New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-M-10(18)S
Sales Tax
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Summary of 2010 Sales and Use Tax Budget Legislation

This memorandum summarizes the amendments to the Tax Law made by Chapter 57 of the Laws of 2010 (New York State budget legislation for 2010-2011) that apply to New York State and local sales and use taxes (sales tax). The following legislative changes are summarized in this memorandum:

- Amendments affecting the sales tax exemption for clothing and footwear;
- Application of sales tax to rent received for hotel occupancy by room remarketers;
- Vendor collection credit no longer available for monthly sales tax filers and vendors remitting via PrompTax;
- Exclusion from sales tax on transportation service for livery service provided by an affiliated livery vehicle in New York City;
- Amendments affecting the application of sales tax in connection with corporate and partnership formation and dissolution involving the transfer of an aircraft or vessel;
- Activities of an affiliated person on behalf of an out-of-state seller that will not cause the seller to be a sales tax vendor;
- Repeal of section 1132(e-1) of the Tax Law related to sales tax credit or refund availability for private label credit card accounts that become worthless;
- Amendments affecting electronic filing and electronic payments;
- Tax enforcement technical corrections;
- Information reporting required for credit and debit card payments; and
- Filing requirements for Industrial Development Agencies and Authorities and for their agents and project operators.

Amendments affecting the sales tax exemption for clothing and footwear

Amendments were made to the Tax Law that affect the exemptions from state and local sales and use tax (hereinafter referred to as sales tax) on clothing, footwear and certain items used to make or repair clothing, sold for less than $110 (the "less-than-$110 clothing and footwear exemption"). These amendments result in the following changes:

- Effective October 1, 2010 through March 31, 2011, there will be no clothing and footwear exemption from state sales tax, or from the 3/8% sales tax imposed in the Metropolitan Commuter Transportation District (MCTD taxes).

- Effective April 1, 2011 through March 31, 2012, clothing and footwear sold for less than $55 will be exempt from state sales tax, and from the MCTD taxes (the "less-than-$55 clothing and footwear exemption").

- Effective April 1, 2012, the less-than-$110 clothing and footwear exemption from state sales tax will be restored and the less-than-$110 exemption will also apply to the MCTD taxes in any county or city located in the MCTD that provides the less-than-$110 exemption from its locally imposed sales taxes.

Effect on counties and cities (localities) that impose local sales and use taxes

Throughout all periods, counties and cities that impose sales tax can continue to provide the less-than-$110 exemption, or elect to provide it if they do not already do so. In addition, counties and cities that impose sales tax can also elect the less-than-$55 exemption during the same period that the exemption applies to the state sales tax (April 1, 2011, through March 31, 2012). If a county or city already has the less-than-$110 exemption, it can continue to provide that exemption, and also elect the less-than-$55 exemption, instead of the less-than-$110 exemption, for the period April 1, 2011, through March 31, 2012.

For more information about these amendments, see TSB-M-10(16)S, *Changes to the Year-Round Sales Tax Exemption for Clothing and Footwear*, which is available on the Tax Department's Web site at *www.tax.ny.gov*.

(Tax Law sections 1115(a)(30), 1109(g), 1210(a)(1), 1210(k))

Application of sales tax to rent received for hotel occupancy by room remarketers

The Tax Law was amended to ensure that sales tax is paid on the full amount charged to customers by businesses such as Web-based travel companies (hereinafter referred to *room remarketers*) for hotel occupancy in New York State. The new law defines *room remarketer* as:

> "A person who reserves, arranges for, conveys, or furnishes occupancy, whether directly or indirectly, to an occupant for rent in an amount determined by the room remarketer, directly or indirectly, whether pursuant to a written or other agreement. Such person's ability or authority to reserve, arrange for, convey, or furnish occupancy, directly or indirectly, and to determine rent therefore, shall be the "rights of a room remarketer". A room remarketer is not a permanent resident with respect to a room for which such person has the rights of a room remarketer."

Under the new law, effective September 1, 2010, a room remarketer constitutes an operator of a hotel to the extent that the room remarketer has acquired the rights of a room remarketer with respect to a room or rooms in a hotel. In addition, rent subject to the sales tax on occupancy of a room or rooms in a hotel now includes any service or other charge or amount paid as a condition of occupancy to a room remarketer. Accordingly, the full amount charged by a room remarketer to its customer for the right to occupy a room in a hotel in New York State constitutes rent for occupancy of a room in a hotel, and is subject to sales tax. Furthermore, since the new law provides that in these circumstances, a room remarketer is an operator of a hotel, the room remarketer must collect the sales tax, and where applicable, the fee of $1.50 per unit, per day imposed in New York City (NYC $1.50 fee) from its customer, and remit the amount collected to the Tax Department.

