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# Current New York State Tax Enforcement Initiatives

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# Civil NY Tax Considerations



## Overview

- **Two distinct phases of a civil tax problem**
  - Do I really owe the tax
  - Can I ever pay the debt
  
- **Differences between each phase**
  - DTF personnel
  - Access to Courts
  - Financial disclosure/loss of assets



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# Audit Process



## Do I owe the tax: Audit Process

- **How to manage the process**
  - Where to conduct the audit
  - Use of representation
  - Statute of Limitations – consent to extend
  - Skeletons known – reveal or not
- **Audit methods**
  - Full review vs. test period
  - Bank deposit analysis
  - Return consistency
- **State of the records**



## Sales Records

- "The sales record either must provide sufficient detail to independently determine the taxable status of each sale and the amount of tax due and collected thereon or may be substantiated by analysis of supporting records." (20 N.Y.C.R.R. 533.2(b)).



## Purchase Records

- "Every purchaser must maintain documentation to substantiate any exemption, exclusion or exception claimed on the purchase of any tangible personal property or service. The purchase records must provide sufficient detail to independently determine the taxable status of each purchase and the amount of tax due, paid or remitted thereon." (20 N.Y.C.R.R. 533.2(c)).



## Recordkeeping for Certain Industries

- No one set of record-keeping rules applies to all vendors. However, your records must be appropriate for your particular operation or business and any record-keeping systems or equipment you use.

Examples:

- Retail
- Automotive repair



## Good Records = Simplified Process

- Use of test period (3 months, 6 months)
- Little or no third party information needed
- No penalties



## Poor Records = Some Pain

- Test period may expand (1 year or more)
- Third party verification likely to be sought (suppliers, vendors, bank deposits)
- Penalty issues likely



## No Records = Disaster

- Alternate Methods of Determining Sales:
  - Mark-up approach (vendor/supplies, purchases)
  - Observation test
  - Payroll analysis
  - Other methods of estimation
- Third party verification is certain
- Significant penalties



## **Recent Law Changes – Additional Penalties**

**Failure to maintain records:**

\$1,000 to \$5,000 per quarter

**Failure to maintain electronic records:**

\$5,000 per quarter

**Failure to present records in "auditable form":**

\$1,000 per quarter



## Options After the Audit

1. Manager Conference
2. Request Conciliation Conference
3. Petition Division of Tax Appeals
4. Appeal to Tax Tribunal
5. Appeal to Supreme Court, Appellate Division  
(Third Dept.)
6. Appeal to Court of Appeals



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# Appeal Process



## Conciliation Conference

- **When to request:**
  - 90 days after Notice of Determination
  - 2 years after Notice of Disallowance
- **How to request:** Form CMS-1
  - Type of tax and years/periods
  - Action disputed
  - Simple statement of facts
  - Issue(s) in dispute; controlling authority



## Conciliation Conference

- How Conducted:
  - Informal meeting with Conferee
  - Location convenient to taxpayer
  - Auditor explains DTF's position
  - Taxpayer explains his/her position
  - No formal testimony
  - No rules of evidence



## Conferee Findings

- Usually issued within 30-45 days of hearing
- If taxpayer consents (within 15 days), case is resolved
- If no taxpayer consent, a Conciliation Order is issued
- Taxpayer then has 90 days to petition Division of Tax Appeals
- Only the taxpayer may appeal; DTF is bound by the Conciliation Order unless a Petition is filed



## Division of Tax Appeals

- Separate judicative agency (replaced DTF Tax Appeals Bureau in 1987)
- Based in Troy, New York where most cases are heard
- Cases are assigned to ALJ who handles all phases of case – pre-trial, trial, post-trial
- More formal process than Conciliation Conference



## Commencing Division of Tax Appeals Action

- When to file: Within 90 days (150 days if taxpayer outside of the United States) of Notice of Determination (Audit), Notice of Disallowance (Refund Claim) or Conciliation Order
- This is a strict deadline – no extension may be sought
- Timely mailing is timely filing if petition is received (i.e. use certified mail)



## **Contest of Petition – Use DTF Form**

- Name, address, telephone number and SSN or EIN
- Statutory notice being contested
- Type of Tax, tax period(s), and amount in controversy
- Concise statement of alleged error made by DTF
- Concise statement of facts to establish the error
- Relief being sought



