

NEW YORK STATE BAR ASSOCIATION TRUSTS AND ESTATES LAW SECTION

REPORT OF THE TAXATION COMMITTEE

REQUEST FOR FURTHER NEW YORK TAX POSTPONEMENT RELIEF THROUGH JULY 15, 2020

T&E #7

May 26, 2020

The Trusts and Estates Law Section of the New York State Bar Association, through its Taxation Committee (the “Committee”), respectfully submits this proposal to request that further New York tax postponement relief be provided at this time by following the same approach taken by the Internal Revenue Service (“IRS”) in Notice 2020-23.¹ This would include postponing to July 15, 2020 the due dates with respect to each of the following:

1. Filing Form ET-706, New York State Estate Tax Return, and payment of New York State estate tax (with relief also to apply to estate tax returns that are already on extension).
2. Making installment payments of estate tax, including under NY Tax Law § 997, that are due prior to July 15, 2020.
3. Filing New York State income tax returns and making tax payments that are scheduled to become due before July 15, 2020 for fiscal year taxpayers such as estates, as well as for other categories of entities (with such relief also to apply to fiscal year income tax returns that are already on extension).²
4. Making second quarter New York State estimated income tax payments for calendar year taxpayers that are currently due on June 15, 2020.³

¹ IRS Notice 2020-23, 2020-18 IRB 742, is set forth at the following link: <https://www.irs.gov/pub/irs-drop/n-20-23.pdf>

² This relief would also apply to other taxes administered by the New York State Department of Taxation and Finance (the “Tax Department”) that are reported on the New York State personal income tax return, such as the New York City resident tax, the Yonkers resident income tax surcharge, the Yonkers nonresident earnings tax, and the metropolitan commuter transportation mobility tax (“MCTMT”) on net earnings from self-employment (collectively “Other Taxes Administered by the Tax Department”).

³ This relief would also apply to Other Taxes Administered by the Tax Department.

5. Filing renunciations of interests under Section 2-1.11 of New York’s Estates, Powers and Trusts Law (the “EPTL”) with the applicable New York Surrogate’s Court to correspond to the relief granted to qualified disclaimers under IRS Notice 2020-23 (by reference to Rev. Proc. 2018-58), particularly given that many of the New York Surrogate’s Courts are operating at limited capacity.

I. DISCUSSION

A. Notice N-20-2 – the “March 29th Notice”

As a response to the COVID-19 emergency and following the direction provided by Governor Cuomo in Executive Order 202.12,⁴ on March 29, 2020, the Tax Department issued Notice N-20-2 (the “March 29th Notice”).⁵ The March 29th Notice confirmed that New York has extended the April 15, 2020 due date to July 15, 2020 for New York State personal income tax and corporation tax returns originally due on April 15, 2020. In addition, this Notice allowed taxpayers to defer all related tax payments due on April 15, 2020 to July 15, 2020, without penalties and interest, regardless of the amount owed. This extension applies to individuals, fiduciaries (estates and trusts), and corporations. Tax returns due on April 15, 2020 were automatically granted the filing and payment deadline extension and relief from penalties and interest without having to file an extension form.

Footnote 1 to the March 29th Notice confirmed that this Notice also applies to other taxes administered by the Tax Department that are reported on the New York State personal income tax return, such as the New York City resident tax, the Yonkers resident income tax surcharge, the Yonkers nonresident earnings tax, and the MCTMT on net earnings from self-employment.

The March 29th Notice specifically provides that “2019 returns due on April 15, 2020, and related payments of tax or installments of tax, including installments of estimated taxes for the 2020 tax year, will not be subject to any failure to file, failure to pay, late payment, or underpayment penalties, or interest if filed and paid by July 15, 2020.” However, “[n]o extension is provided in this notice for the payment or deposit of any other type of state tax, or for the filing of any state information return.” (emphasis added) Accordingly, among other items, it seems that second quarter 2020 New York estimated income tax payments for calendar year taxpayers remain due on June 15, 2020, even though first quarter 2020 New York estimated income tax payments for calendar year taxpayers have been postponed to July 15, 2020.

