S T A T E  O F  N E W  Y O R K

3520--A

2011-2012 Regular Sessions

I N  S E N A T E

February 24, 2011

Introduced by Sen. JOHNSON -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the tax law, in relation to the personal liability of certain persons required to collect state and local sales and compensating use taxes and excise taxes imposed upon motor fuels and petroleum businesses, and disclosures of information concerning certain officers, managers, members and persons with certain ownership interests

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivision 5 of section 283 of the tax law, as separately amended by chapters 275 and 276 of the laws of 1986, is amended to read as follows:

5. A registration shall not be cancelled or suspended nor shall an application for registration be refused unless the registrant or applicant has had an opportunity for a hearing, provided, however, that an application for registration may be denied without a prior hearing. Provided, further, a registration may be cancelled or suspended without a prior hearing, for failure to file a return within ten days of the date prescribed for filing a return under this article or article twenty-eight of this chapter with respect to sales and uses of motor fuel, or for nonpayment of any taxes due pursuant to this article or article twenty-eight or twenty-nine of this chapter with respect to sales and uses of motor fuel if the registrant shall have failed to file such return or pay such taxes within ten days after the date the demand therefor is sent by registered or certified mail to the address of the distributor given in his application for registration, or an address substituted therefor as provided in this subdivision. A registration may be cancelled or suspended prior to a hearing for the failure to continue

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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to maintain in full force and effect at all times the required bond or other security filed with the [tax commission] COMMISSIONER. Provided, however, if a surety bond is cancelled prior to expiration, the [tax commission] COMMISSIONER, after considering all the relevant circumstances, may make such other arrangements and require the filing of such other bond or other security as [it] THE COMMISSIONER deems appropriate. Provided, further, a registration may be cancelled or suspended prior to a hearing for the transfer of such registration without the prior written approval of the [state tax commission] COMMISSIONER. A distributor shall immediately inform the department, in [writing] THE MANNER PRESCRIBED BY THE COMMISSIONER, of any change in its address and, if the distributor is a corporation [or], partnership OR LIMITED LIABILITY COMPANY, the distributor shall immediately inform the department, in [writing] THE MANNER PRESCRIBED BY THE COMMISSIONER, of any change in its officers, directors, MEMBERS, MANAGERS or partners or their residence addresses as shown in its application for registration AND ANY CHANGE IN OWNERSHIP INTEREST OR PROFIT DISTRIBUTION PERCENTAGE CAUSING ANY PERSON TO HAVE, OR NO LONGER HAVE, AN OWNERSHIP INTEREST OF TWENTY PERCENT OR MORE IN SUCH DISTRIBUTOR (MEASURED IN THE AGGREGATE, AND WHETHER DIRECT OR INDIRECT), OR PROFIT DISTRIBUTION PERCENTAGE IF DIFFERENT THAN THE OWNERSHIP PERCENTAGE AND SUCH PROFIT DISTRIBUTION PERCENTAGE IS TWENTY PERCENT OR MORE.

S 2. Subdivision 5 of section 283-a of the tax law, as amended by chapter 560 of the laws of 1993, is amended to read as follows:

