TAX PROVISIONS OF INTEREST IN NEW YORK'S 2022-23 BUDGET

Hodgson Russ State & Local Tax Alert
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The New York State Legislature passed the Revenue portions of the State's 2022-23 Budget on April 7 (Assembly Bill A 9009C/Senate Bill S 8009C), and Governor Hochul signed it on April 9 (2022 Laws of NY Ch. 59). Here are some highlights of the Budget:

Accelerating low and middle income tax reductions: Modest rate reductions for married-filing-jointly taxpayers earning less than $323,200 previously scheduled for tax years beginning after 2024 will now begin after the 2022 tax year (Part A, Subpart A). The Budget also addresses a few unintended glitches resulting from the tax table benefit recapture language added last year (Part A, Subpart B).

And, beginning this year, any student loan forgiveness award included in federal AGI will be subtracted when calculating New York AGI (Part D).

Increase to the Small Business Subtraction modification: Part C of the Budget increases the small business subtraction modification percentage in both the State and City personal income taxes, and expands the modification—previously available only to proprietorships with at least one employee and net business income or farm income of less than $250,000—to include members of certain flow-through entities that are small businesses or farm businesses. Beginning in 2022, the subtraction modification will be increased from 5% to 15%, and it will be available to: (a) sole proprietors with one or more employees and less than $250,000 of net business income or net farm income; (b) owners of New York S corporations and tax-partnerships with one or more employees and net farm income of less than $250,000; and (c) owners of New York S corporations and tax-partnerships with one or more employees and less than $1.5 million of "New York gross business income" attributable to a non-farm business. For tax-partnerships, "New York gross business income" is defined by reference to Tax Law § 658(c)(3)(B)'s definition of "New York source gross income." And for New York S corporations, "New York gross business income" is defined by reference to the receipts included in the numerator of the corporation's apportionment factor. Non-farm flow-through entity owners otherwise entitled to the small business subtraction modification will be disqualified if the sum of their income from such entities exceeds $250,000.

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State PTET Changes for S Corps: Perhaps the most noteworthy changes arise with a couple important modifications to the State Pass-Through Entity Tax ("SPTET"). As was reported several months ago, though this new tax law provision created some headaches for practitioners on the administrative side, the tax itself was a smashing success, with the State reporting $11 billion in new revenue.[1] The Legislature made two changes that make the SPTET an even better way to capture a federal income tax deduction for New York taxes paid on flow-through business income.

The first is somewhat of a technical change related to S corporations. Under the original law, the tax base for S corporations included only New York source income, which for many New York-based businesses is low, due to New York's market-sourcing apportionment rules. The same source-limitation applied to partnerships subject to the SPTET, but only with respect to their nonresident partners. From what we understand, the reason for the source-limitation was the Tax Department's concern that, for federal tax purposes, S corporations could not specially allocate the deduction for the SPTET among resident and nonresident shareholders without putting the entity's S corporation status in jeopardy. To eliminate this perceived problem, the original New York SPTET regime put all S corporation shareholders on the same footing by limiting the SPTET to New York sourced-income only. Unfortunately, this also limited the SPTET benefit for S corporations with only New York resident shareholders, all of whom paid tax on the share of their corporation's un-apportioned income.

With this new legislation, and effective for this tax year (2022), the source-limitation will go away for S corporations with ONLY resident shareholders. To qualify for this benefit, the PTE will have to file a certification (with its SPTET filing for 2022; then with its SPTET election for post-2022 tax years) that all shareholders are residents. So S corporations with only New York resident shareholders get to pay more tax and give their shareholders bigger federal tax deductions and bigger state tax credits.

Click here for a more in-depth analysis of the new provision.

New York City PTET: Starting in 2023, City residents will be able to enjoy the same federal tax benefits for the City taxes paid on flow-through income that are available for the State taxes paid on flow-through income. Here are the highlights of the new City Pass-Through Entity Tax (CPTET) that shifts the liability for the City personal income tax up to electing entities:

- The tax is in new article 24-B of the Tax Law.
- The CPTET is available only through an annual election, and the election deadline is March 15 of the year for which CPTET is going to apply. Interestingly, the new statute (at Tax Law 869) allows the CPTET for all years beginning on and after January 1, 2022, but the effective date language of the Budget (at § 12), indicates that the CPTET is effective for taxable years beginning on and after January 1, 2023.
- The election is available for partnerships required to file a New York State tax return (that includes any partnership with a New York State resident partner), and New York S corporations with only New York City resident shareholders. Notable: The partnerships and S corporations for which CPTET elections may be made don't need to be doing *any* business in New York City!
- Elections may be made by authorized members of eligible tax-partnerships and authorized officers of eligible S corporations.