The new legislation provides that the full amount paid by a room remarketer to a hotel operator for the ability or authority to reserve rooms in a hotel, to convey the rights of occupancy

of the rooms to their customers, and to determine the amount of rent the room remarketer charges its customers for occupancy of the rooms, constitutes rent for hotel occupancy subject to sales tax, and, where applicable, to the NYC $1.50 fee. However, this amount may be claimed as a refund or credit by a room remarketer to be applied against the sales tax, and, where applicable, the NYC $1.50 fee, that the room remarketer is now required to collect from its customer.

For more information about these amendments, see TSB-M-10(10)S, *Amendments Affecting the Application of Sales Tax to Rent Received for Hotel Occupancy by Room Remarketers*, which is available on the Tax Department's Web site at *www.tax.ny.gov*.

(Tax Law sections 1101(c)(2), (3), (4), (6) and (8), 1105(e)(1) and (2))

Vendor collection credit no longer available for monthly sales tax filers and vendors remitting via PrompTax

The Tax Law was amended to provide that the vendor collection credit provided by section 1137(f) of the Tax Law is no longer allowed for persons who:

- file or are required to file a New York State and Local Sales and Use Tax Return for Part-Quarterly Filers (Form ST-809 monthly sales tax return) under section 1136(a)(2) of the Tax Law; or

- pay or are required to pay taxes to the Tax Department by electronic funds transfer under section 10 of the Tax Law (i.e., PrompTax).

This new law applies to sales tax returns filed and electronic funds transfer payments made with respect to sales and use tax quarterly periods beginning on or after June 1, 2010.

(Tax Law section 1137(f)(1))

Exclusion from sales tax on transportation service for livery service provided by an affiliated livery vehicle in New York City

The Tax Law was amended to exclude charges for transportation service provided by *affiliated livery vehicles* wholly within New York City from the sales tax on certain transportation service.

For purposes of this new exclusion, *affiliated livery vehicle* means a for-hire motor vehicle with a seating capacity of up to six persons, including the driver, other than a black car or luxury limousine, that is authorized and licensed by the taxi and limousine commission of a city of one million or more to be dispatched by a livery base station located in such a city and regulated by such taxi and limousine commission. In addition, the charges for service provided by an affiliated livery vehicle must be on the basis of flat rate, time, mileage, or zones and not on a garage-to-garage basis. In effect, these amendments exclude transportation service in New York City that is provided by "livery" or "community cars" licensed by the New York City

Taxi and Limousine Commission (NYC TLC) from the definition of transportation service that is subject to sales tax. As a result, charges for NYC TLC-licensed livery/community car service that begins and ends in New York City are not subject to sales tax.

This amendment is retroactive to June 1, 2009.

For more information on this new legislation see TSB-M-10(15)S, *Sales Tax on Certain Transportation Services Amended to Exclude Livery Service Provided by an Affiliated Livery Vehicle in New York City*, which is available on the Tax Department's Web site at *www.tax.ny.gov*.

(Tax Law section 1101(b)(34))

Amendments affecting the application of sales tax in connection with corporate and partnership formation and dissolution involving the transfer of an aircraft or vessel

The Tax Law was amended to provide that the transfer, contribution, or distribution (transfer) of an aircraft or vessel in connection with certain corporate and partnership transactions, is no longer excluded from the definition of a *retail sale*. Accordingly, the specified transfers are subject to sales tax. However, in certain situations a refund or credit is provided for the sales tax previously paid by the transferor/seller. This new law applies to sales and uses of aircraft or vessels occurring on or after August 11, 2010.

For more information about these amendments, see TSB-M-10(14)S, *Amendments Affecting the Application of Sales and Use Tax to the Transfer, Contribution or Distribution of an Aircraft or Vessel in Connection with Certain Corporate or Partnership Transactions*, which is available on the Tax Department's Web site at *www.tax.ny.gov*.

(Tax Law section 1101(b)(iv))

Activities of an affiliated person on behalf of an out-of-state seller that will not cause the seller to be a sales tax vendor

The Tax Law was amended to narrow the definition of vendor for purposes of sales tax. The new law provides that certain in-state activities conducted by an affiliate on behalf of an out-of-state seller do not make the seller a vendor.

The new law is effective retroactively to June 1, 2009, and applies to sales and uses occurring on or after that date.

For more information on this new law, see TSB-M-10(12)S, *Amendment to the Definition of a Sales Tax Vendor for Out-of-State Sellers with Related Businesses in New York State*, which is available on the Tax Department's Web site at *www.tax.ny.gov*.

