

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division**

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**Amendments That Encourage Compliance with the Tax Law and
Enhance the Tax Department's Enforcement Ability**

Recently enacted legislation (Chapters 57 and 59 of the Laws of 2009) amended the Tax Law to enact a package of provisions that are intended to increase taxpayers' compliance with the Tax Law and to improve the Tax Department's ability to enforce the payment of all taxes that are due and owing.

The following is a summary of each amendment included in this tax compliance and enforcement legislation. Unless otherwise stated, the amendments described in this memorandum became effective April 7, 2009, when Chapters 57 and 59 were signed into law.

The amendments cover the following topics:

- Requirement to make sales tax electronic records available and new penalties related to sales tax record keeping
- Increased penalty for willful failure to collect and pay withholding taxes
- Expedited hearings
- Increased interest rates on underpayments
- Interest on sales tax refunds
- Change in wage reporting and annual withholding tax reconciliation due date
- Appointment of special district attorneys
- Information returns required to be filed by motor vehicle insurers, franchisors and alcoholic beverage wholesalers
- Voluntary disclosure program clarification
- Criminal penalties
- Civil penalties
- Bad check fee

Requirement to make sales tax electronic records available and new penalties related to sales tax record keeping

Persons who elect to maintain sales tax records in an electronic format are required to make the electronic records available and accessible to the Tax Department, even if the records are also maintained in a hard copy format.

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In addition, new penalties apply to persons required to keep sales tax records. These new penalties will now be imposed for the reasons and in the amounts described as follows:

- If a person fails to maintain sales tax records or make them available to the Tax Department, the penalty is up to \$1,000 for the first quarter or part thereof for which the failure occurs and up to \$5,000 for each subsequent quarter or part thereof for which the failure occurs. This penalty applies to sales tax quarterly periods beginning on and after June 1, 2009.
- If a person fails to present or make available sales tax records for the Tax Department's review in a form that can be audited, the penalty is up to \$1,000 for each quarter or part thereof for which the failure occurs. This failure occurs when the records presented lack sufficient organization or are otherwise inadequate to permit direct reconciliation of the receipts, invoices or other source documents with the entries for the quarterly period in the books and records and on the sales tax returns of that person. This penalty applies even if these records, if reorganized, are adequate to verify credits, receipts, and the taxability of items and to perform a complete audit. This penalty took effect on April 7, 2009.
- If a person's records are maintained in an electronic format, and the person fails to make the electronic records available and accessible for review by the Tax Department, a penalty of up to \$5,000 will apply for each quarter or part thereof for which the failure occurs. This penalty took effect on April 7, 2009.

The penalties described above are in addition to any other penalties applicable to sales and use taxes, but may not be imposed or collected more than once for failures for the same quarterly period or part thereof.

If a failure that resulted in any of the above described penalties being imposed was entirely due to reasonable cause and not due to willful neglect, the Tax Department will waive the penalty.

(Tax Law sections 1135(h), 1145(i), (j) and (k))

Increased penalty for willful failure to collect and pay withholding taxes

The responsible person penalty under section 685(g) of the Tax Law for the willful failure to collect and pay over withholding taxes will now include any interest due on the tax,

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whereas previously the penalty was for the amount of tax only. The amount of interest is computed from the date the failure occurred to the date the penalty is paid.

This increased penalty applies to withholding periods beginning on or after January 1, 2009.

(Tax Law section 685(g))

Expedited hearings

An expedited hearing process will now apply in cases where a person receives a written notice that advises the person of:

- the proposed cancellation, revocation, or suspension of a license, permit, registration, or other credential issued by the Tax Department;
- the denial of an application for a license, permit, registration, or other credential issued under the authority of the Tax Law, except for an application to renew a sales tax *Certificate of Authority*;
- the imposition of a fraud penalty for aiding or assisting in the giving of fraudulent returns, reports, statements or other documents; or
- the imposition of a penalty equaling two times the amount of tax due for engaging in other fraudulent behavior under the Tax Law.

For purposes of this memorandum, these three types of notices will be referred to as *specified notices*.

Any person who seeks review by the Bureau of Conciliation and Mediation Services of a *specified notice* must request a conciliation conference within 30 days of receipt of that notice. If a person seeks review by the Division of Tax Appeals of a conciliation order involving a *specified notice*, the hearing request must be made within 30 days after the conciliation order was issued.

