

New York Legislature Passes Amendments to New York City Tax Law

April 3, 2015

Overview

On April 1, 2015, the New York State Legislature delivered S4610A/A6721A to New York's Governor Andrew Cuomo for signature. This legislation introduces broad-based tax reform of the New York City corporate tax regime that is generally consistent with the New York State tax reform provisions effective for tax years beginning on or after January 1, 2015.¹

At the time of issuance of this Tax Alert, the official legislative record has not confirmed the enactment date, which could conceivably relate back to March 31, 2015,² but is in question due, in part, to the later date of delivery to the Governor. As such, we are still evaluating whether this should be treated as a first or second quarter event for financial statement purposes for calendar year taxpayers.

In this Tax Alert we summarize the more significant reforms to New York City's corporate tax structure, which generally would be effective retroactive to tax years beginning on or after January 1, 2015.³

New York City Corporate Tax Reforms

The New York City corporate tax reforms contained in S4610A/A6721A are generally consistent with New York State's corporate tax reform enacted in 2014. However, the New York City's corporate tax reform does not contain an income tax rate reduction for all corporate taxpayers; does not call for the reduction and ultimate elimination of the alternative tax base on capital; and does not adopt bright-line economic nexus thresholds, except for corporations that issue credit cards. Also, the provisions do not modify New York City's unincorporated business tax ("UBT") and do not apply to federal subchapter S corporations or subchapter S subsidiaries, which would continue to be taxed in accordance with the currently-applicable, pre-reform provisions. The reforms are intended to be revenue neutral.

The more significant changes, which would be effective for tax years beginning on or after January 1, 2015, to New York City's corporate tax structure include the following:

- Merging the bank tax and corporate franchise tax for large corporations (C-Corporations).
- Imposing a 9% income tax rate on "financial corporations" (consistent with the former New York City Bank Tax income tax rate).
- Adopting a limited economic nexus concept that provides that a corporation is doing business in New York City if it: 1) has issued credit cards to 1,000 or more customers who have a mailing address within the New York City as of the last day of its taxable year ("customer nexus"); 2) has merchant customer(s) with merchants contracts ("contract nexus") and the total number of locations covered by those contracts equals 1,000 or more locations in New York City to whom the corporation remitted payments for credit card transactions during the taxable year; or 3) the sum of the number of customers giving rise to customer nexus and the number of locations giving rise to contract nexus equals 1,000 or more.
- Adopting general customer-based (market) sourcing of receipts and specific sourcing rules for digital products and financial service receipts.

¹ See <http://open.nysenate.gov/legislation/bill/S4610A-2015>, regarding passage of S4610A/A6721A on March 31, 2015, by both the Senate and the House and delivery to the Governor on April 1, 2015. For more on the 2014 New York State tax reforms, see our [Tax Alert dated April 1, 2014](#).

² There is conflicting information on when the legislation passed the Assembly. While the Assembly website reports that the bill passed both the Senate and Assembly on March 31, it also shows the Assembly vote occurring on April 1. See, http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=S04610&term=2015&Summary=Y&Actions=Y&Votes=Y.

³ Also, significant technical corrections and revisions to New York State Tax Law were sent to the Governor on April 1 in S2009B/A3009B and S2006B/A3006B. See our separate Tax Alert issued on April 3, 2015, for discussion of these provisions.

