]he legislative history of the statute, to prevent tax evasion by New York residents, as well as the regulations, support the view that in order for a taxpayer to have maintained a permanent place of abode in New York, the taxpayer must, himself, have *a residential interest* in the property." The proposed law change here would do nothing to address this issue. In the above example, the proposed law change would result in Iris being taxed as a full-year resident, despite the fact that she did not, under the Court of Appeals decision in *Gaied*, have a "residential interest" in her New York property for nearly half of the year.

It is also worth noting that, in recent years, there have been bills introduced that would ameliorate the impact of the statutory residency rules for taxpayers in circumstances similar to the taxpayer in *Matter of Barker*.[9] In *Barker,* the Department applied the statutory residency

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[8] *Tamagni v. Tax Appeals Tribunal of the State of New York,* 695 N.E.2d 1125 (N.Y. 1998).

[9] *Matter of Barker,* Division of Tax Appeals, N.Y. Tax Appeals Tribunal (Docket No. 822324), January 13, 2011.

test mechanically, taxing Connecticut domiciliary Mr. Barker as a New York State resident. Though Mr. Barker spent well over 183 days in New York State, only about 15-20 days each summer were actually spent at his Hamptons abode, and the remainder were days spent in New York City where Mr. Barker worked as an investment banker, but had no living quarters whatsoever.

The Memorandum in Support of Part O of the Budget Bill suggests that the proposed amendment is needed to ensure that individuals are taxed if they are, "for all intents and purposes," residents of New York. If the Legislature is going to amend the definition of a statutory resident to address the *Sobotka* decision, it ought to consider a comprehensive revision to the statutory residency provisions so that taxpayers who clearly do not meet the "for all intents and purposes" test do not get caught up in the statutory resident net.

Some might argue that the Legislature could achieve both the original intent of the statutory-resident rules and avoid the possibility of untoward results, by drafting a proposed change that is more consistent with the "for all intents and purposes" test. For instance, the Legislature could adopt a pro-rated day count test for statutory residency to be applied to individuals who are domiciled in New York for less than all of the year in question. As applied to the Iris example, such a test might have allowed Iris to spend up to 90 days in New York during the non-domiciliary part of the tax year (July 5–December 31) before she became a statutory resident for that part of the tax year.

Finally, the changes proposed in Part O of the Budget Bill take effect immediately and apply to all tax years for which a statute of limitations for seeking a refund or assessing additional tax is still open. Absent compelling circumstances, changes to longstanding statutes should not be made retroactively applicable. Here, the only rationale for retroactive

application would seem to be generating additional tax revenue, which is not, alone, a compelling justification. We appreciate the goal of revenue protection. But, retroactively-effective legislation, in addition to being susceptible to Constitutional challenges, is almost never good policy. Inasmuch as the current law fully comports with the legislative history of the current law, and the specific provision in question was tested by an August 2015 Division of Tax Appeals case that the Department chose not to appeal, retroactive application would not be good policy in this instance.

VI. Part S: Defer Business Related Tax-Credit Claims

A. Current Law

There is no current law, but a similar deferral regime was in effect for taxable years beginning on or after January 1, 2010 and ending on or before December 31, 2012. We note that the prior deferral of tax credits survived a constitutional challenge.[10]

B. Proposed Changes

Under Part S of the Budget Bill, taxpayers would be required to defer the use and refund of certain business tax credits in excess of $2 million in taxable years beginning on or after January 1, 2018 and ending on or before December 31, 2020. The Budget Bill provides a formula to proportionately reduce each credit by a specified fraction with the result that the taxpayers are only able to use up to $2 million of credits in each taxable year. The total amount of credits deferred under the Budget Bill would be paid back to taxpayers (without interest) over tax years 2021, 2022 and 2023. The timing and amount of the repayment would depend on whether the credits are refundable or non-refundable under the current law. The credits subject to deferral would be expanded from those covered under the prior deferral

[10] *Empire Gen Holdings, Inc. v. Governor of NY*, 967 N.Y.S.2d 919 (Sup. Ct. Albany Cty. June 25, 2013).

regime and, would include brownfields, low-income housing, and historic tax credits, among others.

C. Comments

Some of the tax credits that would be subject to the deferral are used to finance real estate developments across the state and function as an alternative to government issued bonds. We note that the proposed deferral of the tax credits would create uncertainty regarding the viability of tax credits as a financing tool and likely decreases their value, resulting in higher borrowing costs.

VII. Part T: Amend the Refund and Joint Liability Provisions of the Real Estate Transfer Tax

A. Current Law

Under section 1412 of the Tax Law, grantors and grantees claiming to have erroneously paid real estate transfer taxes are allowed to file a refund claim within two years from the date of payment. An additional tax is imposed under section 1402-a on the conveyance of residential real property for consideration of $1 million or more ("the mansion tax"). The mansion tax is imposed on the grantee, but if the grantee is exempt from the tax, the grantor becomes liable for the tax.

B. Proposed Changes

Part T of the Budget Bill would extend the statute of limitations to three years for the filing of a refund claim. The bill would also make the grantor liable for the mansion tax when the grantee fails to pay the tax (not just when the grantee is tax exempt). If the grantor becomes liable, the grantor and grantee would be jointly and severally liable for the tax.

C. Comments

The extension of the statute of limitations to file refund claims to three years is commendable. We believe that the three year refund period promotes fairness to taxpayers by putting the taxpayer and the Department on equal footing (because the Department has three years to assess additional tax). It also promotes procedural uniformity across the various other taxes, thus helping eliminate inadvertent mistakes by taxpayers regarding the timeliness of their refund claim.

