ALM | LAW.COM

New York Law Journal

New York's Latest Legislative Session: What Passed, What Didn't, What's Next

By Sharon L. Klein

September 10, 2023

The first year of the 2023-2024 legislative session began Jan. 4, 2023 and ended June 8, 2023. Here are some of the most significant developments.

What Passed

2023-24 Executive Budget, Enacted April 27, 2023

Personal income tax rates

Although both Senate and Assembly Budget proposals called for an increase in personal income tax rates, no new changes were enacted in the final budget. Both houses proposed increasing the top income tax rate from 10.3% to 10.8% for those with taxable income between $5 million and $25 million. For income levels over $25 million, the proposals called for a rate increase from 10.9% to 11.4%.

Corporate tax rates

Corporate income tax rates were set to expire, but the budget extends the temporary 7.25% business income tax rate through 2026 for taxpayers with a business income base over $5 million.

Pass-through entity tax (PTET)

Previously, in calculating pass-through entity taxable income, an entity was required to deduct the PTET itself, resulting in a circular calculation. The new law resolves the issue with a technical correction that requires entities to include any PTET taxes, or substantially similar taxes paid to other jurisdictions, in the computation of New York and NYC pass-through entity taxable income.

The new law also corrects what the Memorandum in Support describes as an unintentional omission of city resident trusts and estates from participating in NYC PTET. Specifically, the budget amends the definition of "city taxpayer" to include city resident trusts and estates so that S-corporations and partnerships with city resident trust and estate owners may elect to participate in NYC PTET.

Permanent Electronic Notarization Law Effective as of Jan. 31, 2023

Remote online notarization (RON) and remote-ink notarization (RIN) both allow a notary to witness documents via live audiovisual technology. RON is a completely electronic process, whereas RIN requires wet ink notarization of paper documents. RINs are not permitted in New York after Jan. 31, 2023.

SHARON L. KLEIN

On Dec. 22, 2021, Gov. Kathy Hochul enacted RON legislation (N.Y. Exec. Law §135-c Electronic Notarization), which became effective Jan. 31, 2023. RONs require a notary to register with the New York Department of State prior to performing electronic notarizations and pay the $60 fee. Regulations (19 NYCRR § 182.2-182.11) governing the performance of notarial acts, including electronic notarial acts, were made effective as of Jan. 25, 2023.

Beginning Jan. 25, 2023, *all* notaries, including electronic notaries and notaries who only provide traditional in-person services, are required to keep a journal of all notarial acts performed, including the type of identification provided, for 10 years.

For electronic notarization, the notary public must be physically located within New York at the time of the notarization. The principal need not be in New York. The notary must identify the principal through one of the following methods:

1. the notary's personal knowledge of the principal;

2. by means of communication technology that facilitates remote presentation by the principal of an official, acceptable form of ID; or

3. through oath or affirmation of a witness who personally knows the principal, and who is either personally known to the notary or identified by the previously referenced means of communication technology.

The notary must be able to see and interact, in real-time, with the remote signer through audio-visual communication technology. The technology must have security protocols in place

to prevent unauthorized access. The notary must make and keep an audio-visual recording of the electronic notarization and a back-up recording, which must be kept at least 10 years.

After the principal has executed the document, it *must* be transmitted through the software platform to the notary public for officiating. The notary applies stamp and signature after confirming the document is the same as the one signed electronically and *must* add the following to the jurat "This electronic notarial act involved a remote online appearance involving the use of communication technology."

The electronic notarial process does not require transmission of paper records or ink signatures of either the principal or electronic notary. The result of the process is an electronically created, electronically stored document that may be done online.

The new law does not address remote witnessing of wills.

New Jersey Strikes Back

Generally, an employee pays taxes in the jurisdiction in which the employee physically performs services. Even prior to the pandemic, however, New York was one of six states that imposed a so-called "convenience of employer rule."