- Generally, maintaining the schedule under current law to phase-in single sales factor apportionment by 2018, but offering a one-time election for taxpayers/combined groups with \$50 million or less of New York City receipts to retain the 2017 apportionment factor weighting (93% receipts/3.5% payroll/3.5% property). The election would be made on the taxpayer's (or combined group's) original or amended return for the first taxable year commencing on or after January 1, 2018, which would be effective until revoked by the taxpayer (or combined group).
- Limiting what constitutes investment capital and investment income (as newly defined in accordance with the enacted New York State changes, including the 8% limitation on investment income) and modifying existing expense attribution rules so that only interest expense attributable to non-taxable investment or exempt income would be subject to disallowance (similar rules would apply with respect to attributing liabilities to non-taxable investment capital).
 - Also, the law would create a safe harbor election whereby aggregate non-taxable investment and exempt income would be reduced by a flat 40% amount (after taking into account the 8% limitation on investment income) in lieu of being subject to interest expense attribution (except that certain dividends would not be eligible for the 40% safe harbor).
- Changing the starting point for computing New York City taxable income for alien (non-US) corporations with New York City nexus from world-wide taxable income to federal "effectively connected income" (ECI), determined without regard to tax treaties.
- Changing the net operating loss ("NOL") provisions from a pre-apportioned to a post-apportioned computation, ending the requirement that New York City NOL usage be limited to the corresponding amount of federal NOL usage, and providing transition rules for converting NOL deductions from pre-tax reform years for use in subsequent tax years.
- Providing a three-year carryback for NOLs incurred in post-reform taxable years, provided that no NOL can be carried back to a taxable year beginning before January 1, 2015 (the carryforward period would remain at 20 years).
- Adopting full water's-edge unitary combined reporting with a greater than 50% ownership test and an election to permit combined filing for certain commonly owned groups with a seven-year lock-in period.
- Reducing the rate from 8.85% to 6.5% for qualifying *non*-manufacturers with less than \$1 million of allocated business income.
 - The new law provides a smaller rate reduction for qualifying *non*-manufacturers with allocated business income of \$1 million or greater but less than \$1.5 million.
- Reducing the rate from 8.85% to 4.425% for qualifying manufacturers with less than \$10 million of allocated business income.
 - The new law provides a smaller rate reduction for qualifying manufacturers with allocated business income of \$10 million or greater but less than \$20 million.
- Retaining the alternative tax base on capital and increasing the tax cap from \$1 million to \$10 million.
 - The new law would exclude the first \$10,000 of capital tax base.
- Eliminating the additional tax on subsidiary capital and eliminating most exclusions for income from subsidiaries, while retaining an exemption for dividends and "CFC income" (defined by reference to IRC § 951(a)) from unitary subsidiaries.
- Eliminating the alternative tax base equal to 8.85% on 15% of the excess of (a) net income plus the amount of salaries or other compensation paid to any person, including an officer, who at any time during the taxable year owned more than five percent of the taxpayer's issued capital stock over (b) a specific exemption amount (\$40,000).
- Increasing the cap on the alternative "fixed dollar" minimum tax to \$200,000 for taxpayers with New York City gross receipts over \$1 billion, with incremental increases of the fixed dollar minimum over the current cap of \$5,000 where New York City gross receipts are over \$50 million and not over \$1 billion.
 - Since the tax due on a combined report includes the fixed dollar minimum tax for each taxpayer member of the New York City combined group other than the designated agent, the increased fixed dollar minimum amounts would apply to each taxpayer member of the New York City combined group other than the designated agent.
- Permitting New York City to make adjustments to the apportionment of income or capital as originally filed where an assessment is made under the extended statute of limitations applicable in the event of a federal or New York State change to income (or in certain other situations) to the extent based on such federal or

New York State change to income and permitting taxpayers to make the corresponding changes to the apportionment factor as originally filed with regard to a claim for refund of such assessment.

- Providing language for the following credits to make these credits available under the newly created Subchapter 3-A under Title 11, Chapter 6, Section 1 of the NYC Administrative Code: New York City Relocation and Employment Assistance Program (“REAP”) credit, the Lower Manhattan REAP credit, the Industrial Business Zone Tax Credit, and the New York City Biotechnology Credit.

Considerations

The law changes discussed above generally apply retroactively to January 1, 2015, to align with the New York State changes that were enacted last year. The law changes discussed above would not conform the New York City taxation of federal S corporations and the UBT to the New York State Tax Reform changes, and, accordingly, taxpayers may wish to consider whether their choice of business entity is suitable for their business and tax circumstances.

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