5. A license shall not be cancelled or suspended nor shall an application for a license be refused unless the licensee or applicant for a license has had an opportunity for a hearing, provided, however, that an application for a license may be denied without a prior hearing. Provided, further, a license may be cancelled or suspended without a prior hearing, for failure to file a return or report within ten days of the date prescribed for filing under this article or for nonpayment of any sums due pursuant to this article or article twenty-eight or twenty-nine of this chapter with respect to motor fuel if the licensee shall have failed to file such return or report or pay such sums within ten days after the date the demand therefor is sent by registered or certified mail to the address of the transporter given in his application for a license, or an address substituted therefor as in this subdivision. A license may also be cancelled or suspended prior to a hearing for the failure to continue to maintain in full force and effect at all times the bond or other security filed with the commissioner. Provided, however, if a surety bond is cancelled prior to expiration, the commissioner, after considering all the relevant circumstances, may make such other arrangements and require the filing of such other bond or other security as the commissioner deems appropriate. Provided, further, a license may be cancelled or suspended prior to a hearing for the transfer of such license. A transporter shall immediately inform the department, in [writing] THE MANNER PRESCRIBED BY THE COMMISSIONER, of any change in its address and, if the transporter is a corporation [or], partnership OR LIMITED LIABILITY COMPANY, the transporter shall immediately inform the department, in [writing] THE MANNER PRESCRIBED BY THE COMMISSIONER, of any change in its officers, directors, MANAGERS, MEMBERS or partners or their residence addresses as shown in its application for a license AND ANY CHANGE IN OWNERSHIP INTEREST OR PROFIT DISTRIBUTION PERCENTAGE CAUSING ANY PERSON TO HAVE, OR NO LONGER HAVE, AN OWNERSHIP INTEREST OF TWENTY PERCENT OR MORE IN SUCH TRANSPORTER (MEASURED IN THE AGGREGATE, AND WHETHER DIRECT OR INDIRECT), OR PROFIT DISTRIBUTION PERCENTAGE IF

DIFFERENT THAN THE OWNERSHIP PERCENTAGE AND SUCH PROFIT DISTRIBUTION PERCENTAGE IS TWENTY PERCENT OR MORE.

S 3. Subdivision 5 of section 283-b of the tax law, as added by chapter 276 of the laws of 1986, is amended to read as follows:

5. A license shall not be cancelled or suspended nor shall an application for a license be refused unless the licensee or applicant for a license has had an opportunity for a hearing, provided, however, that an application for a license may be denied without a prior hearing. Provided, further, a license may be cancelled or suspended without a prior hearing, for failure to file a return or report within ten days of the date prescribed for filing under this article or nonpayment of any sums due pursuant to this article or article twenty-eight or twenty-nine of this chapter with respect to motor fuel if the licensee shall have failed to file such return or report or pay taxes within ten days after the date the demand therefor is sent by registered or certified mail to the address of the terminal operator given in his application for a license, or an address substituted therefor as in this subdivision. A license may be cancelled or suspended prior to a hearing for the failure to continue to maintain in full force and effect at all times the required bond or other security filed with the [tax commission] COMMISSIONER. Provided, however, if a surety bond is cancelled prior to expiration, the [tax commission] COMMISSIONER, after considering all the relevant circumstances, may make such other arrangements and require the filing of such other bond or other security as [it] THE COMMISSIONER deems appropriate. Provided, further, a license may be cancelled or suspended prior to a hearing for the transfer of such license. A terminal operator shall immediately inform the department, in [writing] THE MANNER PRESCRIBED BY THE COMMISSIONER, of any change in its address and, if the terminal operator is a corporation [or], partnership OR LIMITED LIABILITY COMPANY, the terminal operator shall immediately inform the department, in [writing] THE MANNER PRESCRIBED BY THE COMMISSIONER, of any change in its officers, directors, MANAGERS, MEMBERS or partners or their residence addresses as shown in its application for a license AND ANY CHANGE IN OWNERSHIP INTEREST OR PROFIT DISTRIBUTION PERCENTAGE CAUSING ANY PERSON TO HAVE, OR NO LONGER HAVE, AN OWNERSHIP INTEREST OF TWENTY PERCENT OR MORE IN SUCH TERMINAL OPERATOR (MEASURED IN THE AGGREGATE, AND WHETHER DIRECT OR INDIRECT), OR PROFIT DISTRIBUTION PERCENTAGE IF DIFFERENT THAN THE OWNERSHIP PERCENTAGE AND SUCH PROFIT DISTRIBUTION PERCENTAGE IS TWENTY PERCENT OR MORE.

