

**New York State Department of Taxation and Finance  
Taxpayer Services Division  
Technical Services Bureau**

TSB-M-85 (8)C Revised  
Corporation Tax  
November 6, 1985

This memorandum supercedes TSB-M-85(8)C dated July 16, 1985, which should be destroyed.

Omnibus Tax Equity and Enforcement Act of 1985

GENERAL

Chapter 65 of the Laws of 1985, approved April 17, 1985, created the Omnibus Tax Equity and Enforcement Act. The purpose of the act is to increase compliance with the Tax Law by strengthening and adding to the statutory provisions aimed at enforcing it, thereby reducing unfair business competition and significantly increasing the tax revenues received by the state and local taxing Jurisdictions.

The act provides several enforcement tools, such as:

1. New penalties for tax evaders;
2. Strengthened existing penalties (certain criminal penalties have been upgraded to felony status); and
3. Broader investigatory powers for the Department of Taxation and Finance and authorization for Joint audits with New York City and other states.

The act amends the Tax Law by imposing *new*, stronger and more effective civil penalties on tax evaders and delinquents, with certain penalty provisions being modeled after federal penalty provisions. Amendments to Article 27 of the Tax Law, relating to corporate tax procedures, apply to all tax articles governed by that article.

CIVIL PENALTIES

Failure to File Returns (Tax Law §1085(a)(1), Omnibus bill §67)

New provisions have been added to this subsection. In case of failure to file a tax return within 60 days of the prescribed filing date (determined with regard to any extension of time for filing), unless it is shown that the failure is due to reasonable cause and not to willful neglect, the addition to tax under §1085(a)(1)(B) shall not be less than the lesser of \$100 or 100% of the amount required to be shown as tax on the return. The amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return.

Paragraph (4) of subsection (a) of section 1085 sets minimum and maximum limitations on additions for failure to file returns and pay tax shown or required to be shown on the return. The addition to tax for failure to file a return is 5% per month or fraction thereof up to a maximum of 25% in the aggregate. The addition for failure to pay the tax shown on the return is one half of 1% per month up to a maximum of 25%. If both additions apply, the 5% per month is reduced by the 1/2% per month for the first five months for a maximum addition to tax of 4 1/2%. However, if the return is not filed and the tax is not paid within sixty days of the date prescribed for filing such return, the amount of the addition for failure to file shall not be reduced below the lesser of \$100 or 100% of the amount required to be shown as tax on the return.

With respect to any return, the maximum amount of the addition for failure to pay tax required to be shown on the return within 10 days of the date of a notice and demand (25% of the amount stated in the notice), shall be reduced by the addition to tax for failure to file a return (5% per month up to a maximum of 25% in the aggregate). However, such reduction shall be determined without regard to the minimum addition for failure to file a return within 60 days of the prescribed date for filing such return. (Effective July 16, 1985)

Deficiency Due to Negligence (Tax Law §1085(b) Omnibus bill §68)

This subsection has been amended by the addition of two new paragraphs. Paragraph (2) of this subsection now provides for an addition to tax equal to 50% of the interest payable under §1084 of the Tax Law on that portion of the underpayment attributable to negligence or intentional disregard, for the period beginning on the last date prescribed by law for payment of such underpayment (determined without regard to any extension) and ending on the date of the assessment of the tax (or, if earlier, the date of the payment of the tax). This is in addition to all other penalties except the fraud penalty under §1085(f). (Effective July 16, 1985)

The new paragraph (3) of this subdivision provides that for the purpose of the addition to tax based on negligence, if an underpayment of tax is due to the failure to include in gross income any amount of dividends, patronage dividends or interest under Sections 6042(a), 6044(a) and 6049(a) of the IRC, such failure will be treated as due to negligence, absent clear and convincing evidence to the contrary. The penalty is 5% of that portion of the underpayment attributable to such failure. This penalty is in addition to all other penalties except the fraud penalty under §1085(f). (Effective July 16, 1985)

For the purpose of this subsection, Section 1085(i) applies. The section provides that the amount shown as the tax by the taxpayer upon its return shall be taken into account in determining the amount of the deficiency only if its return was filed on or before the last day prescribed for filing the return, determined with regard to any extension of time for filing.

