

## **Summary of 2004 Budget Legislation and Other Recently Enacted Legislation Relating to Sales and Compensating Use Taxes**

Governor George E. Pataki recently signed into law Chapters 60 and 418 of the Laws of 2004. This memorandum summarizes the amendments to the Tax Law made by those Chapters that are applicable to the state and local sales and compensating use taxes.

### **Sales tax on clothing and footwear**

All clothing, footwear and certain items used to make or repair clothing will continue to be subject to both state and local sales and use taxes (including the  $\frac{1}{4}$  % tax imposed by the state in the Metropolitan Commuter Transportation District (MCTD)<sup>1</sup>) until May 31, 2005. Beginning June 1, 2005, there will be a permanent exemption from state sales and use taxes for clothing, footwear and certain items used to make or repair exempt clothing costing less than \$110 per item of clothing, per pair of shoes or other article of footwear, or per item used to make or repair exempt clothing. However, this exemption will **not** apply on June 1, 2005, or thereafter, to any county or city sales and use taxes unless the county or city has already elected the exemption or elects the exemption. In addition, on June 1, 2005, and thereafter, this permanent exemption will **not** apply to the state's MCTD  $\frac{1}{4}$  % tax except in the area of the MCTD located in a county or city in the MCTD which elects the exemption.

While the permanent clothing and footwear exemption will not apply to either state or local sales and use taxes until June 1, 2005, clothing and footwear costing less than \$110 per item will be exempt from the state sales and use taxes during a one-week temporary exemption period from January 31, 2005, through February 6, 2005.

During the one-week temporary exemption period of January 31, 2005, through February 6, 2005, sales of clothing and footwear costing less than \$110 per item and items used to make or repair such clothing will be exempt from the  $4\frac{1}{4}$  % state sales and use taxes. A county or city imposing sales and use taxes has the option of electing to participate in this one-week exemption period for purposes of its county or city sales and use taxes and, where applicable, the state's  $\frac{1}{4}$ % MCTD tax.

(See Tax Law, Section 1115(a)(30).)

### **Alternative fuel vehicles**

The Tax Law was amended to extend for one year, without interruption, the sales and use tax exemption for purchases of new alternative fuel vehicles and alternative fuel vehicle refueling property. This exemption is available for purchases and uses of these vehicles and

---

<sup>1</sup>The MCTD consists of the city of New York and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester.

property occurring on or before February 28, 2005. In addition, the definition of incremental cost has been amended to provide that the incremental cost of a *qualified hybrid vehicle* purchased on or after March 1, 2004, is \$3,000, regardless of whether a comparable motor vehicle exists. Lastly, the incremental cost of a qualified hybrid vehicle is not required to be separately stated in the written contract or bill if the vehicle was purchased during the period beginning March 1, 2004, and ending August 20, 2004.

For detailed information regarding these amendments, please refer to TSB-M-04(1.1)S, *Amendments to the Alternative Fuels Credits and Exemptions*.

(See Tax Law, Section 1115(p).)

### **Taxpayers' hearing rights**

The Tax Law was amended to change Tax Department practice with respect to the availability of hearings in certain cases. Specifically, there are no longer formal prepayment hearing rights where tax, interest, and/or penalty: (1) is owed due to mathematical or clerical errors on a return; (2) is owed due to changes made to the taxpayer's federal return by the Internal Revenue Service or other competent federal authority (federal changes<sup>2</sup>); or (3) is owed because the taxpayer has not paid all or part of the amount of the tax that the taxpayer has shown as due on the taxpayer's return. However, after payment of the tax, interest, and/or penalty owed, the taxpayer may still file a timely claim for refund or credit. If the Tax Department denies the claim, the taxpayer may then apply for a conciliation conference in the Bureau of Conciliation and Mediation Services or petition for a hearing in the Division of Tax Appeals.

In addition, these amendments provide authority for the Tax Department to issue statutory notice and demands for sales and use taxes and miscellaneous taxes in order to allow for the modifications to the prepayment hearing procedures for such taxes.

