



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

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Taxpayer Bill of Rights Act of 1997

On September 10, 1997 Governor George E. Pataki signed into Law, Chapter 577 of the Laws of 1997, the Taxpayer Bill of Rights Act of 1997 (the Act).

This memorandum provides a general overview of the provisions of the Act. The Act provides taxpayers with additional rights and equitable relief such as:

- awarding attorneys' fees and other costs to taxpayers in certain tax proceedings and placing the burden of proof on the Tax Department as to whether its position was substantially justified,
- allowing tax levies to be released in certain hardship situations,
- awarding damages to taxpayers for certain unauthorized actions of the Tax Department,
- giving taxpayers more time to pay after receipt of a notice that a tax liability is due and owing before additional interest or some penalties start to accrue,
- allowing taxpayers to use designated delivery services in addition to the U.S. Postal Service and still benefit from the rule that deems the date of filing or payment to be the date that the material is postmarked,
- providing more information to taxpayers on why it is claimed that additional tax is due, or on what property cannot be taken to satisfy their tax debts, and
- requiring the Tax Department, if requested by a responsible person, to disclose the names of other responsible persons liable for the same liabilities and whether the department has attempted to collect the liability from these other persons.

In order to promote taxpayer fairness and to make it easier to deal with the Tax Department

and to comply with the Tax Laws, the Act also:

- provides for compromise of liability on a joint income tax return attributable to a former spouse,
- conforms the state and local personal income taxes to the federal income tax provision which allows a credit upon the repayment of "claim of right" income, and
- simplifies mailing requirements for certain local tax enactments required to be mailed to the Commissioner.

Summary of Provisions

Sections 4,5 and 7 through 24 of the Act amended various provisions of the Tax Law which are outside Article 41 (i.e., the Taxpayers' Bill of Rights), but which fall into the category of providing taxpayers with additional rights or equitable relief. Except for sections 5 and 17, all of these amendments have counterparts in the newly enacted Federal "Taxpayer Bill of Rights 2" (P.L. 104-168).

Compromise of Civil Liability

Section 4 of the Act amended Tax Law section 171, subdivision eighteenth-a, to increase the amount of a civil liability that can be compromised without an opinion of Counsel being filed, from \$2,500 to \$25,000. The effective date of this amendment is September 10, 1997.

Compromise of Liability on Joint Income Tax Return

Section 5 of the Act added new Tax Law section 171, subdivision eighteenth-d to provide offer in compromise procedures to a taxpayer who is jointly and severally liable on a joint income tax return. The procedures could be invoked if the following conditions are met:

- At the time of the offer, the taxpayer and spouse are (1) divorced, (2) separated or (3) living apart and ineligible to file a joint federal income tax return.
- The taxpayer is able to demonstrate that collection of the spouse's share of liability from the taxpayer could not be accomplished within a reasonable length of time without imposing substantial economic hardship on the taxpayer. Substantial economic hardship does not necessarily require the bankruptcy or insolvency of the taxpayer.

The procedures would apply only to the share of the joint tax liability which is attributable to the income of the taxpayer's spouse. This share is determined by multiplying the entire amount of the joint liability by a fraction whose numerator is the spouse's tax determined on a separate filing basis, and whose denominator is the sum of the spouse's and taxpayer's taxes determined on a separate filing basis.

A compromise under the Act for the spousal share of liability on the return would not compromise the joint and several liability of the taxpayer's spouse with respect to that return.

This provision of the Act takes effect January 1, 1998.

Use of Designated Delivery Services

Sections 7, 9, 10, 13, 20, 23, and 24 of the Act amended various sections of the Tax Law to provide that for purposes of the timely-mailing-is-timely-filing/payment rules (the mailing rules) applicable to the US Mail apply to private delivery services designated by the U.S. Secretary of the Treasury pursuant to section 7502 of the Internal Revenue Code. That is, dates recorded or marked by the service in the manner described in Internal Revenue Code section 7502 shall be treated as being included within the meaning of "postmark" for purposes of the mailing rules. The Commissioner may withdraw the designation from a private delivery service if it is inadequate for the needs of the State. The Commissioner of Taxation and Finance is also authorized to designate additional delivery services for State purposes. Similar authority is provided with respect to equivalents of registered or certified mail.

