

NO NEW TAXES: NEW YORK'S FY 2020-21 BUDGET BILL SIGNED BY GOVERNOR CUOMO

Hodgson Russ State & Local Tax Alert
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On April 3, 2020, Governor Andrew Cuomo signed into law the \$177 billion New York State budget for fiscal year 2020-2021 (the "Budget"). We covered the Governor's budget proposal here in February, and there are a couple of noteworthy additions, as well as a really important deletion. Indeed, perhaps the biggest news is what's not in the proposal: while many thought Cuomo's plan to legalize and tax recreational cannabis would come to fruition the second time around this year, the Cannabis Regulation and Taxation Act did not make it to the final revenue bill, S. 7509-B/A.9509-B (now 2020 Laws of NY Ch. 59). As for additions, New York became the first State to address conformity with some of the tax relief provisions in the recent federal stimulus bills. Here's our overall review of the tax initiatives included in the Budget.[1]

Substantive Tax Developments

New York Decoupled from Certain Federal CARES Act Provisions

As part of the 2020-2021 budget package, Governor Cuomo signed A.9508/S.7508 (now 2020 Laws of NY Ch. 58), which extends various tax rates and decouples from recent Internal Revenue Code ("IRC") changes resulting from the federal Coronavirus Aid, Relief, and Economic Security ("CARES") Act, enacted to provide taxpayers with some relief from the economic hardships many taxpayers are enduring as a result of the coronavirus pandemic. First, New York chose to decouple the State and City corporate income taxes from the federal increase to the cap on business interest deductions from 30 percent to 50 percent of adjusted net income for taxable years beginning in 2019 and 2020. So New Yorkers will not receive the benefit of the increased federal business interest expense deduction.

For State and City personal income taxpayers, the Budget decouples from all the favorable federal law tax changes enacted after March 1, 2020. This would include taxpayer-favorable net operating loss ("NOL") provisions in the CARES Act. Under the 2017 Tax Cut and Jobs Act, carrybacks under IRC § 172 were eliminated and the use of NOLs (post-December 31, 2017) were limited to 80% of taxable income. But under the CARES Act, taxpayers can now carry back NOLs from 2018, 2019, and 2020 for 5 years, and the 80% utilization limit for tax years before January 1, 2021 is eliminated.

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No explanation has been provided as to why this clearly revenue provision was buried in the “Transportation, Economic Development and Environmental Conservation” Bill (i.e. Ch. 58) instead of the “Revenue” Bill (i.e. Ch. 59).

Personal Income Tax Rate Reductions Not Affected

In 2020, the third year of the multi-year tax cuts enacted in 2016, the Budget continues to phase in lower personal income tax rates for middle-income New Yorkers. The rates are now: 6.09% in the \$43,000 to \$161,550 income bracket, and 6.41% in the \$161,550 to \$323,200 income bracket.

The Maximum Amount and Maximum Income Threshold for the Long-Term Care Insurance Credit are Capped

The Budget amends the Long-Term Care Insurance Credit under the personal income tax to limit eligibility to taxpayers with New York adjusted gross income of less than \$250,000 and to cap the credit amount at \$1,500. Ch. 59, Part E.

The Department of Taxation and Finance is Compelled to Recognize Certain Unclaimed Tax Benefits

Effective for the 2020 tax year, if the New York State Department of Taxation and Finance (the “Department”) determines that a taxpayer has an unclaimed earned income credit it shall compute and issue an earned income credit. In addition, the Department shall allow the standard deduction in lieu of the itemized deduction elected by the taxpayer when the standard deduction is greater than the allowable itemized deductions. Ch. 59, Part F.

The Excelsior Tax Credit Program and Enhanced Tax Credits for Green Projects are Extended

The Budget extended the Excelsior Tax Credit Program through 2029 with Credit Components not to exceed \$200 million in the aggregate for each of the years spanning from 2025-2029. Additionally, the Budget defines and targets those taxpayers engaged in “Green Projects” by enhancing credits within the Excelsior Jobs Program, as follows:

- Increasing the refundable Jobs Credit from up to 6.85% to up to 7.5% for net new jobs in a qualifying Green Project;
- Increasing the refundable investment tax credit from 2% to 5% for new capital investment in a qualifying Green Project; and
- Increasing the maximum Research and Development Tax Credit from 6% to 8% of eligible expenses in a qualifying Green Project.

The term “Green Project” is clarified in a new definition contained in the Budget and “carbon capture and storage” is deleted as an eligible project category. Ch. 59, Part L.

The Film Production Tax Credit is Reformed

The rates for the post-production credits in film-making are reduced under the Budget from 30% to 25% of qualifying production costs paid or incurred in the production of a qualified film. The Budget also requires a “qualified film” (with the exception of a television pilot) to have a minimum budget of one million dollars if it’s shot in Westchester, Rockland, Nassau, or Suffolk county or any of the five boroughs of New York City. If a majority of the shooting days of a “qualified film,” (with the exception of a television pilot) are in a county of the state other than those listed above it must have a minimum budget of \$250,000 to be creditable. Certain television programs are also excluded from the definition of “qualified film.”

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These tax credits are extended to 2025 and the changes apply to applications for film tax credits filed on or after April 1, 2020. A separate section of the Budget, Ch. 59, Part XX, Subpart X clarifies the scope of television writers' and directors' fees includable in qualifying production costs and notes that such fees shall not include relocation fees or hotel costs and per diems. In addition, such fees shall not include salaries or fees paid to writers or directors for work done on episodes of a television series that were deemed conditionally eligible for the tax credit under the Budget prior to the tax year for which the credit is first available. Ch. 59, Part M.