These amendments apply to most of the taxes administered by the Tax Department, including sales and use taxes. However, the amendments do not apply to the Tax on Mortgages (Article 11 of the Tax Law) and the Stock Transfer Tax (Article 12 of the Tax Law).

These amendments take effect immediately and apply to notice and demands and notices of additional tax due issued on or after December 1, 2004.

(See Tax Law, Sections 173-a, 681(d), 682(a), 684(c), 1081(d), 1082(a) and 1084(c))

### **Sales and use tax exemption for repair and maintenance services performed on aircraft**

The Tax Law was amended to provide that receipts from sales of the services of installing tangible personal property in aircraft and of maintaining, servicing or repairing aircraft are exempt from state and local sales and use taxes. The exemption also applies to receipts from sales of tangible personal property purchased by the person providing the exempt services,

---

<sup>2</sup>Federal changes apply only to personal income, estate and corporate taxes but are listed here to describe this new law accurately.

provided that the property becomes a physical component part of the aircraft. The exemption also applies to lubricants applied to an aircraft by the person who performs exempt services.

Sales and use tax regulations section 527.5(a)(3) provides that maintaining, servicing and repairing mean keeping tangible personal property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Therefore, in addition to exempting the sales of tangible personal property and lubricants as described in the immediately preceding paragraph, this amendment exempts the sale of any services that keep an aircraft in a condition of fitness, efficiency, readiness or safety or restoring it to such condition.

Exempt services to aircraft include, but are not limited to:

- cleaning, repairing or replacing upholstery of seating, walls, etc.,
- painting and repairing the interior or exterior of aircraft,
- interior and exterior cleaning of aircraft, including ordinary janitorial services such as, dusting, cleaning and washing of walls, floors and windows,
- mechanical services,
- ramp services to aircraft, such as emptying lavatories and de-icing, and
- operating tugs to tow an aircraft or operating other equipment to provide maintenance, service or repair to the aircraft.

Exempt items (provided they are purchased by the person who performs an exempt service to aircraft and the item becomes a physical component part of the aircraft) include, but are not limited to:

- machinery and equipment installed on the aircraft,
- engine parts,
- waxing and polishing agents,
- headsets that are hardwired into the aircraft and plug-in headsets used by the flight crew,
- paint,
- light bulbs, and
- cloth and other material purchased to repair or replace upholstery of seating, walls, etc.

Also exempt, if purchased by the person performing an exempt service, are lubricants applied to aircraft, such as engine oil, grease, etc. Glycol or other antifreeze sprayed on aircraft for de-icing is not exempt, whether purchased by the owner or lessee of the aircraft or the person performing exempt services on the aircraft, since it is not a lubricant and does not become a physical component part of the aircraft.

In addition, receipts from the sale of the service of storing aircraft are exempt from state and local sales and use taxes if provided by a person in conjunction with and during the rendering of an exempt service to the aircraft.

It should be noted that unless otherwise exempt, the storage of tangible personal property is subject to sales tax. However, in certain cases, where the owner or lessee of the tangible personal property has unlimited control or access to the place where the property is stored, the charge for such renting or leasing real property is not subject to sales tax. See TSB-M-86(3)S,

*Taxable Status of the Rental of Self-Service Mini-Storage Units.* Therefore, the leasing or renting of a hangar or other real property to park the aircraft, and the parking of aircraft in or on hangars, ramps or tiedowns is not subject to sales tax, provided the owner or lessee of the aircraft has regular or immediate access to the aircraft. Also, the service of providing parking for aircraft is not a service enumerated as subject to sales tax under section 1105(c) of the Tax Law.

This amendment is effective December 1, 2004, and will expire on December 1, 2009.

(See Tax Law, Section 1115(dd))

### **Refund or credit for sales and use taxes relating to vessels used in local transit service**

The Tax Law was amended to provide that a refund or credit will be allowed for sales and use taxes paid by certain vessel operators with respect to vessels with a seating capacity of more than twenty passengers used to transport passengers on water. The refund or credit applies to sales and use tax paid on the sale or use of these vessels and on any parts, equipment, lubricants, diesel motor fuel, maintenance, servicing or repairs purchased and used in the operation of any such vessel by such operator provided the vessel is for hire.