S 4. Paragraph (b) of subdivision 1 of section 288 of the tax law, as amended by chapter 44 of the laws of 1985, is amended to read as follows:

(b) The [tax commission] COMMISSIONER shall determine the liability for the penalty imposed by subdivision two of section two hundred eighty-nine-b OF THIS ARTICLE of any officer, director, shareholder or employee of a corporation or of a dissolved corporation, member or employee of a partnership OR A LIMITED LIABILITY COMPANY or employee of an individual proprietorship. The [tax commission] COMMISSIONER shall also determine the amount of such penalty. All of the provisions of this section shall apply to any determination made pursuant to this paragraph and for such purpose the term distributor, as used in subdivisions four, five and six of this section, shall also mean and include such officer, director, shareholder, employee, PARTNER, MANAGER or member as the case may be.

S 5. Subdivisions 2 and 3 of section 288 of the tax law, subdivision 2 as amended and subdivision 3 as added by chapter 44 of the laws of 1985, are amended to read as follows:

2. The [state tax commission] COMMISSIONER may determine the amount of tax due at any time if such distributor (i) has not registered as required by this article, (ii) fails to file a return, (iii) files a willfully false or fraudulent return with intent to evade the tax, or (iv) fails to comply with section two hundred eighty-three of this article in not informing the department[, in writing,] IN THE MANNER PRESCRIBED BY THE COMMISSIONER of any change in its address and, if a corporation, LIMITED LIABILITY COMPANY or partnership, in not informing the department[, in writing], IN THE MANNER PRESCRIBED BY THE COMMISSIONER, of any change in its officers, directors, MANAGERS, MEMBERS or partners or their residence addresses as shown in its application for registration AND ANY CHANGE IN OWNERSHIP INTEREST OR PROFIT DISTRIBUTION PERCENTAGE CAUSING ANY PERSON TO HAVE, OR NO LONGER HAVE, AN OWNERSHIP INTEREST OF TWENTY PERCENT OR MORE IN SUCH DISTRIBUTOR (MEASURED IN THE AGGREGATE, AND WHETHER DIRECT OR INDIRECT), OR PROFIT DISTRIBUTION PERCENTAGE IF DIFFERENT THAN THE OWNERSHIP PERCENTAGE AND SUCH PROFIT DISTRIBUTION PERCENTAGE IS TWENTY PERCENT OR MORE AND WHETHER SUCH PERSON WAS UNDER A DUTY TO ACT FOR SUCH REGISTRANT.

3. If a distributor shall inform the department, in [writing] THE MANNER PRESCRIBED BY THE COMMISSIONER, of any change in its address and, if a corporation, LIMITED LIABILITY COMPANY or partnership shall inform the department, in [writing] THE MANNER PRESCRIBED BY THE COMMISSIONER, of any change in its officers, directors, MANAGERS, MEMBERS or partners or their residence addresses as shown in its application for registration, AND ANY CHANGE IN OWNERSHIP INTEREST OR PROFIT DISTRIBUTION PERCENTAGE CAUSING ANY PERSON TO HAVE, OR NO LONGER HAVE, AN OWNERSHIP INTEREST OF TWENTY PERCENT OR MORE IN SUCH DISTRIBUTOR (MEASURED IN THE AGGREGATE, AND WHETHER DIRECT OR INDIRECT), OR PROFIT DISTRIBUTION PERCENTAGE IF DIFFERENT THAN THE OWNERSHIP PERCENTAGE AND SUCH PROFIT DISTRIBUTION PERCENTAGE IS TWENTY PERCENT OR MORE, AND WHETHER SUCH PERSON WAS UNDER A DUTY TO ACT FOR SUCH REGISTRANT, the determination of the amount of tax due may be made at any time within three years after such information is [received] FILED WITH THE DEPARTMENT IN THE MANNER PRESCRIBED BY THE COMMISSIONER.

