Hodgson Russ LLP ATTORNEYS

NEW YORK'S FY 2021 BUDGET: AN OUNCE OF POT AND NOT MUCH MORE

Hodgson Russ State & Local Tax Alert
February 10, 2020

Executive Budget Proposal

On January 21, 2020, New York Governor Andrew Cuomo outlined his $178 billion Executive Budget proposal for fiscal year 2021. Shortly thereafter, the Division of Budget published the budget revenue bill (the Proposal) and its Memorandum in Support, available here and here, respectively. Highlights of the more noteworthy revenue provisions are summarized below. Those of you who, like us, are curious to see how the proposal plays out in the tax universe, should keep an eye out as there may be further updates in mid-February when the "thirty-day amendments" to the Executive Budget are issued.

Probably the most highly (heh-heh) anticipated part of the proposal is the Cannabis Regulation and Taxation Act (CRTA). Governor Cuomo made a similar marijuana legalization proposal in his fiscal 2020 budget, but the provisions were ultimately abandoned, despite support from the Assembly. Many pundits believe that marijuana legalization is more likely to pass this second time around.

Cannabis Proposals

The CRTA would regulate and control the production, distribution, transportation, and sale of cannabis, cannabis-related products, and medical cannabis within New York State. The CRTA would also add a new Article 20-C to the Tax Law, including the following three taxes to be imposed on the recreational pot industry:

1. The first tax is imposed on the **cultivation** of cannabis at the rate of $1 per dry weight gram of cannabis flower, $0.25 per dry weight gram of cannabis trim, and $0.14 per gram of "wet cannabis" (whole plants weighed within 2 hours of harvesting).

2. The second is a **state tax** imposed on the **sale to a retail dispensary** at the rate of 20% of the invoice price.

3. The third is a **local tax** imposed on the same **sale to a retail dispensary** at the rate of 2% of the invoice price but "collected in trust" for and on account of the county in which the retail dispensary is located.

Attorneys

Paul Baldovin Jr.
Richard Campbell
Katherine Cauley
Thomas Collura
Paul Comeau
William Comiskey
Ariele Doolittle
Christopher Doyle
Catherine Eberl
Joseph Endres
Debra Herman
Daniel Kelly
Joshua Lawrence
Timothy Noonan
Elizabeth Pascal
K. Craig Reilly
Emma Savino

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Every person (except, presumably, consumers) to whom a cannabis flower, cannabis trim, or wet cannabis is sold or transferred to, as well as any person registered as a microbusiness, cooperative, or registered organization under the new Cannabis Law (see below) would be required to apply to the Commissioner of Taxation and Finance for a Certificate of Registration prior to commencing business and to renew such registration every two years. The fee for both original and renewal registration applications would be $600.

Article 4 of the proposed new **Cannabis Law** (which would be Chapter 7-A of New York's Consolidated Laws) would regulate and control the cultivation, processing, manufacturing, distribution and sale of cannabis products for adults over 21 years of age. This part of the proposal would utilize a three-tier producer-to-distributor-to-retailer structure (similar to the alcohol model) for the adult-use cannabis industry. In general, the model prohibits vertical integration and would be coupled with licensing limits and supply management to control market concentration and encourage social-equity-conscious applicant participation.

Other Tax Change Proposals

Reduce Taxes on Small Business

The proposal includes initiatives designed to provide tax relief to small businesses.

Corporate rate reduction: The proposal would reduce the Article 9-A corporate income tax rate from 6.5% to 4% for businesses with 100 or fewer employees and with net income below $390,000.

Tripling the Current Income Exclusion for Farmers and Sole Proprietors: The proposal triples the existing 5% sole proprietor and farm business income AGI subtraction to 15% for small businesses (business income of $250,000 or less) paying taxes via the personal income tax.

Investment Tax Credit Refundability for Farmers: The proposal expands the refundable investment tax credit, currently available only to "new" businesses (or their owners), to include businesses (or their owners) whose primary source of income is from farming operations, thereby allowing this group of taxpayers to receive the full and immediate benefit of their credits.

Enhance the Empire State Child Credit

The proposal would expand the Empire State Child Credit (ESCC) to allow families with a New York State adjusted gross income of $50,000 or less to claim the credit for children including those under four years of age. Previously, the credit applied only for children older than 4 years of age.