We note, however, that the period for refund claims with respect to real property transfers pursuant to Articles 31-a through 31-G remains two years. For consistency purposes, we recommend that the statute of limitations under these Articles also be extended to three years.[11]

VIII. Part X: Provide Responsible Person Sales Tax Relief for Minority LLC Owners

A. Current Law

Section 1131(1) of the Tax Law defines the "persons required to collect tax" for New York State sales tax purposes. The provision imposes absolute liability for unpaid sales taxes of a partnership upon any member of the partnership without regard to whether the member is a general partner or a limited partner. The same clause also imposes absolute liability for unpaid sales taxes of a limited liability company upon any member of the limited liability company without regard to whether the member had any involvement in the financial affairs or management of the business. Unlike the liability imposed on directors, officers, employees or

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[11] We note that New York City's statutes of limitations to request refunds of various local taxes is one year, whereas the statutes of limitations for audit purposes is three years. See, e.g., NYC Admin Code §§ 11-2108, 11-2116 (Real Property Transfer Tax); NYC Admin Code §§ 11-2507, 11-2517 (Hotel Room Occupancy Tax). We recommend that the legislature addresses the discrepancy between the statutes of limitation and extend the time to claim a refund to three years.

managers, there is no requirement that the partner or member be "under a duty to act" for the business in complying with the sales tax laws in order to be held liable.

This "strict liability" language is inconsistent with all other "responsible person" provisions of federal and state tax law as they apply to other forms of doing business (*e.g.,* corporations) and other types of trust fund taxes (withholding taxes). In all other cases, the liability is imposed only on those persons with "a duty to act" in assuring compliance with the laws for collection and paying over the trust fund taxes (sales taxes and withholding taxes).

The absolute liability imposed by the law is also in direct conflict with other provisions of New York law intended to encourage investment in limited liability companies and limited partnerships by protecting passive investors from the liabilities of the business. *See* Limited Liability Company Law §609(a) and New York Partnership Law §§ 121-303.

In Report #1035 (July 22, 2003), the Tax Section of the New York State Bar Association recommended amendment of section 1131(1) to correct what we believed was the unintended effect of amendment of the law in 1994 when New York adopted legislation permitting the creation of limited liability companies. If read strictly, the law imposes personal liability for all unpaid sales taxes on limited partners of a limited partnership and members of a limited liability company even if the limited partner or LLC member was merely a passive investor having no role in the operations of the business.

Since that report was published, there have been several legislative efforts to amend the law to remove the absolute liability provisions. In 2011, a departmental bill from the Department recommended an amendment to section 1131(1) to eliminate the language imposing absolute liability. However, after that effort stalled in the legislature, the Department issued Technical Memorandum TSB-M-11(17)S (Sept. 19, 2011) to provide some

administrative relief from the harsh effects of the law. The TSB allows a limited partner or LLC member with less than a 50% ownership interest and who did not have a "duty to act" in assuring compliance with the sales tax laws, to settle his or her sales tax liability under the law by paying a percentage of the sales taxes owed (inclusive of statutory interest) equal to his or her percentage ownership in the business.

In 2015, Assemblyman Daniel Farrell, Chair of the New York State Assembly Ways and Means Committee., introduced Assembly Bill #1983, which proposed to amend the "responsible person" provisions of the sales tax law to make changes consistent with the recommendations made in Tax Section Report #1035. The bill was identical to the language drafted by the Department in 2011. The Tax Section submitted informal comments on Assembly Bill #1983 in which we agreed with the proposed language amending section 1131(1) to remove the absolute liability provisions. However, we objected to certain other provisions in the bill creating new and onerous registration reporting requirements as well as a provision doubling the statute of limitation for liability (from three years to six years) for anyone failing to comply with those reporting requirements. Our objections noted that the earlier (2011) Department concerns regarding identification of responsible persons likely no longer existed as a result of new questionnaires then being used by the Department to obtain responsible person information when a business registers to become a vendor for the collection of sales taxes. Assembly Bill 1983 was referred to the Assembly Ways & Means Committee, but never moved forward.

B. Proposed Changes

The Budget Bill would amend section 1133(a)(2) of the Tax Law to essentially codify the Departmental policy set forth in TSB-M-11(17)S. That TSB has, as described above,

provided some measure of relief to limited partners of a limited partnership and members of a limited liability company from the imposition of absolute liability for sales tax delinquencies owed by the partnership or limited liability company. Under that TSB, the limited partner or member may settle his or her sales tax liability by paying a percentage of the sales taxes owed (inclusive of statutory interest) equal to his or her percentage ownership in the business if the limited partner or member can demonstrate that he or she had a minority interest (less than 50%) in the business and had no "duty to act" in assuring compliance with the Tax Law. To qualify for relief, the Budget Bill adds the requirements that the person seeking relief cannot: (1) have acted on behalf of the limited partnership or limited liability company in complying with the sales tax laws; (2) have been convicted of a crime under the tax law; or (3) have a past-due tax liability. The Budget Bill does **not** propose any amendment to section 1131(1) to remove the "absolute liability" provisions that include within the definition of "persons required to collect tax" all partners in a limited partnership (including limited partners) and all members of a limited liability company even if they have no involvement in the financial affairs or management of the business.

