

New York 2018-2019 State Budget Bill Enacted

Overview

On April 12, 2018, Governor Andrew Cuomo of New York signed into law the 2018-2019 Budget Act (S07509C/A09509C) (Budget Act).¹ The Budget Act includes amendments to the Article 9-A franchise tax on business corporations (including certain state credits and incentives) and the Article 22 personal income tax. Notably, the Budget Act clarifies the treatment of certain federal tax reform provisions enacted in the 2017 Tax Act² for New York tax purposes and includes provisions intended to reduce the potential burden imposed by federal tax reform on New York individual taxpayers.

This tax alert summarizes the significant New York State and New York City tax law changes included in the Budget Act.

Corporate and Personal Income Tax

Clarification of the New York treatment of certain federal tax reform provisions – Part KK

For purposes of calculating taxable income, New York is a “rolling conformity state,” meaning that New York conforms to the IRC as amended and in effect for the taxable year of the taxpayer that relate to the calculation of taxable income. Accordingly, New York automatically conforms to the provisions of federal tax reform that pertain to the calculation of taxable income.³

The Budget Act amends New York tax law relative to the federal tax reform changes in the following manner:

- Expands the definition of exempt CFC income under Article 9-A to include the federal repatriation amount calculated pursuant to IRC Sec. 965(a) (as adjusted by IRC Sec. 965(b) and without regard to IRC Sec. 965(c)) regardless of whether the shareholder with the IRC 965 inclusion conducts a unitary business with the CFC or CFCs giving rise to the IRC 965 inclusion amount. In addition, the repatriation amount, classified as exempt CFC income, does not constitute investment income.⁴
- Entire net income is determined without application of either (i) the IRC Sec. 965(c) deduction or (ii) the foreign derived intangible income deduction allowed pursuant to IRC Sec. 250(a)(1)(A).⁵
- The existing deduction from entire net income for amounts treated as dividends under IRC Sec. 78 is permitted only to the extent such amounts were not deducted under IRC Sec. 250.⁶
- The underpayment of estimated tax penalty under N.Y. Tax Law Sec. 1085 will not apply to the portion of tax related to interest attributable to the IRC Sec. 965(a) amount treated as exempt CFC income (or the 40% reduction of such exempt CFC income if the safe-harbor election is made).⁷

¹ Chapter 59, Laws of 2018. A copy is available [here](#).

² Public Law 115-97. “An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.”

³ New York Tax Law Sec. 208.9. New York City applies rolling conformity as well. See NYC Administrative Code Sec. 11-652.8.

⁴ S07509C, Part KK, Sec. 1.

⁵ S07509C, Part KK, Sec. 3.

⁶ S07509C, Part KK, Sec. 2.

⁷ S07509C, Part KK, Sec. 4.

These provisions also apply to the New York City Business Corporation Tax.⁸ Similar amendments were made to Article 33 of the New York Tax Law, Franchise Taxes on Insurance Corporations.⁹ These provisions apply to taxable years beginning on or after January 1, 2017.¹⁰

It is also important to note that the Budget Act did not address a number of potential New York tax issues raised by federal tax reform, including the following:

- The New York characterization of Global Intangible Low-Taxed Income (GILTI), income newly taxable at the federal level. Under existing law, the New York State Department of Taxation and Finance (Department) has stated that GILTI (net of the permitted federal deduction) will be included in the New York tax base.¹¹ The implications of GILTI for purposes of the apportionment factor continue to remain unclear as well.
- For personal income tax purposes, the characterization of the federal repatriation amount calculated pursuant to IRC Sec. 965(a)¹² or the characterization of GILTI.
- The newly enacted federal cap on deductible interest expense under IRC Sec. 163(j), including whether to compute the limitation on a separate company or combined group basis.
- The implications upon the eligibility requirements as a qualified New York manufacturer-- specifically, the impact of federal bonus depreciation on the tax basis of assets used in satisfying the statutory asset test, and the inclusion of GILTI or IRC Sec. 965(a) repatriation income in satisfying the statutory gross receipts test.
- The manner in which New York City will treat IRC Sec. 965(a) repatriation income and GILTI inclusion for purposes of the Unincorporated Business Tax and the General Corporation Tax (applicable to S corporations).¹³

[Decoupling from certain provisions of federal tax reform affecting individuals – Part JJ](#)

The Budget Act amends certain personal income tax provisions in an effort to reduce the potential burden imposed by federal tax reform on New York State taxpayers. Under prior law, New York residents could itemize deductions for personal income tax purposes only if they also itemized deductions for federal income tax purposes. Also, itemized deductions for New York purposes generally followed federal rules. The Budget Act allows residents to elect to itemize deductions for New York purposes even if the taxpayer takes the standard deduction for federal tax purposes.¹⁴ In addition, the Budget Act generally decouples from new limitations on itemized deductions from federal tax reform, including the new \$10,000 state and local tax deduction cap (although the existing New York limitation on deducting state income taxes still applies).¹⁵ This provision also may apply to other limitations on itemized deductions resulting from federal tax reform such as limitations which would impact unreimbursed job expenses. These provisions also apply to the New York City personal income tax¹⁶ and apply to taxable years beginning on or after January 1, 2018.¹⁷

⁸ S07509C, Part KK, Secs. 1-a; 3-a; 4-a.

