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New York State's Tax Amnesty Is Under Way

By: Joseph Lipari and Carolyn Joy Lee

Across the country, state budgets are in tatters. The economic downturn experienced over the past two years has cut significantly into sales tax, corporate tax and individual income tax payments. New York State is particularly sensitive to Wall Street's financial condition, and a fall off in bonuses and capital gains has a marked effect on its State and City revenues.

On top of the difficult economy, federal tax legislation has compounded the States' problems. The federal economic stimulus legislation enacted last March (P.L. 107-147) included significant tax incentives, some retroactive to 2001. Many jurisdictions concluded that the package was simply too costly; they therefore "decoupled" from the federal 30% bonus depreciation, and continue to utilize the "usual" cost recovery schedules. New York City was among these, decoupling in respect of areas north of Houston Street. New York State, however, conformed to the federal stimulus package and allowed bonus depreciation, albeit at a further cost to State revenues.

In addition to the State tax costs of the stimulus package, the June, 2001 federal legislation (P.L. 107-16), which supposedly repealed the federal estate tax ten years hence, had an immediate adverse effect on state tax revenues. The repeal beginning in 2002, of the 16% federal credit that had been allowed for state death taxes, in many states effectively repealed the state

death taxes, while increasing federal estate tax collections. New York's estate tax is written in a fashion that precluded such an automatic reduction in New York death tax, meaning New York estates are now more heavily taxed. States such as Florida, however, have lost hundreds of millions of dollars of estate tax revenues to the federal government.

What all these various influences have conspired to create is a fairly alarming state fiscal picture. All around the country states are looking for ways to plug the holes in their budgets. One of the choices they are making is to bring in revenue by offering a tax amnesty. Penalties are waived, interest may be reduced or even eliminated, and the backlog of taxes due but not collected will, it is hoped, be turned into cash. New Jersey offered an amnesty program last spring; Connecticut and Massachusetts have just completed theirs; Kentucky, Ohio, Missouri, Oklahoma and South Carolina all offered amnesty programs this year as well.

For New York State, which currently faces a projected deficit rumored to be as high as \$8 billion in this fiscal year alone, an amnesty cannot fill the hole, but it may help. This year's State budget legislation thus included a provision for a New York State tax amnesty. L. 2002, Ch. 85 (May 29, 2002). Previous New York State amnesties have been offered in 1994 and 1996-97, and while recurring amnesties send a

mixed message as to the costs and consequences of failing to pay one's taxes, the decision nevertheless was made to offer an amnesty program once more.

On Monday, November 18, 2002, Commissioner Arthur Roth of the New York State Department of Taxation & Finance announced that New York's tax amnesty program would start that very day, and run until January 31, 2003. This amnesty features:

- 1) a waiver of all civil penalties,
- 2) a 2% reduction in the rate of interest charged on outstanding tax liabilities; and
- 3) immunity from all administrative, civil and criminal prosecution for taxes for which amnesty is granted.

Importantly, on April 1, 2003, New York's interest rates on underpaid taxes will increase by an additional 2%. There is therefore a 4 percentage point difference between the interest that is payable under amnesty and the interest that will be charged on and after April 1, 2003.

Taxpayers who are eligible for amnesty include those who, for an eligible tax and tax period, an eligible use, or an eligible transaction:

- did not file a required return or report,
- filed a return but understated the tax due, or
- have an outstanding New York tax assessment.

Under amnesty, people who have not filed returns in the past can come

forward and pay their back taxes for all open years with reduced interest, without penalties, and without fear of criminal prosecution. Those who have filed returns – even taxpayers who have been audited and assessed for delinquent taxes – likewise can eliminate all penalties and enjoy a reduced rate of interest.

Availability of Amnesty

In general, amnesty is available for tax liabilities for all tax periods ending (or uses or transactions occurring) prior to January 1, 2001. In the case of taxes that require the filing of quarterly returns, or an annual return due on the last day of February (e.g., sales tax), the amnesty program will apply to taxes due for tax periods ending, or transactions or uses occurring, on or before February 28, 2001. Tax amnesty also applies to estate tax liabilities of decedents with a date of death on or before February 1, 2000.

The long list of the New York taxes that are eligible for amnesty includes: personal income and earnings taxes; numerous corporate and franchise taxes; withholding taxes; sales and use taxes; excise taxes; and miscellaneous taxes such as highway use tax, estate tax, gift tax, generation-skipping transfer tax, and the repealed New York State unincorporated business tax and 10% real property transfer gains tax. Among the State taxes that are not covered by amnesty are the real estate transfer tax, mortgage recording tax, Article 32 bank tax, Article 33 insurance corporation tax, and certain Article 9 taxes. Moreover, penalties on “responsible officers” in respect of fuels and petroleum business taxes and personal income tax withholding are not covered by amnesty.

Local taxes that are administered by the State Tax Department, for example New York City’s resident income tax, and local sales and use taxes, also are included in the amnesty. It is very important to be aware, however, that taxes that are administered by New York City are not part of the amnesty program. Thus, for example, amnesty is available for unpaid State corporate tax due under Article 9-A, but no amnesty

program is available for unpaid City General Corporation Tax. Nonfiling taxpayers who are considering filing under the State amnesty program should therefore consider whether they might also have a comparable New York City exposure. If they do, it may be advisable to file a Voluntary Disclosure request for New York City, and seek to limit the exposure for New York City taxes and penalties.

