

# New York SALT Update: The Governor's Budget and Beyond

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## Learning Objectives



- Understand the potential impact of the Budget Bill and other pending legislative proposals on New York taxpayers.
- Predict which proposals have the best chance of becoming law, and those that will have a more difficult path in 2021.
- Analyze the impact of recent case developments and Department guidance on companies doing business in New York.

# Agenda

## New York Update

- New York State Budget
  - The Budget: What's In?
  - The Budget: What's Not?
- Other Recent Developments
  - Employment Tax Issues
  - Retroactivity and the *Lewis* Decision
  - Sales Tax Developments
  - Corporate Franchise Tax Developments
  - COVID and New York Statutes of Limitations



# The Governor's Fiscal Year 2022 Budget



# The Governor's Fiscal Year 2022 Budget

## The Process

- In January the Governor publishes the Budget Bill, after coordinating requests from executive agencies.
- The Legislature analyzes the Governor's budget, holds public hearings, and seeks further information from agencies.
- Both houses of the Legislature reach agreement on spending and revenue recommendations that may amend the Governor's proposed appropriation bills and related legislation.
- Budget due by end of March.



# The Governor's Fiscal Year 2022 Budget

## Department Appeals of Tax Tribunal Decisions

- Proposes authorizing the New York State Department of Taxation and Finance to appeal Tax Appeals Tribunal decisions to the Appellate Division of the New York Supreme Court.
  - Appeals related to taxes administered by the Department are first heard by the Division of Tax Appeals.
    - Appeals from the DTA are made to the Tribunal.
    - Currently, only the Taxpayer is authorized to appeal Tribunal decisions to the Appellate Division.



# The Governor's Fiscal Year 2022 Budget

## Personal Income Tax Proposals

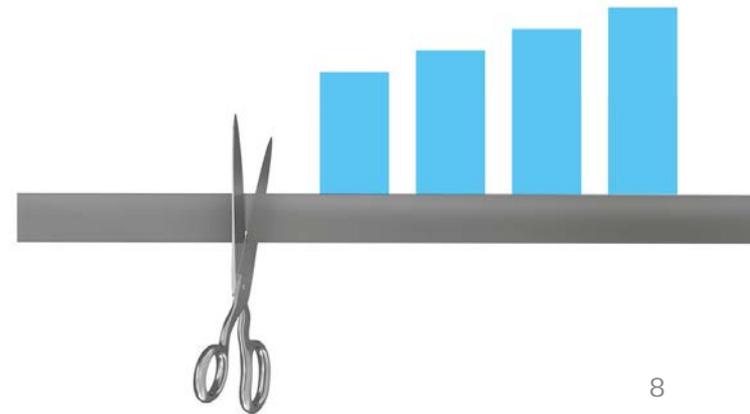
- "High Income Surcharge" – The Budget Bill would impose a temporary income tax surcharge on high-income taxpayers for Tax Years 2021 through 2023.

If the taxpayer's New York Taxable income is:	The surcharge rate is:
Over \$5,000,000 but not over \$10,000,000	0.50%
Over \$10,000,000 but not over \$25,000,000	1.00%
Over \$25,000,000 but not over \$50,000,000	1.50%
Over \$50,000,000 but not over \$100,000,000	1.75%
Over \$100,000,000	2.00%

# The Governor's Fiscal Year 2022 Budget

## Personal Income Tax Proposals, cont.

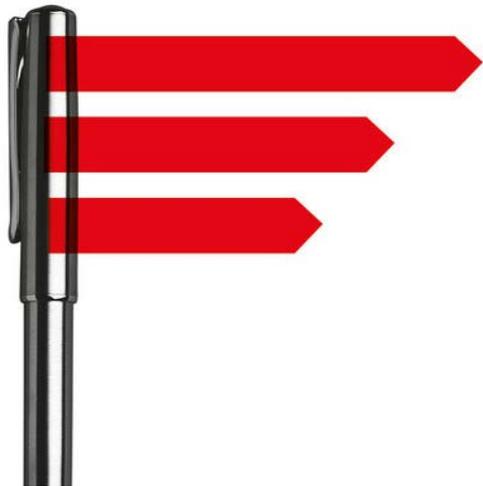
- One Year Delay of Middle Class Tax Cuts – The delay would require New York taxpayers to use the personal income tax rate schedules applicable in 2020 again in 2021, and the rate schedules currently applicable for Tax Years 2021 through 2024 would each be delayed by one year.