- The CPTET tax base for partnerships is the sum of the un-apportioned and un-allocated pro rata shares of the partnership's income flowed through to partners who are individual residents of New York City. Absent special allocations of the CPTET deductions to the City resident partners, all of an electing partnership's partners (including, corporate partners and nonresident partners) will bear their pro rata share of the economic burden (and thus the federal tax benefit) of the CPTET even though only the City resident partners will receive the CPTET credits (see below).
- Because only those S corporations with only City resident shareholders are eligible for the CPTET, the tax base for S corporations is all of the income of the S corporation, un-apportioned.
- The CPTET tax rate is 3.876%.
- CPTET estimates are due on March 15, June 15, September 15 and December 15. And the tax return is due March 15 of the year after the tax year closes. Estimated taxes are payable for the calendar year during which the tax year ends, and the tax is due on March 15 of the year following the calendar year in which the tax year ends.
- City resident owners (and *only* City resident owners) of electing entities are entitled to a credit against their City personal income tax. The credit is equal to their direct share of the entity's CPTET.
- State personal income tax payers are required to add-back any CPTET credit they receive when calculating their state income.

State/City PTET add-back: In calculating income subject to the City's General Corporation Tax and Banking Corporation Tax, the SPTET and CPTET are required to be added back in computing City taxable income (Part MM, Subpart B, §§ 9 and 10). Curiously, these addbacks are retroactively effective for tax years beginning on and after January 1, 2021.

Credits: The Budget was notably filled with credits. Below is a lengthy list of credits that were created, extended, or modified by this election-year Budget:

- *Creation of new credits/exemptions*: The following credits/exemptions are created: Farm Employer Overtime Credit (Part B, Subpart C); COVID-19 Capital Costs Credit (Part E); Conversion from Grade No. 6 Heating Oil Usage to Biodiesel Heating Oil and Geothermal Systems Credit (Part I); Geothermal Energy Systems Credit (Part FF); NYC Child Care Credit (Part II).
- *Extension/modification of existing credits/exemptions*: The following credits/exemptions are extended, modified and/or enhanced: Investment Tax Credit for Farmers (Part B, Subpart A); Farm Workforce Retention Credit (Part B, Subpart B); NYC Musical & Theatrical Production Credit (Part F); Hire-a-Vet Credit (Part H); Low Income Housing Credit (Part J); Clean Heating Fuel Credit (Part K); Transportation for Persons with Disabilities Credit (Part L); Empire State Film Production and Post-Production Credit (Part M); Youth Jobs Program Credit (Part N); Empire State Apprenticeship Credit (Part O); Alternative Fuels and electric Vehicle Recharging Property Credit (Part P); Workers with Disabilities Credit (Part Q); Earned Income Credit (Part JJ); Restaurant Return To Work Credit (Part KK); Supplemental Empire State Child Credit, Earned Income Tax Credit, and Enhanced Earned Income Tax Credit (Part NN).

- *Major extension/and modest expansion of the Brownfield Cleanup Program*: Part LL of Assembly Bill A9008C/Senate Bill S8008C (now 2022 Laws of NY Ch. 58) enacts significant changes to New York State's Brownfield Cleanup Program ("BCP") and its associated tax credits. Here is a recap of the more significant provisions:
  - The Budget extends the BCP, which was set to expire at the end of this year, for an additional ten years to 2032. Projects can submit applications to participate in the program through December 31, 2032. Projects must receive a Certificate of Completion ("CoC") by December 31, 2036 (Section 31).
  - Projects that received a CoC between July 1, 2015 and June 24, 2021, may now claim additional site preparation credits and on-site groundwater remediation credits for seven years following the issuance of the CoC. Previously the credits had to be claimed within five years of the issuance of the CoC (Sections 4, 5, 7 and 8).
  - For sites that received a CoC between March 20, 2010 and December 31, 2015, tangible property credits ("TPCs") will be allowed for 180 months after the issuance of the CoC. Previously such TPCs were required to be claimed within either 120 months or 144 months of the issuance of the CoC (Section 9).
  - Unlike BCP sites located elsewhere in the state, BCP sites located in New York City are not entitled to TPCs related to development on the site unless they satisfy additional requirements or "gates." The Budget adds two new gates: (1) projects satisfying applicable conformance requirements in disadvantaged communities within designated Brownfield Opportunity Areas, and (2) projects being developed as renewable energy facility sites (Section 2).
  - Under the current BCP, the applicable percentage for calculating TPCs starts at 10%. However, this percentage can be increased (but not to exceed 24%) by various factors. The Budget adds the following new factors that may increase the applicable percentage by 5 percentage points for projects accepted into the BCP after January 1, 2023: (1) sites in a disadvantaged community, and (2) sites developed as renewable energy facilities (Section 6).
  - The Budget also clarifies that, beginning in 2022, for sites remediated to Track 1 (the highest standard), the TPC calculation can include costs paid for stadiums (Go Bills!), baseball parks, basketball courts, and other athletic facilities including sports field turf, site lighting, sidewalks, access and entry ways, and other improvements (Section 9).
  - The Budget institutes a new program fee of $50,000 payable once the project is admitted into the BCP. The fee may be waived upon a showing of financial hardship by the applicant. The new program fee cannot be used to calculate tax credits under the program (Section 3).

