

8 Key Tax Provisions Of The NY State Budget

By **Irwin Slomka** (May 9, 2018, 3:53 PM EDT)

On April 12, 2018, Gov. Andrew M. Cuomo signed into law the New York state budget bill passed by the state Legislature for the state's 2018-19 fiscal year. Among the more significant tax provisions adopted (in bill S. 7509-C/A. 9509-C) are the following.



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Creates an Optional Employer Payroll Tax — Part MM

New York State became the first state to enact legislation as a workaround to the \$10,000 federal limitation for state and local tax deductions, creating a new “Employer Compensation Expense Program” proposed by the governor: an annual election, to be made by Dec. 1 of each calendar year for the succeeding year, giving employers in New York the option to become subject to a new payroll tax for tax years beginning after 2018. The elective tax would be imposed on the employer's annual payroll expenses in excess of \$40,000 per covered employee at the rate of 1.5 percent in 2019 and rising to 5 percent when fully phased in starting in 2021. The payroll tax is expected to be deductible by the employer for federal income tax purposes. Covered employees would be allowed a credit against their New York State personal income tax for equivalent amounts.

In considering whether to make the New York payroll tax election, businesses will need to consider whether they intend to offset the new payroll tax cost by adjusting employee compensation as well as the additional cost of compliance, factors that could deter businesses from making the election.

Authorizes State-Operated Charitable Funds — Part LL

The legislation adopts the governor's proposal to establish two state-operated charitable funds, relating to health care and education, to which individuals can make donations and claim a New York State tax credit of 85 percent of the donation amount contributed in the immediately preceding year for tax years beginning after 2018. An earlier press release from the governor stated that these donations may be claimed as federal and state itemized deductions by individuals who itemize, but there remain considerable doubts that the IRS will permit charitable deductions for federal income tax purposes since taxpayers will receive a state tax credit in exchange for the contribution.

Confirms Exemption for One-Time Repatriated Foreign Income — Part KK

The budget bill makes explicit that the one-time inclusion in a corporation's federal taxable income of repatriated foreign income under Internal Revenue Code Section 951, received from a corporation not included in the taxpayer's Article 9-A combined return, qualifies as "exempt [controlled foreign corporation] CFC income" and therefore is not subject to New York state corporate tax. Taxpayers must, however, add back the partial federal deduction allowed for repatriated foreign income. Left in place is the provision for the direct or indirect attribution of the taxpayer's interest deductions to such exempt income and the election allowing the taxpayer to reduce its total exempt income by 40 percent in lieu of such expense attribution, which will have the effect of reducing the benefits of the exempt CFC income exemption. Conforming legislation was passed with respect to the New York City corporate tax. (Note that a state Senate proposal to similarly exempt federal global intangible low-taxed income, or GILTI income, under IRC Section 951A was not enacted.)

Decouples from Federal PIT Deduction Limitations — Part JJ

New York residents will be entitled to claim itemized deductions for New York state and city personal income tax purposes as the law existed immediately prior to the enactment of federal tax reform (i.e., allowing without limitation deductions for local real property taxes, but not state and local income taxes) beginning in 2018. The budget bill also now permits itemized deductions to be claimed for state and city purposes even for individuals who claim the standard deduction for federal tax purposes.

Extends Statute of Limitations for NYS and NYC Tax Departments to Assess Additional Tax on Amended Returns — Part H

Proposed as an "anti-abuse" provision, the legislation will permit the New York state and New York City tax departments to assess additional corporate or personal income tax, including recovery of a previously paid refund, within one year after an amended return is filed. Previously, an amended return did not generally extend the limitation period for the tax departments to assess additional tax. The extended limitation period applies to tax "attributable to a change or correction on the amended return," a phrase that will likely require clarification by regulation. The change applies to amended returns filed on or after the effective date of the budget bill. The tax department continues to have two years to assess tax arising out of the payment of an "erroneous refund" resulting from a mathematical or clerical error by the department.

Clarifies New York Statutory Residency Requirements for Individuals — Part O

The budget bill adopts the tax department's interpretation of the term "resident" for personal income tax purposes whereby in determining whether an individual is a "statutory resident" — an individual who is in the state for more than 183 days in a year and who maintains a permanent place of abode here — days present in the state during a portion of the year when the individual was a New York domiciliary will count toward the "more than 183 day[]" requirement. This was proposed by the governor in light of Matter of Sobotka,^[1] a nonprecedential administrative law judge decision holding that days spent in New York during the portion of the year when the individual was domiciled in the state cannot be counted toward the 183-day test for determining statutory residency. While the governor sought to make the legislation retroactive, the enacted legislation applies only to taxable years commencing on or after the effective date of the legislation.

Codifies Partial Responsible Person Sales Tax Relief for Certain LLC Members and Limited Partners — Part X

The legislation codifies existing tax department policy contained in a 2011 technical memorandum that provides some relief from absolute liability for sales tax owed by a partnership or limited liability company for limited partners and members of such entities. Under the provision, limited partners and members who, among other things, have not acted on behalf of the partnership or LLC in complying with the sales tax laws, may satisfy their sales tax liability on behalf of the entity by paying a percentage of the tax (plus interest) equivalent to their ownership percentages, but only if the limited partners or members have a less than 50 percent interest in the entity and were not under a “duty to act” in complying with the sales tax law. The “absolute liability” provisions in the tax law for partners and members, regardless of their involvement in the financial affairs of the business, remain in place.

Permits Sale for Resale Treatment for Purchases of Prepared Foods by Restaurants — Part J

Prepared food purchased on or after June 1, 2018, by restaurants, taverns, cafeterias, caterers and other establishments will qualify as nontaxable purchases where a properly completed resale certificate is furnished to the seller. Previously, no resale exclusion could be claimed, and restaurants and other food establishments had to pay the sales tax and claim a credit.

Proposals Not Passed

Several of the governor’s proposals were not passed by the Legislature, including: the imposition of an “Internet Fairness Conformity Tax” that would have required internet “marketplace providers” that “facilitate” sales of tangible personal property on behalf of sellers to collect New York sales tax on those transactions; a 14 percent “Healthcare Insurance Windfall Profit Fee” imposed on net underwriting gains from health insurance sales to New York customers; a proposal that would have treated carried interests earned by promoters as income from a trade or business (subjecting nonresident individuals to tax on those amounts) and would have imposed a 17 percent “carried interest fairness fee,” but only if substantially similar legislation was enacted by several nearby states; the deferral of certain business tax credits aggregating in excess of \$2 million annually for the years 2018 through 2020; and affording the New York State Tax Department the right to appeal adverse decisions of the Tax Appeals Tribunal to the New York courts.

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[1] DTA No. 826286 (N.Y.S. Div. of Tax App, Aug. 20, 2015).