Pursuant to this rule, if employees work from home through the employer's necessity, the employee will be taxed in the employee's telecommuting location. If, however, the employee telecommutes for their own convenience, the employee's wages for those workdays will be classified as if the employee was working from the employer's physical office.

With millions continuing to telecommute in the post-pandemic world, the convenience rule could tax employees as if physically working in the state of their employer's office, despite never setting foot in that location.

Since New Jersey offers its residents a tax credit for taxes paid to other states so its residents can avoid double taxation, it was allegedly losing billions in foregone revenue to New York.

On July 21, 2023, Gov. Phil Murphy signed into law legislation (A4649) that contains three components.

The first is to adopt New Jersey's own convenience of employer rule to permit the state to tax employees of New Jersey employers if they reside in another state and work from home for their own convenience (instead of the employer's need). A stated objective is to create parity with New York (a/k/a retaliation…). Second, the new law incentivizes New Jersey residents with tax credits to challenge other states (New York) that collect taxes for services the employees performed while physically located in New Jersey. Third, it creates a pilot program to incentivize job growth and capital investments by providing grants to businesses that assign their employees to New Jersey locations.

The new law is retroactive to Jan. 1, 2023.

Second Homeowners in New York Win Big … Permanently

Although the statutory residence legislation in New York is not new, its interpretation in a recent taxpayer victory case is a very significant statutory development. Pursuant to N.Y. Tax Law §605(b)(1)(B), an individual can be taxed as a statutory resident in New York if that individual (1) maintains a permanent place of abode in New York and (2) spends 183 days or more in the state during the taxable year.

The issue in *Matter of Obus and Coulson*, DTA No. 827736, was whether a New Jersey domiciliary who owned a vacation home in New York, which he and his wife used just a couple of weeks a year, was taxable as a statutory resident. Since the taxpayer worked in New York, and was physically present for more than 183 days, the sole issue in the case was whether he maintained a permanent place of abode during the tax years in question.

The administrative law judge declined to allow taxpayers to rely on *Gaied v. Tax Appeals Tribunal*, 22 N.Y.3d 592 (2014). In *Gaied*, the petitioner was a New Jersey domiciliary who worked in New York and owned an apartment building where his parents resided, but he had no bedroom or personal belongings there. The Court of Appeals concluded a mere ownership interest is not sufficient to create a permanent place of abode—there must be some basis to conclude that the residence was utilized as the taxpayer's residence.

The administrative law judge in *Obus* determined that, since the taxpayers purchased the home as a vacation home for their enjoyment, *Gaied* simply did not apply. Even though taxpayers had rented separate living quarters at the house year-round to a tenant and used the house themselves only two to three weeks a year, the judge found that did not prevent them from using the property, nor did the fact that they used it exclusively for vacations transform its characterization as a permanent place of abode. In *Matter of Obus v New York State Tax Appeals Trib.*, 206 A.D.3d 1511 (N.Y. App. Div. 2022), the Appellate Division, Third Department, disagreed.

Focusing on the legislative intent of the law, the appellate court noted that the statutory resident law was intended to discourage tax evasion by those who are for all intents and purposes residents of the state. Citing *Gaied,* the court noted

that, to qualify as a permanent place of abode, there must be a showing that the taxpayer has a residential interest in the property. Accordingly, the taxpayer must have "utilized" the dwelling as their residence, which is a fact sensitive and subjective inquiry.

Based on the facts, including the taxpayer's minimal use of the property, which was far from his place of business in NYC, the court found that the taxpayer, who fell outside the target statutory resident class of taxpayers, did not have a residential interest in the vacation home.

On Feb. 9, 2023, the motion for leave to appeal was denied (*Matter of Obus v New York State Tax Appeals Trib.*, 39 N.Y.3d 907 (2023)), rendering the Court of Appeals decision final and binding.

