

Summary of Budget Bill Corporation Tax Changes Enacted in 2009

This memorandum contains brief summaries of the corporation tax legislative changes that are part of the fiscal 2009-2010 New York State budget bills (Chapters 56, 57, and 59 of the Laws of 2009). The memorandum covers corporation tax changes under Articles 9 (corporation tax), 9-A (franchise tax on business corporations), 13 (tax on unrelated business income), 32 (franchise tax on banking corporations), and 33 (franchise tax on insurance corporations) of the Tax Law.

This memorandum summarizes legislative changes in the following areas:

- Article 33 franchise tax on for-profit health maintenance organizations
- Definition of gross direct premiums
- Authorization for reciprocal agreements with the United States and other states for crediting certain payments against outstanding debts
- Captive insurance companies
- Empire State film production credit
- Empire Zones Program
- Fuel cell electric generating equipment credit and transportation improvement contribution credit
- Low-income housing credit
- Mandatory first installment of estimated tax
- Public safety communications surcharge
- Tax compliance and enforcement
- Tax preparer registration program

Article 33 franchise tax on for-profit health maintenance organizations (Article 33)

Article 33 of the Tax Law was amended to impose the franchise tax on insurance corporations on for-profit health maintenance organizations (for-profit HMOs) authorized under Article 44 of the Public Health Law. Previously, for-profit HMOs were subject to tax under Article 9-A of the Tax Law.

The legislation does not affect nonprofit health maintenance organizations. Nonprofit health maintenance organizations required to obtain a certificate of authority under Article 44 of the Public Health Law are not subject to the franchise tax on insurance corporations under Article 33.

The amendments apply to tax years beginning on or after January 1, 2009. For more information regarding this legislation, see TSB-M-09(7)C, *For-Profit Health*

Maintenance Organizations Are Now Subject to the Franchise Tax on Insurance Corporations under Article 33.

(Tax Law sections 1500(a), 1502-a, 1510(c)(1), and 1512(a)(10))

Definition of gross direct premiums (Article 33)

Section 1510(c)(2) of Article 33 (franchise tax on insurance corporations) of the Tax Law was amended to provide that the term *gross direct premiums* does not include any premiums that New York State is prohibited from taxing pursuant to federal law, including premiums for health benefits through the Federal Employees Health Benefits program under Title 5 US Code section 8909(f) and premiums paid to Medicare organizations under Title 42 US Code sections 1395w-24(g), 1395w-112(g), or 1395mm(k)(4)(B).

This amendment applies to tax years beginning on or after January 1, 2009.

(Tax Law section 1510(c)(2))

Authorization for reciprocal agreements with the United States and other states for crediting certain payments against outstanding debts

Section 171-t has been added to the Tax Law to provide additional authority for the Tax Department to enter into a reciprocal offset agreement with the federal government or another state (claimant). Under the authority of the new section, the commissioner may enter into an agreement with a claimant under which New York State will agree to offset New York State tax overpayments and vendor payments owed to a person against debts (both tax debts and other debts) owed by that person to the claimant. The agreement must provide that the claimant will do the same for debts owed to New York State; however, the federal government will not be required to offset tax overpayments owed by it except to the extent it agrees to do so. This type of agreement would be in addition to any current agreements under which tax overpayments of the federal government, other states, and New York State are credited against outstanding tax debts.

For purposes of section 171-t of the Tax Law, *vendor payment* means any payment, other than an overpayment, made by a state or the United States to any person, and includes but is not limited to any expense reimbursement to an employee of the state or the United States. *Vendor payment* does not include a person's salary, wages, or pension.

Additionally, section 171-p of the Tax Law has been amended to provide that any fees or charges imposed by the United States or any state, for sending a taxpayer's overpayment or

vendor payment to the Tax Department to satisfy the taxpayer's debt owed to New York State, will be added to the taxpayer's debt. That is, the fee or charge will be paid by the taxpayer.

(Tax Law sections 171-n(1)(c), 171-p(2), and 171-t)

Captive insurance companies (Articles 9-A, 32, and 33)

The Tax Law has been amended to change the tax treatment of certain captive insurance companies. Chapter 57 of the Laws of 2009 added the definition of an overcapitalized captive insurance company to section 2 of the Tax Law. Under the new law, an overcapitalized captive insurance company must be included in a combined return under either Article 9-A or Article 32 with the closest corporation that directly or indirectly owns or controls over 50% of the voting stock of the overcapitalized captive insurance company.