A corresponding amendment was made to the Administrative Code of the city of New York for purposes of the city personal income tax by section 34 of the Act.

We provide further information on the amendments related to the use of private delivery services in Technical Services Bureau Memorandum, TSB-M-97(7)C, (2)I, (7)M, (10)S and (2)R.

These amendments are effective as of September 10, 1997.

Disclosure of Collection Efforts Regarding Responsible Persons

Section 8 of the Act added a new subdivision (f) to Tax Law section 314, to permit the Commissioner to disclose the name of a person liable for a penalty for failure to pay the petroleum business tax, to any other person who is liable for the same penalty. Also, the amendment allows the Commissioner to disclose certain information regarding collection activities undertaken with respect to the other person. Similar provisions were added by the Act in section 16, by adding a new subsection (n) to section 697 with respect to failure to collect and pay over withholding tax, and by section 22 of the Act by adding a new subdivision (e) to Tax Law section 1146 with respect to persons liable for sales and use taxes or liable for prepaid sales tax on automotive fuel or cigarettes.

The effective date of these amendments is September 10, 1997.

Interest-free and Penalty-free Period for Payment

Section 11 of the Act amended subsections (g) and (h) of section 684 of the Tax Law to extend the interest-free period for payment of personal income tax after a notice and demand is issued. The period is extended from 10 calendar days to 10 business days, and, if the total tax liability is less than \$100,000, to 21 calendar days. Identical amendments were made to subsection (g) and (h) of section 1084 relating to the corporate franchise taxes by section 18 of the Act. An amendment was made to section 685(a)(3) of the personal income tax by section 12 of the Act to provide that the penalty for failure to pay a deficiency does not start to accrue until expiration of the 21 calendar day (or 10 business day) period after the date of a notice and demand. Identical amendments were made to section 1085(a)(3) relating to corporate franchise taxes by section 19 of the Act. Conforming amendments were made to the personal income tax law section 692(c) by section 14 of the Act, and to the corporate franchise tax law section 1092(c) by section 21 of the Act, to require that warrants may not be filed by the Tax Department until a notice and demand has remained fully or partially unpaid for 21 calendar days (or 10 business days, if applicable) from the date of the notice.

Corresponding amendments were made to the Administrative Code of the City of New York for purposes of the city personal income tax by sections 32, 33 and 35 of the Act.

This extension of the interest-free period applies to any notice and demand given after March 31, 1997.

Disclosure of Collection Efforts Regarding Joint Filers

Section 15 of the Act added a new subsection (m) to Tax Law section 697. Subsection (m) provides that for purposes of the personal income tax, where a deficiency with respect to a joint return has been assessed and the individuals who filed the return are no longer married or are separated, the Commissioner shall disclose in writing to such an individual who makes a written request, whether an attempt has been made to collect the deficiency from the other individual. In addition, the Commissioner will provide information concerning the general nature of the collection activity, and the amount collected. Corresponding amendments were made to the Administrative Code of the City of New York for purposes of the city personal income tax by sections 36 and 37 of the Act.

This amendment applies to such requests made on or after September 11, 1997.

Estate Tax Release of Lien Fee

Section 17 of the Act amended subdivision (c) of section 982 of the Tax Law, to delete the

\$25 fee which is required to be paid by an applicant for a certificate of discharge of the estate tax lien. This amendment applies to applications for certificates of discharge filed on or after September 11, 1997, for decedents dying after May 25, 1990.

Taxpayer Bill of Rights

Sections 25 through 31 of the Act amended various sections of Article 41 of the Tax Law-Taxpayers' Bill of Rights.

Section 25 of the Act added a new section 3003 to the Tax Law to provide that all "thirty-day" letters (statement of proposed audit changes) must state the basis for any proposed deficiency. This requirement would also apply to those notices of deficiency or determination and notice and demands which are initiated manually, and which are the first such letters or notices issued to the taxpayer with respect to a particular matter. In the event a description is inadequate under this section, the thirty-day letter or other notice will not be invalidated. This section is to take effect July 1, 1998, and apply to letters and notices issued thereafter.

Section 26 of the Act amended Tax Law section 3008(a) to allow the Commissioner to abate interest attributable to unreasonable errors and delays by Tax Department employees acting in a managerial capacity. This amendment is applicable to interest accruing with respect to deficiencies or payments for taxable periods beginning, or events occurring on or after September 11, 1997.