S 6. Subdivision 2 of section 289-b of the tax law, as amended by chapter 276 of the laws of 1986, is amended to read as follows:

2. Any officer, director, shareholder or employee of a corporation or of a dissolved corporation, [any] employee of a partnership, MANAGER, MEMBER OR EMPLOYEE OF A LIMITED LIABILITY COMPANY, or [any] employee of an individual proprietorship, who as such officer, director, shareholder, MANAGER, MEMBER or employee is under a duty to act for such corporation, partnership, LIMITED LIABILITY COMPANY or proprietorship in complying with any requirement of this article, and any member of a partnership (BUT NOT INCLUDING A LIMITED PARTNER UNLESS THE LIMITED PARTNER IS ACTIVE IN THE OPERATION OF THE PARTNERSHIP), which fails to pay the taxes imposed by or pursuant to this article, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax not paid, plus penalties and interest computed pursuant to subdivision one of this section as if such person were a distributor. If the [tax commission] COMMISSIONER determines that such failure was due to reasonable cause and not due to willful neglect, [it] THE COMMISSIONER shall remit all or part of such penalty imposed under this subdivision. Such penalty shall be determined, assessed, collected

and paid in the same manner as the taxes imposed by this article and shall be disposed of as hereinafter provided with respect to moneys derived from the tax.

S 7. Subdivision 1 of section 1131 of the tax law, as amended by chapter 576 of the laws of 1994, is amended to read as follows:

(1) "Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee [or], MEMBER OR manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee, MEMBER or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of this article; and any member of a partnership [or limited liability company] (BUT NOT INCLUDING A LIMITED PARTNER UNLESS THE LIMITED PARTNER IS ACTIVE IN THE OPERATION OF THE PARTNERSHIP). Provided, however, that any person who is a vendor solely by reason of clause (D) or (E) of subparagraph (i) of paragraph [(8)] EIGHT of subdivision (b) of section eleven hundred one OF THIS ARTICLE shall not be a "person required to collect any tax imposed by this article" until twenty days after the date by which such person is required to file a certificate of registration pursuant to section eleven hundred thirty-four OF THIS PART.

S 8. Section 1136 of the tax law is amended by adding a new subdivision (j) to read as follows:

(J) THE COMMISSIONER MAY REQUIRE ANY PERSON REGISTERED OR REQUIRED TO BE REGISTERED WITH THE COMMISSIONER UNDER SECTION ELEVEN HUNDRED THIRTY-FOUR OF THIS PART TO DISCLOSE, ON A REPORT, RETURN, APPLICATION OR FORM (OR ANY COMBINATION OF THESE), INFORMATION INCLUDING, BUT NOT LIMITED TO, THE FOLLOWING: (1) FOR ANY LEGAL ENTITY OTHER THAN A PUBLICLY TRADED CORPORATION, THE NAME OF, AND IDENTIFYING INFORMATION FOR, EVERY PERSON WITH AN OWNERSHIP INTEREST OF TWENTY PERCENT OR MORE (MEASURED IN THE AGGREGATE, AND WHETHER DIRECT OR INDIRECT) IN SUCH PERSON REGISTERED OR REQUIRED TO BE REGISTERED, OR PROFIT DISTRIBUTION PERCENTAGE IF DIFFERENT THAN THE OWNERSHIP PERCENTAGE AND SUCH PROFIT DISTRIBUTION PERCENTAGE IS TWENTY PERCENT OR MORE; (2) FOR ANY LEGAL ENTITY OTHER THAN A PUBLICLY TRADED CORPORATION, ANY CHANGE IN OWNERSHIP INTEREST CAUSING ANY PERSON TO HAVE, OR NO LONGER HAVE, AN OWNERSHIP INTEREST OR PROFIT DISTRIBUTION PERCENTAGE OF TWENTY PERCENT OR MORE IN SUCH PERSON REGISTERED OR REQUIRED TO BE REGISTERED, AND THE NAME OF, AND IDENTIFYING INFORMATION FOR, ANY SUCH PERSON HAVING, OR NO LONGER HAVING, SUCH AN OWNERSHIP INTEREST OR PROFIT DISTRIBUTION PERCENTAGE; (3) FOR A CORPORATION, THE NAME OF, AND IDENTIFYING INFORMATION FOR, ANY PRESIDENT, VICE PRESIDENT, CHIEF FINANCIAL OFFICER, CHIEF EXECUTIVE OFFICER AND SECRETARY OR TREASURER OF SUCH CORPORATION; (4) FOR A CORPORATION, ANY CHANGE IN ANY OF THE OFFICERS LISTED IN PARAGRAPH THREE OF THIS SUBDIVISION AND THE NAME OF, AND IDENTIFYING INFORMATION FOR, ANY NEW OFFICER WITH ANY SUCH TITLE; (5) FOR A LIMITED LIABILITY COMPANY OR PARTNERSHIP, THE NAME OF, AND IDENTIFYING INFORMATION FOR, ANY PERSON DESIGNATED AS THE TAX MATTERS PARTNER OR PARTNERS OR TREATED AS SUCH UNDER THE UNITED STATES INTERNAL REVENUE CODE OR OTHERWISE DESIGNATED BY THE LIMITED LIABILITY COMPANY OR PARTNERSHIP AS THE INDIVIDUAL OR INDIVIDUALS RESPONSIBLE FOR TAX ISSUES; (6) FOR A LIMITED LIABILITY COMPANY, THE NAME OF, AND IDENTIFYING INFORMATION FOR, EVERY PERSON DESIGNATED AS A MANAGER OF THE LIMITED LIABILITY COMPANY BY OPERATION OF LAW OR UNDER