An *overcapitalized captive insurance company* is an entity that is treated as an association taxable as a corporation under the Internal Revenue Code (IRC) and:

- more than 50% of the voting stock is owned or controlled directly or indirectly by a single entity that is treated as an association taxable as a corporation under the IRC and not exempt from federal income tax;
- it is licensed as a captive insurance company under the laws of New York State or another jurisdiction;
- its business includes providing, directly and indirectly, insurance or reinsurance covering the risks of its parent and/or members of its affiliated group; and
- 50% or less of its gross receipts for the tax year consists of premiums.

The amendments apply to tax years beginning on or after January 1, 2009. For more information regarding this legislation, see TSB-M-09(9)C, *Tax Treatment of Overcapitalized Captive Insurance Companies*.

(Tax Law sections 2.11, 211.4(a)(7), 211.4(b)(1), 1452(d), 1452(m)(4), 1462(f)(2), 1462(f)(3), 1500(a), and 1502-b(a))

Empire State film production credit (Articles 9-A and 22)

The statewide aggregate dollar amount of Empire State film production credits allowed has been increased by an additional \$350 million for 2009. Also, the tax year in which the credit may be claimed has been changed for credits of \$1 million or more, as described below.

- If the amount of the credit is at least \$1 million but less than \$5 million, the credit is claimed over a two-year period beginning with the tax year in which the production of

the qualified film is completed and the next succeeding tax year. One-half of the amount of the credit allowed is claimed in each year.

- If the amount of the credit is at least \$5 million, the credit is claimed over a three-year period beginning with the tax year in which production of the qualified film is completed and the next two succeeding tax years. One-third of the amount of the credit allowed is claimed in each tax year.

Credits of less than \$1 million will continue to be claimed in the tax year in which the production of the qualified film is completed.

For more information about this credit, contact the New York State Governor's Office for Motion Picture and Television Development by e-mail at nyfilm@empire.state.ny.us.

These provisions apply to tax years beginning on or after January 1, 2009.

(Tax Law section 24(a)(2))

Empire Zones Program (Articles 9, 9-A, 22, 32, and 33)

The Tax Law and the General Municipal Law were amended to provide changes to the Empire Zones Program. These changes affect taxpayers claiming Empire Zone (EZ) credits, including Qualified Empire Zone Enterprise (QEZE) credits under Tax Law Articles 9, 9-A, 22, 32, and 33 for tax years beginning on or after January 1, 2008. For more information regarding the changes to the Empire Zones Program, see TSB-M-09(5)C, (4)I, *Legislative Changes to the Empire Zones Program*.

(Tax Law sections 14(a)(2), 14(h), 14(m), 15(b)(3), 17, 210.12-B(d-1), 210.12-C(c-1), 210.19(e-1), 210.20(b-1), 606(j)(4-a), 606(j-1)(3-a), 606(k)(5-a), 606(l)(1-a), 685(p-2), 688(h), 689(c)(4), 1085(k-2), 1088(h), 1089(c)(4), 1456(d)(2-a), 1456(e)(5-a), 1511(g)(5-a), and 1511(h)(2-a))

Fuel cell electric generating equipment credit and transportation improvement contribution credit (Articles 9, 9-A, 22, 32, and 33)

The fuel cell electric generating equipment credit was allowed for the purchase and installation of fuel cell electric generating equipment used in New York State. The transportation improvement contribution credit was allowed for a certified contribution of at least \$10 million to a qualified transportation improvement project in New York State.

Effective for tax years beginning on or after January 1, 2009, no new claims for these tax credits will be allowed. However, taxpayers who have a carryover of the fuel cell electric generating equipment credit may continue to carry that credit forward until it is used up.

(Tax Law sections 20(a), 187-n, 210.37, 606(g-2), 606(i), 1456(t)(1), and 1511(x)(1))

Low-income housing credit (Articles 9-A, 22, 32, and 33)

The New York State low-income housing tax credit program was established in 2000 to promote the construction and rehabilitation of low-income housing in New York State. The credit is similar to the federal low-income housing credit and is administered by the New York State Division of Housing and Community Renewal.