## Other Division of Tax Appeals Rules

- DTF has 75 days to answer petition
- Discovery is limited; deposition only allowed if witness not available for trial
- Motion practice is limited
- Stipulations are strongly encouraged
- Pre-trial memoranda are required:
  - List of witnesses
  - List of Exhibits
  - Legal Issues identified
- Small claims hearing option (tax not over \$20,000)



## Division of Tax Appeals Hearing

- Case is heard by a single ALJ – no jury
- DTF presents jurisdictional records at the outset
- Each party allowed Opening Statement, Direct Examination of Witnesses, Cross-Examination, Closing Statement
- Proposed Findings of Fact and Conclusion of Law are typically requested by each party
- ALJ's decision rendered within 6 months



## Tax Appeals Tribunal

- Once ALJ's determination is made, either party has 30 days to file an exception
- Any exception is filed with Tax Appeals Tribunal. The exception must detail the Findings of Fact and Conclusions of Law that are disputed
- Each party submits Briefs. Oral argument may occur
- The Tax Appeals Tribunal conducts a de novo review of the record
- Decision is rendered within 6 months



## Judicial Review Process

- Only the taxpayer may appeal an adverse determination by the Tax Appeals Tribunal
- Appeal is to the Appellate Division, Third Department by Article 78 proceeding
- Time for appeal – 4 months
- Standard for review – the determination is “arbitrary and capricious” and not supported by substantial evidence
- Appeal to Court of Appeals is only by permission



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# Criminal Tax Considerations



“These changes signal an unmistakable determination to improve tax compliance and curtail cheating. They will be welcome news for the millions of honest taxpayers who are forced to take up the slack for those who cheat.”

*William Comiskey, Esq.  
Deputy Commissioner of Enforcement  
New York State Department of Taxation and Finance*

- 200+ new agents
- Deputize Tax Attorneys as Assistant District Attorneys
- Give Tax Agents Statewide Power to Initiate Actions



# “8 Ways to Commit Tax Fraud”

New York State Tax Law Sections 1801-1806

Willfully doing any of the following:

- Failure to file
- Make or file a false return or report
- Supply false information
- Engage in a scheme to defraud the State
- Remit taxes collected
- Failing to collect sales excise or withholding tax
- With intent to evade failing to pay any tax due
- Issuing a false exemption certificate



## Felony Conduct

<u>Class</u>	<u>Amount*</u>	<u>Penalty</u>
E Felony	Over \$ 3,000	4 years State Prison
D Felony	Over \$10,000	7 years State Prison
C Felony	Over \$50,000	15 years State Prison
B Felony	Over \$1 million	25 years State Prison

\* In a single year period.

$$3,000 \div 365 = \$8.22$$

$$10,000 \div 365 = \$27.40$$



## Monetary Penalties

### **Felony**

Individual: 200% of tax up to \$50,000

Corporation: 200% of tax up to \$250,000

### **Misdemeanor**

Individual: 200% of tax up to \$10,000

Corporation: 200% of tax up to \$20,000



## Other Crimes

- Willful Failure to Comply with Subpoena
- Tax Preparer Complicity



# **“You have the right to remain silent”... well, not really.**

- Accountants and tax professionals do not have privilege- must respond to subpoenas and testify truthfully under oath.
- Failure to maintain records is punishable
- Failure to produce records is a crime
- Tampering with records in a felony



“It is a new day for criminal tax enforcement in New York and the fight against tax fraud is the central component of the Department’s strategy to narrow New York’s annual multi-billion dollar tax gap.”

“We are confident...this historic enforcement package will help the department and state prosecutors deter many who previously thought they were above the law.”

*William Comiskey, Esq.  
Deputy Commissioner of Enforcement  
New York State Department of Taxation and Finance*



## Proceedings in Criminal Courts on Tax Matters

- Misdemeanor Information (1801) or Felony Complaint (1802 *et seq*)
- Grand Jury Indictment
- Concurrent Jurisdiction with NYS Tax Enforcement Officers and other Police
- Concurrent Jurisdiction between NYS Tax Attorney/ NYS Attorney General/  
Onondaga County DA
- Arraignments held in Local Court, not in Albany.
- Voluntary surrender
- Bail
- Reappearance
- Negotiation
- Tax repayment
- Penalty
- Licensure and Certificate of Relief From Civil Disability
- Prosecutorial and Judicial "Attitude".
- Move toward centralized handling



## How Do You Usually Get Involved?

- Call from client that badges are at the door--- but usually after clandestine visits.
- Civil Audit gone badly.
- "Raid" and closure.
- Investigation by other agency: Labor, Unemployment, Worker's Comp, IRS.
- Target date to coincide with key dates - Ramp up of new initiative

April 15th



- When the tax man cometh, your accountant is not necessarily your friend.
- Accountants must comply with subpoenas, must share documents and notes, and truthfully testify. There is no privilege.



