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Report No. 1487
February 9, 2024

The Honorable Amanda Hiller
Acting Tax Commissioner and General Counsel
NYS Department of Taxation and Finance
W.A. Harriman Campus, Building 9
Albany, NY 12227

The Honorable Liz Krueger
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New York State Senate
NYS State Capitol Building
Albany, NY 12247

The Honorable Helene E. Weinstein
Chair, Ways and Means Committee
New York State Assembly
923 Legislative Office Building
Albany, NY 12248

Re: *Proposed Legislation on the Pass-Through Entity Tax Election Due Date*

Dear Acting Commissioner Hiller:

The Tax Section of the New York State Bar Association (the "Tax Section") is pleased to provide the following comments and recommendations in support of Assembly Bill A8451, which would change the annual election due date for the New York State and City Pass-Through Entity Tax ("PTET") from March 15 to September 15.¹

¹ The principal drafter of this letter was Elizabeth Pascal with helpful comments from Jack Trachtenberg, Jiyeon Lee-Lim, Alysse McLoughlin, Irwin Slomka, Paul Comeau, Peter Faber, Michael Schler, Kim Blanchard, and Elliot Pisem. This Letter reflects solely the

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The Tax Section supports extending the time to make the PTET election, including the extension in the proposed legislation. As discussed in more detail below, the change would permit more businesses to participate in the PTET, would not have any additional cost to New York State, and would bring New York State's election due date more in line with other states' PTET election dates.

Background and the Current PTET Election Due Date

The PTET was enacted with the 2021-2022 New York State Executive Budget (the "Budget Act") in response to the federal Tax Cuts and Jobs Act ("TCJA") of 2017 which, among other things, limited personal income tax filers to \$10,000 in total state and local tax deductions on their federal income tax returns. This provision of the TCJA disproportionately impacted New Yorkers, many of whose total state and local taxes significantly exceed \$10,000 annually. New York, along with a total of now 36 states (plus New York City), responded to the federal state and local tax deduction limitation by enacting a PTET, allowing owners of pass-through entities (Subchapter S corporations, partnerships and multi-member LLCs) to elect to pay the tax on the pass-through income at the entity level. As an expense of the pass-through entity, the entity can deduct the tax expense on its federal return without being subject to the \$10,000 state and local tax deduction limitation enacted by the TCJA. The Tax Section supported New York's enactment of a PTET as an "effective tool to reduce the impact of the SALT Deduction Limitation on New York taxpayers."²

New York's PTET was effective for the 2021 taxable year, with the 2022-2023 Budget Act enacting a New York City PTET to permit pass-through entities with New York City resident members to shift the incidence of New York City income taxes to the eligible entity. Tax Law § 861(c) requires that a PTET election must be made "on or before the due date of the first estimated payment under section eight hundred sixty-four of this article [i.e., March 15th] and will take effect for the current taxable year."³ After the due date, the election is irrevocable. Thus, for the 2023 tax year, an eligible entity must have made the PTET election by March 15th, 2023.

views of the Tax Section and not those of the New York State Bar Association's Executive Committee or its House of Delegates.

² NYSBA Tax Section report on the 2021-2022 New York State Executive Budget (Report No. 1449, March 6, 2021).

³ Because the budget legislation was enacted after March 15th, for the 2021 tax year, taxpayers had until October 15, 2021 to make the PTET election. The 2022-2023 budget legislation made significant changes to the PTET, including establishing an electing Resident S corporation and a NYC PTET. As a result, for the 2022 tax year, the election deadline was extended to September 15, 2022.

New York's early PTET election due date is unusual among the 36 states with an elective PTET.⁴ Virtually all of these states require that eligible entities make the PTET election on or with a return filed by the original due date or extended due date, if applicable,⁵ with estimated payments due during the taxable year, in line with the due dates for other estimated payments of income taxes.