What Didn't Pass

Governor Vetoes Proposal Requiring Principals to Notify Co-Trustees and Co-Beneficiaries When Signing Power of Attorney (POA)

On Dec. 16, 2022, Gov. Kathy Hochul vetoed a proposal (A.4601/S.8892) that provided that, when a principal who is a trustee of a trust signed a POA that allowed the agent to affect the trust and the agent was not a co-trustee, the principal had to notify all other co-trustees of the signing and identify the agent. Similarly, if a beneficiary signed a POA and the agent was not a co-beneficiary, the principal had to notify all other beneficiaries of the signing and identify the agent.

The justification for the proposed change was to prevent a nonparty raiding the trust and taking all the funds. However, with regard to a trustee, fiduciary duties are personal and cannot be delegated. With regard to a beneficiary, it is unclear how a beneficiary's agent could raid a trust.

The veto message (Veto Message – No 111) also included the justification that "the notice requirement called for in the bill with respect to beneficiaries may pose challenges since beneficiaries of a trust are not always known to be beneficiaries."

What's Next?

Proposal to Fully Decouple from Federal Opportunity Zone Tax (in Assembly and Senate Committees)

Federal law grants investors in Qualified Opportunity Zones (QOZ) three benefits: 1. defer capital gains until sale or Dec. 31, 2026; 2. increase basis (reduce gain) by 10% if QOZ investment is held for five years/15% if held for seven years before Dec. 31, 2026; and 3. completely exclude gain for QOZ investments held at least 10 years. New York's 2021-2022 Executive Budget eliminated the first two benefits. This proposal (A.2170/S.0543) would eliminate the third.

Proposal to Clarify Joint Account Ownership and Disposition (Passed Senate, in Assembly Committees)

New York Banking Law (NYBL) §675 creates two presumptions when a deposit is made into a joint bank account in the name of the depositor and another person. First, each account holder has the immediate ability to withdraw one-half of the deposited funds, which creates an irrevocable gift of one-half of the account to the other account holder, regardless of whether any funds are actually withdrawn. Second, on the death of one account holder, the balance automatically vests in the survivor.

Since many individuals open these types of accounts for convenience purposes only (for example an elderly person wishing to allow a child to write checks on their account), the statute can often thwart the intent of the depositor.

The presumption of an immediate gift also translates to immediate gift tax consequences if the gift exceeds the current annual exclusion amount and is not covered by the marital deduction. Consider, for example, that joint accounts between spouses, one of whom is not a U.S. citizen, could have an immediate federal gift tax consequence if the gift exceeds the annual exclusion for transfers to non-U.S. citizens ($175,000 for 2023).

In recognition of the fact that many depositors do not intend to make an irrevocable one-half gift to the other account holder or to leave the account to the survivor if the depositor dies first, NYBL §678 was enacted to establish "convenience accounts." These accounts allow the depositor and another account holder to withdraw funds for the depositor's benefit, while ownership of the funds remains in the depositor and, on the depositor's death, the funds pass to the depositor's estate.

However, convenience accounts have apparently not been widely adopted, and many employees of NY banking institutions may not even know of their existence.

This proposal (A.1578A/S 6545) would create NYBL §675-a and address these gifting and survivorship concerns. Specifically, with joint accounts in the name of a depositor and another person, title would be solely with the depositor. On the death of the depositor, the bank would deliver the funds in accordance with the contract, signature card or other governing document between bank and depositor, which is required to contain a choice of disposition on death to the depositors' estate (convenience account) or to a designated person (survivorship account). In default of designation, the funds would be paid to the depositor's estate.

Several versions of the current proposal have been introduced over the years, but none have yet passed.

Proposal to Reform New York Estate Tax; Establish Gift and Inheritance Tax (in Assembly and Senate Committees)

This bill (A.3193/S.2782) would lower New York's estate tax exemption to $750,000 and apply progressive marginal tax rates ranging from 5% to 50%, for estates over $30 million. The bill would introduce a gift tax and an inheritance tax system, subject to certain exceptions and credits. The

exemptions from the proposed gift and inheritance taxes are modest at $50,000 and $250,000, respectively, while the tax rates applicable to both would range from 5% to 50%.