The Public Housing Law has been amended to increase the statewide aggregate dollar amount of low-income housing tax credits that may be used for qualifying low-income housing projects from \$20 million to \$24 million.

In addition, to conform with recent changes to the federal low-income housing credit, the security bond in lieu of recapture provision has been eliminated for New York State purposes. Taxpayers will no longer be required to post a bond upon disposition of an interest in a low-income housing building if it is reasonably expected that the building will continue to qualify as an eligible low-income building for the remaining compliance period for that building.

If a building is disposed of and there is any reduction in the qualified basis of the building that results in an increase in tax for the current or subsequent tax years, the period to issue a deficiency assessment relating to a credit recapture is extended to three years from the date the Commissioner of the New York State Division of Housing and Community Renewal is notified by the taxpayer that the building is no longer in compliance. For more information see the form and instructions for DTF-626, *Recapture of Low-Income Housing Credit*.

These provisions are effective as of April 7, 2009.

(Public Housing Law, section 22(4) and Tax Law section 18(b)(7))

Mandatory first installment of estimated tax (Articles 9, 9-A, 32, and 33)

Under current law, all taxpayers whose preceding year's tax, exclusive of the MTA surcharge, exceeds \$1,000 are required to pay a mandatory first installment of estimated tax. The installment must be paid with the tax return required to be filed for the preceding tax year, or with an application for extension of time to file that return.

In addition, under current law, all taxpayers subject to the mandatory first installment who are doing business in the Metropolitan Commuter Transportation District (MCTD) are also required to make a mandatory first installment of estimated tax for the MTA surcharge. The

mandatory first installment of estimated tax for the MTA surcharge is paid with the surcharge return required to be filed for the preceding tax year, or with the application for extension of time to file that surcharge return. The MCTD includes New York City (the counties of New York (Manhattan), Bronx, Kings (Brooklyn), Queens, Richmond (Staten Island)), and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester.

For tax years beginning on or after January 1, 2010, the Tax Law has been amended to provide an increase in the mandatory first installment of estimated tax for general business corporations (Article 9-A), banking corporations (Article 32), non-life insurance corporations (Article 33), and entities subject to tax under sections 184, 186-a, and 186-e of Article 9, whose preceding year's tax, exclusive of the MTA surcharge, exceeds \$100,000. Those taxpayers will be required to pay a mandatory first installment equal to 40% of the preceding year's tax. For life insurance corporations subject to tax under section 1510(b)(1) of Article 33, the mandatory first installment remains at 40% of the preceding year's tax if that preceding year's tax exceeds \$1,000. In addition, taxpayers who are required to pay their mandatory first installment at the 40% rate and are subject to the MTA surcharge are also required to pay a mandatory first installment of the MTA surcharge at 40% of the preceding year's MTA surcharge. The remaining three estimated tax payments are adjusted so that the total payments do not exceed the total estimated tax due for the tax year.

The mandatory first installment of estimated tax and estimated MTA surcharge (except for life insurance corporations as noted above) remains at 25% of the preceding year's tax and MTA surcharge, respectively, for those taxpayers whose preceding year's tax exceeds \$1,000, but is less than or equal to \$100,000.

(Tax Law sections 197-b.1(a), 213-b(a), 1461(a), and 1514(a)(1))

Public safety communications surcharge (Article 9)

The state wireless communications service surcharge previously found in County Law section 309 was repealed and enacted in substantially the same form in new Tax Law section 186-f. The surcharge is now called the public safety communications surcharge.

The purpose of the surcharge is to provide revenue for a variety of public safety purposes including, but not limited to, those specifically designated for the support or implementation of 911 or enhanced 911 services. Moving the surcharge to the Tax Law reflects the fact that the Tax Department currently handles the collection of the surcharge and incorporates the department's general administrative powers, including allowing the enforcement of payment of the surcharge and the ability to pay refund claims. The new legislation remedies problems caused by the department's inability under current law to pay refunds to providers and individuals who have overpaid or paid the surcharge in error.

The repeal of County Law section 309 and the provisions of new Tax Law section 186-f are effective September 1, 2009.

For more information regarding this legislation, see TSB-M-09(8)C, *Public Safety Communications Surcharge*.

(Tax Law sections 186-e.8 and 186-f)

Tax compliance and enforcement

The Tax Law has been amended to enact a package of provisions that are intended to increase taxpayers' compliance with the Tax Law and to improve the Tax Department's ability to enforce the payment of all taxes that are due and owing.