Deficiency Due to Fraud (Tax Law §1085(f), Omnibus bill §69)

Section 1085(f) has been amended to include a new paragraph (2) which provides, that in addition to the 50% penalty provided in this section, there shall be added to the tax an amount equal to 50% of the interest on the portion of any underpayment attributable to fraud, for the period beginning on the last day prescribed by law for payment of such underpayment (determined without regard to any extension) and ending on the date of the assessment of the tax (or, if earlier, the date of the payment of the tax). This fraud penalty is in lieu of the penalties under Section 1085(a) and (b). (Effective July 16, 1985)

For the purpose of this subsection, Section 1085(1) applies. The section provides that the amount shown as the tax by the taxpayer upon its return shall be taken into account in determining the amount of the deficiency only if its return was filed on or before the last day prescribed for filing the return, determined with regard to any extension of time for filing.

Substantial Understatement of Liability (Tax Law §1085(k), Omnibus bill §72)

Section 1085(k) was amended to provide that there is a substantial under-statement of tax if the understatement of tax exceeds the greater of 10% of the tax required to be shown on the report for the taxable year, or \$5,000. The amount to be added to the tax is 10% of the amount of any underpayment attributable to the understatement. The term "understatement" means the excess of the amount required to be shown on the return for the taxable year, over the amount of tax imposed which is shown on the return reduced by any rebate within the meaning of §1081(h). (Effective July 16, 1985)

Aiding or Assisting in the Giving of Fraudulent Returns, Reports, Statements or Other Documents (Tax Law §1085(1), Omnibus bill §73)

Section 1085 of the Tax Law was amended by adding a new subsection (1). This new subsection provides that there shall be a penalty, not to exceed \$10,000, imposed on any person defined by section 1085(J) who, with the intent that tax be evaded, shall for a fee or other compensation, or as an incident to the performance of other services, for which such person receives compensation, aid or assist in, or procure, counsel or advise the preparation or presentation of a false or fraudulent return, report, declaration, statement or other document in connection with any matter arising under Article 9, 9-A, 9-B, 9-C, 13, 13-A 32 and 33.

Where any return, report, declaration, statement or other document is fraudulent or false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, report, declaration, statement or other document, this new penalty may be imposed.

For purposes of imposition of this penalty the term "procures" includes ordering (or otherwise causing) a subordinate to do an act, and knowing of, and not attempting to prevent, participation by a subordinate in an act. The term "subordinate" means any other person (whether or not a director,

officer, employee, or agent of the taxpayer involved) over whose activities the person has direction, supervision or control. For purposes of imposition of this penalty, a person furnishing typing, reproducing, or other mechanical assistance with respect to a document is not treated as having aided or assisted in the preparation of such document by reason of such assistance. (Effective July 16, 1985)

For purposes of this section, the word "person" is defined by Section 1085(j) of the Tax Law.

Burden of Proof (Tax Law §1089(e), Omnibus bill §74)

Section 1089(e) has been amended to add a new paragraph (4). This new paragraph provides that the burden of proof as to whether a person is liable for a penalty imposed under subsection (1) of this section shall be upon the Tax Commission.