Extend the Excelsior Tax Credit Program and Enhance Tax Credits for Green Projects

The Excelsior Jobs Program would be extended under the proposal by establishing new credit caps through 2039 and allowing the use of unused credits through 2049. Absent an extension, new program entrants would not be given the opportunity to receive tax benefits for the full 10-year benefit period. Additionally, the proposal 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.

Extend Hire-A-Vet Credit for Two Years

The proposal extends this credit for an additional two years, adding the 2020 and 2021 hiring periods. 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).

Cap the Maximum Amount and Income Threshold for the Long-Term Care Insurance Credit

The proposal would amend the Long-Term Care Insurance Credit under the personal income tax to make only taxpayers with New York adjusted gross income of less than $250,000 eligible for the credit and to cap the credit amount at $1,500.

Authorize the Department of Taxation and Finance to Recognize Unclaimed Tax Benefits

Under the proposal, the Tax Department could (1) compute and issue an earned income credit when it discovers a taxpayer is eligible for such credit and did not claim it; and (2) 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.

Reform the Tobacco Products Tax

The proposal would also reform the definition of "wholesale price" of tobacco products to clarify that it means the price for which the tobacco products are sold to a distributor. The proposal also would authorize 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.

Modernize and Merge Real Property Tax Forms and Processes

The proposal would facilitate the modernization and consolidation of the process for reporting real property transfers and paying the associated tax and fees.

Under current procedures, when real property is sold two different State-required forms must be filed, both on paper, and a real estate transfer tax (RETT) must be paid unless an exemption applies. The two forms (RP-5217 and TP-584) are largely duplicative of one another, but they cannot be readily combined because one form is a "tax" return subject to the secrecy provisions of the Tax Law, and the other is a real property tax report that, by law, is fully subject to public disclosure.

The proposal would authorize the Commissioner of Taxation and Finance to combine these two forms into a consolidated real property transfer form and to implement an online system for e-filing the consolidated form and paying the associated taxes and fees. This reform should streamline the real property transfer process for practitioners and other affected parties, while ensuring that the confidential portion of the RETT return remains subject to the secrecy protections. The proposal would also protect the interest of county clerks by ensuring that they will continue to receive the same fees that they now collect ($9 per RP-5217 and $1 per TP-584), even though users of the online system will be e-filing the forms with, and paying the taxes and fees to, the Tax Department. It should be noted that the Department's e-filing option would apply in New York City and Westchester County (which have already instituted their own electronic deed recording systems) only if the City or County opt-in to its use.

Enforcement Initiatives

Make Warrantless State Tax Debt Collection Methods Permanent

The proposal would make permanent the authority of the Commissioner of Taxation and Finance (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. The law authorizing warrantless bank account data-matching is set to expire on April 1, 2020.

Cigarette Tax Enforcement and Penalties

The proposal would make it more difficult for cigarette sellers to evade tax liabilities and violation penalties while increasing the severity of penalties. Currently, if a retailer is caught selling untaxed cigarettes, the Tax Department is authorized to suspend a retailer's Certificate of Registration (CoR) to sell tobacco products. The Tax Department also notifies the SLA (State Liquor Authority) and the Gaming Commission when such action is taken, and those respective agencies can then suspend the retailer's applicable liquor and/or lottery licenses as well.

The proposal would:

(1) continue the Tax Department's authority to revoke a retailer's CoR for its first violation for selling untaxed cigarettes, but would enhance the sanction by automatically initiating the revocation process of the retailer's Sales Tax Certificate of Authority (CoA);

(2) increase the duration of first CoR revocation from six months to one year (to reflect the time a CoA revocation hearing may take);

(3) add "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

(4) amend the revocation process for lottery and liquor licenses by requiring they automatically be revoked upon revocation of a CoR for selling untaxed cigarettes.

Conclusion

Other than the reintroduction of the provisions regarding cannabis, there are not a lot of noteworthy proposals in the revenue portion of the Executive Budget Bills. But the "thirty-day" amendments due in February may include a few surprises and, of course, no one will really know what the sausage looks like until it finally exits the grinder at the end of March.

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