

2015 NEW YORK TAX UPDATE

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TOPICS

- New Cases and Hot Topics
- Review of 2015-16 Budget Measures
- Review of 2014 Corporate Tax Reform

NEW CASES AND HOT TOPICS - RESIDENCY

- Residency -- Continued focus on audit
 - 5,000 audits/year!
- *Gaied v. Tribunal* (2014, NY Court of Appeals)
 - No “permanent place of abode” unless the place is used as a residence
- *Matter of Zanetti* (2014, TAT)
 - A minute really does count as a day
- *Matter of May* (2015, ALJ)
 - Taxpayers win these cases, even if domicile changes to foreign country

NEW CASES AND HOT TOPICS – SALES TAX

- Information Services – expanding again
 - *RetailData LLC and Wegmans* (ALJ 2015)
 - Price-checking = info service?
 - Investment research: sales tax on Wall Street
- Cloud computing: taxable sale of software?
 - NYS says yes; Just Say No!

NEW CASES AND HOT TOPICS – CORPORATE TAXES

- Corp Tax Reform is big topic (more later)
 - Look out: Economic nexus is the new trend
- *Matter of Expedia* (ALJ 2015)
 - Is it a service or something else?
 - Taxpayers win long fought battle on sourcing issue
- *Knowledge Learning Center* (TAT 2015)
 - Tribunal reversal on combination case
 - Distortion is a factor in post-07 law, but now we have new rules anyway!

NEW CASES AND HOT TOPICS – ENFORCEMENT STUFF

- Voluntary Disclosure Program
 - Humming right along
- Criminal enforcement lighter, but continuing
 - Sales tax issues
 - Residency
- License Suspension Program
 - In full gear
- False Claims Act Cases
 - On the rise or on way out?

NEW CASES AND HOT TOPICS – START-UP NY

- StartUp New York
 - 10 years
 - No corporate, personal, real estate or sales taxes
 - College and university related
 - For new businesses/new jobs
 - Not for retailers or personal service businesses

2015-16 BUDGET BILL

- Signed into law April 1, 2015
- Overview of tax provisions
 - Amends last year's Corporate Tax Reform legislation
 - New sales and use tax exemptions
 - Extends limitation on charitable contributions
 - Expands Excelsior Jobs Tax Credit Program
 - Creates Employee Training Incentive Program
 - Warrantless wage garnishment extended
 - NYC Corporate Tax Reform

CORPORATE TAX REFORM AMENDMENTS

- Several provisions meant to clarify corporate tax reform enacted last year
- Some “clarifications” seek to limit some of the tax benefits
- Major provisions:
 - Changes to the Definition of “Investment Capital”
 - Clarifications to Economic Nexus
 - Qualified New York Manufacturers

SALES AND USE TAX CARVE-OUT FOR YACHTS

- “Vessel” purchase price not subject to sales tax after 1st \$230K
- Credit for sales tax paid on vessel to other state
 - Only available for sales tax paid to other state for portion of purchase price \leq \$230K
- No use tax until vessel is used 90 consecutive days in NYS or is registered in NYS



SALES TAX EXEMPTION FOR AIRCRAFT

- New sales tax exemption “general aviation aircraft”
- Defined as “all aircraft “used in civil aviation,” except for commercial aircraft used to transport persons or property for hire.”



LIMITATION ON CHARITABLE CONTRIBUTIONS

- Extends charitable tax deduction limitation for millionaires
- Limits deduction for individuals with income >\$1M
- Maximum itemized deduction based on income:
 - Income \$1M to \$10M → 50% of charitable contributions
 - Until 2017
 - Income Over \$10M → 25% of charitable contributions
 - Until 2018

BEER-TASTING EXEMPTION

- Use tax exemption for bottled used in wine tasting events now applies to other tasting events
- Now applies to tastings by licensed breweries and cider producers



WARRANTLESS WAGE GARNISHMENT EXTENDED

- Tax Law § 174-c enacted as part of 2013-14 Budget Bill
- Allows Tax Department to serve income executions on individual tax debtors and their employers without docketing public warrant
- Was scheduled to sunset April 1, 2014
- Now extended through April 1, 2017



NYC CORPORATE TAX REFORM

- New corporate tax provisions in new subch. 3-A of chapter 6 under title 11 of NYC Admin. Code
- Applies generally for all years beginning on/after January 1, 2015
- NYC corporate tax now largely conforms to NYS



GARY HE / EPA

NYC CORPORATE TAX REFORM NON-CONFORMING PROVISIONS

- NYC continues to disregard federal & NYS S-corp elections
- UBT still in effect
- No economic nexus standard
- Increased business income tax rate for major financial institutions
 - 9% rate for financial corps with > \$100B assets
 - 8.85% rate applies to most other corps
- Reduced tax rates for qualified manufacturing corps → did not adopt 0% rate

BUDGET PROVISIONS NOT ENACTED

- Expansion of sales tax collection requirements to marketplace providers
- Provision to target so-called sales and use tax avoidance strategies
 - Included acceleration of sales tax on related party leases
 - No more SMLLCs as separate entities
 - No more corporate reorg exemptions

INTRODUCTION – CORPORATE TAX REFORM

- Corporate Tax Reform was signed into law as part of the 2014-15 New York State budget bill on March 31, 2014
- Most provisions effective for tax years beginning after January 1, 2015
- Most significant corporate tax changes since 1987