⁹ S07509C, Part KK, Secs. 4-b through 4-f.

¹⁰ S07509C, Part KK, Sec. 5.

¹¹ See the New York State Department of Taxation and Finance's *Preliminary Report on the Federal Tax Cuts and Jobs Act*, dated January 2018, p.30. In the *Preliminary Report*, the Department observed that New York could decouple from the federal GILTI deduction or it could exempt GILTI from taxation entirely. In the Budget Act, neither of these options was adopted.

¹² On April 13, 2018, the Department released [Important Notice N-18-4, New York's Treatment of IRC Sec. 965 Repatriation Income for Individuals for Tax Year 2017](#), stating that for individuals, the net IRC Sec. 965 amount is required to be included in federal adjusted gross income, and consequently, New York taxable income. There is no New York exemption or deduction for this income for individuals (including S corporation shareholders).

¹³ On April 20, 2018, New York City released [Finance Memorandum 18-4, Deemed Repatriation Income under the General Corporation Tax, the Banking Corporation Tax, and the Unincorporated Business Tax](#), stating that taxpayers subject to New York City's General Corporation Tax, Banking Corporation Tax or Unincorporated Business Tax must report their IRC § 965(a) inclusion amounts and IRC § 965(c) deduction amounts on IRC 965 Transition Tax Statements and their applicable federal tax forms as the law provides no specific modifications for these income and deduction amounts. "Instead, the income must be classified as business income, investment income, or income from subsidiary capital, to the extent applicable, and deductions must be attributed to that income, including the IRC § 965(c) amount. The net income (net section 965 income) must be allocated or, in the case of income from subsidiary capital, excluded, in accordance with its classification and existing law."

¹⁴ S07509C, Part JJ, Sec. 3.

¹⁵ *Id.*

¹⁶ S07509C, Part JJ, Sec. 6.

¹⁷ S07509C, Part JJ, Sec. 7.

Charitable contributions to certain newly-created funds – Part LL and Part EEE

The Budget Act created two new charitable contribution funds to be administered by the State Comptroller and the Tax Commissioner to accept contributions to fund state sponsored health care and education programs.¹⁸ Such contributions are intended to be deductible for taxpayers who itemize deductions and would provide a New York personal income tax credit of 85% of (i) the amounts contributed to the new charitable funds during the immediately preceding tax year and (ii) qualified contributions made to certain other designated entities.¹⁹ Amounts contributed to the two new charitable contribution funds for which a New York state deduction was claimed must be added back for New York City personal income tax purposes.²⁰ Also, the Budget Act grants localities authority to create similar funds, donations to which are intended to result in a local property tax credit.²¹ The Budget Act also provides that the Department is required to set up an online application system for taxpayers to submit claims for reimbursements of payments of interest on fixed and final determinations of underpayments of federal tax liability for the 2019, 2020 and 2021 tax year that arise from the taxpayers' reliance on amendments to the New York Tax Law enacted in 2018.²² These provisions takes effect immediately.²³

Optional employer compensation expense tax system – Part MM

The Budget Act amends the N.Y. Tax Law to add a new Article 24 implementing an optional Employer Compensation Expense Tax (ECET).²⁴ This new Article is intended to address the impact of the federal tax reform on individual taxpayers recognizing that while federal tax reform limits the state and local tax deduction for an individual, payroll taxes remain deductible for an employer. The optional ECET will allow employers to annually elect to be taxed on the payroll expense paid to covered employees at the rate of 5% (phased in over a 3-year period, with a 1.5% rate in 2019 and a 3% rate in 2020) on all annual payroll expenses in excess of \$40,000 per employee.²⁵ The covered employee would be allowed a state personal income tax credit based on his/her salary over \$40,000 multiplied by the annual payroll tax rate, multiplied by the result of one minus a fraction, the numerator of which is the tax imposed on the covered employee without regard to any tax credits and the denominator of which is the covered employee's taxable income.²⁶ An employer cannot deduct from the wages or compensation of an employee any amount that represents all or any portion of the tax imposed on the employer under the ECET.²⁷ The Department recognized in its *Preliminary Report on the Federal Tax Cuts and Jobs Act* that there are a number of issues associated with the ECET which require further study, such as the impact of the ECET on labor costs, nonresidents, local governments, and federal employees (since New York is constitutionally prohibited from levying a tax (such as the ECET) on the Federal Government).²⁸