The following is a brief summary of the items contained in the tax compliance and enforcement package that apply to the taxes under Articles 9, 9-A, 32, and 33 of the Tax Law:

- **Voluntary Disclosure and Compliance (VDC) program.** Section 1700(4) of the Tax Law has been amended to clarify that returns and reports filed by taxpayers who participate in the VDC program may be disclosed to the Secretary of the United States Treasury (which includes the Internal Revenue Service) or the proper officer of any state or city with which the Tax Department has an information exchange. The amendment applies to returns and reports filed under the VDC program on or after April 7, 2009. For more information, see TSB-M-09(6)I, (6)C, (5)M,(1)R, (5)S, *Voluntary Disclosure and Compliance Program Legislative Change Regarding the Disclosure of Information*.

(Tax Law section 1700(4))

- **Bad check or failed electronic withdrawal fees.** The new law authorizes the commissioner to impose a \$50 fee when a check, money order, or electronic funds withdrawal, in payment of any amount due under a tax, fee, special assessment, or other imposition administered by the department, is returned without payment. If a payment is returned, the Tax Department will send a separate bill for \$50 for each tax return or other tax document associated with the returned payment. In the case of electronic funds withdrawal, the \$50 fee will not be imposed if the reason for the return of the payment is due to an error by the Tax Department or the originating depository financial institution. This authorization is effective for payments related to authorized tax documents required to be filed for tax years beginning on or after January 1, 2009.

(Tax Law section 30)

- **Interest on underpayments.** The underpayment interest rate for corporate taxes is increased to the federal short-term rate plus seven percentage points. In addition, the minimum underpayment interest rate for all taxes is increased to 7.5% per annum. Also, if no underpayment interest rate is set for any calendar quarter, the rate will be 7.5% per

annum for that quarter. The increase in underpayment interest rates as described above, took effect on April 7, 2009, and applies to the interest chargeable or due on taxes or on any other amounts, or portion thereof, that remain or become due on and after that date.

(Tax Law sections 1084(a)(1), 1085(c)(1), 1096(e)(1), and 1096(e)(2))

- **Criminal penalties.** The amendments created a new series of crimes under Article 37 of the Tax Law entitled "*Tax Fraud Acts*". These amendments related to tax fraud apply to all taxes administered by the Tax Department. Under the new law, anyone who engages in a tax fraud act would be committing a class A misdemeanor. If a person commits a tax fraud act with intent to defraud the state or a political subdivision or to evade tax, the person would be committing a class E, D, C, or B felony. The felony level would depend on the dollar amount of tax not paid. These new criminal penalty provisions apply to offenses committed on or after April 7, 2009.

(Tax Law sections 1800(c), 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1831, 1832, and 1833)

- **Fraud penalties.** The Tax Law has been amended to increase the civil penalty for failure to pay tax due to fraud from 50% of the amount of unpaid tax to two times the amount of unpaid tax. As a result of this change, the additional fraud penalty equal to 50% of the interest payable on the tax due has been eliminated. The new fraud penalty applies to returns and other documents filed or required to be filed and to actions taken and omissions occurring with regard to tax years beginning on or after January 1, 2009. In addition, a penalty for submitting false or fraudulent documents has been added to the Tax Law. The penalty is equal to \$100 for each false or fraudulent document submitted or \$500 for each false or fraudulent return that is submitted.

(Tax Law sections 685(e), 685(cc), 1085(f), and 1085(u))

Additional information on all the amendments included in the compliance and enforcement legislation will be provided by the Tax Department in a future document.

Tax preparer registration program

Section 32 has been added to the Tax Law to provide that certain tax return preparers who prepare New York State returns for individuals or businesses for a fee, and facilitators who facilitate the making of refund anticipation loans or refund anticipation checks, must register annually with the Tax Department. Certain preparers must also pay an annual \$100 registration fee. Tax preparers who prepare personal income tax returns for compensation must register with the Tax Department for personal income tax returns filed on or after December 31, 2009. Tax preparers who prepare returns other than personal income tax returns must register with the Tax Department for returns filed on or after December 31, 2010.

Additional information on who is required to register and the method for registering for the tax preparer registration program will be provided by the Tax Department in a future document.

(Tax Law section 32)

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.