C. Comments

While we have commended the Department for extending administrative relief to limited partners and limited liability members who, under a strict reading of the current language of section 1131(1), have been found to have absolute liability for sales taxes owed, we continue to take the position that the TSB relief does not go far enough to address the unfairness of the statute. We continue to believe that section 1131(1) needs to be amended to remove the absolute liability language. If the LLC member or limited partner is merely a passive investor without any involvement in the business, he or she should have no

"responsible person" liability for unpaid sales taxes. Sales tax liabilities are potentially some of the largest of the trust fund liabilities and even a very small percentage ownership interest can result in very large liabilities owed even under the relief provisions of the TSB. As accurately described in the "Justification" of Assembly Bill 1983, "[t]he existing language of the state law that creates personal liability in passive investors is not just grossly unfair, it could deter investment in New York State businesses."

While the codification of TSB-M-11(17)S would assure a permanency and an interpretive weight to the relief provision that does not currently exist in its form as a TSB-M (which is merely an informational statement of existing department policies and may be changed by the Department), it is disappointing that the Budget Bill does not seek to amend section 1131(1) and finally address the unfairness of imposing absolute liability for sales tax on mere investors in a business especially when there is no policy justification for the law, no consistency with similar federal or state "responsible person" provisions, and the law is in direct conflict with other provisions of New York law intended to limit liability of passive investors.

Furthermore, in contrast to the provisions of TSB-M-11(17) S, the Budget Bill adds the following requirements for relief:

> "[T]he commissioner may deny an application for relief to any such limited partner or member who the commissioner finds *has acted on behalf of such limited partnership or limited liability company in complying with any requirement of this article* or has been convicted of a crime provided in this chapter or *who has a past-due liability, as such term is defined in section one hundred seventy-one-v of this chapter."* (emphasis added).

We believe that the above wording creates some ambiguities. We do not believe that relief should be denied to a limited partner or limited liability company member who may become aware that there is a delinquency in the filing of sales tax returns or the payment of sales taxes by the business and attempts to intervene in some positive way to demand that the business become compliant with the Tax Law or make arrangements for payment of sales tax delinquencies. Under the above language, even a positive effort on the part of the limited partner or member to right the wrong could place them at risk for denial of relief. Perhaps a better way of expressing the above requirement would be:

> "has *acted on behalf of such limited partnership or limited liability company in* ***thwarting compliance*** *with any requirement of this article ...."*

Similarly, the denial of relief to anyone "*who has a past-due liability, as such term is defined in section one hundred seventy-one-v of this chapter"* is overbroad and overly restrictive. Under section 171-v, the term "past-due liability" means "any tax liability or liabilities which have become fixed and final such that the taxpayer no longer has any right to administrative or judicial review." This means that any limited partner or member who owes even a single dollar of unpaid tax liability would not qualify.

This additional limitation represents a significant narrowing of the relief provided by TSB-M-11(17)S, though we understand it may be consistent with how the Department is currently administering the policy. In any event, while the Tax Section supports a more vigorous reworking of the statute to entirely remove the absolute liability language for LLC members and limited partners, we at a minimum recommend that the restriction on providing relief to individuals with other tax debts be reconsidered. In our view, the unfairness of

holding minority, passive investors responsible for entity-level sales and use tax debts should be mitigated as a matter of good tax policy and administration.

IX. Part AA: Internet Fairness Conformity Tax

Part AA of the Budget Bill proposes (i) a major change to the way sales and use taxes would be collected for sales made through so-called "marketplace providers" and (ii) a system whereby persons not required to collect tax in New York would be required to submit certain reports to New York State and to purchasers.

The marketplace proposal would shift the burden of collecting sales tax from the retailer to a "marketplace provider" that "facilitates sales of tangible personal property." It also has the effect of increasing the reach of New York's authority to require the collection of sales tax on online sales made by out-of-State sellers through marketplace providers with New York State nexus. Additionally, it would shift responsibility for the collection of sales tax for sales by an in-State seller to the marketplace provider in regard to particular sales.

The reporting proposal would require sellers and marketplace providers who are not required to obtain a certificate of authority to submit information returns with respect to sales to New York purchasers to New York State, as well as annual statements of purchases with notices that sales tax may be due to the purchasers.

A. Current Law

1. *Marketplace Provider*

Under current law, the responsibility to collect and remit sales taxes on taxable in-State sales is limited to "vendors."[12] A vendor is defined as a person "making sales" that has a sufficient connection to New York State to require the vendor to collect and remit sales tax on sales to customers in the State.[13] In certain circumstances, an agent of the vendor can be treated as a "co-vendor," with joint responsibility for collecting and remitting the sales tax.[14] When sales tax is not collected by the vendor on a taxable sale, the purchaser is obligated to remit use tax with respect to the use of the purchased property.[15]

Because vendors are defined as the persons actually making sales, a party that merely facilitates a sale between a seller and a buyer through a physical or online marketplace forum is not a vendor and does not have tax collection responsibilities, even if such party has in-State nexus. The responsibility for collecting sales tax lies with the seller itself. Critically, an out-of-State seller that does not otherwise have nexus with New York does not create in-State nexus by selling goods through an online marketplace, and is not required to collect and remit sales tax on sales made through an online marketplace.[16] This does not relieve in-State purchasers from liability for use tax.[17] Use tax is generally acknowledged to be

[12] Tax Law §§ 1131(1), 1132(a)(1).

[13] Tax Law § 1101(b)(8).

[14] Tax Law § 1101(b)(8)(ii)(A).

[15] Tax Law § 1110.

