

Summary of the 2008 Sales and Use Tax Budget Legislation

This memorandum summarizes the amendments to the Tax Law made by Chapter 57 of the Laws of 2008 that are applicable to state and local sales and use taxes (sales tax). Chapter 57 was signed into law on April 23, 2008.

Certain exempt organizations required to collect sales tax on additional types of sales

Beginning September 1, 2008, nonprofit charitable, educational, and religious organizations, armed services posts, and other organizations exempt from sales tax as described in sections 1116(a)(4), (5) and (6) of the Tax Law, collectively referred to as exempt organizations, are required to collect state and local sales and use tax on their retail sales of the following property and on their sales, other than for resale, of the following services:

- any lease or rental of tangible personal property;
- any utility service described in section 1105(b) of the Tax Law;
- any service to real property described in section 1105(c)(5) of the Tax Law; and
- any tangible personal property where the sale is made by remote means, such as by telephone, mail order (including email), over the Internet, or by other similar methods, provided the exempt organization makes such sales with a degree of regularity, frequency, and continuity.

The sales described above are subject to tax whether or not they are made from a shop or store. Sales of tangible personal property made from a shop or store by these exempt organizations were already subject to tax and remain taxable. A *shop or store* is any place or establishment where goods are sold from display with a degree of regularity, frequency, and continuity, and any place where sales are made through a temporary shop or store located on the same premises as persons required to collect tax. These organizations also remain liable for collecting tax on receipts from their sales of food and drink made in or by a restaurant, tavern, or other establishment operated by the organization. Also, organizations described in sections 1116(a)(4) and (5) of the Tax Law remain liable for collecting tax on receipts from their sales of parking services.

For more information on this new law, see TSB-M-08(5)S, *Tax Law Amendments Related to Sales Made by Certain Sales Tax Exempt Organizations Effective September 1, 2008*.

(Tax Law, Section 1116 (b)(1))

Sales tax nexus

The Tax Law was revised to create a presumption that certain sellers are *vendors* for sales and use tax purposes. Sellers that meet the presumption conditions described below are required to register for sales tax purposes and collect state and local sales taxes.

Under the new legislation, a seller that makes taxable sales of tangible personal property or services in New York State is presumed to be a vendor if both of the following conditions are met:

- The seller enters into an agreement or agreements with a New York State resident or residents under which, for a commission or other consideration, the resident representative directly or indirectly refers potential customers to the seller, whether by link on an Internet Web site or otherwise. A resident representative would be indirectly referring potential customers to the seller where, for example, the resident representative refers potential customers to its own Web site, or to another party's Web site which then directs the potential customer to the seller's Web site.
- The cumulative gross receipts from sales by the seller to customers in New York State as a result of referrals to the seller by all of the seller's resident representatives under the type of contract or agreement described above total more than \$10,000 during the preceding four quarterly sales tax periods. (Sales tax quarterly periods end on the last day of February, May, August and November.)

A seller may rebut the presumption that it is soliciting sales in New York State through resident representatives.

These amendments went into effect April 23, 2008. However, a business covered by the presumption that registered by June 1, 2008, could avoid the assessment of any prior sales tax owed, including penalty and interest, if certain conditions were met.

For more detailed information on this new law, see TSB-M-08(3)S, *New Presumption Applicable to Definition of Sales Tax Vendor*, and TSB-M-08(3.1)S, *Additional Information on How Sellers May Rebut the New Presumption Applicable to the Definition of Sales Tax Vendor as described in TSB-M-08(3)S*.

(Tax Law, Section 1101(b)(8))

Sales tax re-registration program

Part LL-1 of Chapter 57 directs the department to institute a sales tax vendor re-registration program. All vendors registered for sales tax purposes must re-register and obtain a new Certificate of Authority.

Under this program, a \$50 re-registration fee must be paid by vendors that are required to file on a monthly or quarterly basis. Vendors that are annual filers do not owe the fee when they re-register.

The vendor re-registration program begins November 1, 2008, and will be completed by March 31, 2012. The department will be re-registering vendors in stages beginning November 1, 2008. Vendors will be contacted by the department when it is their time to re-register.

