



Insights: Publications

4 Key Takeaways | New York Tax Developments

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On January 16th, Kilpatrick tax partner **Jeff Reed** presented during a New Jersey Society of CPAs, Bergen County seminar. Jeff discussed recent New York tax developments.

Here are 4 key takeaways from the webinar:

1. New Revenue Sources Could Put Less Pressure on Income/Sales Tax Systems: New York has received several billion dollars in revenue over the last few years from its excise tax on mobile sports wagering. It is also receiving revenue from a recent excise tax on cannabis. Most recently, congestion pricing was implemented in lower Manhattan, which seems to be reducing congestion and generating substantial tolls based on early reports. One thing to watch is whether new state revenue streams put less pressure on the income tax and sales/use tax systems to generate revenue.

2. Litigation Relating to New York Corporate Tax Reform Increasing: In 2015, New York “modernized” its corporate tax system to eliminate the bank tax, implement market-based sourcing, and adopt mandatory unitary combined reporting. The interpretive regulations were finalized at the end of 2023 and are retroactive to 2015. A recent decision holds that the retroactivity does not violate due process, because earlier versions of the regulations were posted online, putting taxpayers on notice about what the ultimate positions in the regulations were likely to be. Also relating to corporate tax reform, a recent administrative law judge determination concludes that the use of contract manufacturing does not make a company ineligible for the “New York Qualifying Manufacturer” classification. Another administrative law judge determination holds that each member of a combined group must individually qualify as a Qualifying Emerging Technology Company (“QETC”) for the group to receive the benefit of lower QETC tax rates. Look for more litigated cases addressing New York Corporate Tax Reform related issues in the coming months.

3. Tax Cuts and Jobs Act Related Conformity and PTET Issues: States generally responded to the \$10,000 state and local tax deduction limitation from the 2017 Tax Cuts and Jobs Act (TCJA) by offering pass-through entity tax elections to move the tax to the entity level. In New York, the PTET election must be made by March 15th, which is earlier than in most states. A re-occurring PTET issue is whether the benefits of PTET apply the year a pass-through entity is acquired. New York has issued helpful Q+As that address this issue and other PTET related questions. A New York bill would change the state's treatment of GILTI. More generally, GILTI is an issue that many jurisdictions addressed quickly and superficially in 2018 informal guidance shortly after the Tax Cuts and Jobs Act became law and have not addressed since, leading to lack of clarity, controversy, and litigation. Recently, the New Jersey Tax Court ruled that the 2017 mandatory repatriation tax is not a taxable

dividend to individual New Jersey shareholders because the dividend is not distributed (rather the tax is on undistributed earnings). Expect to see more PTET issues and state issues relating to conformity to the TCJA.

4. New York Audits Continue to Ramp Up: The New York State Department of Taxation and Finance has an extensive team of auditors trained to conduct personal income, corporate income, sales and use tax, nonresident withholding/MCTMT, and fuels tax audits, among other audit types. In the personal income tax area, residency continues to be the chief audit issue, and there are also regular audits on the taxability of the sale of interests in a NY business by a nonresident. In the corporate income tax area, there are recurring issues, although the issues are more bespoke than under the pre-corporate tax reform years when it seemed every large corporate taxpayer had a NY combination audit. In the sales/use tax area, NY taxes information services and takes the position that software as a service (“SAAS”) is taxable as tangible property/canned software; there continue to be audits of online service providers and providers of data/ statistics who also provide some consulting/interpretive advice along with the raw data and information. Unlike in some states, NY will conduct sales/ use tax audits of businesses of all sizes, from the largest corporations to local small businesses, and the stakes are high because NY routinely imposes responsible officer liability on the managers/owners of businesses with sales/use tax liabilities.

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