To qualify for the refund or credit, the vessel operator must provide local transit service in New York State and operate pursuant to a certificate of public convenience and necessity issued by the New York State Commissioner of Transportation or by a like officer or agent of the United States, or pursuant to a contract or agreement with the city of New York.

The amount of the refund or credit is based on the *local transit service percentage*, which is the proportion that an operator's vessel hours in local transit service in this state in the calendar year immediately preceding the end of the quarterly return period to which such refund or credit relates bear to such operator's total hours operated in this state in such year. The amount of the credit or refund is determined by multiplying the sales or use tax paid by the operator on its purchases of eligible vessels, parts, equipment, etc. during the quarter, by the operator's local transit service percentage. If the vessel operator was not engaged in local transit service in the prior calendar year, it would determine its local transit service percentage with respect to its first four quarterly sales tax returns by using the proportion that the operator's vessel hours in local transit service in the state in the first three months of operation bears to the operator's total hours operated in the state in those three months.

#### **Example 1**

A vessel operator is engaged in local transit service in New York State during the sales tax quarterly period ending February 28, 2005 and also was engaged in local transit service during the entire year ending December 31, 2004. During the calendar year ending December 31, 2004, the vessel operator's vessel hours operated in a local transit service in New York State was 30,000 hours and total vessel hours operated in New York State was 60,000 hours. The vessel operator's local transit service percentage is 50 percent for purposes of determining the vessel operator's refund or credit for the sales tax return filed which covers the sales tax quarterly period ending February 28, 2005 (the percentage that 30,000 vessel hours bears to 60,000 total hours operated).

**Example 2**

Same facts as in Example 1, except that the vessel operator begins operation of local transit service in New York State on December 1, 2004. During the sales tax quarterly period ending February 28, 2005, the vessel operator had vessel hours operated in a local transit service in New York State of 5,000 hours and total vessel hours operated in New York State of 10,000 hours. The local transit service percentage is 50 percent for purposes of determining the vessel operator's refund or credit for the operator's first four quarterly sales tax returns including the return for the sales tax quarterly period ending February 28, 2005 (the percentage that 5,000 vessel hours operated in a local transit service in New York State during the sales tax quarterly period ending February 28, 2005 bear to 10,000 total vessel hours operated in New York State during the same 3 month period).

These amendments are effective for purchases made services rendered and uses occurring on or after December 1, 2004.

(See Tax Law, Section 1119(b))

**Sales tax registration certification requirement for businesses seeking to contract with New York State agencies**

The Tax Law was amended to require certain persons seeking to enter into contracts with state agencies or public authorities to certify that they, their affiliates, their subcontractors and the affiliates of their subcontractors have a valid certificate of authority to collect New York State and local sales and compensating use taxes. This requirement arises if the total amount of such persons' sales delivered into New York State are in excess of \$300,000, and with respect to any affiliates, subcontractors, or affiliates of subcontractors whose sales delivered into New York State exceeded \$300,000. However, the requirement only applies to individual contracts or agreements with state agencies or public authorities for the sale of commodities or services having a value in excess of \$15,000. Persons seeking to enter into contracts with state agencies or public authorities must make this certification before the Office of the State Comptroller (OSC), or other contract approver if OSC is not required to approve the contract, will approve such contract. If the contract has a term of more than one year, the certification must be done annually. The certification must also be done before any contract is renewed.

This certification requirement is not applicable if the covered agency and the contract approver determine in writing that the contractor is the only person capable of performing the contract and the contract is necessary to (1) address an emergency; (2) ensure the provision of essential services; and/or (3) ensure the public health, safety and welfare.

This amendment applies to contracts resulting from solicitations to purchase issued by covered agencies on or after January 1, 2005.

(See Tax Law, Section 5-a)

### **Designation of Empire Zones extended**

The General Municipal Law was amended to extend the date areas are designated as an Empire Zone to March 31, 2005. Prior to this change, the designation of areas as Empire Zones would have expired on September 13, 2004.