Proposal to Increase Income Taxes on High Earners (in Assembly and Senate Committees)

This bill (A.3115/S.2059) would institute a progressive personal income tax. New rates would be added for single taxpayers earning more than $450,000 per year, and married taxpayers earning more than $500,000. Additional brackets are added in roughly $100,000 increments, with 0.5% tax increases per bracket, increasing the tax rate to 11% for an individual making $1 million per year, 12% for a married couple making $2 million per year, reaching 24% for an individual or married couple making $20 million per year.

Proposal to Apply 1% NYC Income Tax on Earnings of Non-NYC Residents (in Assembly Committees)

This proposal (A.6238), named the Infrastructure Jobs Act, would impose a 1% tax on the earnings in NYC of non-NYC residents. All revenue collected would be divided equally between the City of New York and the Metropolitan Transit Authority, reportedly allowing NYC to address its traffic congestion problems and upgrade its transportation infrastructure. Residents of New York who live outside of NYC would receive a dollar-for-dollar tax credit to offset real property taxes attributable to the taxpayer's primary residence.

Proposal to Impose Additional Capital Gains Tax (in Assembly and Senate Committees)

This proposal (A.2576/S.2162) would amend current law by introducing additional tax on capital gains. Currently, the highest federal tax rate on ordinary income is 37%, while the highest federal tax rate on long-term capital gains is 23.8%. Since New York applies a flat tax rate to all income, regardless of its character, the amended law would apply an additional New York tax of 13.2% to a taxpayer's long-term capital gains to bring the combined state and federal tax rate up to 37%, so the total tax does not differ between ordinary income and long-term capital gains. The proposal would be retroactively effective to taxable years beginning Jan. 1, 2021.

Proposal to Adopt the New York Trust Code

The New York Trust Code (NYTC) is a comprehensive statute that would modernize New York law, updating many statutory provisions to reflect current times, codifying existing case law, and generally providing a centralized statutory trust code.

Among the most important new provisions are the following: allowing nonjudicial settlement agreements; allowing judicial modification of dispositive provisions; allowing reformation to correct mistakes; codifying the standard of capacity necessary to create a revocable trust (same as required to make a will); allowing a testamentary trustee to resign without court approval; and adopting a New York Directed Trust Act, allowing a settlor to separate fiduciary responsibilities by naming a trust director with the authority to direct the trustee regarding the investment, management, or distribution of trust property.

The NYTC has been over a decade in the making, the result of comprehensive review and study by all the major professional associations in New York. It would apply not only to new trusts but to virtually all trusts created before the effective date unless there is a clear indication of contrary intent in the trust and vested rights will not be adversely affected.

Proposals to adopt the NYTC have previously been introduced, but have not yet passed. It is expected that the NYTC proposal will be reintroduced this legislative session when the legislature reconvenes for the 2024 year.

This article is for general information only and is not intended as an offer or solicitation for the sale of any financial product, service, or other professional advice. Wilmington Trust does not provide tax, legal or accounting advice. Professional advice always requires consideration of individual circumstances. Wilmington Trust is a registered service mark used in connection with various fiduciary and non-fiduciary services offered by certain subsidiaries of M&T Bank Corporation.

Sharon L. Klein *is Executive Vice President at Wilmington Trust, N.A.* *The author wishes to thank her colleagues* **James Byrne***, a Senior Wealth Relationship Manager, and* **Shaquille Kampta***, a Family Wealth Associate, for their valuable assistance. This article includes developments through Aug. 25, 2023.*

Sharon L. Klein
Executive Vice President

President, Family Wealth,
Eastern U.S. Region

Wilmington Trust, N.A.
277 Park Avenue, 26th Floor
New York, NY 10172
(P) 212-415-0531

sklein@wilmingtontrust.com
www.wilmingtontrust.com

Reprinted with permission from the September 10, 2023 edition of the NEW YORK LAW JOURNAL © 2023 ALM Global Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-256-2472 or reprints@alm.com. # NYLJ-9142023-49313