Sections 27 and 28 of the Act, respectively, amended Tax Law sections 3010(b)(3) and added new paragraph 5 to section 3010(b), to provide that with respect to deferred payment agreements or installment agreements to pay tax liabilities. The amendments set forth that the Commissioner may not alter, terminate or modify an agreement, unless a notice of such action is provided to the taxpayer not later than 30 days prior to the action and explains why the action is being taken. An exception is provided for cases in which the Commissioner believes that the collection of the tax to which the agreement relates is in jeopardy. This amendment is effective as of January 1, 1997.

Section 29 of the Act added a new section 3017 to provide that notices sent to taxpayers by the Department of Taxation and Finance ("department") under section 5222(d) of the Civil Practice Law and Rules (relating to notice to be given to a judgment debtor when a restraining notice is served) or under section 5232(c) of such Law and Rules (relating to notice to be given a judgment debtor when his property is the subject of a garnishment) shall list substantially all property exempt by law from being applied to the satisfaction of warranted tax liabilities. Provision is also made for service of the notice upon an individual taxpayer in cases involving the sale of such a taxpayer's real property. If the notice contains the same basic text or information required to be set forth in notices under CPLR sections 5222(d) and 5232(c), the notice shall be deemed sufficient for purposes of those provisions. This section shall take effect January 1, 1998.

Section 30 of the Act amended section 3022(a)(1) of the Tax Law to authorize the Commissioner of Taxation and Finance to release a levy on property if he determines that the levy

is creating an economic hardship due to the individual taxpayer's financial condition. This section also added a new subdivision (d) to section 3022 to authorize the Commissioner to return property which has been levied upon if the Commissioner determines that (1) the levy was premature or otherwise not in accordance with department procedures, (2) the taxpayer has entered into an installment agreement to satisfy the liability, (3) the return of the property will facilitate the collection of the liability, or (4) the return of the property would be in the best interests of the taxpayer (as determined by the Commissioner) and the state. This amendment takes effect on January 1, 1998.

Section 31 of the Act added a new Part III to Article 41 of the Tax Law, comprising new sections 3030, 3032, 3034, 3036 and 3038, which relate to proceedings against the state for actions of the Tax Department or its officers or employees.

New section 3030 allows taxpayers to recover costs, including attorneys' fees, incurred by them in administrative or court proceedings brought by or against the department in connection with the determination, collection or refund of any tax, if the taxpayer is the prevailing party and the department cannot establish that its position was substantially justified. The department will bear the burden of proof as to whether its position was substantially justified. The taxpayer is required to have exhausted the administrative remedies available with respect to the determination, collection or refund of tax. However, any failure by the taxpayer to agree to an extension of time for assessment of tax cannot be considered in determining whether a taxpayer had met that requirement. If the department fails to follow its own published guidance, a rebuttable presumption arises that the department's position was not substantially justified. This section took effect immediately and applies to proceedings commenced on or after September 11, 1997.

New section 3032 to the Tax Law provides for a civil cause of action against the state if the department fails to release a tax lien within 40 days after the tax liability has been fully satisfied or has become unenforceable, or has been fully bonded. Damages may be reduced if administrative remedies are not exhausted, and will be reduced by the amount which could have been reasonably mitigated by the taxpayer. This section essentially codifies existing common law rights available to taxpayers. It also authorizes the Commissioner to contract with private dispute resolution services to review the claims. This section takes effect January 1, 1998, and applies to damages arising on or after such date.

New Tax Law section 3034 provides that a taxpayer may bring a civil action against the state for damages if an officer or employee of the department recklessly or intentionally disregards any provision of law in connection with the collection of any tax. Any right of action under the common law or the Court of Claims Act was not changed by the Act. This section takes effect immediately and applies to actions of officers or employees of the Tax Department occurring on or after September 11, 1997.

New section 3036 of the Tax Law provides a cause of action in the Court of Claims for

persons, other than the taxpayer (other than the person against whom is assessed the tax out of which the levy arose), for wrongful levy upon his or her property, or for surplus proceeds by a lienor whose interest in property is junior to the state's interest. This section essentially codifies existing common law rights. This section takes effect immediately and applies to causes of action arising on or after September 11, 1997.