This amendment took effect on August 20, 2004.

(See General Municipal Law, section 969(a) and TSB-M-02(5)S)

### **Certain charges and fees collected by and imposed upon rental vehicle companies operating at airports**

The General Business Law was amended, in part, to provide that rental vehicle companies that operate car rental facilities in airports can separately state and recover a *consolidated facility charge* and a *concession recovery fee* from its vehicle renters.

Under these amendments, *consolidated facility charge* is defined, in part, to mean “a fee required by an airport to be collected by a rental vehicle company from a [vehicle] renter for the finance, design and construction of consolidated airport car rental facilities . . .” *Concession recovery fee* is defined, in part, to mean “the allowable recovery by a rental vehicle company from its [vehicle] renters of those fees, which an airport imposes on a rental vehicle company’s applicable revenues...”

Unless otherwise exempt, state and local sales taxes are imposed on the receipts from any use or rental of a motor vehicle. As relevant here, Tax Law section 1101(b)(3) defines *receipt* as the amount of the sale price of any property, valued in money, whether received in money or otherwise, without any deduction for expenses, and also including any charges by the vendor to the purchaser for shipping or delivery, regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser.

The *consolidated facility charge* and the *concession recovery fee* constitute expenses of the rental vehicle company. Thus, regardless of whether the rental vehicle company separately states such fees on its bill to the renter, the fees are part of the receipt subject to tax.

These amendments take effect on November 18, 2004.

(See General Business Law, section 396-z and Tax Law section, 1101(b)(5))

### **Expansion of qualifications to be eligible for exempt status for organizations or posts of present or past members of the armed forces**

The Tax Law was amended to expand the classification of people that an organization or post of past or present members of the armed forces, (including an auxiliary unit, society of, trust or foundation for) may include in determining whether the organization or post meets the criteria

for tax-exempt status for sales and use tax purposes.

Prior to this amendment, in order for an organization or post to qualify to be exempt for sales and use tax purposes, the membership of the organization or post must have consisted of: (1) at least 75 percent of past or present members of the U.S. armed forces; and (2) substantially all of the other members were individuals who were cadets or were spouses, widows, or widowers of past or present members of the U.S. armed forces or of cadets.

Under this amendment, criteria (2), has been expanded to include ancestors and lineal descendants of past or present members of the U.S. armed forces or of cadets.

This amendment was effective June 1, 2004.

(See Tax Law, section 1116(a)(5)(B))

### **Revocation of tax-exempt status of identified terrorist organizations**

The Tax Law was amended to provide for the revocation of the tax-exempt status, for New York State tax purposes, of terrorist organizations whose names have been published pursuant to Internal Revenue Code Section 501(p) and which are no longer tax-exempt for federal purposes. This section applies to all of the state and local taxes, fees and other impositions administered by the Commissioner of Taxation and Finance, including sales and use taxes.

When an organization's sales tax-exempt status is revoked, it must collect sales and use taxes on all of its taxable sales. If an organization whose tax-exempt status has been revoked does not collect the proper sales and use taxes on its taxable sales, the purchaser owes and is required to pay the taxes due. The purchaser will not be held liable for any penalty or interest for failing to file a return or to pay the sales and use taxes if the purchaser files a return and pays the tax due within 30 days of the date the purchaser learns that the tax is owed.

In addition, when an organization is notified by the Tax Department that its tax-exempt status is revoked for sales and use tax purposes, the organization must immediately surrender its *Exempt Organization Certificate* and cease using its corresponding tax exemption number and exempt purchase certificate(s) to make purchases exempt from sales and use taxes.

An organization whose tax-exempt status has been revoked pursuant to paragraph 1 of section 27 of the Tax Law will have the right to appeal the determination using the procedures set forth by Article 40 of the Tax Law. However, the organization cannot challenge the merits of the determination made by the IRS.

This amendment was effective on September 8, 2004, although the revocation of an organization's tax-exempt status will become effective on the later of November 11, 2003, or the date that the Internal Revenue Service publishes the organization's name pursuant to Internal Revenue Code section 501(p).

(See Tax Law, section 27)