[16] Tax Law §§ 1101(b)(8)(v)(A).

[17] Tax Law § 1110.

underreported.[18] Thus, in an effort to increase use tax compliance, in lieu of having purchasers compute the use tax on each individual purchase, New York offers a simplified method whereby residents can elect on their personal income tax return to pay an estimated aggregate use tax on all purchases costing less than $1,000 each, which estimate is based on the residents' taxable income.[19]

2. *Information Reporting*

Under current law, no information reporting requirements are imposed on sellers or on marketplace providers.

B. Proposed Changes

1. *Marketplace Provider*

Part AA of the Budget Bill would alter the structure of current law by placing the burden of collecting tax on sales facilitated through an online or physical marketplace on the "marketplace provider." Under the proposal, a "marketplace provider" is defined as any person who "facilitates a sale of tangible personal property" by a "marketplace seller." A marketplace provider facilitates sales when it (i) "provides the forum" in which, or by means of which, the sale takes place and (ii) such person or an affiliate of such person either collects the receipts paid by a customer to a marketplace seller for the sale of tangible personal property or contracts with a third party to collect such receipts. A "forum" includes an internet website, catalog or similar forum or a physical forum, such as a "shop, store, or booth." Importantly, a

[18] Memorandum in Support, Part AA (stating that the proposal will increase revenues by $80 million in 2019 and $159 million annually thereafter).

[19] Form IT201i, p. 26.

person who facilitates sales exclusively by means of the Internet is not a marketplace provider if its annual sales have been no more than one hundred million dollars for every calendar year after 2016. The proposal would take effect on September 1, 2018.

2. *Information Reporting*

Part AA of the Budget Bill would also require sellers and marketplace providers who are not required to obtain a certificate of authority to submit information returns to the Commissioner with respect to sales to New York purchasers, as well as annual statements of purchases with notices that sales tax may be due to the purchasers.

The first requirement applies to "non-collecting sellers" who are defined as persons who make sales of tangible personal property, are not required to obtain a certificate of authority in New York, and do not collect sales tax in regard to tangible personal property delivered to New York. A non-collecting seller is required, upon, request of the Commissioner, to provide to the Commissioner each New York purchaser's name and last known address, and the total of the non-collecting seller's receipts from purchases by the New York purchaser.

In addition, non-collecting sellers with receipts of five million dollars or more during the calendar year are required to file an annual information return with the Commissioner. The return must include the total of the non-collecting seller's receipts from sales of tangible personal property that are delivered to New York "together with such other information the Commissioner may prescribe." In addition, such non-collecting sellers are required to provide an annual statement of purchases to each New York purchaser for purchases of tangible personal property delivered to a location in New York. This document must include both a statement that sales or use tax was not collected and that the purchaser may be required to

remit such tax directly to the Commissioner and a list of transactions entered into during the prior calendar year by the purchaser showing the date of each purchase, a description of the item purchased, and the amount paid for each item. Non-collecting sellers **over the $5 million threshold** are also required to prominently display a notice on all order forms and sales receipts (including screens that summarize the transaction prior to the completion of sale) stating that a purchaser may be required to submit tax directly to the State.

A separate requirement applies to "non-collecting marketplace providers," which are marketplace providers (as defined above, including the $100 million threshold embedded in the definition) who are not required to obtain a certificate of authority under the new requirements described above and who do not collect sales tax in regard to tangible personal property delivered to New York. Non-collecting marketplace providers are required to perform the requirements set forth above on behalf of a non-collecting seller for all sales they facilitate for such non-collecting sellers. Non-collecting marketplace providers are required to provide notice to each non-collecting seller for whom they facilitate sales of tangible personal property that states that the seller may be required to obtain a certificate of authority and informs the seller of information that the marketplace provider may provide to the Commissioner.

C. Comments

At the outset we note that the Supreme Court has issued a writ of certiorari in the matter of *South Dakota v. Wayfair, Inc.*, No. 17-494, in which South Dakota has asked the Supreme Court to reconsider the sales-tax only physical presence nexus requirement established by *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The Supreme Court's ultimate determination in this matter has the potential to fundamentally change the underlying constitutional jurisprudence that has resulted in New York's inability to directly impose sales tax on Internet

sales. The proposals in Section AA of the Budget Bill, which appear designed to navigate around the constitutional constraints, may no longer be necessary. Given the possibility of change in the underlying federal law, we note that this is an unusual juncture for New York to propose the significant new changes set forth in the Budget Bill. We suggest that consideration be given to the *Wayfair* matter in connection with review of the proposals in the Budget Bill.

1. *Marketplace Provider*

The proposed approach in the Budget Bill would significantly alter nationwide practices as to the party responsible for collecting sales tax on sales facilitated through third parties.[20] The proposal would impose significant compliance obligations and potential tax liabilities on marketplace providers, parties whose sole role in the transaction is to facilities sales between two unrelated parties, and who may not be in a position to make determinations as to taxability. Under the proposal, this designation of collection responsibility is mandatory—if a marketplace provider facilitates sales, the marketplace provider will be responsible for sales tax compliance for those sales.[21] The Tax Section expresses no opinion on this provision as a policy matter, although we note that it would represent a substantial change.

The shifting of responsibility for collecting tax from the marketplace seller to the marketplace provider under the proposal appears to have two major effects. First, with respect to sellers that already have nexus in New York, it would appear to relieve them of the

[20] For states with similar statutes, see Minnesota H.F. 1 (2017) and Washington H.B. 2163 (2017).