# The Governor's Fiscal Year 2022 Budget

## Pass-Through Proposal

- Create a new Article 24-A of the New York Tax Law, enacting an optional pass-through entity tax on the New York sourced income of partnerships and S corporations that are comprised solely of individual partners or shareholders.
- Pass-through entities with corporate members cannot elect in.
- Amend the personal income tax laws to authorize electing partners, members, and shareholders to a refundable tax credit equal to 92% of the pro rata share of taxes the electing entity paid under Article 24-A.



# The Governor's Fiscal Year 2022 Budget

## Other Notable Provisions

- Eliminate the S corporation election and require all federal S corporations to be treated as S corporations for state tax purposes.
- Legalize Adult-Use Cannabis – For the third consecutive year, the Budget Bill proposes authorizing and taxing adult-use cannabis.





# The Governor's Fiscal Year 2022 Budget

## Other Notable Provisions

### — Sales Tax Provisions:

- Subject vacation rentals to New York Sales Tax and New York City's hotel unit fee. The Budget Bill would also require "vacation rental marketplace providers" to collect sales tax on the vacation rentals that they facilitate.
- Technical correction to sales tax remote vendor registration would confirm the sales volume threshold that triggers New York's remote vendor sales tax registration and collection requirements from \$300,000 to \$500,000 over the previous four sales tax quarters.

# The Governor's Fiscal Year 2022 Budget

## What Did the Governor Exclude?

- Billionaire "Mark to Market" Tax – A.8277/A.10414 (2019/2020 Session)
- Carried Interest "Fairness Fee" – S.999/A.2195
- Stock Transfer Tax Rebate Repeal – S.1406
- Digital Ad Gross Revenues Tax – S.1124
- Digital Ad Sales Tax – S.302/A.734
- CEO "Pay Gap" Tax – S.1813/A.3691
- Corporate Tax Rate Increases



# Other Recent Developments



# Telecommuting to and from New York Area During COVID-19

- New York: You're still working here even if you're not.
- The New York State Department of Taxation and Finance issued guidance providing that New York-based employees teleworking outside the state due to the COVID-19 pandemic must continue to source their income to the state under the "convenience of the employer" test, unless the narrow "bona fide employer office" exception applies.
  - New York State Dep't of Tax'n and Fin., Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax (Oct. 22, 2020), [www.tax.ny.gov/pit/file/nonresident-faqs.htm](http://www.tax.ny.gov/pit/file/nonresident-faqs.htm) (accessed Jan. 31, 2021).



## Retroactivity

*Matter of Franklin C. Lewis*, No. 827791  
(NY Tax App. Trib. May 21, 2020)

- The New York State Tax Appeals Tribunal held that a taxpayer's due process rights were violated when the New York State Department of Taxation and Finance retroactively applied a law change.
- The Tribunal held that "public policy considerations against retroactivity" dictate a finding that retroactively applying legislation to a taxpayer who relied on a final Tribunal decision interpreting New York tax laws when structuring a stock sale transaction violates a taxpayer's right to due process.



## Sales Tax—Software as a Service (“SaaS”)

- The Department issued an Advisory Opinion opining that SaaS is taxable as prewritten software if the “primary function” of the service is the prewritten software. If the prewritten software is an incidental part of the service, the taxability of the receipts depends on whether the taxpayer’s “primary service” is taxable. TSB-A-20(28)S.



- In *Matter of MarketShare Partners, LLC*, No. 828562 (NYS DTA Dec. 3, 2020), an ALJ agreed that software as a service is subject to sales tax as prewritten software and is taxable in New York when accessed by customers located in New York, even if servers holding SaaS are out of state.

# Sales Tax—Protective/Detective Services

*Matter of Secureworks, Inc.*, Nos. 828328 & 828329  
(NYS DTA Jan. 14, 2021)

- ALJ concluded that a variety of the taxpayer's IT services, including a service whereby the taxpayer managed and/or monitored firewalls, constituted taxable protective services.
  - New York tax law subjects "protective" and "detective" services to sales tax, but does not provide a definitive definition of those terms.
    - It does provide examples of such services, including "services provided by or through alarm or protective systems of every nature"
  - The ALJ claimed he also found support from the definition of "watch, guard or patrol agency" in New York's General Business Law.