To qualify for the benefits of New York State’s amnesty program a taxpayer must apply for amnesty between November 18, 2002 and January 31, 2003. Applications must be postmarked by January 31, 2003 if sent by mail, or must be submitted by midnight eastern standard time January 31, 2003 if submitted over the Internet. Tax amnesty payments must be made in full by the later of March 15, 2003, or the date specified in a bill from the Tax Department. If taxes and interest are not paid in full by that deadline, amnesty will be denied.

Taxpayers Not Eligible

A taxpayer who was granted amnesty under either of the 1994 or 1996-97 New York State tax amnesty programs is not eligible for the 2002-03 tax amnesty program for the same taxes for which amnesty was previously granted. For example, if amnesty had been obtained under either of the 1994 or 1996-97 tax amnesty programs for an Article 9-A corporation tax liability, the taxpayer is not eligible under the current program for amnesty with respect to unpaid Article 9-A corporation taxes. However, the taxpayer would retain eligibility for other taxes, such as for withholding tax or sales tax, under the 2002-03 tax amnesty program.

Business taxpayers that have, or that are part of a combined filing group that has, more than 500 employees in the United States on the date of the amnesty application are not eligible for amnesty with respect to most of the taxes otherwise covered by amnesty, including Article 9 and 9-A taxes, personal income taxes, withholding, and sales and use tax.

A taxpayer is not eligible for amnesty for a tax and period in which the taxpayer is the subject of a criminal investigation or pending criminal prosecution relating to such tax and period. However, the taxpayer may apply for all other eligible taxes and periods which are not the subject of any such pending proceeding. If an application is denied due to an ongoing criminal investigation or pending criminal prosecution, the taxpayer may resubmit the amnesty application if these criminal proceedings do not result in conviction. The resubmission must be within 30 days of official notice that the investigation has been terminated, or within 30 days of the conclusion of the prosecution. If the taxpayer is never officially notified of the termination of a criminal investigation, the resubmission must be made within five years and thirty days of the date the Department mails its notification of denial of amnesty.

A taxpayer who has been convicted of a crime related to a tax is not eligible for amnesty for any period or any assessment relating to that same tax.

If a taxpayer currently is a party to civil litigation involving a disputed assessment, it must withdraw from such litigation in order to obtain amnesty. The State has explained that, in the case of any protest of a civil case currently before the Bureau of Conciliation and Mediation Services or the Division of Tax Appeals, the taxpayer must submit a withdrawal of the protest before an amnesty application is filed. If the amnesty application is denied, that withdrawal will not be filed, and the protest can continue. However, if amnesty is granted the withdrawal of protest will be filed and become final. If amnesty is granted but subsequently revoked, for example because the amnesty application is found to be false or fraudulent, the protest will still be considered terminated. In the case of a proceeding pending in civil court, the taxpayer is similarly required to discontinue the proceedings, by contacting the court that has jurisdiction over such case.

Applying for Amnesty

Applying for amnesty is as simple as filling out a form. New York has issued a new form, AM-2, which is a one-page amnesty application. Many taxpayers who already have an assessment against them also are receiving rather stern letters from New York State which explain how to apply for amnesty, and inform the taxpayer of the amounts owed and the savings amnesty represents. The Tax Department may also send such taxpayers a prepared Form AM-1, setting forth the taxes New York believes are due and are eligible for amnesty. That Form AM-1 can be completed and submitted by the taxpayer as an amnesty application.

A separate application form must be filed for each tax type for which the taxpayer is making an amnesty application. The application forms can be completed and submitted by mail on or before January 31, 2003. Alternatively, taxpayers can file over the telephone, or in certain cases application may be made over the Internet. With a properly completed Power of Attorney, a tax representative can prepare and submit the amnesty application.

Recognizing the possibility of last-minute problems, New York's Publication AM-101 further provides that, if a taxpayer cannot locate an amnesty application form, a letter postmarked on or before January 31, 2003 will suffice, provided it includes a variety of specified information and is accompanied by payment of the "best estimate" of the tax and interest owed. A best estimate is all of the tax and half of the interest due.

For taxpayers who have not yet filed returns, or filed incomplete returns, the amnesty application must be accompanied by completed or amended tax returns.

For taxpayers currently in settlement negotiations or who have recently settled cases, the amnesty appears to be slightly more complicated. We are continuing to follow this, as the procedures are still being developed.

To qualify for amnesty, all amounts owed must be paid with the application or by March 15, 2003 (or, if later, by the date set forth in a tax amnesty bill mailed to the taxpayer by the State) The State's amnesty website, www.nystax-amnesty.com, includes an interest computation feature. Alternatively, taxpayers can make the same "best estimate"

that they owe all of the tax and half of the usual statutory interest. Taxpayers can pay the tax and interest owed electronically by one of two methods: electronic funds withdrawal directly from a savings or checking account, or with a Discover®, Novus® or MasterCard®. (The credit card service provider charges a convenience fee to taxpayers to cover the cost of providing this service.) Personal income taxpayers may also use Visa® to make a payment. The payment is effective on the date it is charged.

In many cases taxpayers with outstanding New York tax issues will find amnesty an appealing and cost-effective way to resolve their tax liabilities. There may, however, be cases in which an amnesty filing raises other issues, for example federally or with New York City, or because the amnesty application must cover all open years. In such circumstances, careful consideration must be given to the possible collateral effects of an amnesty filing.

If you have any questions regarding New York State's amnesty, please do not hesitate to contact Carolyn Joy Lee at (212) 903-8761, or Joseph Lipari at (212) 903-8765.

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