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## New Use Tax Reporting Requirements Create Much Confusion

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The periodic attempts by New York State to enforce its Compensating Use Tax ("Use Tax")<sup>1</sup> have been compared to the apocryphal definition of second marriages ("the triumph of hope over experience"). In May 2003, the State legislature adopted a new tactic in its never-ending battle to collect Use Tax from a populace that insists upon making purchases by mail order or over the Internet, by enacting legislation directing the Tax Commissioner to amend personal income tax returns to insert a line for reporting Use Tax and "take other steps necessary to inform taxpayers of their legal requirements."<sup>2</sup> Now, as taxpayers and their advisers face the first income tax filing season under the new rules, they are becoming aware of the complications arising from these new Sales and Use Tax ("SUT") filing obligations.

The Use Tax is designed to avoid the circumvention of the Sales Tax by imposing an equivalent tax on the use in New York of goods purchased without the imposition of such Sales Tax. Typically, Use Tax applies when property is acquired out of state and subsequently brought into the state or is purchased from an out-of-state vendor who has no obligation to collect Sales Tax. Due to differing local jurisdiction Sales Tax rates, Use Tax is also due when property is purchased in one locality and subsequently brought into another locality. Lawyers, accountants, and other individuals who are residents of New York

typically will owe SUT on personal purchases of such products as electronics (computers, DVD players, calculators, Blackberries, and Palm Pilots), books, clothing, jewelry, and other items of property purchased over the Internet or by mail-order catalog and delivered to the individual in New York without the payment of SUT.<sup>3</sup>

The Use Tax applies to New York resident individuals, estates and trusts<sup>4</sup> and businesses in the State whether conducted by entities such as corporations, partnerships or limited liability companies or individuals conducting business in their own names.<sup>5</sup> Significantly, however, a "welcome stranger" rule provides that the use of property or services purchased by the user while a "nonresident of this state" is exempt from Use Tax.<sup>6</sup> Thus, for example, an individual who first becomes a New York resident when he moves from California to New York, or a corporation that had never previously conducted business in New York, is not required to pay Use Tax on the tangible personal property purchased while a nonresident that is brought to New York upon the initial relocation to New York.

Prior to the 2003 legislation, individuals and businesses not required to be registered<sup>7</sup> with the New York State Department of Taxation and Finance (the "Department") as a vendor were required to report and remit any Use Tax liability on a *Purchaser's Report of Sales and Use Taxes* ("Former Form

ST-130") within 20 days from the date that either a purchase of property or services subject to tax and upon which Sales Tax was not paid was made, are first brought or delivered into New York.<sup>8</sup> In response to the May 2003 legislation, the Department revised and re-named Former Form ST-130 the *Business Purchaser's Report of Sales and Use Tax* ("Current Form ST-130") and limited its application to nonregistered businesses. The Department also created a new form, the *Individual Purchaser's Report of Sales and Use Tax*, Form ST-140, and limited its application to nonregistered individuals, estates and trusts who do not file personal income tax returns.

Individuals, estates, and trusts who file a New York income tax return do not file Form ST-140 but, instead, report any Use Tax due on their income tax returns. Thus, for the first time, non-registered individuals, estates and trusts have to file a different type of return than nonregistered businesses to report and remit Use Tax. The filing deadlines and type of disclosure required on these returns are not the same. Since the SUT filing obligations, returns and filing deadlines differ depending upon the type of taxpayer involved, an overview of the requirements and procedures to be followed this filing season by taxpayer type is useful.

### Nonregistered Individuals

By April 15, 2004, individuals who file a New York Resident Income Tax

Return (Form IT-200 and IT-201), or who file a Nonresident and Part Year Resident Income Tax Return (Form IT-203), or who do not file any New York income tax return but owe SUT, must determine the amount of SUT they owe for tax year 2003 and remit such amount to the State. The due date for reporting and paying the SUT for all individuals is the same -- the date that the Federal Income Tax Return must be filed. If the SUT is not timely reported or paid over to the State, interest and penalties apply.

Specifically, resident individuals are required to report any SUT due on Line 56 of their New York Resident Income Tax Returns. Nonresident and part-year residents are required to report any SUT due on Line 52 of their Nonresident Income Tax Returns. If the individual requests an extension of time to file the income tax return, *the individual must report any SUT due (as well as income tax due) at the time he or she requests the extension of time to file a return* on Form IT-370, *Application For Extension Of Time To File For Individuals*, and include payment of the SUT shown as due. Individuals who are residents for SUT purposes but are not residents for Personal Income Tax purposes and have no New York source income will not file New York Income Tax Returns, but instead will file Form ST-140, the *Individual Purchaser's Report of Sales and Use Tax*.