Any person who receives a *specified notice* and seeks a hearing before the Division of Tax Appeals must file a petition with the Division of Tax Appeals within 30 days of the receipt of the notice unless the person has requested a conciliation conference as previously described. If the petition is not filed within the 30-day period, the actions described in the *specified notice* will

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be permanently and irrevocably fixed. The expedited hearing must be scheduled within 10 days of the receipt of the petition by the Division of Tax Appeals.

The determination of the administrative law judge must be rendered within 30 days of receipt of the petition by the Division of Tax Appeals. If an exception is taken to the determination of the administrative law judge, the decision of the Tax Appeals Tribunal in response to the exception must be issued within 3 months of receipt of the petition.

Any request by the person seeking the hearing that delays the hearing process will extend the time limitations imposed on the Division of Tax Appeals or the Tax Appeals Tribunal to issue a determination or decision, respectively. In addition, the Division of Tax Appeals or the Tax Appeals Tribunal may not approve any postponement or other delay without a showing of good cause by the party requesting postponement or other delay. If good cause for postponement or delay is not shown by that party, the Division of Tax Appeals or the Tax Appeals Tribunal must render a default determination or decision against the moving party for any unwarranted delay to the hearing process.

For any expedited conference or hearing under this new law, if the Tax Department finds that the collection of any tax or the public safety will be jeopardized by delay, the department may immediately cancel, revoke, or suspend a license, permit, registration or other credential issued under the Tax Law, before the commencement of those proceedings. In this case, a written notice of this action must be given to the licensee, permittee, registrant, or otherwise credentialed person by registered or certified mail or personal service as provided by the Civil Practice Law and Rules. The license, permit, registration, or other credential will be permanently and irrevocably cancelled, revoked, or suspended, unless the licensee, permittee, registrant, or otherwise credentialed person, within 30 days of receipt of the written notice, files a petition with the Division of Tax Appeals for a review. Then, an expedited hearing must be scheduled within 10 business days of receipt of the petition.

This new expedited hearing process applies to notices issued on or after April 7, 2009.

(Tax Law Sections 170.3-a(b), (e) and (h) and 2008)

Increased interest rates on underpayments

The underpayment interest rate on unpaid income taxes (including New York City and Yonkers income taxes), estate and generation-skipping taxes is increased to the federal short-term rate plus five and one-half percentage points. For corporate taxes and miscellaneous taxes, the underpayment interest rate is increased to the federal short-term rate plus seven

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percentage points. The sales and use tax underpayment interest rate is increased to the greater of fourteen and one-half percent or the federal short-term rate plus seven percentage points.

In addition, the minimum underpayment interest rate for all taxes is increased to seven and one-half percent. Also, if no underpayment interest rate is set for any calendar quarter, the rate will be seven and one-half percent for that quarter.

This increase in underpayment interest rates took effect on April 7, 2009, and applies to the interest chargeable or due on taxes or on any other amounts, or any portion thereof, that remain or become due on and after that date.

(Tax Law sections 171, subd. Twenty-sixth (a), 684(a), 684(j), 685(c)(1), 697(j)(1), 697(j)(2)(B), 1084(a),(j), 1085(c)(1), 1096(e)(1), 1096(e)(2)(B), 1142(9), 1145(a)(1)(ii), 1145(a)(2), Administrative Code of the City of New York sections 11-1784(a), 11-1784(j), 11-1785(c)(1), 11-1797 (j)(1), and 11-1797(j)(2)(B))

Interest on sales tax refunds

In the case of sales tax refunds, the new law provides that interest does not accrue on sales and use tax refunds claimed on a late return or on an application for refund or credit before the date the return or the application is filed in processible form with the Tax Department. In addition, the new law provides that, for refunds of sales tax under section 1139 of the Tax Law, no interest will be paid on the refund if the refund is issued either within three months after the later of the return's due date or filing date or within three months after the filing date of an application for a sales tax refund or credit.

These sales and use tax provisions apply to refunds or credits claimed on returns or applications for refunds or credits filed on or after June 1, 2009.

(Tax Law section 1139(d))

Change in wage reporting and annual withholding tax reconciliation due date

Beginning with the last withholding tax quarter of 2009, employers must submit wage reporting information for the last calendar quarter and the annual withholding tax reconciliation information on or before January 31 of each year. Under prior law, this information was due no later than February 28 of each year.

