



Department of Taxation and Finance

Important:

This TSB-M is obsolete and cannot be relied upon. 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.



New Policy Relating to Responsible Person Liability under the Sales Tax Law

This memorandum describes the department's new policy relating to responsible person liability under sections 1131(1) and 1133 of the Tax Law for persons who are members of a limited liability company (LLC) or limited partners of a limited partnership.

General

Section 1133 of the Tax Law imposes personal responsibility for payment of sales and use taxes (sales taxes) on certain owners, officers, directors, employees, managers, partners, or members (responsible persons) of businesses that have outstanding sales tax liabilities. This means that the responsible person's personal assets could be taken by the Tax Department to satisfy the sales tax liability of the business. A responsible person is jointly and severally liable for the tax owed along with the business entity or any of the business's other responsible persons. In addition, they can be held personally liable even though the business entity is a corporation or a limited liability company.

In the case of a partnership or LLC, section 1131(1) of the Tax Law provides that each partner or member is a responsible person regardless of whether the partner or member is under a duty to act on behalf of the partnership or company. This means that these persons can be held responsible for 100% of the sales and use tax liability of a business. The department recognizes that this situation can result in unfortunate consequences for certain partners and members who have no involvement or control of the business's affairs. Accordingly, the department has developed the following new policy that provides some relief to the *per se* personal liability for certain limited partners and members.

Eligibility for relief

Under the department's new policy, the following limited partners and LLC members who otherwise are responsible persons under section 1131(1) may be eligible for relief:

- Limited partners (of a limited partnership) may be approved for relief if they demonstrate that they were not under a duty to act in complying with the Tax Law on behalf of the partnership.

- LLC members who can document that their ownership interest and percentage distributive share of the profits and losses of the LLC are less than 50% may be approved for relief if they demonstrate that they were not under a duty to act on behalf of the company in complying with the Tax Law.

In addition to meeting one of the conditions stated above, the limited partner or member must cooperate with the department in providing substantiated information regarding the identities of other potentially responsible persons, particularly in identifying those persons who were involved in the day-to-day affairs of the business. In addition, in the case of tiered entities (for example, a partnership that is a partner in another partnership) the department will expect the limited partner's or member's assistance in detailing the overall ownership structure, including information regarding out-of-state entities. This requirement will be applied reasonably with the recognition that certain taxpayers, especially passive investors with only small ownership interests or distributive shares, may not know or have access to the information the department is seeking. The pending expiration of any statute of limitations in which to assess the sales and use tax due will also be taken into consideration in granting relief.

The following partners and members do not qualify for relief:

- any general partners of a partnership (including general partners of a limited partnership);
- any partners of a limited liability partnership (LLP); and
- any LLC member holding a 50% or more ownership interest in the LLC, or entitled to a distributive share of 50% or more of the profits and losses of the LLC.

Available relief

The eligible persons described above will qualify for the following relief:

- no penalty owed by the business or other responsible persons will be due from such eligible person; and
- the sales tax liability of the eligible person will be limited to an amount determined by multiplying the business's liability for taxes and interest by the person's percentage of ownership interest in the business, or by the person's percentage share of the profits and losses of the business, whichever is higher.

Example 1: An LLC owes \$10,000 of sales tax and interest. Member X is a 4% passive member of the LLC and receives 4% of the profits and losses of the LLC. Member X has also been assessed the \$10,000 on the grounds that member X is a responsible person of the LLC. If qualified for relief, member X would be expected to pay \$400 ($\$10,000 \times 4\%$) to settle his or her responsible person liability.

Example 2: Same as above, except that member X is assessed for only \$8,000 of the LLC's \$10,000 liability, because the statute of limitations barred the department from assessing X for one of the sales tax quarters in question. If qualified for relief, member X would be expected to pay \$320 ($\$8,000 \times 4\%$) to settle his or her responsible person liability.

Treatment of payments

Payments made by responsible persons will be applied as follows:

- Payments made by responsible persons who are eligible for the relief described in this memorandum will not be credited against the liability of other responsible persons who are also eligible for relief. That is, those other responsible persons must calculate their responsible person liability by applying their applicable percentage to the full value of their assessment, without any credit for payments made by other responsible persons under this policy. The amount owed by those responsible persons would be the amount so calculated or the business's remaining sales or use tax liability, whichever is less.
- Payments made by responsible persons other than as part of the new policy would continue to be applied to the liability of the business and other responsible persons as they are currently.

Effective date

This new policy which provides relief took effect March 9, 2011.

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