(Tax Law, Section 1134)

New York City local sales tax replaces the Municipal Assistance Corporation (MAC) local sales tax for New York City

When the Municipal Assistance Corporation (MAC) for the City of New York was formed, New York City's local 4% sales tax imposed by the New York City Administrative Code was suspended. At the same time, Section 1107 of the Tax Law was added to impose a 4% local sales tax in the city. The section 1107 tax was to remain in effect until the MAC bonds were paid off. Since the MAC bonds were paid off in July of 2008, the section 1107 tax expired August 1, 2008, and the city's own tax resumed August 1, 2008.

Accordingly, provisions of Article 29 of the Tax Law and the New York City Administrative Code have been amended so that New York City's local sales tax resumed on August 1, 2008. New York City's local sales tax will be the same as the section 1107 tax that expired July 31, 2008, with the following exception.

Exception: Effective August 1, 2008, the services of installing, maintaining, servicing, or repairing tangible personal property (including machinery, equipment, parts, tools, and supplies) became exempt from the local sales taxes in New York City, provided the tangible personal property is used or consumed predominantly either in farm production or in a commercial horse boarding operation, or in both. (These services are also exempt from the New York State sales tax). A farmer or commercial horse boarding operation in the city may purchase these services tax exempt by giving the supplier of the service a properly completed Form ST-125, *Farmer's and Commercial Horse Boarding Operator's Exemption Certificate*.

(Tax Law Sections 1105(c)(3)(vi), 1142-A(a), 1210 opening paragraph, 1210(a), (f), (i), 1223(a), 1261(c); Repealed T.L. Sections 1212-A(f) and (g))

Voluntary Disclosure and Compliance Program

The Tax Law has been amended to add new Article 36, Compliance and Enforcement Initiatives. Section 1700 of Article 36 establishes the Voluntary Disclosure and Compliance Program to be administered by the department.

The Voluntary Disclosure and Compliance Program allows eligible taxpayers to voluntarily disclose and pay certain underreported tax liabilities and interest. By executing a compliance agreement with the department, taxpayers will avoid tax penalties as well as civil, administrative, and criminal actions by the department.

An *eligible taxpayer* is an individual or entity subject to any tax imposed by, or pursuant to the authority of the Tax Law or any other law imposing administrative tax responsibilities on the department, and who meets all of the following criteria:

- The taxpayer is not currently under audit by the department.
- The taxpayer is voluntarily disclosing a New York tax liability that the department has not determined, calculated, researched, or identified at the time of the disclosure.
- The taxpayer is not currently a party to any criminal investigation being conducted by an agency of the state or any political subdivision thereof.
- The taxpayer is not seeking to disclose participation in a tax avoidance transaction that is a federal or New York State reportable or listed transaction.

The term *taxpayer* includes any person required to pay or collect any of the taxes covered by the program. A taxpayer can be an individual, partnership, estate, trust, corporation, limited liability company, joint stock company, or any other company, trustee, receiver, assignee, referee, society, association, business, or any other person subject to tax.

An eligible tax for the program is any tax currently or previously imposed under the Tax Law or administered by the department. To be eligible the tax must not have been previously assessed.

This provision took effect April 23, 2008. For additional information on this program, visit the Tax Department Web site (www.nystax.gov).

(Tax Law section 1700)

Financial institution data-match system for state tax collection purposes

The Tax Law has been amended to add new Article 36, Compliance and Enforcement Initiatives. Section 1701 of Article 36 requires the department to develop and operate a financial institution data-match system for state tax collection purposes. This system will assist the department in the collection of tax debts.

Each financial institution doing business in New York State must, in conjunction with the department or the department's authorized designee (the designee), develop and operate a data-match system to facilitate the identification and seizure of non-exempt financial assets of tax debtors identified by the department or the designee. If a financial institution has a data-match system developed or used to administer the child support enforcement programs of this state that is approved by the department or the designee, the financial institution may use that system to comply with the provisions of section 1701 of the Tax Law.

Each financial institution will be required to provide identifying information each calendar quarter to the department for each tax debtor identified by the department if the tax debtor maintains an account at the institution. The identifying information must include the tax debtor's name, address, social security number or other taxpayer identification number, and all account numbers and balances in each account. The financial institution will not be liable under state law to any person for the disclosure of this information to the department or designee, or for any other action taken in good faith to comply with section 1701 of the Tax Law.

Both the financial institution and the designee are prohibited from disclosing to the tax debtor that the name of the tax debtor has been received from or furnished to the department, unless the department authorizes them in writing to do so. However, a financial institution may disclose to its depositors or account holders that the department has the authority to request certain identifying information on certain depositors or account holders under the financial institution data-match system.

