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New York: Breaking News from Albany

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This time, however, it is only about taxes!

As we go to press there is word that New York State Governor Paterson, the Senate (*i.e.* Joe Bruno), and the Assembly (*i.e.*, Shel Silver) have reached agreement on the 2008/09 budget. Based on the most recent postings of the bill (A. 9807-C and S. 6807-C) to the relevant websites, it appears that the agreed tax law changes will include the following:

- Changes to the LLC/LLP fee structure to base the fees on New York source gross income (defined by reference to federal gross income plus cost of goods sold). Part AA-1.
- Compliance initiatives, including a statutory voluntary disclosure provision, which provides for penalty relief and protection from criminal prosecution, but does not prescribe a limitation on the lookback period. This provision also includes a financial institution data match provision to enhance collection of judgments. Part CC-1.
- Treatment of credit card companies as having nexus to New York, and thus required to file under Article 32, if certain thresholds are met. The bill includes limitations on the inclusion of such corporations in Article 32 combined groups. Part EE-1.
- Changes to the “captive” REIT and RIC provisions enacted in 2007. These amendments to the general business corporation, bank, and insurance taxes require combination at a more-than-50% ownership level, rather than 80%; and disallow the dividends paid deduction to the extent of dividends paid to affiliates of the captive’s +50% shareholder. Banks whose REIT and RIC subsidiaries fall under these new rules are then given a 100% (rather than the usual 60%) exclusion for dividends in respect of the captive REIT or RIC. This element of the legislation is, apparently, now scheduled to sunset for tax years beginning on or after January 1, 2011. Part FF-1.
- A reduction in the rate of the Article 9-A tax on capital, coupled with an increase in the cap on the capital tax for non-manufacturers, from \$1

- million to \$10 million, for taxable years beginning in 2008 through 2010. Effective for tax years beginning on or after January 1, 2011, the cap reverts to \$1 million. Part GG-1.
- Addback of the federal deduction allowed under Internal Revenue Code section 199. Part HH-1.
- Changes to the computation of corporations' mandatory first installment payments, effective for years beginning on or after January 1, 2009. Part JJ-1.
- New sales tax rules on sales by not-for-profits. Part KK-1.
- A new program to re-register all New York vendors under the sales tax. Part LL-1.
- The "Amazon Tax" – now an evidentiary presumption that non-New York vendors have nexus to New York if they enter into agreements with New York "affiliates" to refer potential customers to the vendor, and sales to New York customers total at least \$10,000 in a year. Part OO-1.
- Various limited changes to the City sales tax. Part SS-1.
- Changes to the Brownfields, Film, and Low Income Housing credits. Parts VV-1, WW-1 and XX-1.
- Extension of the investment tax credits available under Article 9-A, the bank tax, and the personal income tax, from the scheduled expiration date of October 1, 2008, to October 1, 2011. Part YY-1.

Many of these provisions mirror those we wrote about in our February edition of the *State Tax Return*, but some have undergone changes in the interim, and all require closer study. It also seems that the new legislation affecting the combination of captive REITs and RICs merits a fresh look in light of the two Technical Services Bureau Memoranda regarding combination that the Department released in March. TSB-M-08(2)C, March 3, 2008; and TSB-M-08(3)C, March 10, 2008 (discussed herein).

Finally, a very recent determination by a New York State Administrative Law Judge in a combination case foreshadows some rather interesting, and potentially scary, thinking on economic substance and substantial business purpose.¹

In short: "Live, from New York – It's always something!" ■

¹ *In the Matter of the Petition of Kellwood Company*, NYS Tax Appeals Tribunal, Division of Tax Appeals, DTA #820915, March 27, 2008.



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