Recognizing that tax return preparers must now solicit information necessary to complete the new SUT line item from taxpayers who might not have kept diligent records of purchase transactions, the Department created a "Sales and Use Tax Chart" (the "Chart") that allows individuals to calculate SUT due on personal purchases of individual items and services costing less than \$1,000 based upon the individual's Federal Adjusted Gross Income ("AGI"). Under the Chart, the tax ranges from \$6 for individuals with zero AGI to a maximum annual SUT of \$200 for individuals with AGI of approximately \$580,000 or more. Individuals who do not file any New York PIT returns may also use the Chart to calculate and report the SUT due on Form ST-140. If

any taxpayer determines that he owes less SUT for personal purchases that each cost less than \$1,000 based upon an exact calculation, the taxpayer may ignore the Chart and report the amount determined on an exact basis on the relevant SUT line.

For each separate item or service purchased at a cost of \$1,000 or more, the taxpayer must calculate the exact amount of SUT due using worksheets and the rates by jurisdiction provided in the Instructions to the returns.<sup>9</sup> Individuals filing an income tax return will report the aggregate amount of tax due on the SUT line (i.e., Chart amount plus exact amount of SUT due, if any, on purchases costing \$1,000 or more). Individuals who do not file an income tax return will report and pay SUT on Form ST-140 in the same manner. No further detail of the purchase is required, unless an item or service costs \$25,000 or more. Any individual reporting a SUT liability in respect of an item costing \$25,000 or more must complete an additional form, Form IT-135, *Sales and Use Tax Report For Purchases of Items and Services Costing \$25,000 Or More*, which details each such transaction (i.e., date, description of item, vendor's name and address, delivery address, address of use and purchase price). Form IT-135 must be attached to either the individual's income tax return or Form ST-140.

If the individual is married and files a joint return, he or she may include the spouse's SUT liability for the spouse's personal purchases on the joint return. Individuals who have paid sales or use tax to another taxing jurisdiction may be entitled to a credit for the tax paid to the other jurisdiction, but the credit is contingent upon the other jurisdiction providing a reciprocal credit for SUT.<sup>10</sup> If an individual determines that he or she has overpaid any SUT to the Department, he or she must file Form AU-11, *Application For Credit or Refund of Sales or Use Tax*. Conversely, an individual who files an income tax return and later determines that he or she owes additional SUT is instructed to report the additional amount of SUT due on Form ST-140. The Department does not

want an individual to file an amended income tax return to report additional SUT due to the State.

### **Individuals' Business<sup>11</sup>**

Sole proprietors and other individuals who file a Federal Schedule E, Schedule C or Schedule F are required to report and pay SUT on all business-related purchases on their income tax return, or Form ST-140 if they do not file a New York income tax return. The due dates for reporting and paying the SUT are the same as those articulated for individuals above. Individuals filing an income tax return solely report one aggregate amount of SUT. Individuals filing Form ST-140 must separately report the SUT due for personal and business purchases.

The major difference in calculating the SUT due for business-related purchases is that such taxpayers may not utilize the Chart; an exact calculation of SUT is necessary.<sup>12</sup> Also, a sole proprietor who engages in business in New York but has no permanent place of abode in New York is considered to be a resident for SUT purposes in the location where the individual is doing business, with respect to purchases of property or services used in the business. The sole proprietor will file a New York Nonresident and Part Year Resident Income Tax Return and owe SUT only on purchases made with respect to the business operated in New York. Conversely, a sole proprietor who files as a resident of New York and who maintains a permanent place of abode in New York will owe SUT on both personal and business purchases.

### **Estates and Trusts**

A nonregistered trust or estate is a resident only if it "is carrying on a business, trade, profession or employment in New York"; the county or city where the business is conducted is the trust or estate's residence.<sup>13</sup> As such, the Department instructs the Fiduciary of a trust or estate to report and pay SUT solely on business-related purchases of the trust or estate, either on Form IT-205, *Fiduciary Income Tax Return* or on Form ST-140, by the date that the trust

or estate's Federal Income Tax return is due.

### Business Entities

Most law and accounting firms and other nonregistered business entities that are partnerships, LLC's or corporations, are required to report and pay SUT on Current Form ST-130, *Business Purchaser's Report of Sales and Use Tax*. This method of filing is consistent with prior practice; only the name of the Form has changed. Accordingly, SUT must be paid within 20 days from the date the business purchases property or services subject to tax and upon which

Sales Tax was not paid. An exact calculation of the SUT is necessary, and details of purchases required.