## Sales Tax—Information Services

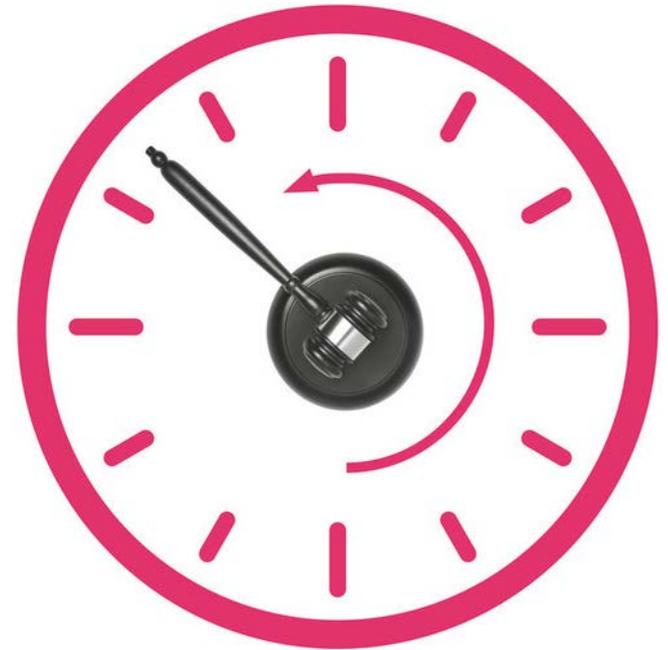
*Matter of Dynamic Logic*, No. 828619 (NYS DTA Jan. 14, 2021)

- In *Dynamic Logic*, an ALJ determined that services that measure the effectiveness of an advertising campaign constitute a taxable information service.
  - An information service:
    - “has been interpreted to mean ‘the sale of the service of furnishing information by a business whose function it is to collect and disseminate information which is taxable under Tax Law § 1105 (c) (1) and not the mere sale of information’ . . . . In order to determine a service’s taxability, [the courts must] focus[] on the service in its entirety, as opposed to reviewing the service by components or by the means in which the service is effectuated.”
  - Under the primary function test, the DTA determined that collecting and analyzing an advertising campaign to furnish a report was the primary function and not the taxpayer’s consulting services.

# Statute of Limitations to File Appeals

## Executive Order 202.8

- New York Governor Andrew Cuomo released Executive Order 202.8, which tolled deadlines “for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding” from March 20 until April 19, 2020. Subsequent executive orders extended the tolling period until November 3, 2020.
- The New York City Tax Appeals Tribunal provided guidance on its website stating that Governor Cuomo’s Executive Orders extended the time limitations for filing an appeal.
- However, the New York State Division of Tax Appeals stated on its website that it does not have “the authority to waive statutory deadlines” and that “any petition, exception, or request for an extension of time to file an exception must be filed . . . by the current statutory deadline.”



# Addendum

## Convenience of the Employer – New York State



# New York: Convenience Of The Employer

- Employers are required to withhold New York State income tax from their nonresident employees' New York source income if the nonresident is in the State for more than 14 days in a calendar year, using the following formula:

$$\text{New York Source Income} = \text{Nonresident's Total Compensation} \times \frac{\text{Total Days Worked in New York}}{\text{Total Days Worked Everywhere}}$$

- N.Y. Tax Law § 671; 20 NYCRR 171.6(b); TSB-M-12(5)I (July 5, 2012).

- New York's COTE test provides that a nonresident who teleworks outside the state is deemed to be working at the in-state location of her employer unless the nonresident teleworks out of necessity and not just her convenience. 20 N.Y.C.R.R. 132.18(a).

# New York: Convenience Of The Employer, cont.

- The New York State Department of Taxation and Finance issued guidance providing that for apportionment purposes, “any normal work day spent at the home office will be treated as a day worked outside the state if the taxpayer’s home office is a bona fide employer office []. Any day spent at the home office that is not a normal work day would be considered a nonworking day. A normal work day means any day that the taxpayer performed the usual duties of his or her job. For this purpose, responding to occasional phone calls or emails, reading professional journals or being *available* if needed does not constitute *performing the usual duties* of his or her job.”
- *New York Tax Treatment of Nonresidents and Part-Year Residents Application of the Convenience of the Employer Test to Telecommuters and Others*, TSB-M-06(5)I (May 15, 2006).