[21] Budget Bill Part AA § 2.

responsibility of collecting sales tax and shift that responsibility to the marketplace provider.[22] Second, it appears to provide a mechanism for the collection of sales tax for sales by sellers that do not have any nexus with the State. The marketplace provider would be responsible for collecting and remitting the tax on sales made by both in-State and out-of-State sellers.

i. Nexus

We have not identified any obvious constitutional infirmity in placing the responsibilities set forth in the Budget Bill on marketplace providers, so long as the marketplace provider meets the statutory and constitutional nexus requirements with the State. Indeed, it may be analogized to imposing a sales tax collection responsibility on in-State co-vendors (discussed below).[23] We do, however, recommend that the Tax Law make clear that only marketplace providers with nexus to New York are required to collect sales tax. At a minimum, the law should provide that marketplace providers must have "a connection with the state which satisfies the nexus requirement of the United States constitution."[24]

[22] We note that under the proposal, in order to be relieved of responsibility for collecting sales tax, the seller must obtain a "completed certificate of collection" from the marketplace provider which states that the marketplace provider will collect the sales tax. Budget Bill Part AA § 3.

[23] *See*, *e.g.*, TSB-A-86(13)S (N.Y.S. Dep't of Taxation & Fin., Mar. 26, 1986) (ruling that a household appliance telephone ordering service is responsible for collecting and remitting sales tax as a co-vendor on sales made on behalf of out-of-state suppliers).

[24] We note that under the Budget Bill, marketplace sellers that have nexus with New York must ascertain whether the marketplace provider has nexus in order to determine which party will bear tax collection responsibilities. If the marketplace provider has nexus with New York, the marketplace seller will be relieved of sales tax collection responsibilities with respect to those sales that it makes through the marketplace provider. However, if the marketplace provider does not have nexus with New York, sales tax collection responsibilities for those sales will remain with the marketplace seller.

As described above, we note that these nexus requirements may change depending on the U.S. Supreme Court's determination in the *Wayfair* matter. Based on current law, in order to satisfy constitutional requirements to be required to collect and remit sales tax on behalf of New York, a marketplace provider would need to have a non-de minimis physical presence in New York, either directly or through *Scripto/Tyler Pipe*-type agency or representative nexus. In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), which will be revisited in *Wayfair*, the U.S. Supreme Court reaffirmed its decision in *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967) establishing a "bright-line" physical presence rule under the Commerce Clause; under this bright-line rule a state can compel those out-of-state mail order sellers having a physical presence in the state to collect its use taxes, but cannot impose a collection obligation on those who do no more than communicate with customers in the state by mail or common carrier as part of an interstate business. Accordingly, a marketplace provider would have nexus with the State only if it has a physical presence in the state, such as if personnel of the marketplace provider are physically present in the State on a regular or systematic basis. While in-state physical presence is a necessary predicate to nexus, such in-state presence need not be "substantial;" rather, it need only be demonstrably more than the slightest presence.[25] For example, it is unclear whether merely having a server in the State would meet this nexus standard.

Nexus can also be established through attribution from independent contractors or agents under the U.S. Supreme Court decisions in *Scripto* and *Tyler Pipe*. In *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), the Supreme Court held that regular solicitation of sales by independent contractors (and not employees) was sufficient to establish a sales and use tax

[25] *National Geographic Soc. v. California Bd. Of Equalization*, 430 US 551 (1977); *Orvis Co. v. Tax Appeal*

collection obligation by an out of state corporation with no physical presence in the state. Indeed, the Supreme Court has stated that "the crucial factor governing nexus is whether the activities performed in [the] state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in [the] state for the sales.'"[26]

In view of the above precedent, and in the absence of direct precedent regarding marketplace providers, the Tax Section does not take a position on the required nexus where the marketplace seller does not itself have nexus with the State, but raises it as an issue that should be considered and addressed in the legislation, or else by regulation, and notes that any such guidance may need to be revisited in light of the final determination in *Wayfair*. We also acknowledge the decision of the New York State Court of Appeals in *Amazon.com, LLC v. New York State Department of Taxation and Finance*,[27] in which the court found substantial nexus in the absence of actual physical presence.

ii. Scope of Application

The proposed reporting requirements are limited to sales of personal property. We note that for purposes of New York's sales and use tax, personal property includes computer software,[28] therefore bringing within the ambit of the marketplace provider provisions those online marketplaces that sell software applications and computer games. Prior versions of

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Tribunal, 86 N.Y.2d 165 (1995).

[26] *Tyler Pipe Indus., Inc. v. Washington State*, 483 U.S. 232 (1987) (quoting *Tyler Pipe Indus. v. Dep't of Revenue*, 105 Wash.2d 318, 323 (1986)).

[27] 20 N.Y.3d 586 (2013).

[28] 1101(b)(6)

proposed marketplace reporting requirements would also have included sales of occupancies or admissions, which are no longer covered by the current proposal.[29]

Under the proposed definition, an entity is a "marketplace provider" only if it collects the receipts paid by a customer. We understand that there are "peer-to-peer" online marketplaces where the buyer has the ability to pay the seller directly, resulting in the marketplace provider not collecting such receipts. It appears that such sales are excluded from the application of this section, especially in light of the deletion of language that has been present in former marketplace reporting proposals that provided that the term "marketplace provider" included organizations that arrange for exchange of messages between customers and sellers.[30]

We also understand that there are companies that create and manage websites that are branded in the name of the selling business, and may provide the types of services identified in the definition of a "marketplace provider." For example, in addition to creating a website for the seller, such companies may also collect the receipts from the seller's customers through the website and remit them to the seller. If the intent of the proposal is to treat as a "marketplace provider" an entity that facilitates sales through a website address that is specific to a single business, rather than a website address that identifies a marketplace, then we recommend that the proposal make that clear.