New section 3038 of the Tax Law provides that a taxpayer may bring a civil action for damages against the state in the Court of Claims if an officer or employee of the state knowingly or negligently discloses the taxpayer's return, particulars of the return or other information in violation of the Tax Law's secrecy provisions. Also, a taxpayer may bring a civil action for damages against a person who is not an officer or employee of the state if such person knowingly or negligently violates the Tax Law's secrecy provisions. (Examples would be independent contractors and others who obtained confidential tax information from the Tax Department or other agencies which, in turn, obtained the information from the Tax Department.) Damages will be the greater of the sum of \$1000 for each act of unauthorized disclosure or the actual damages plus punitive damages for willful or grossly negligent disclosures plus the costs of the action. This section takes effect immediately and applies to disclosures made on or after September 11, 1997.

The period of limitations for filing the claims against the state provided for in new Tax Law sections 3032, 3034, 3036 and 3038 is set forth in section 10 of the Court of Claims Act. These new sections provide that a claim for injury to property or personal injury based on the negligence of a state officer or employee must be filed within two years if a notice of claim is filed within 90 days of the accrual of the cause of action. If the injury is caused by an intentional tort of a state officer or employee, a claim must be filed within one year if a notice of claim is filed within 90 days. Other claims against the state, not otherwise provided for in section 10 of the Court of Claims Act, must be filed within two years if a notice of claim is filed within 90 days of the accrual of the cause of action. Where administrative proceedings are required to be exhausted, these proceedings will not extend the period of limitations or substitute for filing a required notice of claim.

Claim of Right

Section 40 of the Act added section 662 to the Tax Law. This section provides that, where claim of right income was recognized for State tax purposes in a prior year, and where its repayment is subject to federal claim of right credit treatment, the same credit treatment will apply under the state income tax. "Claim of right" income is income properly recognized on a prior year's tax return, the receipt of which is subsequently determined to be erroneous. Typical claim of right situations involve unemployment compensation benefits which are subsequently repaid upon an administrative finding of ineligibility and profits on stock sales which are subsequently paid over upon an SEC finding of insider profits.

Federal claim of right treatment provides for either a deduction or a credit. A deduction is allowed in the year of repayment for the amount of claim of right income repaid. However, where the deduction exceeds \$3,000, section 1341 of the Internal Revenue Code provides a credit in lieu

of the deduction, if the tax determined with the credit *is less* than that determined with the deduction. The amount of the credit is the amount of tax paid on the income in the income inclusion year. However, the taxpayer takes the credit in the repayment year.

The state amendment further follows the federal approach in that, if the state claim of right credit exceeds the tax for the current year, it will be treated as a tax overpayment and credited or refunded to the taxpayer.

Conforming amendments with respect to the New York City and Yonkers income taxes and earnings and nonresidents tax were made by sections 38, 39, 41, 42 and 43 of the Act to section 25-n of the General City Law and to sections 659, 1312(a), 1332(a) and 1342 of the state and city income tax laws, respectively. Corresponding amendments to the New York City Administrative Code and to the Codes and Ordinances of the City of Yonkers were made by sections 44 through 48 of the Act.

The claim of right provisions of the bill apply to items of claim of right income repaid in taxable years beginning after 1996.

Mailing Rules for Local Tax Enactments

Sections 49, 50, 51 and 52 of the Act amended sections 1210(d), 1211(d), 1212(e), and 1212-A(d) of the Tax Law, respectively, to allow counties, cities and school districts to mail certain local sales and use tax enactments to the Commissioner of Taxation and Finance by certified mail. These amendments apply to any local law, ordinance or resolution mailed on or after September 10, 1997.

Section 53 of the Act amended section 1301(d) of the Tax Law to allow New York City to mail city personal income tax local laws to the Commissioner of Taxation and Finance by certified mail. This amendment applies to city personal income tax local laws mailed on or after September 10, 1997.

Sections 54 and 55 of the Act amended sections 1321(c) and 1340(b) of the Tax Law, respectively, to allow the city of Yonkers to mail city income tax and nonresident earnings tax local laws to the Commissioner by certified mail. This amendment applies to city income tax and nonresident earnings tax local laws mailed on or after September 10, 1997.