

State Tax Observations

At Last, NYS Issues Guidance on Its New Pass-Through Entity Tax

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This week – finally – the New York State Department of Taxation and Finance (Tax Department) issued a Technical Services Memorandum, [TSB-M-21\(1\)C.\(1\)](#), addressing open issues regarding New York's new pass-through entity tax (PTET). The Memorandum, coupled with the Tax Department's [website](#), provides useful examples, access to the election form, and guidance on early payment of the PTET in 2021.

We addressed the law and open questions in our recent [State Tax Observations article](#). We now summarize below the significant information contained in the Memorandum and on the website.

Due Dates and How to Make the PTET Election

New York's PTET is elected annually and, once elected, is irrevocable. For 2021, the election must be made by October 15, 2021. For subsequent years, the annual election must be made in the January 1st to March 15th timeframe. The election can be made only online. It must be done through the Tax Department's Online Business Account Service. As such, an account must be set up first. How to create an account, or if one is already created, how to make the PTET election, can be found [here](#).

Who Can Make the Election

Only an "authorized person" may make the PTET election on behalf of an eligible partnership or S corporation. According to the Tax Department's website, tax professionals may not make this election on behalf of their clients.

Publicly Traded Partnerships, Single Member LLCs, Sole Proprietorships, Trusts, non-profit entities, and corporations (excluding S corporations) are not eligible to make the PTET election.

PTET Payments and Returns

For 2021, an entity has the option to make a payment of estimated PTET. There will be an online application by December 15, 2021 to accomplish this. While the law calls for payment of the 2021 tax in March 2022, the option to make a payment in 2021 allows cash-basis taxpayers to take the deduction in 2021.

In addition, partners, members, and shareholders are still required to make estimated payments for 2021 as if the entity has made no payments on their behalf. The individual payments cannot take into account any PTET credit. The combination of the PTET estimates, coupled with the individual estimates, results in duplicative payments for an extensive period of time, particularly for those filing and taking their PTET credit as late as the extended due date of October 15, 2022. For all following years, this issue goes away.

For tax years starting on January 1, 2022, an electing entity is required to make quarterly estimated payments of at least 25% of the lesser of 100% of the prior year PTET (there must be PTET elected in that prior year) or 90% of the current year PTET. Payments cannot be applied to any other tax and are not allowed to be transferred between related individuals or entities. Penalties and interest will apply to underpayments and late payments. Estimated payments are due on or before March 15th, June 15th, September 15th, and December 15th in the calendar year prior to the year in which the due date of the PTET return falls.

The PTET return is due on March 15th and must be filed on a calendar year basis. Fiscal year taxpayers do not recompute their income on a calendar year basis but will determine their taxable income based on the calendar year that includes their year-end date. A six-month extension may be requested online by March 15th. Once filed, a PTET return may not be amended for any reason. Penalties and interest will apply to late filing and/or late payments.

PTET Income

S corporations calculate the income subject to PTET by aggregating all items of income, gain, loss or deduction. Losses and deductions are applied to income and gains regardless of any limitations applied at the owner's level of taxation including capital loss, basis, or passive loss limitations. The net amount must then be apportioned.

Partnerships must classify all members as residents or non-residents before determining income subject to PTET. Members or partners may not be classified as part-year residents for PTET. A member or partner should be treated as a resident if they are a resident of New York for New York personal income tax purposes for at least half of the year. All other members or partners should be treated as nonresidents.

The resident pool taxable income subject to PTET is calculated by aggregating all income amounts offset by losses and deductions without application of any owner level limitations (similar to the S corporations above).

The non-resident pool taxable income is the same as the resident calculation but is limited to New York source amounts only.

Once both pools are calculated, they are combined and the appropriate tax rate is applied. The PTET rates range over several brackets from 6.85% for PTET taxable income of less than \$2 million up to 10.90% on PTET taxable income exceeding \$25 million.

To the extent there is an ineligible partner (e.g., C corporation) or a tiered partnership, their share of taxable income is not included in the calculation of PTET taxable income and therefore is not otherwise eligible for the credit.

PTET Credits

On the entity's PTET Return, the total PTET must be allocated as a credit to eligible partners, members or shareholders.

S corporations calculate the allocation of the PTET Credit based on ownership percentages of eligible shareholders.

Partnerships calculate the allocation of the PTET Credit for each pool (resident and non-resident). The total PTET is split between the resident and non-resident pool based on each pool's relative percentage of the total combined pool's taxable income. Each pool is then allocated between the partners of their respective pool based on each partner's profit and loss percentage. If a special allocation is present, an electing partnership must take these allocations into account when computing each pool.

If one pool is zero or less, then the entire PTET Credit is allocated among the remaining pool based on profit and loss percentages within that pool only.

Taxpayers receiving a PTET Credit from an electing entity may claim the credit on Form IT-653, Pass-Through Entity Tax Credit, and attach it to their New York State personal income tax return. (The form is not yet available.) An individual personal income tax return must be filed to take advantage of the credit. A group return (composite) cannot claim this credit.

If more than one credit is provided to an eligible taxpayer, they may be aggregated. If the credit exceeds the individual's income tax due, it may be carried forward or refunded.

A resident credit for New York State residents' share of the PTET payment of a "substantially similar" PTET paid to other states will also be allowed. This will be accompanied by an addback to income for that "substantially similar" credit. The Memorandum states that a list of substantially similar taxes will be made available.

Contact Us

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