⁴ Executive Order 202.12 is set forth at the following link: <https://www.governor.ny.gov/news/no-20212-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>

⁵ The March 29th Notice is set forth at the following link: <https://www.tax.ny.gov/pdf/notices/n20-2.pdf>

The March 29th Notice was released after the IRS's corresponding grant of federal tax postponement relief, and provided similar relief to what the IRS conferred. In Notice 2020-18 (issued on March 20, 2020), the IRS postponed the due date for both filing Federal income tax returns and making Federal income tax payments from April 15, 2020 to July 15, 2020.⁶ The March 29th Notice therefore brought New York State in conformity with the federal tax postponement relief conferred in Notice 2020-18.

B. The Subsequent IRS Postponement Relief Granted on April 9, 2020

As a further response to the COVID-19 emergency, on April 9, 2020, the U.S. Treasury Department and the IRS issued **Notice 2020-23**, which significantly expanded the scope of emergency tax postponement relief conferred by the IRS. The relief granted by this new notice covers taxpayers that have an IRS tax filing or payment deadline between April 1 and July 15, 2020. It applies to fiscal year entities (such as Form 1041 for estates), Form 706 estate tax returns (including federal estate tax returns that are already on extension), installment payments of estate tax in connection with estate tax returns that were filed in prior years, and to a multitude of information returns and other forms. In addition, Notice 2020-23 postponed the deadline for calendar year 2020 second quarter estimated tax payments from June 15 to July 15.

Notice 2020-23 also postponed to July 15, 2020 the timeframe to perform certain acts that do not necessarily involve tax return filings. These include the timeframe to obtain treatment as a “qualified disclaimer” for federal gift tax purposes.⁷ This is accomplished by Notice 2020-23's reference to Rev. Proc. 2018-58.⁸ The final paragraph

⁶ Notice 2020-18, 2020-15 IRB 590, is set forth at the following link: <https://www.irs.gov/pub/irs-drop/n-20-18.pdf>. In addition, in Notice 2020-20, 2020-16 IRB 660 (issued on March 27, 2020), the IRS postponed the April 15 gift tax return filing and payment deadline to July 15, 2020. New York State does not impose a gift tax, although it does impose an “addback” for estate tax purposes on certain taxable gifts made by New York residents within three years of death. **NY Tax Law** § 954(a)(3). IRS Notice 2020-20 is set forth at the following link: <https://www.irs.gov/pub/irs-drop/n-20-20.pdf>

⁷ Pursuant to section 2518(a) of the Internal Revenue Code of 1986, as amended (“IRC”), if a person makes a “qualified disclaimer” with respect to an interest in property, such person shall be treated as if the interest in property had never been transferred to such person for federal gift and estate tax purposes. Treas. Reg. § 25.2518-1(c), in turn, can take into account applicable state law in connection with determining the effectiveness of a qualified disclaimer. In this connection, EPTL 2-1.11(c)(2) addresses the requirements for renunciations of interests for New York property law purposes, and provides, among other things, that “[s]uch renunciation shall be in writing, signed and acknowledged by the person renouncing, and shall be filed in the office of the clerk of the court having jurisdiction over the will or trust agreement governing the property of which the disposition would otherwise be made or the court which issued letters of administration, or if there is no probate or administration, then in a surrogate's court provided by law as the place of probate or administration of the decedent's estate, within nine months after the effective date of the disposition.” Such filings may present undue challenges given that many of the New York Surrogate's Courts are operating at limited capacity at this time.

⁸ Rev. Proc. 2018-58, 2018-50 IRB 990, is set forth at the following link: <https://www.irs.gov/pub/irs-drop/rp-18-58.pdf>

of Section III.A of Notice 2020-23 (at the bottom of page 6) provides that any person performing a time sensitive action listed in *Rev. Proc. 2018-58*, which is due to be performed on or after April 1, 2020 and before July 15, 2020 (a “Specified Time-Sensitive Action”), is an “Affected Taxpayer.” Under Section III.C of Notice 2020-23 (on page 8), Affected Taxpayers have until July 15, 2020 to perform all Specified Time-Sensitive Actions that are due to be performed on or after April 1, 2020, and before July 15, 2020. This *supplements* the itemized list of postponed tax filing and payment obligations that are explicitly set forth in Notice 2020-23.⁹