Procedural

Extension of the statute of limitation upon the filing of an amended return - Part H

The Budget Act amends the personal income tax (both New York State and New York City) and the franchise tax on business corporations (New York State only) to extend the statute of limitations for assessing additional tax owed on an amended return to one year after such amended return was filed.²⁹ Generally under the new provision, if a taxpayer files an amended return, an assessment of tax (if not deemed to have been made upon the filing of the amended return), including recovery of a previously paid refund, "attributable to a change or correction on the amended return from a prior return" may be made at any time within one year after such amended return is filed. Before this law change, in most cases, the Department had three years from the original filing date of a tax return to audit and assess additional tax and an amended return did not extend the statute of limitations. These changes are effective immediately and apply to all amended returns filed after April 12, 2018.³⁰

¹⁸ S07509C, Part LL, Sec. 1.

¹⁹ S07509C, Part LL, Sec. 4.

²⁰ S07509C, Part SS, Sec. 2.

²¹ S07509C, Part LL, Sec. 9.

²² S07509C, Part EEE, Sec. 1.

²³ S07509C, Part LL, Sec. 10; Part EEE, Sec. 2.

²⁴ S07509C, Part MM, Sec. 1.

²⁵ *Id.*

²⁶ S07509C, Part MM, Sec. 2.

²⁷ S07509C, Part MM, Sec. 1. Payroll tax payments generally are due quarterly, at the same time an employer is required to remit payments of personal income tax withholding.

²⁸ *Preliminary Report*, p. 10-12.

²⁹ S07509C, Part H, Secs. 1, 2 and 3.

³⁰ S07509C, Part H, Sec. 4.

Sales and Use Tax

Simplification of the sale for resale exemption for prepared food – Part J

The Budget Act amends N.Y. Tax Law § 1105(d), which imposes sales tax on purchases of food and beverages when sold in establishments such as restaurants, taverns, or by caterers, to include a resale provision.³¹ The added provision allows a vendor to purchase food and drink of any nature or food alone exempt from sales tax when the food is to be resold in or by restaurants, taverns, or caterers. The vendor shall provide a properly completed resale certificate at the time of purchase. This provision is effective on June 1, 2018.³²

Credits & Incentives

Hire-a-Vet tax credit – Part Q

The Budget Act amends the N.Y. Tax Law to extend the Hire a Vet credit by two years.³³ The extension enables taxpayers to claim the tax credit for tax years beginning before January 1, 2021 for the hiring of qualified veterans that commence employment before January 1, 2020.³⁴

New York Youth Jobs Program – Part R

The Budget Act amends N.Y. Labor Law and N.Y. Tax Law to generally provide for a 50% increase in the amount of tax credits available to taxpayers that hire at-risk youth under the New York Youth Jobs Program.³⁵ These changes are effective for tax years beginning on or after January 1, 2018.³⁶ Further, beginning on or after January 1, 2019, qualified employers would be required to comply with enhanced reporting requirements.³⁷

New York Low Income Housing credit – Part PP

The Budget Act amends N.Y. Public Housing Law to allow transferability of the New York Low-Income Housing Credit, in whole or in part, to a transferee person or entity.³⁸

Considerations

The Budget Act reflects certain changes to New York/New York City corporate and personal income taxes in response to federal tax reform, though additional changes may be forthcoming. In its *Preliminary Report on the Federal Tax Cuts and Jobs Act*, the Department stated that given the far-reaching nature of federal tax reform, New York will need to “undertake extensive analysis as it considers how best to respond to its consequential reforms, and the law’s impacts will need to be examined over time.” Taxpayers impacted by the enactment of the Budget Act or federal tax reform as applied to New York State/City tax law should consult with their New York tax advisors for further assistance.

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If you have questions regarding any tax law changes included in the Budget Act on other New York tax matters, please contact any of the following Deloitte Tax professionals:

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³¹ S07509C, Part J, Sec. 1.

³² S07509C, Part J, Sec. 2.

³³ S07509C, Part Q, Secs. 1 and 2.

³⁴ S07509C, Part Q, Sec. 4.

³⁵ S07509C, Part R, Secs. 1, 4 and 7.

³⁶ S07509C, Part R, Sec. 10.

³⁷ S07509C, Part R, Secs. 2,3,5,6,8,9 and 10.

³⁸ S07509C, Part PP, Secs 1 and 2.

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