(Tax Law section 674(a)(4)(A))

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Appointment of special assistant district attorneys

Section 702 of the County Law has been amended to permit a District Attorney to appoint attorneys employed by the Tax Department as Special District Attorneys to investigate and prosecute tax cases, irrespective of the Tax Department attorney's county of residence. This provision is effective April 7, 2009.

(County Law, section 702(7))

Information returns required to be filed by motor vehicle insurers, franchisors and alcoholic beverage wholesalers

The new legislation requires that information returns must be filed by:

- any motor vehicle insurer that makes payments on behalf of its insured persons to persons who service or repair the insured person's motor vehicle;
- every franchisor, as defined by section 683 of the General Business Law, that has one or more franchisees that are required to be registered for sales tax under section 1134 of the Tax Law; and
- any alcoholic beverage wholesaler as defined in section 3 of the Alcoholic Beverage Control Law, that, with certain exceptions, makes sales of alcoholic beverages without collecting sales tax (e.g., sales for resale).

The first information returns under the new law are due on or before September 21, 2009, and cover the period from March 1, 2009 to August 31, 2009. The second return is due on or before March 22, 2010, and will cover the period September 1, 2009 to February 28, 2010. Annual returns must then be filed on or before March 20th for each succeeding year, and must cover the four sales tax quarterly periods immediately preceding that date.

The new law also requires that the filers of these annual information returns give a report (vendor's report) on or before March 20th of each year, to each person about whom information is required to be reported on the annual information returns, of the information pertaining to that person that was included in the return.

Comprehensive guidance that gives more details regarding this new law has been issued. See TSB-M-09(8)S, *New Requirement for the Filing of Information Returns for Insurers*, TSB-M-09(8.1)S, *Additional Guidance Relating to the New Requirement for the Filing of*

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Information Returns for Insurers, TSB-M-09(9)S, New Requirement for the Filing of Information Returns for Franchisors, TSB-M-09(9.1)S, Additional Guidance Relating to the New Requirement for the Filing of Information Returns for Franchisors, TSB-M-09(10)S, New Requirement for the Filing of Information Returns for Alcoholic Beverage Wholesalers and TSB-M-09(10.1)S, Additional Guidance Relating to the New Requirement for the Filing of Information Returns for Alcoholic Beverage Wholesalers.

(Tax Law sections 1136(i) and 1145(i))

Voluntary disclosure program clarification

The Tax Law has been amended to clarify that returns and reports filed by taxpayers who participate in the voluntary disclosure and compliance program may be disclosed to the Secretary of the United States Treasury, his or her delegates (which includes the Internal Revenue Service) or the proper officer of any state or city with which the Tax Department has an information exchange. For more information, see TSB-M-09(6)I, (6)C, (5)M, (1)R, (5)S, *Voluntary Disclosure and Compliance Program Legislative Change Regarding the Disclosure of Information.*

(Tax Law section 1700(4))

Criminal penalties

Article 37 of the Tax Law has been amended to create a new series of crimes entitled "Tax Fraud Acts". These amendments apply to all taxes administered by the Tax Department.

Tax fraud act means willfully engaging in an act or acts or willfully causing another to engage in an act or acts pursuant to which a person:

- fails to make, render, sign, certify, or file any return or report required by the Tax Law or by regulations promulgated thereunder within the time required;
- files or submits a return, report, statement or document with the state or any political subdivision of the state, or with any public office or public officer of the state or any political subdivision of the state, knowing that the return, report, statement or other document required under the Tax Law contains any materially false or fraudulent information or omits any material information;

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- knowingly supplies or submits materially false or fraudulent information in connection with any return, audit, investigation, or proceeding or fails to supply information within the time required by or under the provisions of the Tax Law or any regulation promulgated thereunder;
- engages in any scheme to defraud the state or a political subdivision of the state or a government instrumentality within the state by false or fraudulent pretenses, representations or promises as to any material matter, in connection with any tax imposed under the Tax Law or any matter under the Tax Law;
- fails to remit any tax collected in the name of the state or on behalf of the state or any political subdivision of the state when the collection is required under the Tax Law;
- fails to collect any tax required to be collected under Articles 12-A, 18, 20, 22, or 28 or pursuant to the authority of Article 29 of the Tax Law;
- fails to pay any tax with intent to evade the tax; or
- issues an exemption certificate, interdistributor sales certificate, resale certificate, or any other document capable of evidencing a claim that taxes do not apply to a transaction, which he or she does not believe to be true and correct as to any material matter, which omits any material information, or which is false, fraudulent, or counterfeit.