CRIMINAL ENFORCEMENT

The criminal penalty provisions in the Tax Law with respect to all state and local taxes administered by the State Tax Commission have been codified in a new Article 37 of the Tax Law. (Section 1095 has been repealed)

Limitation on Fines (Tax Law §1800(c), Omnibus bill §39)

The terms "felony" and "misdemeanor" have the same meanings as they now have in the Penal Law. The disposition of such offenses and the sentences imposed, therefore, will be as provided in the Penal Law, except that in the case of a corporation, the fine for a felony may not exceed \$250,000 and the fine for a misdemeanor may not exceed \$20,000 for a class A misdemeanor. (Effective immediately)

Failure to File a Return or Report; Supply Information; or Supplying False Information (Tax Law § 1801(h), Omnibus bill §39)

Any person who, with intent to evade any tax imposed under Article 9, 9-A, 13, 13-A, 32 or 33, or any requirement thereof or any lawful requirement of the Tax Commission, fails to make, render, sign, certify or file any return or report, or to supply any information within the time required by or under the provisions of such articles, or who, with like intent, supplies false or fraudulent information, will be guilty of a misdemeanor. (Effective November 1, 1985)

Repeated Failure to File; Corporate Taxes (Tax Law §1803, Omnibus bill §39)

Any person who, with intent to evade payment of any tax imposed under Article 9, 9-A, 13, 13-A, 32 or 33, fails to file a return or report for three (3) consecutive taxable years shall be guilty of a class E felony, provided that the person had an unpaid tax liability with respect to each of the three (3) consecutive taxable years. However, a valid defense will be that the defendant had no unpaid tax liability with respect to any of the three (3) consecutive taxable years. For purposes of this section, declarations of estimated tax are not included in the terms "returns" and "reports". (Effective November 1, 1985)

False Returns or Reports; Corporate Taxes (Tax Law §1805, Omnibus bill §39)

Any person who, with intent to evade any tax imposed by or any requirement of Article 9, 9-A, 13, 13-A, 32 or 33, or any lawful requirement of the Tax Commission thereunder, shall make, render, sign, certify or file any false or fraudulent return or report, declaration or statement shall be guilty of a misdemeanor. However, where such return or report substantially understates the tax, the taxpayer is guilty of a class E felony. Under the felony provision, the tax required to be shown on the report or return for the taxable period reduced by the amount of tax imposed which is shown on the return or report must be more than \$1500. The taxpayer must be acting without reasonable ground for belief that his conduct is lawful, with intent to evade at least \$1500 of tax. For purposes of this section, declarations of estimated tax are not included in the terms "returns" and "reports". (Effective November 1, 1985)

Aiding or Assisting in the Giving of Fraudulent Returns, Reports, Statements, or Other Documents; Corporate Taxes (Tax Law §1808, Omnibus bill §39)

Any person who, with the intent that any tax imposed under Article 9, 9-A, 13, 13-A, 32 or 33, or any lawful requirement of the State Tax Commission thereunder, be evaded, shall for a fee or other compensation or as an incident to the performance of other services for which such person receives compensation, aid or assist in, or procure, counsel or advise the preparation or presentation under, or in connection with any matter arising under any such article of a materially false or fraudulent return, report, declaration, statement or other document, shall be guilty of a misdemeanor, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return. However, with respect to returns or reports only, where such person thereby causes, by a common scheme or plan, an understatement of tax liability of one or more persons of more than \$1500 in the aggregate, such understatement will be considered a class E felony. Such act shall be considered a class E felony whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return or report. (Effective November 1, 1985)

Failure to Obey Subpoenas (Tax Law §1809, Omnibus bill §39)

Any person who, being duly subpoenaed, pursuant to §174 of the Tax Law or the provisions of the Civil Practice Laws and Rules, in connection with a matter arising under Article 22, 9, 9-A, 13, 13-A, 32 or 33, or any related income or earnings tax statute, fails or refuses to attend without lawful excuse, refuses to be sworn, refuses to answer any material and proper question or refuses, after reasonable notice, to produce books, accounts, records, memoranda, documents or other papers in his possession or under his control which constitute material and proper evidence shall be guilty of a misdemeanor. (Effective November 1, 1985)

Failure to Pay Tax (Tax Law §1810, Omnibus bill §39)

