



## Department of Taxation and Finance

### **Important:**

This TSB-M is obsolete and cannot be relied upon. 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.



## **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or members of a limited liability company (LLC), as previously explained in TSB-M-11(6)S. Accordingly, TSB-M-11(6)S is obsolete.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:  $\$10,000 + \$1,600 = \$11,600 \times 4\% = \$464$ .*

*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:  $\$8,000 + \$1,300 = \$9,300 \times 4\% = \$372$ .*

*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:  $\$20,000 + \$3,100 = \$23,100 - \$8,000 = \$15,100 \times 6\% = \$906$ .*

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.

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