A person *willfully* engages in any of the above described *tax fraud acts* when a person engages in such an act with intent to defraud, intent to evade the payment of taxes or intent to avoid a requirement of the Tax Law, a lawful requirement of the Commissioner of Taxation and Finance or a known legal duty.

Under the new law, anyone who commits a tax fraud act would be committing a class A misdemeanor. If a person commits a tax fraud act with intent to defraud the State or political subdivision or to evade tax, the person is committing a class E, D, C or B felony as described below:

- a person commits a criminal tax fraud act in the fourth degree, which is a Class E felony, when the act results in the evasion of tax (either by means of underpayment, or receipt of a refund, or both) in an amount in excess of \$3,000 during a period of not more than one year;

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- a person commits a criminal tax fraud act in the third degree, which is a Class D felony, when the act results in the evasion of tax (either by means of underpayment, or receipt of a refund, or both) in an amount in excess of \$10,000 during a period of not more than one year;
- a person commits a criminal tax fraud act in the second degree, which is a Class C felony, when the act results in the evasion of tax (either by means of underpayment, or receipt of a refund, or both) in an amount in excess of \$50,000 during a period of not more than one year; and
- a person commits a criminal tax fraud act in the first degree, which is a Class B felony, when the act results in the evasion of tax (either by means of underpayment, or receipt of a refund, or both) in an amount in excess of \$1,000,000 during a period of not more than one year.

Other highlights of this new criminal penalty legislation include the following:

- the fine imposed for committing a Tax Law felony, will be up to double the amount of any underpaid tax;
- a person who fails to obey any subpoena in connection with a tax matter would be guilty of a misdemeanor;
- provisions that make it clear that crimes specified in the Tax Law are additional to and do not preempt crimes specified in the Penal Law;
- clarification that the Penal Law provisions with respect to aiding and abetting and anticipatory crimes, such as attempt and conspiracy, apply to Tax Law crimes;
- provisions that set forth that any commercial tax preparer who, with intent to evade the requirements imposed on tax preparers by the Tax Law, fails to sign a return he or she is required to sign or fails to register as required is guilty of a Class A misdemeanor; and
- provisions that amend the Penal Law to broaden the venue in connection with the filing of false tax returns or other tax documents to permit prosecution in any county in which an underlying transaction occurred, where that transaction is reflected or reported on a tax return or tax document or was required to be reflected or reported on that tax return or tax document.

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These new criminal penalty provisions apply to offenses committed on or after April 7, 2009.

(Criminal Procedure Law, section 20.40(4), Penal Law, sections 470.05(1), 470.10(1), 470.15(1), 470.20(1), 470.21(1), 470.22(1), 470.23(1), 470.24(1), Tax Law, sections 480-a(5), 1111(m), 1137(f), 1800(c), 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1811, 1812, 1812-f, 1813, 1814, 1815, 1817, 1818, 1820, 1831, 1832, and 1833)

Civil penalties

The Tax Law has been amended to increase the civil penalty for failure to pay tax due to fraud for various taxes administered by the Tax Department and to add new civil penalties and increase an existing civil penalty for specified taxes under the Tax Law for certain activities.

(1) Civil penalty increased for failure to pay due to fraud

The new law increased the civil penalty under the various taxes for failure to pay tax due to fraud from 50 percent of the amount of tax due to two times the tax due. As a result of this change, the additional fraud penalty equal to 50 percent of the interest payable on the tax due has been eliminated. This revised fraud penalty applies to:

- motor fuel tax (Article 12-A of the Tax Law);
- alcoholic beverages tax (Article 18 of the Tax Law);
- cigarettes and tobacco products tax (Article 20 of the Tax Law);
- highway use tax (Article 21 of the Tax Law);
- fuel use tax (Article 21-A of the Tax Law);
- personal income tax (Article 22 of the Tax Law);
- sales and use tax (Article 28 and the local sales taxes authorized under Article 29 of the Tax Law); and
- corporation taxes (Articles 9, 9-A, 32 and 33 of the Tax Law).