THE LIMITED LIABILITY COMPANY'S OPERATING AGREEMENT; AND (7) FOR A PARTNERSHIP OR LIMITED LIABILITY COMPANY, ANY CHANGE IN ANY PERSONS REQUIRED TO BE DISCLOSED FOR SUCH PARTNERSHIP OR LIMITED LIABILITY COMPANY PURSUANT TO PARAGRAPH FIVE OR SIX OF THIS SUBDIVISION AND THE NAME OF, AND IDENTIFYING INFORMATION FOR, SUCH PERSONS. THE COMMISSIONER SHALL PRESCRIBE THE FORM OF SUCH REPORT, RETURN, APPLICATION OR FORM AND SHALL INDICATE WHEN AND HOW IT IS TO BE FILED. PROVIDED, HOWEVER, THAT SUCH DISCLOSURE SHALL NOT BE REQUIRED TO BE UPDATED MORE FREQUENTLY THAN QUARTERLY AND THE COMMISSIONER SHALL ALLOW ANY PERSON WITH RESPECT TO WHOM SUCH DISCLOSURE IS REQUIRED TO BE MADE TO MAKE THE REQUIRED DISCLOSURE AT THEIR OWN INITIATIVE.

S 9. Subparagraph (B) of paragraph 3 of subdivision (a) of section 1138 of the tax law, as amended by chapter 456 of the laws of 1998, is amended to read as follows:

(B) The liability, pursuant to subdivision (a) of section eleven hundred thirty-three of this [article] PART, of any officer, director or employee of a corporation or of a dissolved corporation, member or employee of a partnership, MEMBER, MANAGER OR EMPLOYEE OF A LIMITED LIABILITY COMPANY or employee of an individual proprietorship who as such officer, director, employee, MANAGER, or member is under a duty to act for such corporation, partnership, LIMITED LIABILITY COMPANY or individual proprietorship in complying with any requirement of this article for the tax imposed, collected or required to be collected, or for the tax required to be paid or paid over to the [tax commission] COMMISSIONER under this article, and the amount of such tax liability (whether or not a return is filed under this article, whether or not such return when filed is incorrect or insufficient, or where the tax shown to be due on the return filed under this article has not been paid or has not been paid in full) shall be determined by the [tax commission] COMMISSIONER in the manner provided for in paragraphs one and two of this subdivision. Such determination shall be an assessment of the tax and liability for the tax with respect to such person unless such person, within ninety days after the giving of notice of such determination, shall apply to the division of tax appeals for a hearing. If such determination is identical to or arises out of a previously issued determination of tax of the corporation, dissolved corporation, partnership, LIMITED LIABILITY COMPANY or individual proprietorship for which such person is under a duty to act, an application filed with the division of tax appeals on behalf of the corporation, dissolved corporation, partnership, LIMITED LIABILITY COMPANY or individual proprietorship shall be deemed to include any and all subsequently issued personal determinations and a separate application to the division of tax appeals for a hearing shall not be required. The [tax commission] COMMISSIONER may, nevertheless, of [its] THE COMMISSIONER'S own motion, redetermine such determination of tax or liability for tax. Where the [tax commission] COMMISSIONER determines or redetermines that the amount of tax claimed to be due from a vendor of tangible personal property or services, a recipient of amusement charges, or an operator of a hotel is erroneous or excessive in whole or in part, [it] THE COMMISSIONER shall redetermine the amount of tax properly due from any such person as a person required to collect tax with respect to such vendor, recipient, or operator, and if such amount is less than the amount of tax for which such person would have been liable in the absence of such determination or redetermination, [it] THE COMMISSIONER shall reduce such liability accordingly. Furthermore, the [tax commission] COMMISSIONER may, of [its] THE COMMISSIONER'S own motion, abate on behalf of any such person,