## New York: “COTE is Constitutional”

- The New York Court of Appeals upheld the rule as constitutional.
  - In *Zelinsky*, the court held that a law professor’s entire income was subject to New York income tax because the taxpayer’s work performed at his home office in Connecticut was “inextricably intertwined” with his professional duties performed in New York. The court reasoned that because the professor worked at home for his own convenience, his entire income was attributed to New York and New York was justified in taxing it.
  - The court held that its decision in *Allen* did not apply because that case involved unemployment insurance – and not taxes or apportionment – which was not subject to the same constitutional standards as taxation. In *Allen*, the court held that an out-of-state individual who “telecommuted” to New York was not “localized” in New York. Instead, the court held that the employee was localized in Florida because she physically performed her work at her home office in Florida.
    - *Zelinsky v. New York State Tax Appeals Tribunal*, 1 NY3d 85, 801 NE2d 840, 769 NYS2d 464 (2003), cert. denied, 541 US 1009, 124 S. Ct. 2068 (2004); see also *In re Allen*, 100 N.Y.2d 282 (2003).

## New York: COTE is Broad

- The New York Court of Appeals held that a nonresident who worked in Tennessee but traveled to New York to meet with his employer could not allocate the Tennessee days to non-New York days. The court noted that the employee worked in Tennessee for his own convenience because the employer “did not require him to perform any work in Tennessee and would not have objected if he had worked out of its New York office.”
  - *Huckaby v. New York State Div. of Tax Appeals*, 4 NY3d 427 (2005), *cert. denied*, 546 US 976, (2005).
- The New York Division of Tax Appeals determined that 100% of an Arizona resident’s wages must be sourced to New York even though the employer paid all expenses necessary to set up the home office in Arizona, and it also paid for the expenses needed to maintain the office. The DTA explained that there was no evidence presented that it was necessary for the Arizona resident to work in Arizona.
  - *In the Matter of the Petition of Manohar and Asha Kakar*, DTA No. 820440 (Feb. 16, 2006).

# New York: Convenience Of The Employer, cont.

<b>Primary Factor</b> <b>No additional factors, or</b>	<b>Secondary Factors</b> <b>At least 4, and</b>	<b>Other Factors</b> <b>At least 3</b>
<p>An office may be considered a bona fide employer office if the employee's home office contains or is near specialized facilities that cannot be made available at the employer's place of business but are or near the employee's home.</p>	<ol style="list-style-type: none"> <li>1. The home office is a requirement or condition of employment.</li> <li>2. The employer has a bona fide business purpose for the employee's home office location.</li> <li>3. The employee performs some of the core duties of his or her employment at the home office.</li> <li>4. The employee meets or deals with clients, patients, or customers on a regular and continuous basis at the home office.</li> <li>5. The employer does not provide the employee with designated office space or other regular work accommodations at one of its regular places of business.</li> <li>6. Employer reimbursement of expenses for the home office.</li> </ol>	<ol style="list-style-type: none"> <li>1. The employer maintains a separate telephone line and listing for the home office.</li> <li>2. The employee's home office address and phone number is listed on the business letterhead and/or business cards of the employer.</li> <li>3. The employee uses a specific area of the home exclusively to conduct the business of the employer that is separate from the living area. The home office will not meet this factor if the area is used for both business and personal purposes.</li> <li>4. The employer's business is selling products at wholesale or retail and the employee keeps an inventory of the products or product samples in the home office for use in the employer's business.</li> <li>5. Business records of the employer are stored at the employee's home office.</li> <li>6. The home office location has a sign indicating a place of business of the employer.</li> <li>7. Advertising for the employer shows the employee's home office as one of the employer's places of business.</li> <li>8. The home office is covered by a business insurance policy or by a business rider to the employee's homeowner insurance policy.</li> <li>9. The employee is entitled to and actually claims a deduction for home office expenses for federal income tax purposes.</li> <li>10. The employee is not an officer of the company.</li> </ol>



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