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For income tax and corporation franchise taxes, the amendments relating to the fraud penalties apply to returns and other documents filed or required to be filed and actions taken and omissions occurring with regard to taxable years beginning on or after January 1, 2009. For all other taxes, these amendments apply to such fraudulent actions occurring on or after April 7, 2009.

(2) New civil penalties and increased existing civil penalty

New penalties related to the filing of information returns under the motor fuel tax (Article 12-A of the Tax Law)

The following penalties were added under the motor fuel tax:

- a penalty for failure to file the required information return under the motor fuel tax imposed by Article 12-A of the Tax Law (motor fuel tax), on or before the due date, which is \$1,500 for the first violation and \$3,000 for the second and any subsequent violation;
- a penalty for failure to file the required informational return under the motor fuel tax within 60 days of the due date, which is \$2,000 for the first violation and \$4,000 for the second and any subsequent violation;
- a penalty for failure to file a complete informational return as required under the motor fuel tax, which is \$1,500 for the first violation and \$3,000 for the second and any subsequent violation; and
- a penalty for making a statement on an informational return required under the motor fuel tax for which there is no reasonable basis when made, which is \$2,000 for the first violation and \$4,000 for the second and any subsequent violation.

Penalty increased for the filing of frivolous tax returns and a new penalty added for specified frivolous submissions (personal income tax)

The frivolous tax return penalty was increased and a new penalty was added under the personal income tax as follows:

- The penalty under section 685(q) of the Tax Law, for filing a return which does not contain information on which the substantial correctness of the self-assessment may be judged, or contains information that on its face indicates that the self-assessment

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is substantially incorrect and is based on a position which is frivolous, or an intent to delay or impede the administration of the personal income tax law, was increased from \$500 to \$5,000.

- A new penalty of up to \$5,000 was added for *specified frivolous submissions*. A *specified frivolous submission* means a *specified submission* that is based on a position that the Tax Department has identified as frivolous under the Tax Law or reflects a desire to delay or impede the Tax Department's administration of the Tax Law. A *specified submission* means a request for conciliation conference, a petition to the Division of Tax Appeals, an application for an installment payment agreement or an offer in compromise.

The increase in penalty for filing frivolous tax return and the new penalty for specified frivolous submissions apply to taxable years beginning on or after January 1, 2009.

New false or fraudulent document penalty (personal income tax, corporation franchise tax and sales and use tax)

New penalties were added under the personal income tax, corporation franchise tax and sales and use tax for any taxpayer that submits a false or fraudulent document to the Tax Department. The new penalties are \$100 for each false or fraudulent document submitted with a return, with a total maximum penalty of \$500 for each return submitted with the false or fraudulent documents.

For personal income tax and corporation tax purposes, this new penalty applies to taxable years beginning on or after January 1, 2009. For sales tax purposes, this new penalty is effective for sales tax quarterly periods beginning on or after April 7, 2009.

New penalty for aiding or assisting in the giving of fraudulent returns, reports, statements or other documents (sales and use tax)

A new penalty of up to \$5,000, was added under the sales and use tax. The new penalty is imposed on any person who, with the intent that tax be evaded, for a fee or other compensation, aids or assists in, or procures, counsels, or advises the preparation or presentation under Article 28 of the Tax Law, or in connection with any matter arising under Article 28 of the Tax Law, of any return, report, declaration, statement or other document that is fraudulent or false as to any material matter. This new penalty also applies if the person supplies any false or fraudulent information, whether or not such

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falsity or fraud is with knowledge or consent of the person authorized or required to present that return.

(Tax Law sections 289-b(1), 433(1), 481(1), 512(1), 527(d), 685(e),(q),(cc), 1085(f),(u), 1145(a), (i), (j))

Bad check fee

The Tax Law has been amended to authorize the Tax Department to impose a \$50 fee when a check, money order, or electronic funds withdrawal, in payment of any amount due under a tax, fee, special assessment or other imposition administered by the Tax Department, is returned without payment. If a payment is returned, the Tax Department will send a separate bill for \$50 for each tax return or other document associated with the returned payment. In the case of electronic funds withdrawal, the \$50 fee will not be imposed if the reason for the return of the payment is due to an error by the Tax Department or the originating depository financial institution. This is effective for payments related to authorized tax documents required to be filed for tax years beginning on or after January 1, 2009.

(Tax Law section 30)

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.