STRUCTURAL/COMPUTATIONAL REFORMS

- Article 32 (Bank Franchise Tax) merged into Article 9-A (Corporate Franchise Tax)
 - > Pre-2015 law
 - Banks used 3-factor (payroll, receipts, deposits) apportionment, deduction of 22.5% interest income attributable to federal/NY obligations, and exclusion of income/expenses from International Banking Facilities
 - > A separate Bank Tax seen as unnecessary following Gramm-Leach-Bliley
 - > Banks paid a disproportionately large share of corporate taxes under the old rules

STRUCTURAL/COMPUTATIONAL REFORMS

- Article 9-A is streamlined
- Pre-2015 law
 - > Tax on highest of four bases

ENI, capital, AMTI, fixed dollar minimum + tax on subsidiary capital + MTA surcharge (if applicable) based on a “hold harmless” calculation

STRUCTURAL/COMPUTATIONAL REFORMS

> New law

AMTI base eliminated

Capital base remains but phased out by 2021

Business income now the primary tax base

No separate tax on subsidiary capital

MTA surcharge survives but with simplified calculation

NEW ECONOMIC NEXUS RULES

- Pre-2015 law
 - Physical presence required with very limited exceptions
 - Credit card companies
 - Foreign corporate partners



NEW ECONOMIC NEXUS RULES

- New law
 - Economic nexus rules can apply without physical presence
 - Applies to any taxpayer with \$1M+ in NY gross receipts
 - For combined reporting group, threshold is met by aggregating all members of group with \$10,000+ NY receipts
 - Does not override PL 86-272
 - Fulfillment service nexus exception eliminated
- Will new rules hold constitutional water?

BUSINESS INCOME BASE TAX RATES

	2014 (tax rate for ENI)	2015	2016	2017	2018 and beyond
Qualified NY Manufacturers	0.0%	0.0%	0.0%	0.0%	0.0%
Qualified Emerging Technology Companies	7.1%	5.7%	5.5%	5.5%	4.875%
Small Businesses	6.5%	6.5%	6.5%	6.5%	6.5%
Remaining Taxpayers	7.1%	7.1%	6.5%	6.5%	6.5%

NEW TAX BASES

Pre-2015 Law

- Corporations calculate ENI from federal taxable income (or worldwide income) with modifications
- Separate apportionment of business income and investment income
- Exclusion of income, gain, losses from subsidiary capital and expenses directly or indirectly attributable to subsidiary capital

NEW TAX BASES

New Law - Primary Base is Business Tax Base

- $\text{Tax} = \text{Rate} \times \text{BAP} \times (\text{ENI} - \text{investment income} - \text{other exempt income})$
- Eliminates exemption for income from subsidiary capital and for 50% of dividends received from non-subsidiaries
- No add back of foreign taxes paid
- Alien corporations with ECI disregard treaty benefits

CLASSIFICATION *INVESTMENT INCOME*

Under Pre-2015 Law

Includes all income from “investment capital”

Taxpayer could elect to treat cash as investment or business income

Apportioned using issuer’s allocation percentages

Litigation involving categorization

- See *Xerox v. NY*

CLASSIFICATION *INVESTMENT INCOME*

Under New Law

Not subject to tax

Now a much narrower category

- Only includes income from stocks of non-unitary corporations held for more than 6 consecutive months (measured across tax years)

Income from subsidiary capital is not investment income

No election to treat cash as investment income

Exception for income from other securities/debt obligations that cannot be constitutionally apportioned to NY

NEW 2015 LIMITATIONS TO DEFINITION OF “INVESTMENT CAPITAL”

- Stock must be held more than 1 year
- Stock must qualify as a capital asset under I.R.C. § 1221
- For stocks acquired on/after Oct. 1, 2015:
 - Must identify stock as stock “held for investment”
 - Must record on date stock acquired
- For stocks acquired on/after Jan. 1, 2015 –must never have been held stock for sale to customers in regular course of taxpayer’s business

NEW LIMITATIONS TO DEFINITION OF “INVESTMENT CAPITAL” - CONTINUED

- Investment income now limited to no more than 8% of ENI
- Example - *corporation whose income is mostly investment income*
 - Pre-2015 - *very small amount of its investment income would have been taxed due to NY's favorable investment allocation %*
 - January 1 - April 1, 2015 - *the law proscribed any taxation of that income*
 - Now - *92% of corp's income taxed in NY, subject to NY's business allocation percentage*

APPORTIONMENT

- Still receipts only
 - > Now applies to banks
- Market-based sourcing for all receipts
 - > No longer based on where services are performed
 - > Eliminates much of the controversy for “other business receipts” in the e-commerce realm?
- More specific framework/process for determining source
- May elect to apportion 8% of all QFI income in lieu of sourcing

APPORTIONMENT *HIERARCHY FOR SOURCING DIGITAL PRODUCTS*

1. Location of primary use
2. Location where product is received by the customer
3. Prior year's apportionment factor for the digital product
4. Current year's apportionment factor for other digital products that can be sourced using the hierarchy

COMBINED REPORTING *PRE-2015 LAW*

Combined reporting mandatory for non-alien general business corporations that

Are engaged
in a unitary
business

Meet an 80%
ownership
requirement

Engage in
substantial inter-
corporate
transactions or
have a distortive
relationship
(maybe)

COMBINED REPORTING *NEW LAW*

- Unitary water's edge combined reporting
- Test is unitary business + >50% stock ownership

Say goodbye to substantial inter-corporate transactions test

The end of decombination audits?

The beginning of unitary business audits?

QUESTIONS?



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