NEW YORK ENACTS MAJOR CORPORATE TAXATION REFORMS

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New York enacted major corporate tax reforms on March 31, 2014 when Governor Andrew Cuomo signed the final New York State budget legislation for Fiscal Year 2014-2015. Generally, the provisions are effective for tax years beginning on or after January 1, 2015.[62] The new law changes do not automatically affect New York City taxes; conformity by New York City will require additional legislation. Significant changes are outlined below:

NEW NEXUS STANDARD

Historically, New York State taxed out-of-state corporations that had a physical nexus with the state, although physical nexus could be indirect or attenuated. The reform abandons the concept of physical nexus and adopts a new economic standard based on an annual dollar threshold of receipts derived from the state. By doing so New York significantly expands the number of corporations that will be subject to tax in the state. Corporations will now be taxable in New York for purposes of the corporation franchise tax and the metropolitan transportation business tax ("M.T.A.") surcharge if they have $1 million or more of receipts from activity in New York. Furthermore, a corporation that is part of a combined reporting group and has receipts derived from New York of less than $1 million but more than $10,000 satisfies the threshold requirement if the New York receipts of all group members who individually exceed $10,000 equal $1 million or more in the aggregate.

FOREIGN (NON-U.S.) CORPORATIONS

Foreign (non-U.S.) corporations, referred to as alien corporations, will only be subject to New York tax if they are considered as U.S. domestic corporations under Internal Revenue Code (I.R.C.) §7701 or have effectively connected income under I.R.C. §882 for the tax year. This may have the effect of reducing the tax base of those foreign corporations that are subject to New York tax. However, the new nexus standard also applies, and thus, more foreign corporations may end up being subject to New York tax (alone or on a combined basis) in the future. Note that a

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62 The Budget Bill is available here: http://open.nysenate.gov/legislation/bill/S6359D-2013

foreign corporation cannot claim treaty benefits to avoid U.S. tax unless the treaty specifically so provides.

BANKING CORPORATIONS

Banking corporations will no longer be subject to a separate taxing regime but will be subject to the same taxing regime as other commercial corporations.[63] Additionally, banks meeting certain requirements and general business corporations are required to be included in the same combined filing group.

NEW (OFTEN LOWER) TAX RATES: N.O.L.'S AND TAX CREDITS

The existing corporate franchise tax rate of 7.1% is reduced to 6.5% effective January 1, 2016.[64] The M.T.A. surcharge is increased to 25.6% effective for tax years beginning on or after January 1, 2015 and before January 1, 2016. Thereafter, the rate would be adjusted annually at the Commissioner's discretion depending on the state's financial need. Additionally, the M.T.A. surcharge will be assessed based on the new economic nexus standard and on the highest of the tax bases, determined before credits rather than after credits.

"The existing corporate franchise tax rate of 7.1% is reduced to 6.5% effective January 1, 2016. "

All corporations will now calculate tax on the following three tax bases (reduced from four): business income base, capital base, and fixed dollar minimum base. The new law adopts additional tax brackets and substantially increases the tax amount for some brackets.[65] The capital base tax rate will be completely phased out by 2021, with qualified New York manufacturers paying a lower tax rate during the phase-out period.[66]

Special rules apply to qualified New York manufacturers, who will have an effective net income tax rate of 0%.

Changes are made to the use and calculation of net operating losses ("N.O.L.'s") available for use for New York tax purposes. Tax credits have been enhanced.

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63 Article 32 of the New York Tax Law was repealed under the Budget Bill.

64 Some taxpayers, such as qualified New York manufacturers, will enjoy an even lower rate.

65 For example, the current top bracket applies to taxpayers with receipts of over $25 million. The applicable tax amount for such taxpayers is $5,000. Under the new law, the top bracket would be for taxpayers with receipts of over $1 billion, and the tax amount would be $200,000. There are four other brackets in between.

66 The new legislation also caps the tax paid under the capital base during the phase-out to $5 million for tax years beginning on or after January 1, 2008 and before January 1, 2011 and $1 million for taxable years beginning on or after January 1, 2011.

CHANGES TO APPORTIONMENT RULES

The New York apportionment factor is a single receipts factor with a set of complex customer-based sourcing rules. Specific provisions exist for various types of sales including other business receipts, rents and royalties, and digital products. Under the new law an annual irrevocable election can be made to use in the numerator either a fixed amount of 8% of all net income from qualified financial instruments or a customer location apportionment factor. Under the new law receipts from intangible property, such as patents and trademarks, will be apportioned to New York based on the extent of activities related to the intangible that take place in the state. Receipts from services and other business transactions will be apportioned to New York based on a customer location hierarchy, specifically starting with where the customer receiving the benefit of the transaction is located.

COMBINED REPORTING

Unitary combined reporting will be required for tax years beginning on or after January 1, 2015. Combined reporting will be required for any taxpayer that is part of an affiliated group (using a more than 50% ownership or controls test by voting power) and is engaged in a unitary business with those corporations. It should be noted that combined reporting will apply to alien corporations that satisfy state ownership and unitary thresholds and that are considered U.S. domestic entities under I.R.C. §7701 or have effectively connected income under I.R.C. §882 for the tax year. Additionally, the new law provides taxpayers an election to file a combined return with a commonly owned group of corporations.