**Registered Individuals, Estates, Trusts and Business Entities.** Individuals, estates, trusts, and business entities that are registered or required to be registered<sup>14</sup> with the Department as a vendor continue to report and pay all SUT on purchases related to their registered business on periodic (*i.e.*, quarterly or monthly) SUT returns. Personal purchases made by these persons are however to be reported and paid in accordance with the rules discussed above (*i.e.*, via the filing of an income tax return, Form ST-130 or Form ST-140).

Despite the multiple forms, for most individuals the only additional obligation will be to fill out SUT Line 56 or 52 on their Personal Income Tax returns. Given the fast-approaching April 15, 2004, SUT reporting and payment deadline, taxpayers and their advisors need to review thoroughly the SUT taxes unpaid on individual purchases, so that their April 15 income tax filings and tax payments are in order. One can hope that the 2003 SUT amendment ushers in a sound union between taxpayers' SUT reporting and payment obligations and the Department's enforcement thereof.

<sup>1</sup> Tax Law Section 1110.

<sup>2</sup> 2003 N.Y. Laws Part R3, section 1. Subsequently, technical legislation was enacted to provide that the newly added lines require the reporting of "sales and compensating use tax". Apparently, the amendment was considered necessary because it was felt that most persons do not understand what the Use Tax is without a reference to the Sales Tax. In substance, however, the amendment primarily informs and requires taxpayers to report and pay New York Use Tax.

<sup>3</sup> Residents of New York who purchase items in New York that are delivered outside New York do not owe SUT on the purchases. Only when the resident individual subsequently brings the property into New York would he or she have a Use Tax liability.

<sup>4</sup> The SUT residency rules are broader than those applicable for the purpose of treating someone as a New York resident under the Personal Income Tax. Any individual maintaining a "permanent place of abode" in New York State is a resident for SUT purposes without regard to the number of days the individual is present in New York. 20 NYCRR §526.15.

<sup>5</sup> The SUT Regulations provide that a corporation is a resident of New York if it is "doing business," "maintaining a place of business" or "carrying on in this State any employment, trade, business or profession." 20 NYCRR §526.15(b).

<sup>6</sup> Tax Law Section 1118(2).

<sup>7</sup> Section 1134 of the Tax Law governs who must "file with the commissioner a certificate of registration" for SUT purposes: (i) any person who is required to collect SUT and is commencing or opening a new place of business (*i.e.*, any vendor of tangible personal property); (ii) any person who purchases or sells tangible personal property for resale and is commencing or opening a new place of business; (iii) any person who sells automotive fuel; (iv) any person who takes possession of or pays for business assets under a bulk sale; (v) any person who sells cigarettes; and (vi) any person who has previously had its certificate of authority revoked. A person who otherwise is not required to register with the Department, may voluntarily register and must file returns and pay tax in accordance with the rules set forth in the SUT regulations and statute for persons required to register with the Department. 20 NYCRR § 533.3(a)(1).

<sup>8</sup> 20 NYCRR §531.6(b).

<sup>9</sup> If an individual buys multiple items from a vendor each individual item of property must be considered separately when determining if it satisfies the \$1,000 Chart threshold. For example, if an individual purchases 4 chairs that each cost \$300 and 1 table that costs \$200 dollars, the Chart is applicable for all items since each individual item costs less than \$1,000. Additionally, when determining whether an item exceeds the \$1,000 threshold, the cost for any shipping and handling should be ignored. Once it is determined that an item satisfies the \$1,000 threshold, however, the cost of any shipping and handling must be included in the SUT tax base when calculating the total amount of SUT due on the purchase.

<sup>10</sup> See NY Dept. Tax'n & Fin., Publication 39, *A Guide To New York State Reciprocal Credits For Sales Taxes Paid To Other States*, Jan. 2004.

<sup>11</sup> This section discusses the rules applicable to businesses that are not registered, or required to be registered, with the Department. See discussion *infra* for registered individuals, estates, trusts, and business entities, as well as footnote 8 for a discussion of who is required to be registered.

<sup>12</sup> Presumably, the Department concluded that businesses must maintain records of all purchases and, thus, can compute SUT exactly.

<sup>13</sup> NY Dept of Tax'n & Fin., Instructions for Form IT-205, Form IT-205-I; NY Dep't of Tax'n & Fin., Instructions for Form ST-140, Form ST-140-I; Publication 774, *supra* note 12.

<sup>14</sup> See *supra* footnote 8 for a discussion of who is required to be registered for SUT purposes.

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