(Tax Law section 1101(b)(8)(i)(I))

Repeal of section 1132(e-1) of the Tax Law related to sales tax credit or refund availability for private label credit card accounts that become worthless

Section 1132(e-1) of the Tax Law was repealed effective July 1, 2010. The repeal of section 1132(e-1) eliminates the sales tax credit or refund provisions applicable to private label credit card accounts that are held by a lender when all or a portion of a debt owed the lender is charged off as worthless. Under terms of the repeal, no credit or refund may be claimed under the provisions of section 1132(e-1) by either a vendor or a lender on or after July 1, 2010, regardless of the date of the underlying sales tax transaction or the date the bad debt is written off. As of July 1, 2010, bad debt credit and refunds are now governed by section 1132(e) of the Tax Law, and such claims must be made according to Sales and Use Tax Regulations section 534.7 governing those bad debt credits or refunds.

For more information, see TSB-M-10(11)S, *Sales Tax Credit or Refund No Longer Available for Bad Debt Accounts Held by Private Label Credit Card Lenders*, which is available on the Tax Department's Web site at *www.tax.ny.gov*.

(Part W of Chapter 57 of the Laws of 2010)

Amendments affecting electronic filing and electronic payments

The Tax Law and the Administrative Code of the City of New York were amended in relation to penalties imposed upon tax return preparers who fail to electronically file (e-file), to authorize reasonable correction periods for electronic tax filings and payments, and to prohibit tax return preparers and software companies from charging separately for electronic filing of New York tax documents. These amendments are as follows:

- The amendments changed what will be considered reasonable cause for the failure to e-file penalty. Under existing law, a tax return preparer who is required by the e-file mandate to file returns electronically is subject to a $50 penalty for each failure to e-file a return unless reasonable cause for the failure is shown. Under the amendments, a client who elects to not e-file his or her return is no longer an example of reasonable cause. Therefore the client opt-out procedure using Form TR-800-ST has been eliminated. This amendment applies to tax returns and other tax documents required to be filed electronically on or after December 31, 2010.

  If a tax return preparer has reasonable cause not to e-file, he or she must maintain adequate documentation for each instance.

- The amendments authorize the Commissioner of Taxation and Finance to establish reasonable correction periods and resubmission procedures for electronic tax filing and payments that were initially rejected after they were timely filed. This applies to electronic returns and payments made for tax years beginning on or after December 31, 2010.

- The amendments also prohibit tax return preparers and software companies from charging separate fees for the electronic filing of New York tax documents. In addition, software companies are prohibited from offering a version of tax software that charges a separate fee for the electronic filing of authorized tax documents and another version of the same software that does not.

  Any tax return preparer or software company that violates these provisions will be liable for a penalty of $500 for the first violation and a penalty of $1,000 for each subsequent violation. These amendments became effective as of August 11, 2010.

For the most up-to-date e-file information on e-file requirements, visit the Tax Department's Web site at *www.tax.ny.gov*.

(Tax Law sections 29(e), 33, 34, 685(u) and section 11-1785(t) of the Administrative Code of the City of New York)

Tax enforcement technical corrections

The Tax Law was amended to make technical corrections to the tax enforcement provisions of last year's budget legislation (Chapter 57 of the Laws of 2009), which included revisions to the criminal penalties under Article 37 of the Tax Law and established the right to an expedited hearing in certain circumstances. In addition to some minor technical corrections made to the aggregation provisions of section 1807 of the Tax Law and the effective date provisions of Subpart I of Chapter 57 of the Laws of 2009, the amendments include several technical corrections. The technical corrections included in the amendments that apply to sales tax include the amendments explained below related to the expedited hearing process enacted by Chapter 57 of the Laws of 2009.

Expedited hearings

Chapter 57 of the Laws of 2009 included provisions to allow for expedited hearings before the Bureau of Conciliation and Mediation Services and Division of Tax Appeals in cases where a person receives a written notice that advises the person of:

- the proposed cancellation, revocation, or suspension of a license, permit, registration, or other credential issued by the Tax Department;

- the denial of an application for a license, permit, registration, or other credential issued under the authority of the Tax Law, except for an application to renew a sales tax *Certificate of Authority*;

- the imposition of a fraud penalty.

Those provisions required that in situations where an expedited hearing was available, the conciliation conference must be requested within 30 days of the receipt of

the notice that was to be the subject of the hearing. Chapter 57 of the Laws of 2009 also inadvertently repealed language in the Tax Law which specified the process by which a party can discontinue a conciliation conference.

The new legislation provides that the 30-day period for requesting an expedited hearing begins on **the date of mailing of the notice** that is to be the subject of the hearing. Under the prior law, the 30-day period for requesting an expedited hearing began on the date the notice was received. In addition, the new law clarifies that the expedited hearing provisions do not apply to a denial of an application for, or a cancellation, revocation, or suspension of a certificate of registration as a retail dealer of cigarettes or tobacco products, which are covered by section 480-a(4)(c) of the Tax Law.