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[29] See Part X, 1/19/15 Budget Bill.

[30] See Part X, 1/19/15 Budget Bill.

iii. Physical Marketplaces

In identifying the "forum" through which a marketplace provider facilitates a sale, the proposal also refers to a "shop, store, or booth" in addition to online marketplaces. We have struggled to identify a situation where a physical marketplace such as a store that does not already have tax collection responsibilities would meet the criteria specified in the statute.

We note that the exception for sellers that facilitate sales *exclusively* by means of the Internet applies only if the seller facilitated less than one hundred million dollars annually for every calendar year after 2016. We agree that the high threshold is appropriate here given the burden of compliance with the law. It is not clear to us why this exception would apply only to Internet websites and not to other retailers. For example, an Internet website that is under the threshold would immediately become a marketplace provider if it were to publish a catalogue.

iv. Other Matters

The Budget Bill states that generally a seller would be relieved from its duties to collect tax if it has received in good faith a properly completed certificate of collection from the marketplace provider certifying its compliance. It then goes on to provide that the Commission may (i) develop a contractual provision or approve a contractual provision developed by the marketplace provider which, if included in the contract, will have the same effect as the certificate of collection and (ii) provide by regulation or otherwise that inclusion of such provision in the publicly available agreement between the marketplace provider and the marketplace seller will have the same effect as the certificate of collection. We note that this provision differs from the rules applicable for other sales tax exemptions. For example, a certificate of exemption must be obtained from a non-profit organization; it is not sufficient to

recite in the contract that the organization is non-profit. We are unclear as to the meaning and scope of the prong requiring inclusion of the contractual provision in a publicly available agreement and suggest that this be clarified. We are concerned that requiring public availability of the commercial contract, including sensitive business terms, may dissuade parties from using this provision.

We note that the Budget Bill states that the Department may provide by regulation or otherwise that a seller will be relieved of duty to collect tax for sales facilitated by a marketplace provider only if such marketplace provider is not on a list on the department's website of marketplace providers whose certificates of authority have been revoked at the commencement of the applicable quarterly period. We are concerned about the potential burden on sellers of needing to check this list on such a frequent basis and would suggest that an annual period be considered.

v. Co-Vendor Approach

One alternative to the Budget Bill's approach that could achieve the bill's apparent policy objectives would be to amend the law to permit a marketplace provider to be treated as a co-vendor under Tax Law § 1101(b)(8)(ii). Under existing law, the Department has the authority to treat any "salesman, representative, peddler or canvasser" as the seller's agent, and thus as jointly liable for collecting and remitting the sales tax.[31] By allowing the Commissioner to treat the marketplace provider as a co-vendor, the marketplace seller would remain the party primarily responsible for collecting and remitting the tax, but where the Commissioner determines it to would be efficient for administration of the tax, the marketplace

[31] Tax Law § 1101(b)(8)(ii).

provider could be held jointly responsible. Under this approach, whether or not a marketplace seller has New York nexus, the marketplace provider could be treated as responsible for collecting the sales tax upon reasonable notice by the Department.

2. *Information Reporting*

The proposed approach in the Budget Bill follows the general approach taken by Colorado in Colo. Rev. Stat. §39–21–112, which was the subject of litigation in *Direct Mktg. Assn. v. Brohl*, 814 F.3d 1129 (10th Cir. 2016), cert. denied, 580 U.S. 16-267. In that case the 10th Circuit held both that Colorado's law does not violate the dormant Commerce Clause because it does not discriminate against or unduly burden interstate commerce and that *Quill's* bright-line physical presence test did not extend beyond tax collection to information reporting. We note that the Budget Bill would expand the information reporting obligation not just to sellers but to marketplace providers; it has not been determined whether the rationale of *Direct Mktg. Assn.* would properly extend this obligation beyond sellers to marketplace providers as well.

i. Privacy Concerns

We have significant privacy concerns with the proposal in the Budget Bill. Under the proposal, the State would be entitled to request that each non-collecting seller or non-collecting marketplace provider furnish the Commissioner with a listing of the name of each New York purchaser and the total of the non-collecting seller's receipts from each purchaser. The mere fact that a purchaser has made a purchase from a particular website may be sensitive information that a purchaser may not want to disclose to the State. Similarly, in order for purchasers to obtain assistance from tax preparers in determining whether purchases are

taxable (see below), they will need to share what may be sensitive information regarding the details of their purchases (even those of *de minimis* value) with their tax preparers.

ii. Purchasers

Under the proposal, the State would receive a listing with the name of each New York purchaser and the total of the non-collecting seller's receipts from each purchaser, but no information on the purchase itself or whether the purchase is taxable. This may result in a situation where the State makes inquiry of a purchaser with respect to potential tax due where the items purchased were not in fact taxable.

Similarly, the notice requirement applies to each sale of tangible personal property, whether taxable or not. The notices to the seller may accordingly be misleading: A seller would be required to submit a statement to a purchaser specifying that "the purchaser may be required to remit tax" even when the item sold to the purchaser is clearly not taxable.

