

TAX UPDATES FROM CONNECTICUT, NEW JERSEY AND NEW YORK CITY

Hodgson Russ Tristate Tax Alert
August 26, 2021

As summer winds to a close, we bring you the latest news and our perspectives on interesting tax developments in the tristate area.

Update from New Jersey

End of New Jersey Teleworking Policies

See our recent [State & Local Tax Alert](#) for an update on the implications of the end of New Jersey's COVID-19 teleworking policies with respect to Corporation Business Tax, Sales Tax and employer withholding obligations.

Innocent Spouse Relief

In the tax world everyone is familiar with the concept of federal innocent spouse relief. While both spouses are jointly and individually responsible for federal tax due on a joint return, a spouse may be relieved of this liability under I.R.C. § 6015 if the spouse can establish that he or she did not know, and had no reason to know, that there was an understatement on a return, and it would be inequitable to hold the innocent spouse liable for the tax deficiency.

Unfortunately, federal innocent spouse relief does not extend to New Jersey Gross Income Tax (GIT) liabilities. In a recent New Jersey Tax Court decision, *Gentile v. Director, Div. of Taxation*, Docket No. 013601-2017 (Tax 2021), a husband claimed a right to innocent spouse relief in connection with his wife's failure to report income derived from criminal activity. The court held that the GIT does not contain a provision similar to I.R.C. § 6015 and, therefore, does not afford innocent spouse relief.

All was not lost for the husband, however, because the Division's assessment was issued after the general three-year statute of limitations and the Division asserted that it could issue an assessment at any time because the taxpayers filed a false or fraudulent return with an intent to evade tax. However, when the Division claims no statute of limitations applies, the burden is on the Division to prove the taxpayer's false or fraudulent intent. In *Gentile*, the Division had yet to present any such proof, resulting in the denial of the Division's motion for summary judgment. As a result, even though innocent spouse relief is not available in the context of the GIT, if the spouse in *Gentile* lacked knowledge of the understatement on the joint

Attorneys

Paul Baldovin Jr.
Open Weaver Banks
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

Practices & Industries

State & Local Tax

TAX UPDATES FROM CONNECTICUT, NEW JERSEY AND NEW YORK CITY

return, then the Division should not be able to prove that he filed a false or fraudulent return and the assessment would be untimely.

While the court in *Gentile* refused to make innocent spouse relief available for purposes of the GIT, other New Jersey decisions have embraced similar equitable concepts in connection with determining whether an individual has “responsible person status” for Sales Tax deficiencies. In *Lanier v. Director, Div. of Taxation*, Docket No. 013087-2015 (Tax 2017), the Tax Court held that the definition of “persons required to collect tax” is analogous to the innocent spouse relief contemplated by I.R.C. § 6015. The court reasoned that both statutes are based in equity and designed to avoid the injustice of imposing personal liability on individuals who were not responsible for a failure to pay taxes.

What this means is that spouses (and also unrelated individuals) can oppose responsible person assessments relating to Sales Tax by proving they are more akin to an innocent spouse than to a person who had the duty to pay the Sales Tax. See also *Skaperdas v. Director, Div. of Taxation*, 14 N.J. Tax 103 (1994), *aff’d*, 295 N.J. Super. 293 (App. Div. 1996) (finding an individual who served as director and corporate officer of a corporation was not personally liable for the corporation’s Sales Tax liability because his lack of sophistication and involvement made his role in the running of the corporation analogous to that of an innocent spouse in federal income tax liability cases).

Update from New York City

The NYC Department of Finance recently posted an updated Statement of Audit Procedure (SAP) for its Voluntary Disclosure and Compliance Program (VDCP). Although dated January 22, 2021 it was not posted to the website until recently. In substance, the 2021 SAP differs little from its predecessor 2012 publication, other than including a reference to the DOF’s new, electronic submission option for VDCP applications. But the posting of the SAP offers an opportunity to revisit the NYC voluntary disclosure program and the important ways it differs from its New York State counterpart.

Like the NYS program, the NYC VDCP program allows taxpayers to disclose noncompliance with the City’s taxes, regardless of the reason, so long as they have not previously been contacted by NYC regarding the tax type; are not under audit; are not the subject of any criminal investigation by the State; and are not reporting a federal or state reportable transaction. Like the NYS program, participation in the program offers the abatement of all potential penalties, both civil and criminal, in exchange for full payment of the taxes and interest due for the returns filed as part of the program and full compliance with NYC’s tax obligations going forward. In addition, taxpayers may request a limited lookback of either three or six years, depending on the circumstances, beyond which the DOF agrees not to audit or assess for that tax type.

But there are key differences between the City and State VDCP programs as far as process and eligibility for the limited lookback.

- NYC does not permit a taxpayer who is under audit by the DOF, assumedly for *any* tax type, to participate in its voluntary disclosure program whereas NYS only bars participation in the program for that tax type and tax years under audit (although an audit might prevent a limited lookback).
- NYC requires full disclosure of the circumstances of the noncompliance as well as an estimate of the amount of tax due *by year*. Unlike the NYS agreements, the NYC VDCP agreement will only cover the specific years disclosed in the application.

TAX UPDATES FROM CONNECTICUT, NEW JERSEY AND NEW YORK CITY

- NYC still permits an anonymous application and the taxpayer may wait to see whether the facts of the application warrant a three or six-year limited lookback before disclosing their identity.
- NYC only recently implemented an online application process but still allows a written request, whereas NYS relies on its longstanding electronic application process.
- NYC does not allow a three-year lookback if the taxpayer currently does not have a current obligation to file NYC returns. This is not a factor with NYS.
- NYC does not permit a limited lookback if the taxpayer previously filed returns for that tax type and then stopped filing.

Despite these restrictions (and a still somewhat cumbersome application process), NYC's voluntary disclosure program, like its state counterpart, still offers a relatively simple way to come into compliance with NYC taxes so long as you come forward before the City finds you.

Contact [Open Weaver Banks](#) (646.218.7524), [Debra Herman](#) (646.218.7532), or [Elizabeth Pascal](#) (716.848.1622) if you have any questions about how these tax laws may impact you or your business.