(Tax Law sections 170(3-a)(b), 170(3-a)(h), 1807, 1808, 1809, 2008(2)(a) and (b) and section 34 of subpart I of Chapter 57 of the Laws of 2009)

Information reporting required for credit and debit card payments

The Tax Law was amended to require the filing of annual reports with the Tax Department relating to credit and debit card payments to payees with a New York State address or who are New York State taxpayers (referred to collectively for purposes of this memorandum as *New York State payees*). These amendments follow the provisions of section 6050W of the Internal Revenue Code to require annual reports be filed by payment settlement entities, third-party settlement organizations, electronic payment facilitators, or other third parties acting on behalf of payment settlement entities, also as defined by section 6050W of the Internal Revenue Code. For purposes of this memorandum these entities will be referred to collectively as a *reporting entity*.

New filing requirements related to filing that will be required under Section 6050W of the Internal Revenue Code

Section 6050W of the Internal Revenue Code requires a reporting entity to file annual information returns with the Internal Revenue Service (IRS) reflecting the transactions of their payees. Under the federal law, the first information returns must be filed with the IRS by January 31, 2012, covering payment information for calendar year 2011. Under the new Tax Law provisions, a reporting entity that is required to file the information returns under section 6050W of the Internal Revenue Code is also required to file either a duplicate information return with the Tax Department or a duplicate of any information returns related to New York State payees. The duplicate information return required under this new law must be filed within 30 days of the filing of the information returns required to be filed with the IRS under section 6050W of the Internal Revenue Code.

Under the new law, the Tax Department is required to maintain and make available to a reporting entity no later than 45 days prior to the deadline for filing the duplicate information returns a list or database of New York State taxpayers and persons

registered for sales tax purposes. A reporting entity is prohibited from using this list or database for any purpose other than to enable them comply with the filing requirements of this new law.

In addition, the Tax Department is prohibited from using for any purpose information received from payment settlement entities concerning non-New York State payees.

Penalties for failure to file the duplicate information returns under the new law

The new law provides that a $50 penalty will be imposed for each failure to file the duplicate information return with the Tax Department, with an annual maximum penalty of $250,000. The Tax Department may waive all or any portion of the penalty if there is shown that the failure to file was due to reasonable cause and not due to willful neglect, or if it is determined that rescinding the penalty would promote compliance with the requirements of the Tax Law, or if it is in the interest of effective tax administration by the Tax Department.

Effective date

While this new law was enacted on August 11, 2010, as indicated above, the duplicate information returns required to be filed with the Tax Department are not due until 30 days after information returns are filed with the Internal Revenue Service under section 6050W of the Internal Revenue Code. Therefore, since the first information returns to be filed with the IRS will be due on January 31, 2012, the first duplicate information returns required to be filed with the Tax Department will be due on March 1, 2012. The Tax Department will be issuing additional guidance in the future regarding this requirement to file the duplicate information returns.

(Tax Law section 1703)

Filing requirements for Industrial Development Agencies and Authorities and for their agents and project operators

The General Municipal Law (GML) was amended to restore the requirement that an Industrial Development Agency (IDA) established under the GML must notify the Tax Department within 60 days when it appoints an agent or project operator. This amendment is retroactive to January 31, 2008. IDAs that appointed agents/project operators during the period January 31, 2008, through August 11, 2010, must file notices by November 9, 2010

The Public Authorities Law (PAL) was amended to require the Troy and Auburn IDAs also to notify the Tax Department within 60 days when they appoint an agent or project operator. This amendment is retroactive to January 1, 2010. Thus, the Troy and Auburn IDAs must file notices with the Tax Department by November 9, 2010, regarding any agents/project operator they appointed during the period January 1, 2010, through August 11, 2010.

In addition, the PAL was amended to require every agent/project operator of the Troy IDA or Auburn IDA to file an annual statement with the Tax Department regarding sales and use tax exemptions claimed during the prior year. This requirement is, and continues to be, in place for agents and project operators of IDAs established under the GML.

Thus, with these law changes, every IDA must file Form ST-60, *IDA Appointment of Project Operator or Agent For Sales Tax Purposes*, with the Tax Department within 60 days to report it has appointed an agent or project operator. Likewise, every IDA agent/project operator must file annually Form ST-340, *Annual Report of Sales and Use Tax Exemptions Claimed by Agent/Project Operator of Industrial Development Agency/Authority (IDA)*. These forms are available on the Tax Department's Web site at *www.tax.ny.gov*.

(General Municipal Law, section 874(9) and Public Authorities Law, sections 1963(3) and (4) and 2326(3) and (4))

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.