Hire-A-Veteran Credit Extended for Two Years

The Budget extends this Hire-A-Vet credit for an additional two years, adding the 2020 and 2021 hiring periods. To be eligible for the credit, the veteran must work for a period not less than one year and not less than 35 hours per week. The program provides a refundable tax credit to employers equal to 10% of wages paid to a qualified veteran (up to \$5,000) and 15% of wages paid to a disabled veteran (up to \$15,000). Ch. 59, Part B.

Tobacco Products Tax Amended

The Budget amends the definition of "wholesale price" to reflect the price at which a tobacco product is sold to a New York State registered distributor, including the federal excise taxes paid by the manufacturer or other person and applies to tobacco products possessed in New York on or after October 1, 2020. The Budget also clarifies that the invoice received by a distributor with respect to its purchase of a tobacco product will be presumptive evidence of the wholesale price of such tobacco product. The Budget further defines "retailer dealer" (effective June 1, 2020) to include "all persons required to collect the tax" and adds a new section concerning "affiliated persons" (see "Enforcement Initiatives", below). The Budget authorizes the imposition of penalties for failure to maintain adequate books and records required for cigarette and tobacco products taxes and make them available for inspection. Ch. 59, Parts H and I.

Real Property Tax Amended

- Oil & Gas—The Budget extends the oil and gas fees for three years until March 31, 2024. 59, Part C.
- STAR Program—The Budget permits the Commissioner of the Department to extend the enrollment period of the STAR income verification program past 2019 under certain circumstances. Ch. 59, Part U. Also, where appropriate, the Commissioner is authorized to remit to affected property owners a payment in the amount equal to the difference between the school tax bill that the property owner actually received and the school tax bill that the property owner would have received had (s)he enrolled in the program in a timely manner. It also repeals the law regarding enforcement of delinquent state tax liabilities through the suspension of eligibility for STAR exemptions and removes references to the former STAR offset program. Ch. 59, Part S.
- Railroad property—Railroad real property shall be assessed according to the value and ownership as of the thirty-first day of December of the year preceding the year in which the assessment roll is filed in the office of the city or town clerk, except that those determinations shall be based upon ownership as of the thirty-first day of December of the second year preceding the date required by law for the filing of the final assessment roll for purposes of city assessment rolls required to be filed between January first and June first inclusive and for all village assessment rolls. The term "rate valuation date" means the date as of which the full value of taxable real property on an assessment roll is estimated for purposes of the state equalization rate to be applied in the establishment of the railroad ceiling.

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Further, in determining assessment ceilings, the Commissioner shall apply the final state equalization rate used for the local assessing jurisdiction on the assessment roll for the year immediately preceding the year in which the assessment ceiling is being established except that (1) if a special equalization rate was established for such assessment roll, such rate shall be applied, and (2) in the case of a special assessing unit, the equalization rate to be applied shall be the applicable class equalization rate used on such assessment roll. Ch. 59, Part T.

Excise Tax on Alcoholic Beverages Amended

The Budget eliminates the excise tax on liquors containing not more than 2% of alcohol by volume and permits the Commissioner to allow registered distributors to purchase alcoholic beverages from another registered distributor without paying tax, effective June 1, 2020. The law further excludes taxpayers holding certain licenses from filing requirements under certain specified conditions.

The Budget also clarifies that the Commissioner may permit a registered distributor to make certain purchases of alcoholic beverages without tax from another registered distributor. Ch. 59, Part J.

Enforcement Initiatives

Warrantless State Tax Debt Collection Methods Extended

The Budget extends through April 1, 2025 the authority of the Commissioner of the Department: (1) to use the financial institution data-matching system for collection of fixed and final tax debts, and (2) to serve income executions (wage garnishments) on individual tax debtors and, if necessary, on the employers of such debtors, without the necessity of filing a tax warrant. Ch. 59, Part A.

Cigarette Tax Enforcement and Penalties

The Budget makes it more difficult for cigarette sellers to evade tax liabilities and violation penalties while increasing the severity of penalties. When a retail dealer possesses or sells cigarettes unlawfully, (1) its registration will be revoked for one year; (2) for a second such possession or sale of untaxed cigarettes within a period of five years by a retail dealer or affiliated person, the registration of any retail dealer that is an affiliated person shall be revoked for three years; and (3) for a third such possession or sale, the registration is revoked for five years. Under the Budget, the Commissioner may refuse to register any person as a retailer dealer where tax is due to the state.

If unstamped or unlawfully stamped cigarettes are found in a retail dealer's warehouse or warehouse of any affiliated person of such retail dealer, the revocation of the retail dealer's Certificate of Registration ("CoR")...shall be applicable to each retail place of business in this state through which such retail dealer and any affiliated person of such retail dealer sells cigarettes.

The Budget also: (1) Adds "affiliated persons" language to eliminate the common practice of one individual being the owner of several different retail locations using slightly different business names each with its own CoR and thereby accumulating several violations at locations while minimizing the impact of penalties and punishments; and (2) amends the revocation process for lottery and liquor licenses by requiring that they be automatically revoked upon revocation of a CoR for selling untaxed cigarettes. Ch. 59, Part I.

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Conclusion

In addition to the cannabis legalization and taxation failing to make the final Budget, some of the revenue proposals originally raised by Governor Cuomo but not passed in the Budget include: tax breaks for small businesses, extending the child care credit, and merging real property tax collection forms. Interestingly, the Budget also gives the State Budget Director and Governor Cuomo unprecedented powers to unilaterally revise the state's fiscal plan throughout the coming fiscal year, including the authority to make additional cuts as the Governor sees fit upon revenue deviations of as little as 1%.

[1] All references to certain "Parts" herein are to the various Parts of the final revenue bill. The legislative section regarding decoupling from recent Internal Revenue Code changes resulting from the federal CARES Act provisions can be found in S. 7508-B/A.9508-B, Part WWW