For purchasers that use income estimates for computation of use tax as described above, the information provided on the notices will be irrelevant. Accordingly, consideration should be given to requiring the notices to explain the availability of this method so as to make purchasers aware that there is an alternative method to be used instead of adding up all purchases made and determining the taxability of each item.

iii. Notices

The requirement that repeated notices about use tax obligations be included by non-collecting sellers on all order forms, sales receipts, and screens summarizing transactions prior

to completion seems to us to go too far. A single notice on the sales receipt and on the final screen commemorating the transaction would seem to suffice for this purpose.

With respect to the annual tax notice that must be provided by the marketplace provider to the seller, it is not clear to us why this should be, in the first instance, sent by mail. Email is the typical method of communication utilized by Internet vendors and the cost of mailing notices to sellers may be significant. We note that New York State does not send its own Forms 1099G by mail but instead delivers them by Internet download.[32]

[32] https://www.tax.ny.gov/pit/file/1099g.htm

Technical Memorandum
TSB-M-18(2)C, (3)I
Income Tax
Corporation Tax
April 6, 2018

New York State Tax Treatment of Nonqualified Deferred Compensation

Federal Public Law 110-343 (the “Public Law”) added § 457A to the Internal Revenue Code (IRC) to address the taxation of certain nonqualified deferred compensation attributable to services performed on or after January 1, 2009. For nonqualified deferred compensation to which IRC § 457A does not apply due solely to the fact that the amount deferred is attributable to services performed before January 1, 2009, the Public Law, Division C, § 801(d)(2) requires such deferrals, to the extent such amounts are not includable in gross income in a tax year beginning before January 1, 2018, to be included in gross income for federal tax purposes in the later of:

- the last tax year beginning before January 1, 2018; or
- the tax year in which there is no substantial risk of forfeiture of the rights to such compensation.

This memorandum addresses the New York State tax treatment of such amounts, and applies to:

- resident and nonresident individuals;
- sole proprietorships;
- partnerships (including limited liability companies [LLCs] and limited liability partnerships [LLPs] that are treated as partnerships for federal income tax purposes);
- estates and trusts; and
- Article 9-A taxpayers.

Article 22 resident individuals

Under Tax Law § 611, the New York taxable income of a resident individual is the individual’s New York adjusted gross income (NYAGI) less the individual’s New York deductions and exemptions. The NYAGI of a resident individual is the individual’s federal adjusted gross income (FAGI), taking into account any addition or subtraction modifications required under Tax Law § 612. For New York State income tax purposes, all nonqualified deferred compensation (including all appreciation and earnings related to such deferrals) that is required to be included in FAGI in a tax year in accordance with the Public Law, Division C, § 801(d)(2), must be included in NYAGI in that tax year, if the taxpayer is a New York resident in such year.

Resident taxpayers may be allowed a resident tax credit for any income sourced to and taxed by another state. See Form IT-112-R, *New York State Resident Credit*, for more information about this credit.

Article 22 nonresident individuals

Under Tax Law § 601(e), nonresident individuals are subject to tax on taxable income derived from New York sources. The New York source income of a nonresident individual is the sum of the net amount of income, gain, loss, and deductions included in the individual's FAGI and derived from or connected with New York sources, taking into account any addition or subtraction modifications required under Tax Law § 612. New York source income includes income that is included in the nonresident individual's FAGI and is related to a business, trade, profession, or occupation previously carried on in the state, whether or not as an employee. See Tax Law § 631(b)(1)(F). This income includes nonqualified deferred compensation (including all appreciation and earnings related to such deferrals) that is required to be included in FAGI in a tax year in accordance with the Public Law, Division C, § 801(d)(2), if such compensation is related to a business, trade, profession, or occupation previously carried on in the state, whether or not as an employee.

The amount of such nonqualified deferred compensation that must be included in a nonresident's New York source income is determined as follows:

- If the business, trade, profession, or occupation was carried on wholly in New York State in the tax year the services were performed, the entire amount of nonqualified deferred compensation must be included in New York source income.
- If the business, trade, profession, or occupation was carried on wholly outside New York State in the tax year the services were performed, none of the nonqualified deferred compensation is included in New York source income.
- If the business, trade, profession, or occupation was carried on partly in and partly outside New York State during the tax year the services were performed, the amount of nonqualified deferred compensation to be included in New York source income is determined using the rules described below for:
  - an *employee*, if the nonresident performed the services as an employee; or
  - a *business*, if the nonresident was carrying on a business in New York State. For purposes of this memorandum, a *business* includes sole proprietorships and partnerships (including LLCs and LLPs that are treated as partnerships for federal income tax purposes). For the allocation rules for income earned as a nonresident shareholder of a New York S corporation, see *Taxation under Article 9-A* below.

Services previously performed partly in and partly outside New York State

Employee

If a nonresident individual is required to include nonqualified deferred compensation in FAGI in a tax year in accordance with the Public Law, Division C, § 801(d)(2), and such compensation relates to services performed as an employee in a previous tax year, the following method is used to determine the amount of such compensation that must be included in New York source income in the year such income is included in FAGI.

The individual computes a fraction:

- the numerator is the number of working days employed in New York during the tax year the services were performed; and
- the denominator is the total number of working days employed both in and outside New York during the tax year the services were performed.

Such fraction is multiplied by the amount of nonqualified deferred compensation (including all appreciation and earnings related to such deferrals) included in FAGI that relates to services performed as an employee in that tax year. See 20 NYCRR § 132.18.