A violation of the disclosure policy will result in the imposition of a civil penalty equal to the greater of one thousand dollars (\$1,000) or the amount in the account of the person to whom the disclosure was made, for each instance of unauthorized disclosure by the financial institution. This civil penalty can be assessed and collected as if the penalty were tax.

For purposes of this new provision:

Debt means all liabilities, including unpaid tax, interest, and penalty, that the department is required by law to collect and that have been reduced to judgment by the docketing of a New York State tax warrant in the office of a county clerk located in New York State or by the filing of a copy of the warrant in the office of the Department of State.

Tax debtor means a natural person or any entity other than a natural person named on a New York State tax warrant and identified thereon as a judgment debtor.

Financial institution means any financial institution authorized or required to participate in a financial institution data-match system or program for child support enforcement purposes under federal or state law.

(Tax Law section 1701)

Electronic filing and electronic payment mandate

Section 29 has been added to the Tax Law to authorize the Tax Department to require electronic filing (e-file) and electronic payment (e-pay) of all tax documents, except those required for personal income and earnings tax purposes. The requirement to e-file personal income tax documents is contained in Tax Law section 658(g)(10) and is not affected by the new legislation.

As of the date this memorandum was issued, sales tax returns were not required to be e-filed. The Tax Department will issue a future guidance document in advance of changing its policy regarding the e-filing of sales tax returns. For up-to-date information on e-file, including information as to which returns or documents are currently required to be e-filed, visit our Web site at www.nystax.gov and click on the e-file logo.

For purposes of new section 29 of the Tax Law, the following terms have been defined:

- *Authorized tax document* means a tax document that the Tax Department has authorized to be filed electronically.
- *Electronic* means computer technology.
- *Original tax document* means a tax document that is filed during the calendar year for which that tax document is required or permitted to be filed.
- *Tax* means **any** tax or other matter administered by the Tax Department. However, the term *tax* does not include the New York State, New York City, and Yonkers income and earnings taxes imposed under Articles 22, 30, 30-A, or 30-B of the Tax Law.
- *Tax document* means a return, report, or any other document relating to a tax or other matter administered by the Tax Department.
- *Tax return preparer* means any person who prepares for compensation, or who employs or engages one or more persons to prepare for compensation, any authorized tax document. For purposes of section 29, the term *tax return preparer* also includes a payroll service.
- *Tax software* means any computer software program intended for tax return preparation purposes. For purposes of section 29, the term *tax software* includes, but is not limited to, an off-the-shelf software program loaded onto a tax preparer's or taxpayer's computer, an online tax preparation application, or a tax preparation application hosted by the Tax Department.

If a tax return preparer prepares more than 100 original tax documents during any calendar year beginning on or after January 1, 2007, and if in any succeeding calendar year the tax return preparer prepares one or more authorized tax documents using tax software, then for that succeeding calendar year and for each subsequent calendar year, all authorized tax documents must be e-filed by that tax return preparer in accordance with instructions issued by the Tax Department.

If a taxpayer does not use a tax return preparer to prepare an authorized tax document during any calendar year beginning on or after January 1, 2008, but instead prepares that tax

document itself using tax software, then, for that calendar year and for each subsequent calendar year, all authorized tax documents prepared by the taxpayer using tax software must be e-filed in accordance with instructions issued by the Tax Department.

Taxpayers must, in accordance with instructions issued by the Tax Department, e-pay any tax liability or other amount that is required to be paid with an authorized tax document that must be e-filed.

If a tax return preparer is required to file authorized tax documents electronically and the preparer fails to file one or more of those documents electronically, then the preparer will be subject to a penalty of \$50 for each failure to electronically file an authorized tax document. However, a penalty will not be imposed if the failure is due to reasonable cause and not due to willful neglect. Reasonable cause includes, but is not limited to, a taxpayer's election not to electronically file the authorized tax document.

If a taxpayer is required to electronically pay any tax liability or other amount due shown on, or required to be paid with, an authorized tax document that is required to be filed electronically, and the taxpayer fails to electronically pay one or more of the liabilities or other amounts due, then the taxpayer will be subject to a penalty of \$50 for each failure to pay electronically.

The new provisions do not affect the withholding and sales tax PrompTax systems under sections 9 and 10 of the Tax Law.

(Tax Law section 29)

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.