Proposed Legislation

Assembly bill A8451 would amend the Tax Law to extend the election due date from March 15th of the taxable PTET year to September 15th of that year, beginning with the 2024 PTET taxable year. The proposed legislation would require that eligible entities make estimated payments due under Tax Law § 864 of 25% for elections made between March 15th and before June 15th, and 50% for elections made between June 15th and before September 15th.⁶

The Tax Section believes that the proposed legislation would expand the number of entities eligible to make the PTET election and resolve certain administrative issues that arise with the current election due date without any additional cost to the State.

1. Pass-through entities formed after March 15th will be able to make the election. Under the current legislation, entities formed after March 15th cannot make the PTET election in the year of formation. The proposed legislation expands the number of new entities that would be eligible to make the election in their first year of existence by permitting entities formed prior to September 15th to make the election.
2. Entities will be better able to determine whether to make the PTET election. Many entities have very little sense as of March 15th of the taxable year whether a PTET election will be of value to them. For example, some entities might get very little benefit from making a New York PTET election in most years, except in a year with an unusual capital gain or other transaction that would generate significant New York pass-through taxable income. As a result, an entity might not make the election, only to realize later in the year that participation in New York's PTET would have produced a significant federal benefit. Conversely, some taxpayers might make the election annually "just in case" there could be a meaningful federal benefit, increasing transaction costs for them and for New York State by requiring

⁴ Connecticut, which enacted its PTET in 2018, originally had a mandatory PTET, along with an elective alternative calculation of the PTET. Legislation enacted in 2023 and effective for the 2024 tax year eliminated the mandatory PTET base.

⁵ Michigan, Hawaii, and Oklahoma are among the only states that, like New York, require the election to be made prior to the due date of the return.

⁶ We note that the proposed legislation does not indicate what estimated payment must be made for an election made on September 15th. We recommend that the legislation address the percentage of estimated payments that must be made if an election is made on the due date of September 15th.

an additional return to be filed with little to no New York PTET due. Moving the election due date to September 15th will provide eligible entities more time to consider whether an election will be beneficial and will, in many cases, avoid the costs of an unnecessary election.

3. Extending the election due date avoids administrative problems that arise with the March 15th S election due date. One of the unintended consequences of the current March 15th election is that corporations that make the New York S election on or close to the March 15th deadline might be administratively prevented from making the PTET election. Any federal S corporation must make a New York S election by filing Form CT-6 by March 15th, applicable to January 1st of that year. Form CT-6 must be filed by mail or fax with the Tax Department. Although a corporation filing Form CT-6 by fax on March 15th will have made a valid New York S election for that year, the same taxpayer will unlikely be able to make a PTET election on that same day. That is because the PTET election can only be made through the corporation's online account. Until the Tax Department processes the CT-6 and adjusts the account so that the corporation is an S corporation eligible to make the PTET election, the entity will not have the option to make the PTET election. Extending the election to September 15th should eliminate this problem for corporations that are making the New York S election for the first time in the same year that they hope to make a PTET election.
4. Extending the election due date should not have any impact on the budget. As stated in the supporting memorandum to the bill, there should be "no impact on total state revenues." We note, however, that the extended due date along with the estimated payment requirements could result in estimated payments by the pass-through entity as well as estimated payments by the individual partners or shareholders prior to the entity's election, resulting in significant refunds requested by the individuals on their personal income tax returns. Although there might not be any remedy to this problem, similar to what occurred in the first year of New York's PTET,⁷ we note that some states permit estimated payments to be shifted from withholdings made by pass-through entities on behalf of their non-resident members, to the PTET account once the election is made, which could alleviate some of the problem with the doubling up of payments.⁸

Conclusion

We appreciate your consideration of our comments and would be happy to discuss the proposed legislation further with you. If you have any questions, please contact me.

⁷ See Tax Section Report No. 1451, *supra*, at 2.

⁸ Iowa and Wisconsin, for example, permit such shifting of estimated payments.

Respectfully Submitted,



Jiyeon Lee-Lim
Chair

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