New York Tax Laws–Once Again, Stay Tuned

By Carolyn Lee[1]

Carolyn Lee provides an overview of current tax law proposals for New York State. While the Governor's budget proposal included few tax law changes, other proposals have been put forth by the state legislature.

As we go to (the electronic version of) print, New York State's budget and related 2012–13 potential tax law changes remain somewhat up in the air. The Governor's January 17 budget proposal had relatively few proposed tax law changes, but other proposals warrant monitoring.

The Governor's Budget

After last year's significant changes in the personal income tax rates, this year's budget proposals are less interesting. There is, for example, a proposal to tax loose tobacco at the same rate as pre-rolled cigarettes to eliminate the New York tax break currently enjoyed by those who roll their own. There is a proposal to coordinate new sales tax registrations, with bringing the registrants' (or certain affiliates') sales tax debts current. There is a proposal to limit individuals' property tax exemptions where other tax liabilities are outstanding—a proposal that would link two tax systems that currently have very little dialog, which could engender potential complications.

Technical changes are proposed for the sales tax on "room remarketers," and the Governor also proposed technical corrections to the special Metropolitan Transportation Corp. (MTA) Payroll Tax to put Professional Employer Organizations (PEOs) on the same footing as companies that directly employ workers in the commuting districts—a seemingly rational rule. Finally, a variety of tax incentives, particularly credits relevant to environmental investment and low-income housing, are proposed to be expanded. That pretty much summarizes Governor Cuomo's proposals.

Other Proposals

There are other proposals out there, however. The New York State Assembly (dominated by Democrats) recently issued its 2012–13 Budget Proposal. The Assembly proposal concurs with many of the Governor's proposals, but also makes a few substantive and technical proposals of its own. For corporate taxpayers the most significant proposal here may be the extension, once again, of the transitional rules related to the federal Gramm-Leach-Bliley Act (known as the Financial Services Modernization Act),[2] while New York continues to contemplate the going-forward taxation of affected companies. These transitional rules were intended to provide banks and securities firms some certainty as to their New York taxes as the companies exercise their expanded

Carolyn Lee is a Partner in the New York, New York office of Jones Day. She may be contacted at 212.326.3966 or *cjlee@jonesday.com.*

federal powers. (*See* the "Unified Banking and Corporate Tax" discussion below.)

Tax Rates

New York's Senate also recently weighed in with their proposals. These proposals target small businesses proposing, for example, a corporate tax rate reduction from today's maximum 6.85-percent to a proposed 5.5-percent rate for small business, with the elimination of the minimum tax as well. The Senate (dominated by Republicans) also proposes tax incentives for job creation and the energy industry. They have also proposed procedural changes to make changes (*e.g.,* increases) in taxes and fees more challenging to achieve legislatively.

Audits

One overall trend of potential interest is whether to increase or decrease funding for audit, enforcement and collection, based on expected efficiencies. Decreases may appear warranted particularly in light of current economic conditions. Business taxpayers, however, are largely on the radar screen and are largely compliant, save for confusion as to the rules. We may, therefore, need to watch what the taxing jurisdictions are doing in terms of audit resource allocation and immediate budgetary savings. It is difficult to find and collect taxes from those who do business off the grid, but this ought to be a first priority for auditors. One hopes that any reduction in audit staffing would not evolve into a tendency to audit those already in the system, as compared to finding those who are noncompliant.

Unified Banking and Corporate Tax

While the specific proposals currently under consideration in New York may seem relatively uneventful, there are other proposals floating about that may come to the fore after the budget is done. One very important proposal is the Department of Revenue's (the "Department") effort to rewrite the State's general corporate franchise tax (Article 9-A) and bank tax (Article 32) and unite them in a single corporate tax. (New York City has not yet signed on to this effort.) Among the significant differences between the existing two regimes are differing apportionment rules, different applications of economic nexus theories, differing treatment of investment income and income from subsidiaries and differences in the treatment of net operating losses. The Department has done extensive work on drafting legislation to blend the two existing tax regimes into a single corporate tax, the theory being to make substantive and coordinating changes while remaining revenue neutral. Thus far, however, the proposal has not been formally introduced.

Carried Interests

Another potentially significant future topic could be the treatment of "carried interests." New York State, under the Personal Income Tax on nonresidents, and New York City, under the Unincorporated Business Tax (UBT), have both expressed displeasure with the current treatment of income derived from carried interests in partnerships pursuing investment activities in New York. Thus far their displeasure has not been codified in any tax law amendments, although New York City recently started an audit initiative targeting the allocation of expenses between UBT-taxable and UBT-exempt affiliates. For New York, this area obviously has significant economic development overtones, so the likelihood of actual legislative changes is unclear. Nevertheless, it is an issue worth watching.

Responsible Persons for Sales Tax

A final example of legislation we might see relates to New York's sales tax. The law has long bedeviled investors in limited liability companies (LLCs) and their advisors by treating *every* member of an LLC as a "responsible person" with potential personal liability for any and all sales and use taxes due from the LLC but not paid. In this context, the supposed "limited" liability of the investors clearly is breached, and even those with no management role can be tagged for the LLC's sales/use tax liabilities. Proposals have repeatedly been offered to rein in this very business-unfriendly law: hopefully some remedy is creeping closer to fruition.

Blue-Ribbon Commission

Stepping back from the current specifics, Governor Cuomo recently announced his plan to create a blue-ribbon commission to review New York's tax laws and to consider the big-picture issues.

Where this will go remains to be seen, but it seems a forward-thinking step. Detailed and comprehensive attention to issues affecting electronic commerce, for example, would be far preferable to the largely (and sometimes changing) case-by-case administrative guidance we currently endeavor to interpret.

All in all, it seems quite possible that in the next year or two we will be seeing deeper questions pondered. As we go to print, however, we await further developments on the direction and focus of New York's tax laws.

Endnotes

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2 Gramm-Leach-Bliley Act of 1999 (P.L. 106-102).