any part of the tax determined to be erroneous or excessive whether or not such tax had become finally and irrevocably fixed with respect to such person but no claim for abatement may be filed by any such person. The provisions of this paragraph shall not be construed to limit in any manner the powers of the attorney general under subdivision (a) of section eleven hundred forty-one OF THIS PART or the powers of the [tax commission] COMMISSIONER to issue a warrant under subdivision (b) of such section ELEVEN HUNDRED FORTY-ONE against any person whose liability has become finally and irrevocably fixed.

S 10. Subdivision (b) of section 1147 of the tax law, as amended by chapter 412 of the laws of 1986, is amended to read as follows:

(b) The provisions of the civil practice law and rules or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the state or the [tax commission] COMMISSIONER to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this article. However, except in the case of a willfully false or fraudulent return with intent to evade the tax no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that where no return has been filed as provided by law, the tax may be assessed at any time. PROVIDED, FURTHER, THAT AN ASSESSMENT AGAINST ANY PERSON WITH RESPECT TO WHOM A DISCLOSURE WAS REQUIRED TO BE FILED OR MADE PURSUANT TO SUBDIVISION (J) OF SECTION ELEVEN HUNDRED THIRTY-SIX OF THIS PART WHO WAS UNDER A DUTY TO ACT FOR A VENDOR, RECIPIENT OF AMUSEMENT CHARGES, OR OPERATOR OF A HOTEL AS DESCRIBED IN SUBPARAGRAPH (B) OF PARAGRAPH THREE OF SUBDIVISION (A) OF SECTION ELEVEN HUNDRED THIRTY-EIGHT OF THIS PART MAY BE MADE WITHIN SIX YEARS FROM THE LATER OF THE DUE DATE OR THE FILING DATE OF THE QUARTERLY RETURN PERTAINING TO THE TAX LIABILITIES AT ISSUE IF THE REQUIRED DISCLOSURE WAS NOT TIMELY FILED OR MADE. Where a purchaser furnishes a vendor with a false or fraudulent certificate of resale or other exemption certificate or other document with intent to evade the tax, the tax may be assessed against such purchaser at any time. For purposes of this subdivision, a return filed before the last day prescribed by law or regulation for the filing thereof or before the last day of any extension of time for the filing thereof shall be deemed to be filed on such last day. [Notwithstanding any other provision of this article, if the time to assess additional tax would otherwise have expired on or before December nineteenth, nineteen hundred sixty-nine, the time to assess such additional tax is hereby extended to and including December twentieth, nineteen hundred sixty-nine, except that it may be further extended by a taxpayer's consent in writing as provided in subdivision (c) hereof.]

S 11. This act shall take effect on the first day of the quarterly period, as described in subdivision (b) of section 1136 of the tax law, next commencing at least ninety days after the date this act shall have become a law and shall apply to quarterly periods beginning on or after such date.