If nonqualified deferred compensation (including all appreciation and earnings related to such deferrals) from services performed in more than one tax year is included in FAGI, these rules are applied separately for each tax year that such services were performed, and the aggregate amount of New York source income is reported on the individual's New York State nonresident income tax return for the tax year the taxpayer is required to include such nonqualified deferred compensation in FAGI for federal tax purposes.

For an employee who is a nonresident for the tax year the nonqualified deferred compensation is included in FAGI for federal tax purposes, but who was a resident for the tax year the services were performed, the amount that is included in New York source income is calculated using the same methodology described above. Taxpayers must maintain documentation to substantiate the allocation.

Business

If a nonresident individual is required for federal income tax purposes to include in FAGI any nonqualified deferred compensation (including all appreciation and earnings related to such deferrals) that:

- is related to services performed by the nonresident individual in a previous tax year as a sole proprietor; or
- is related to services performed by a partnership (including LLCs and LLPs that are treated as partnerships for federal income tax purposes) in a previous tax year,

then the nonresident individual's New York source income related to such nonqualified deferred compensation is determined using one of the following methods:

- If the books and records of the sole proprietorship or partnership, from the year the services were provided, adequately disclose and represent the proportion of the net amount of the items of income, gain, loss and deduction derived from or connected with New York sources, the total amount of items and net amount of such items for the tax year the services were provided may be used to determine the allocation. A partnership must report these amounts to the nonresident partner on Form IT-204-IP and must also complete item P on Form IT-204-IP.

- If the books and records of the sole proprietorship or partnership, from the year the services were performed, do not adequately disclose and represent the proportion of the net amount of the items of income, gain, loss and deduction derived from or connected with New York sources, the proportion of income that is attributable to New York sources is determined using the three factor formula described in 20 NYCRR 132.15(c), calculated by the sole proprietorship or partnership for the tax year the services were performed. A partnership must report these amounts to the nonresident partner on Form IT-204-IP and must also complete item P on Form IT-204-IP.

If the methods described above do not fairly and equitably allocate and apportion the items of income, gain, loss and deduction attributable to the partnership for a tax year, the department may prescribe an alternative method of allocation. A sole proprietor or partnership may also submit an alternative method of allocation, provided that the proposed method is thoroughly explained and disclosed on the taxpayer's income tax return. If the department approves the proposed allocation and apportionment, the method may be used in lieu of the methods described above. See 20 NYCRR 132.25.

If nonqualified deferred compensation (including all appreciation and earnings related to such deferrals) from services performed by a sole proprietor or a partnership in more than one previous tax year is included in a nonresident individual's FAGI, these rules are applied separately for each tax year that such services were performed. The aggregate amount of New York source income must be reported by a partnership to the nonresident partner, and must be reported on the nonresident individual's New York State nonresident income tax return, for the tax year the taxpayer is required to include such nonqualified deferred compensation in FAGI for federal tax purposes.

Part-year residents

If an individual changes resident status during the tax year, the rules described in this memorandum under *Article 22 resident individuals* apply where the nonqualified deferred compensation (including all appreciation and earnings related to such deferrals) is properly reportable in the resident period of the tax year, and the rules described under *Article 22 nonresident individuals* apply where the nonqualified deferred compensation (including all appreciation and earnings related to such deferrals) is properly reportable in the nonresident period of the tax year.

Nonresident and part-year resident estates and trusts

The rules described in this memorandum apply to nonresident estates and trusts and part-year resident trusts where the nonqualified deferred compensation (including all appreciation and earnings related to such deferrals) is includible in the federal income of the estate or trust.

Yonkers nonresident earnings tax

The Yonkers nonresident earnings tax is imposed on wages and net earnings on self-employment attributable to a business, trade, profession, or occupation carried on in the city of Yonkers. Under the rules described in this memorandum, if an individual performed services in the city of Yonkers, the nonqualified deferred compensation (including all appreciation and

earnings related to such deferrals) is allocated to Yonkers using the same rules that apply to nonresidents of New York State.

Taxation under Article 9-A

For corporations taxable under Tax Law Article 9-A (including New York S corporations), nonqualified deferred compensation (including any appreciation and earnings related to such deferrals) that is includible in federal taxable income in accordance with the Public Law, Division C, § 801(d)(2), is considered business income under Article 9-A and is included in the apportionment factor under the rules in Tax Law § 210-A and the applicable regulations.

For a resident individual who is a shareholder of a New York S corporation, such individual's distributive share of nonqualified deferred compensation (including all appreciation and earnings related to such deferrals) from the S corporation that is required to be included in FAGI in a tax year in accordance with the Public Law, Division C, § 801(d)(2), must be included in NYAGI in that tax year.

A nonresident individual who is a shareholder of a New York S corporation determines the amount of such nonqualified deferred compensation derived from New York sources by applying the S corporation's business apportionment factor to such amounts included in New York adjusted gross income (see TSB-M-15(7)C, (6)I, *Impact of New York State Corporate Tax Reform on New York S Corporations and their Nonresident and Part-Year Resident Shareholders*).

However, if a nonresident individual who is a shareholder of a New York S corporation is required to include nonqualified deferred compensation in FAGI in a tax year in accordance with the Public Law, Division C, § 801(d)(2), and such compensation relates to services performed as an employee of the S corporation in a previous tax year, then the individual must instead use the method for employees to determine the amount of nonqualified deferred compensation related to that past employment that must be included in New York source income (see *Employee* on page 2).

Note: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.