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# Collection Process



## Voluntary Disclosure and Compliance Program (VDCP)

- Established in 2008 to encourage taxpayers who owe back taxes to voluntarily disclose tax liabilities not known to DTF
- Incentives to those who disclose liabilities and are accepted into the program:
  - DTF won't impose penalties
  - No criminal charges arising from liabilities



## Effects of Disclosure Under VDCP

- Law prohibits DTF from using the disclosure as evidence against taxpayer unless the taxpayer intentionally fails to comply with VDCP agreement
- DTF *is* permitted to disclose any return or report filed under the VDCP with the IRS, and any other state or city tax agency (2009 amendment)



## Eligibility for VDCP

- To be eligible, applicant must meet ALL of following criteria:
  - Not currently under audit by DTF;
  - Has not received a bill for the past due taxes being disclosed;
  - Not under criminal investigation by any New York State agency or subdivision; AND
  - Not seeking to disclose participation in a tax shelter



## VDCP Application Process

- Submit an application to ([http://www.tax.state.ny.us/e-services/vold/program\\_info.htm](http://www.tax.state.ny.us/e-services/vold/program_info.htm)) with an explanation of:
  - Taxes owed;
  - Reason the taxpayer failed to report those taxes; and
  - Request for a limited look-back clause, if applicable



## Limited Look-Back Clause

- If owe taxes for more than three years, may request a limited look-back clause be added to any VDCP agreement
- Must disclose ALL tax liabilities, but need only file returns and pay tax and interest on those from limited look-back period
- May still be audited for any periods not disclosed!



## Limited Look-Back Eligibility

- DTF will consider adding a limited look-back clause under certain circumstances:

<b>Circumstance</b>	<b>Look-back period with full repayment</b>
Collected sales/withholding tax not remitted	Shorter of 6 years or the period beginning with earliest date tax collected and ending with the most recently completed tax period
Tax fraud or tax evasion (other than trust taxes)	6 year look-back period
Mistake, confusion, ignorance, inability, or similar explanation (other than trust taxes)	3 year look-back period



## Application Process, cont.

- If DTF determines taxpayer is eligible and approves application, will send taxpayer a Voluntary Disclosure Agreement
- Must sign agreement and send back with copies of tax returns for periods subject to agreement
- In order to participate and receive benefits of program, *must* pay any tax and interest disclosed in agreement



## Termination of VDCP Agreement

- Taxpayer can cause the agreement to be rescinded by DTF in 3 ways:
  - Intentionally provide false material information or omit material information in VDCP application
  - Attempt to intentionally defeat or evade a tax subject to the agreement
  - Intentionally fail to comply with any of the terms of the agreement, including failing to make payments



## Installment Payment Agreements (IPAs)

- If the taxpayer cannot pay his/her bill immediately, you can request an installment payment agreement (IPA)
- Liability paid in monthly installments, generally over 24-48 months



## Effects of IPA

- While paying in installments, interest and any penalty will continue to accrue on any unpaid balance
- Tax Department will suspend enforcement efforts while in compliance with payment agreement
- Tax Department may still file a tax warrant to secure debt



## IPA Requirements

- Tax Department bases the decision to allow an IPA on:
  - prior history of compliance (all returns filed),
  - current financial condition (DTF-5), and
  - adherence to all Department requirements (file returns and pay all future taxes as they become due)



## IPA Termination/Modification

- Requires 30 day prior written notice with explanation of grounds, including:
  - Information supplied to enter agreement is inaccurate or incomplete;
  - Financial condition changes significantly;
  - Fail to make installment payment or another tax liability when due; or
  - Fail to supply DTF with updated information regarding financial condition when requested





## NY Tax Warrants

- Filed only after tax has been assessed
- Becomes lien on all property in County where filed
- Good for 10 years; renewable for additional 10 years (like NY Judgment)

## NY Tax Levies

- Income Execution is most typical
  - First service – sent to taxpayer
  - Second service – sent to employer
  - NY limited to 10% of wages
- Levy on bank account(s) is also likely
  - Bank required to freeze account for 21 days
  - NY bank levy continues for 90 days
- NY can **not** levy Retirement Funds, Social Security, Disability Payments



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# Questions and Answers