Any person who, with intent to evade any tax or any requirement of Article 9, 9-A, 13, 13-A, 32 or 33 or Article 22 or any related income or earnings tax statute, or any lawful requirement of the Tax Commission thereunder, who fails to pay the tax, will be guilty of a misdemeanor. (Effective November 1, 1985)

## ENFORCEMENT AND OTHER PROCEDURES

### Certificate, Unfiled Return (Tax Law §1091(d), Omnibus bill §28)

The certificate of the State Tax Commission to the effect that a tax has not been paid, that a return or declaration of estimated tax has not been filed, or that Information has not been supplied, as required by or under the various articles applicable to corporate taxes, shall be prima facie evidence that such requirements were not complied with. (Effective immediately)

### Warrants and Liens (Tax Law §1091(d) and (f) Omnibus Bill §75)

The warrant provisions of the various corporate taxes have been amended to make it clear that the filing of a tax warrant creates an immediate, continuing and perfected lien.

Liens created by the filing of warrants will apply to both real and personal property. To take effect with respect to real property the warrant must be filed in the office of the county clerk. With respect to personal property, the warrant (or a record of its issuance) must be filed in both the Department of State and the Office of the County Clerk. (Effective July 16, 1985)

### Attorney General; Jurisdiction (Tax Law §1091(e), Omnibus bill §28)

The attorney general now has concurrent jurisdiction with any district attorney in the prosecution of any offenses arising under Article 37 of the Tax Law, with respect to the taxes to which Article 27 applies. (Effective immediately)

### Examination of Books and Witnesses (Tax Law §1096(b), Omnibus bill §30)

Tax Law §1096(b) presently provides that the State Tax Commission, for the purpose of ascertaining the correctness of any return or for the purpose of making an estimate of tax liability of any corporation, shall have the power to examine or to cause to have examined, by any agent or representative designated by it for that purpose, any books, records, papers or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the corporation rendering the return through any officer or employee of such corporation, or the attendance of any other person having knowledge in the premises, and may take testimony and require proof material for its information, with power to administer oaths to such person or persons.

Tax Law §174 provides that the members of the State Tax Commission, their deputies, secretary and any other officer or employee of the Department of Taxation and Finance duly designated and authorized by resolution of The State Tax Commission, duly entered upon its minutes, shall have power to administer oaths, take affidavits and certify acknowledgments in relation to any matter or proceeding in the exercise of the powers or duties of the State Tax

Commission under the Tax Law and in relation to any written instrument required or permitted to be filed with the State Tax Commission. The State Tax Commission shall have the power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to the investigations and inquiries which it is authorized to conduct, and to examine them in relation to any matter which it has power to investigate and to issue commissions for the examination of witnesses who are out of the state or unable to attend before the State Tax Commission or excused from attendance. A subpoena issued under this section shall be regulated by the Civil Practice Law and Rules. Any person who shall testify falsely in any material matter pending before the State Tax Commission shall be guilty of and punishable for perjury.

Under the Omnibus bill, the State Tax Commission may take any action under section 1096(b), renumbered 1096(b)(1), to inquire into the commission of an offense connected with the administration or enforcement of Article 27 or Article 9, 9-A, 13, 13-A, 32 or 33, provided however, that notwithstanding the provisions of Section 174, no such action shall be taken after a referral by the department or the State Tax Commission to the attorney general, a district attorney, or any other prosecutorial agency is in effect. (Effective November 1, 1985)

Pursuant to section 108 of the Omnibus Tax Equity and Enforcement Act of 1985, the State Tax Commission is authorized to conduct Joint audits with one or more states of the United States, with the City of New York, or with such states through national or regional tax associations, pursuant to specific agreements with such state or states, if it considers such an audit program to be advantageous to the administration by the State Tax Commission of the taxes imposed by or pursuant to the authority of the Tax Law or Article 2-E of the General City Law. (Effective immediately)