Section III.B of Notice 2020-23 (on page 7) provides that for an “Affected Taxpayer,” with respect to “Specified Filing and Payment Obligations,” the due date for filing “Specified Forms” and making “Specified Payments” is automatically postponed to July 15, 2020. This means that Affected Taxpayers do not have to call the IRS or file any extension forms, or send letters or other documents to receive this relief. *However, Affected Taxpayers who need additional time to file their return may file the appropriate extension form by July 15, 2020 to obtain an extension to file their return, but the extension date may not go beyond the original statutory or regulatory extension date. For example, a Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, may be filed by July 15, 2020 to extend the time to file an individual income tax return, but that extension will only be to October 15, 2020. That extension will not extend the time to pay federal income tax beyond July 15, 2020.*

This relief provided by IRS Notice 2020-23 includes not just the filing of Specified Forms, but also all schedules, returns, and other forms that are filed as attachments to Specified Forms or are required to be filed by the due date of Specified Forms. It also applies to any elections that are made or required to be made on a timely filed Specified Form (or attachment to a Specified Form).

As a result of the postponement of the due date for filing Specified Forms and making Specified Payments under IRS Notice 2020-23, the period beginning on April 1, 2020, and ending on July 15, 2020, will be disregarded in the calculation of any interest, penalty, or addition to tax for failure to file the Specified Forms or to pay the Specified Payments. Interest, penalties, and additions to tax with respect to such postponed Specified Filing and Payment Obligations will, however, begin to accrue on July 16, 2020.

In addition, Notice 2020-23 provides that Affected Taxpayers have until July 15, 2020 to perform all Specified Time-Sensitive Actions that are due to be performed on or after April 1, 2020 and before July 15, 2020. This relief includes the time for filing all petitions with the Tax Court, or for review of a decision rendered by the Tax Court, filing

⁹ The final paragraph of Section III.A of IRS Notice 2020-23 (on page 6) further provides that *the term Specified Time-Sensitive Action also includes an investment at the election of a taxpayer due to be made during the 180-day period described in IRC § 1400Z-2(a)(1)(A). This pertains to the contribution of capital gains to a qualified opportunity fund where such investment would otherwise be required on or after April 1, 2020 and before July 15, 2020.*

a claim for credit or refund of any tax, and bringing suit upon a claim for credit or refund of any tax. Notice 2020-23 further states that it does not provide relief for the time period for filing a petition with the Tax Court, or for filing a claim or bringing a suit for credit or refund if that period expired before April 1, 2020.

C. *Conforming New York Relief with the Subsequent IRS Postponement Relief*

In accord with the policy of granting emergency relief to New Yorkers during the COVID-19 pandemic that underscored the Governor's issuance of Executive Order 202.12 -- which culminated in the Tax Department's promulgation of the March 29th Notice -- we respectfully submit that it is both timely and warranted for the Governor to issue a subsequent Executive Order¹⁰ at this time authorizing the Tax Department to confer further tax postponement relief though July 15, 2020 consistent with the federal tax postponement relief that was granted by IRS Notice 2020-23. Accordingly, we respectfully request that such directives be issued at this time, and would welcome the opportunity to work together with the Tax Department in implementing this.

II. RECOMMENDATION

The Committee respectfully recommends that further New York tax postponement relief be provided at this time by following the same approach taken by the IRS in Notice 2020-23, including by postponing to July 15, 2020 the due dates with respect to each of the following:

1. Filing Form ET-706, New York State Estate Tax Return, and payment of New York State estate tax (with relief also to apply to estate tax returns that are already on extension).
2. Making installment payments of estate tax, including under NY Tax Law § 997, that are due prior to July 15, 2020.
3. Filing New York State income tax returns and making tax payments that are scheduled to become due before July 15, 2020 for fiscal year taxpayers such as estates, as well as for other categories of entities (with such relief also to apply to fiscal year income tax returns that are already on extension).¹¹
4. Making second quarter New York State estimated income tax payments for calendar year taxpayers that are currently due on June 15, 2020.¹²

¹⁰ Executive Order 202.12's grant of authorization to the Tax Department to confer tax postponement relief expired on April 27, 2020.

¹¹ This relief would also apply to Other Taxes Administered by the Tax Department.

¹² This relief would also apply to Other Taxes Administered by the Tax Department.

5. Filing renunciations of interests under EPTL § 2-1.11 with the applicable New York Surrogate's Court to correspond to the relief granted to qualified disclaimers under IRS Notice 2020-23 (by reference to Rev. Proc. 2018-58), particularly given that many of the New York Surrogate's Courts are operating at limited capacity.