Real Property Tax-Related Amendments: The following real property tax laws are extended, modified and/or enhanced:

- Part Y amends the procedures for an owner of local public utility mass real property to challenge an assessed value.
- Part Z provides a good cause extension to the filing deadline on an application for the enhanced STAR exemption. Further, Subpart C clarifies the applicable income tax year for the basic STAR credit. Subpart D allows the name of STAR credit recipients to be shared with assessors outside of New York State. Finally, Subpart E permits certain information pertaining to a decedent to be shared with assessors of the assessing unit in which the address reported on the decedent's real property tax return is located.
- Part AA amends provisions in the real property tax law related to the assessment grievance process for owners of solar and wind energy systems.

- Part BB expands the Homeowner Tax Rebate Credit into 2022.
- Part HH creates the Childcare Center Tax Abatement for Certain Properties in New York City. The abatement applies to eligible buildings in which construction, conversion, alteration, or improvement completed on or after April 1, 2022, has resulted in the creation of a childcare center or the expansion of an existing childcare center. The abatement is up to seven dollars for each square foot of the premises, but shall not exceed $20,000.

Racing and Gaming Laws: Several provisions of the State gaming laws were amended. Part DD provides for additional funding from the Catskill off-track betting corporation's capital acquisition fund to be available to off-track betting corporations for certain statutory obligations, payroll, and expenditures necessary to accept authorized wagers. Funding is contingent on approval by the State gaming commission. Part EE amends provisions related to licenses for simulcast facilities and extends certain simulcast licensing agreements through June 2023.

Video Game Production: Part OO creates a new empire state digital gaming media production credit. Qualified digital gaming media production costs incurred and paid in New York may be eligible for a credit up to 25% of their production costs. The credit is available for qualified taxpayers from January 1, 2023 through December 31, 2027.

Odds and Ends: Part T exempts from the Petroleum Business Tax the gallons of motor fuel, diesel motor fuel, and residual petroleum product used in tug boats and tow boats.

Withholding tables and methods, and quarterly interest rates may now be published on the Department's website and don't need to be published in regulations (Part W).

The current exemptions for certain food and beverages sold through vending machines will continue through May 31, 2023. They were set to expire May 31, 2022 (Part GG).

During the state of emergency (but not to extend beyond December 31, 2021) employees forced to work outside of New York during COVID still count as New York employees for certain tax credit and incentive programs (Part LL).

Cannabis trade or business expense deductions denied under IRC § 280E will, effective this year, be subtraction modifications for the income tax bases of both the State corporate franchise and personal income taxes (Part PP). It doesn't appear that this applies to any of the City taxes.

From June 1, 2022 to December 31, 2022, certain fuel and sales taxes will be suspended (Part RR). This seems like it could be a compliance nightmare for many reasons, only one of which is that the taxes get turned back "on" in the middle of a sales tax quarter at midnight on December 31. What if something else just happens to be going on that night and at that time that could be a distraction to, like, everyone in the Eastern Standard Time Zone? Maybe New York should arrange for some sort of count-down in a public place like *Times Square* so those people who don't own clocks, watches, or phones know when to turn the tax back on.

In another Budget enactment (2022 Laws o NY Ch. 58, Part JJJ) the Legislature requires the Tax Department to hire an "economic impact firm" to analyze "each tax credit, tax deduction, and tax incentive…which relates to increasing economic development" and provide "a complete and thorough evaluation of the return on investment for each tax credit, tax deduction, and tax incentive, the economic impact of each relevant program, including: direct and indirect benefits, the creation of temporary project hires, the fiscal impact of each relevant program, revenues received and forgone by municipalities and New York [S]tate." Interestingly, the Legislature didn't ask for an analysis of how the higher personal income tax rates it adopted last year influenced the diaspora of many uber-wealthy out of New York and how that will affect the State's fisc in the future.

If you would like more information about the above budget or tax issues, contact the authors of this letter: Joseph Tantillo (716.848.1639), Chris Doyle (716.848.1458), Joseph Endres (716.848.1504), Open Weaver Banks (646.218.7524) or Timothy Noonan (716.848.1265), or any other member of our State and Local Tax Practice Group.

[1] Richard Rubin, New York Business Owners Sidestep Billions in Federal Taxes With State's Help, Wall Street Journal (Jan. 10, 2022).